THE SUPREME COURT OF IOWA

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Supreme Court No. 18-2201

Scott County No. CVCV297911

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DARREN PETRO, Plaintiff-Appellant

vs.

PALMER COLLEGE OF CHIROPRACTIC, Defendant-Appellee

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APPEAL FROM THE IOWA DISTRICT COURT FOR SCOTT COUNTY

THE HONORABLE STUART WERLING

THE HONORABLE MARY E. HOWES

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# PLAINTIFF-APPEELANT FINAL REPLY BRIEF

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### A. Unless the Legislature had Prohibited Enforcement, The Davenport Civil Rights Ordinance May be Enforced in District Court

Unless the legislature has prohibited the enforcement of local civil rights laws in district court, expressly or impliedly, a local civil rights ordinance may be enforced in district court. This rule comes directly from this Court's most recent case dealing with the civil rights powers of local jurisdictions, *Baker v. City of Iowa City*. 750 N.W.2d 93, 99 (Iowa 2008). In the section titled "Governing Legal Principles" the Baker court held that an exercise of municipal power is valid unless it is irreconcilable with state law. *Id.* at 100.

This standard is also consistent with the Home Rule Amendment to the Iowa Constitution and Iowa's Home Rule Statute. The amendment states:

> Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine local affairs of government, except that they shall not have power to levy any tax unless expressly authorized by the general assembly.
>
> The rule or proposition of law that a municipal corporation possesses and can exercise only those powers granted in express words is not a part of the law of this state.

Iowa Const. art. III, § 38A. Palmer argues that unless the legislature has expressly allowed it, Davenport lacks the power to enforce its civil rights ordinance in district court. This argument is expressly prohibited by the second paragraph of Article III, Section 38A of the Iowa Constitution and is "not a part of the law of this state." *Id.*

The Iowa Home Rule Statute also supports Petro's proposed standard: unless prohibited by the legislature, the Davenport Civil Rights Ordinance ("DCRO") may be enforced in state court. Iowa Code § 364.1 states:

> A city may, except as expressly limited by the Constitution of the State of Iowa, and if not inconsistent with the laws of the general assembly, exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the city or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents. This grant of home rule powers does not include the power to enact private or civil law governing civil relationships, except as incident to an exercise of an independent city power.

Iowa Code § 364.1 (2017). Under the Home Rule Statute, unless expressly limited by the Iowa Constitution or inconsistent with the laws of the general assembly, the DCRO may be enforced in district court. *See id*. There is no express provision in the Iowa Constitution and no statute inconsistent with the City of Davenport's issuance of a right-to-sue letter so that its ordinances may be enforced in district court. In doing so, the city is properly exercising

its power "to preserve and protect" the rights of its citizens and to "preserve and improve" their "peace, safety, health, welfare [and] comfort."

The other sections of the Home Rule Statute also directly support Petro's position. Iowa Code Section 364.2 states, in pertinent part:

> 2. The enumeration of a specific power of a city does not limit or restrict the general grant of home rule power conferred by the Constitution of the State of Iowa. **A city may exercise its general powers subject only to limitations expressly imposed by a state or city law.**
>
> 3. An exercise of a city power is not inconsistent with a state law unless it is irreconcilable with the state law.

Iowa Code § 364.2(2-3) (2017) (emphasis added).

The Iowa Legislature even included a section on the limitations of a city's power, Section 364.3. *See* Iowa Code § 364.3 (2017). The introductory, unnumbered paragraph of Section 364.3 states "The following are limitations upon the powers of a city[.]" Given this unambiguous language, the list that follows is an exclusive list of limitations. *See Luttenegger v. Conseco Fin. Servicing Corp.*, 671 N.W.2d 425, 433-34 (Iowa 2002) (holding that a list introduced by the word "including" was not an exclusive list).

The legislature put forth twelve (12) specific areas where municipal power was limited, but none of the restrictions forbid the enforcement of a local civil rights law in district court. Subsection 12 even includes

limitations on a municipality's power to enact civil rights protections in employment, but never prohibits enforcement of a local civil rights law in district court. *See* Iowa Code § 364.3(12) (2017).

Palmer's proposed standard—that Davenport lacks the authority to allow enforcement of its civil rights ordinance in district court unless the legislature explicitly gave it this power—conflicts with this Court's long standing precedent, the laws of the general assembly, and the Iowa Constitution. *See Baker*, 750 N.W.2d at 99-100 (holding that a local jurisdictions power is limited only by the legislature's express declaration); Iowa Code § 364.1-3 (2017) (stating that a municipality has all powers unless expressly limited by the legislature); Iowa Const. art. III, § 38A (stating "The rule or proposition of law that a municipal corporation possesses and can exercise only those powers granted in express words is not a part of the law of this state.").

### B. *Molitor* and Its Companion Decisions Support Petro's Position that the DCRO May be Enforced in District Court

Palmer has placed considerable emphasis on this Court's *Molitor* decision. *See Molitor v. City of Cedar Rapids*, 360 N.W.2d 568 (Iowa 1985). In *Molitor* this Court struck down a local ordinance because "Municipal power over local and internal affairs does not include authority to confer jurisdiction on the district court." *Id.* at 569. However, the

*Molitor* Court favorably cited the *Cedar Rapids* and *Dietz* cases interpreting local jurisdictions' powers in the civil rights arena under their home rule powers and the ICRA ("ICRA"), both of which support Petro's position. *See id.*

*Cedar Rapids Human Rights Commission v. Cedar Rapids Community School District* presented an issue directly analogous to the one currently before this Court. 222 N.W.2d 391 (Iowa 1974). In 1974 the ICRA provided that decisions of the Iowa Civil Rights Commission could be appealed to the district court as in equity and de novo. *Id.* at 401. At the time, the ICRA **did not** have a provision granting jurisdiction to the district court to hear appeals of local commissions' decisions. *Compare* Iowa Code § 216.19(7) (2017) *with* Iowa Code § 601A.12 (1973). That provision was not added until the civil rights act was amended in 1979. *See* Iowa Code Chapter 601A (1979). Despite the fact that the ICRA did not expressly provide that the district court has jurisdiction to hear appeals from the orders of local commissions, the Court nevertheless found that Cedar Rapids had the authority to confer jurisdiction on the district court. The Court even invalidated the Cedar Rapids Human Rights Ordinance because the "Cedar Rapids ordinance is inconsistent [with the ICRA] in not providing a statutory procedure for judicial review[.]" *Cedar Rapids*, 222 N.W.2d at 402.

*Dietz v. Dubuque Human Rights Commission* provides the most direct support for Petro's position. 316 N.W.2d 859 (Iowa 1982). In *Dietz*, the district court found it lacked jurisdiction to hear an appeal of a local commission's finding because "jurisdiction to review could only be conferred by constitution or statute and that municipalities have no power to expand, create, or contract the jurisdiction of district courts." *Id.* at 861. The district court's position in *Dietz* is nearly identical to Palmer's position in the present action. *See id.* This Court reversed, finding that Dubuque had the power to confer jurisdiction on the district court because the Dubuque ordinance tracked with the ICRA review provisions. The Court held that "the legislature intended to provide for local agencies and to authorize them to adopt ordinances tracking with the provisions of [the ICRA.]" *Id.* at 861.

Although *Dietz* was decided after the adoption of the 1979 amendments to the ICRA, the Court did not rely on the statutory provision requiring local jurisdictions to provide for judicial review. *See id.* In fact, the Court noted "Only incidentally, and perhaps unnecessarily, did the legislature provide for court review of referral agency decisions. But in so doing, we hold it did not abolish other local agencies and their right to adopt chapter 601A review provisions, authorized by the first two paragraphs of section 601A.19." *Id.* at 862.

These two cases stand for the clear proposition that the ICRA allows municipalities to confer jurisdiction on the district court, as long as the local ordinance tracks the state law. *See Cedar Rapids*, 222 N.W.2d 391; *Dietz*, 316 N.W.2d 859. This holding was expressly recognized by *Molitor*, which held that "municipal authority to provide for judicial review must derive from and accord with state law." *Molitor*, 360 N.W.2d at 569.

In this case, it is clear that the DCRO derives from and accords with the ICRA, a fact that Palmer has not contested. Provisions of the Davenport ordinance are virtually identical Iowa Code § 216.16, which provides complainants with the right to file a discrimination case in district court. *Compare* Davenport, Iowa, Municipal Code § 2.58.090 *with* Iowa Code § 216.16 (2017). Because the provisions of the DCRO allowing a complainant to file suit in district court derive from and accord with state law, the ordinance is valid and Petro may maintain his age discrimination in education action. *See Molitor*, 360 N.W.2d at 569.

### C. The ICRA Does Not Preclude Enforcement of a Local Civil Rights Law in District Court

Palmer continues to argue that the ICRA precludes enforcement of a local civil rights law in district court. This is a gross misinterpretation of the ICRA, and is inapposite with its purpose and the mandate that it be interpreted broadly to effectual its purposes.

Iowa Code Section 216.19(8) does not preclude the enforcement of a local civil rights law in district court. This section reads: "The referral of a complaint by the Iowa civil rights commission to a referral agency or by a referral agency to the Iowa civil rights commission shall not affect the right of a complainant to commence an action in the district court under section 216.16." Palmer argues that the reference to section 216.16 precludes complainants from bringing an action in district court under a local civil rights law. That is not what Section 216.16 says. Section 216.16 deals solely with the procedures for a complainant to request a right-to-sue letter and file in district court. *See* Iowa Code § 216.16 (2017). Nothing in 216.16 states that actions can only be brought for violations of Chapter 216. It simply outlines the procedural requirements that must be met before requesting a right-to-sue letter. *See id.*

216.19(8)'s referral to the 216.16 actually strengthens Petro's argument that local civil rights laws are properly enforced in district court. When construing 216.19(8) broadly to effectuate the ICRA's purposes, it shows a clear intent by the legislature that local commissions are allowed to issue right-to-sue letters as long as their procedural requirements align with the requirements of 216.16. *See* Iowa Code § 216.19(8) (2017); Iowa Code § 216.18(1) (2017). And in this case, because the DCRO's procedural

requirements on requesting a right-to-sue letter are virtually identical to the requirements of Section 216.16, Petro can maintain his action based on the Davenport commission's issuance of the right to sue letter. *Compare* Davenport, Iowa, Municipal Code § 2.58.090 *with* Iowa Code § 216.16 (2017).

Additionally, Palmer fails to adequately discuss the most applicable section of Chapter 216: Section 216.19(1). This section states, in its entirety:

> All cities shall, to the extent possible, protect the rights of the citizens of this state secured by the Iowa civil rights Act. Nothing in this chapter shall be construed as indicating any of the following:
>
> a. 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.
>
> 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.

Iowa Code § 216.19 (2017).

The legislature's intent in enacting this section is two-fold. First, that they are in no manner circumscribing or otherwise limiting a local jurisdiction's ability to prohibit discrimination and to fashion remedies for violations of the prohibition. This means the legislature assumed that, prior to the passage of the ICRA, local jurisdictions had this power already. This is consistent with this Court's holdings on a local jurisdiction's power in the civil rights arena. *See id.*; *Cedar Rapids*, 222 N.W.2d 391. If local jurisdictions had the authority to craft prohibitions on discrimination and enforcement provisions prior to the enactment of the ICRA, and the ICRA specifically preserves this power, then local jurisdictions still have the power to craft remedies for violations of their civil rights acts. *Cf.* Iowa Code § 216.19 (2017); *Cedar Rapids*, 222 N.W.2d 391.

Additionally, when subsections (b) and (c) of Section 216.19 are read in conjunction, they show that the legislature intended to allow local jurisdictions to craft remedies for violations of their local laws. The DCRO's prohibition of age discrimination in education was enacted pursuant to Section 216.19(c). *See* Iowa Code § 216.19(c) (2017) (allowing cities to prohibit "broader or different categories of unfair or discriminatory practices."). Therefore, Petro's rights under the DCRO are rights secured by Iowa Code Chapter 216. *See id.* at 216.19(b-c) (2017). And because Petro's

rights under the DCRO are secured by Chapter 216, Davenport has the authority to "develop[] procedures and **remedies** necessary to insure the protection of" these rights. *Id.* at 216.19(1)(b) (2017) (emphasis added). Accordingly, Iowa Code Sections 216.19(b) and (c) allow Davenport to confer jurisdiction on the district court for the enforcement of the DCRO. *See* Iowa Code § 216.19(b-c) (2017).

## II. THE DISTRICT COURT LACKED JURISDICTION TO RULE THAT PETRO'S COMPLAINTS WERE DUPLICATIVE

Because Chapter 17A provides the exclusive avenue for a party to seek judicial review of agency action, the district court lacked jurisdiction to reconsider the Iowa Civil Rights Commission's decision that Petro's complaints were distinct. Palmer puts forth two creative arguments in support of their position, both of which are unfounded. First, because arguments based on lack of jurisdiction are never waived, Palmer's argument to the contrary is baseless. Second, the agency action at issue was, and is still to this day, reviewable under Chapter 17A.

### A. Arguments Based on Lack of Jurisdiction are Never Waived

Palmer takes the novel position that, because Petro failed to appeal the district court's decision in Palmer's previous 17A appeal, Petro has waived his argument that the district court lacked jurisdiction to dismiss his

complaint as duplicative. This argument ignores well-established law on this issue, learned by most law students in their first semester of civil procedure. Arguments based on lack of jurisdiction cannot be waived. *See Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908) (dismissing case on appeal *sua sponte* for lack of jurisdiction, despite neither party arguing that the court lacked jurisdiction).

Palmer has cited no support for their position, because none exists. "Jurisdiction is a statutory matter and cannot be conferred by consent, waiver, or estoppel." *State v. Ryan*, 351 N.W.2d 186, 187 (Iowa 1984). "Challenges to the subject matter jurisdiction of the district court can be raised at any time during the course of proceedings." *Shirley v. Pothast*, 508 N.W.2d 712, 715 (Iowa 1993). "Once the issue is raised, the court must determine whether it has jurisdiction, regardless of how or when the issue is presented." *Cargill, Inc. v. Conley*, 620 N.W.2d 496, 501 (Iowa 2000). Therefore, Palmer's arguments that Petro is estopped from arguing that the district court lacked jurisdiction, or that these arguments have been waived, are without support and directly contrary to the law of Iowa and the United States.

Petro raised the issue of whether the court had jurisdiction in its resistances below. Petro did not waive his argument that the district court

lacked jurisdiction to adjudicate the issue of whether his administrative complaints were duplicative.

### B. The ICRC's Determination that Petro's Complaints Were Not Duplicative Was Reviewable Agency Action

The Iowa Civil Rights Commission decided that Petro's complaints were not duplicative in the so-called Stewart Memo. Palmer conceded that the Stewart Memo was agency action, but argues that it was unreviewable agency action, and therefore Chapter 17A's exclusivity provisions do not apply. However, because the Stewart Memo was "other agency action," it is reviewable "at any time." In fact, under the provisions of Chapter 17A Palmer could have filed a 17A petition challenging the Stewart Memo immediately after its issuance. And Palmer still has the right to file a petition for judicial review if they chose to do so.

Iowa Code § 17A.19(3) states, in pertinent part: "In cases involving a petition for judicial review of agency action other than the decision in a contested case, the petition may be filed at any time the petitioner is aggrieved or adversely affected by that action." The Stewart Memo was not a "decision in a contested case." *See id.*; Iowa Code § 17A.2(5) (defining contested case as "a proceeding . . . in which the legal rights, duties or privileges of a party are required by Constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing."). No

evidentiary hearing has ever been held in this case. Accordingly, the Stewart Memo is other agency action. *See* Iowa Code § 17A.19(3) (2017).

Because the Stewart Memo is "other agency action," Palmer does not have to satisfy the requirements to seek intermediate judicial review: Palmer can simply file their 17A petition "at any time." *See* Iowa Code § 17A.19(3) (2017). And because Palmer may seek judicial review of the Stewart Memo through 17A, the provisions of 17A provide "the exclusive means by which a person or party who is aggrieved or adversely affected may seek judicial review of such agency action." Iowa Code § 17A.19 (2017).

Simply put, Palmer's previous petition for judicial review challenged the wrong agency action. Palmer challenged the issuance of the right to sue letter, not the conclusions of the Stewart Memo. Petro pointed this out in his briefing on this issue; that the Stewart Memo was other agency action that could be challenged at any time. Rather than refiling their petition for judicial review challenging the correct agency action, Palmer moved for summary judgment and received a *de novo* review of the conclusions of the Stewart Memo, all in direct violation of Iowa Code § 17A.19. Palmer should not be allowed to make an end-run around the exclusivity provisions of Chapter 17A. Because the district court lacked jurisdiction to rule that

Petro's civil rights complaints were duplicative, the decision of the district court must be vacated.

## III. PETRO'S BREACH OF CONTRACT CLAIM IS ACTIONABLE

### A. Petro's Breach of Contract Claim is Not Superseded by the ICRA and is Timely

#### *1. Palmer Cannot Have Its Cake and Eat it Too*

Palmer's argument that Petro's breach of contract claim is superseded by statute drips with logical inconsistency. If Petro is allowed to maintain his age discrimination action based on the Davenport Civil Rights Ordinance, then Petro's breach of contract claim is likely superseded because it is based on many of the same facts. However, if Petro cannot bring his age discrimination action, as Palmer so aggressively argues, then his claim cannot be superseded by statute.

Palmer's argument that the ICRA supersedes Petro's breach of contract claim is even more unreasonable, as it is uncontested that the ICRA does not provide a cause of action for age discrimination in education. *See* Iowa Code § 216.9 (2017). In effect, Palmer is taking the contradictory position that Petro cannot maintain his age discrimination action under the applicable civil rights laws *and* that these same civil rights laws nevertheless

preempt his breach of contract action. Palmer cannot have its cake and eat it, too.

### *2. Petro's breach of contract claim is not a disguised tort*

As explained more fully in section II(B)(3) below, Petro's breach of contract claim is not a disguised tort; it is a valid and enforceable claim for breach of contract. Petro's claim is based on Palmer's breach of their promise to refrain from age discrimination, and the breach of their good faith duty to provide him with an education in the chiropractic sciences. Petro's breach of contract claim is not an attempt to avoid the statute of limitations by artful pleading, it is an attempt to hold Palmer accountable for the promises it made to Petro in exchange for tuition payments.

### *3. Petro did not waive his argument that his claim was timely filed*

Petro did not waive the argument that his claim is not barred by the statute of limitations. Palmer's argument that the statute of limitations has run is part and parcel of their argument that Petro's breach of contract claim is either a disguised tort or superseded by the ICRA. Both of these issues were thoroughly addressed in Petro's opening brief, and were supported by adequate citation. (Brief p. 41)

Additionally, the district court's dismissal of Petro's breach of contract claim was based on the court's determination that the promise to

refrain from age discrimination lacked consideration and was an unenforceable promise. The district court's only mention of the statute of limitations was in a footnote and amounted to dicta.

#### *4. Even if Petro's claim is a disguised tort, he timely filed his administrative complaint*

Even if Petro's claim is a disguised discrimination tort, it is uncontested that he filed his claims with both the Iowa Civil Rights Commission and the Davenport Civil Rights Commission within 300 days of the last discriminatory incident. Even assuming *arguendo* that Petro's claim is merged with a civil rights claim, his claim is still timely filed.

### B. Palmer's Promise to Refrain from Age Discrimination is Concrete and Enforceable

Palmer advances a number of arguments regarding why Palmer's specific promise to refrain from age discrimination is not enforceable, all of which are not founded in law or fact. First, each term of a contract does not need to be supported by separate consideration, and because the contract as a whole is supported by consideration, all of the terms are enforceable. Second, a promise to comply with existing law is enforceable, as long as the contract as a whole is supported by sufficient consideration. Additionally, unlike the unenforceable, illusory promises in the case law Palmer cites, a promise to refrain from age discrimination is concrete and enforceable.

Finally, Palmer has a duty to act in good faith in fulfilling the terms of the contract, which it breached by constructively expelling Petro.

#### *1. It is not necessary that each term of a contract be supported by separate consideration as long as the contract as a whole is supported by consideration*

Palmer argues that its promise to refrain from age discrimination in education is unenforceable because it is not supported by consideration. However, Palmer's argument "assumes that every provision in a contract must have a separately bargained for and stated consideration. It need not." *Sarnoff v. Am. Home Prod. Corp.*, 798 F.2d 1075, 1080 (7th Cir. 1986). "[T]he law does not require every term of the contract to have a separately stated consideration." *Edwards v. First Am. Corp.*, 798 F.3d 1172, 1182 (9th Cir. 2015). "A single performance or return promise may thus furnish consideration for any number of promises." Restatement (Second) of Contracts § 80, cmt. a.

In this case, the contract between Petro and Palmer, as a whole, was supported by sufficient consideration. Petro promised to pay tuition, and Palmer agreed to provide Petro with an education in chiropractic science. (APP.000115 ¶ 58) These mutual promises provide sufficient consideration, and "thus furnish[ed] consideration for any number of promises." Restatement (Second) of Contracts § 80, cmt. a. Palmer's argument that its

promise to refrain from age discrimination was not supported by consideration is meritless and based on a fundamental misunderstanding of American contract law. *See id.*

### *2. A promise to comply with existing law is enforceable as long as the contract, as a whole, is supported by consideration*

Palmer's second reason that their promise to refrain from age discrimination is unenforceable is that promises to comply with existing law are unenforceable. This argument confuses enforceability with sufficient consideration. Palmer has cited to no court that has held that promises to comply with existing laws are unenforceable.

None of the cases Palmer cites support the notion that promises to comply with existing laws are unenforceable terms of a contract. The only courts that dismissed claims based on these promises did so because the overall contract lacked consideration. *See Bustillos v. Bd. Of Cty. Commissioners for Hidalgo Cty.*, No. CV 13-0971, 2015 WL 8014565, at *22 (D.N.M. Oct. 20, 2015) (holding that no contract existed between plaintiff and defendant because entire agreement lacked consideration).

If contractual provisions promising to comply with existing law are unenforceable, this Court will be invalidating contractual provisions in a multitude of contracts executed and entered into all over the state. *See Lyon*

*Financial Services, Inc. v. Illinois paper and Copier Co.*, 732 F.3d 755, 766 (7th Cir. 2013) (stating "Myriad commercial contracts contain similar provisions allocating the risks and duties related to compliance with the law. Representations of legal compliance are common in mortgage-industry contracts for example, and will almost certainly feature prominently in the wave of post-financial-crisis litigation.") Provisions of every construction contract that require the parties to comply with OSHA or environmental regulations would be unenforceable. Provisions in contracts between banks and stock traders requiring the parties to comply with SEC regulations and other state and federal laws would be unenforceable.

Perhaps recognizing this, courts across the United States have found that provisions requiring one or both parties to comply with existing law are enforceable. *See Delaware & Hudson Ry. Co. v. Knoedler Mfrs., Inc.*, 718 F.3d 656, 667 (3rd Cir. 2015) (holding that a contractual provision calling for compliance with federal law was enforceable); *Nat'l Refrigeration, Inc. v. Standen Contracting Co.*, 942 A.2d 968, 972 (R.I. 2008) (holding "In unequivocal terms, the contract placed the burden on National to comply with all laws bearing on the performance of the work of this subcontract."); *State, By & Through Departments of Transp. & Labor v. Enserch Alaska Const., Inc.*, 787 P.2d 624, 628-29 (Alaska 1989) (holding that contract

provision required "compliance with all applicable laws and regulations regarding the hire of Alaska residents now in effect or that may subsequently take effect[.]"); *Ryan v. Bd. of Cty. Comm'rs for Gallatin Cty.*, 620 P.2d 1203, 1209 (Mont. 1980) (holding contract provision requiring party to comply with state law required the party to obtain a license to operate landfill pursuant to state law); *First Philadelphia Preparatory Charter Sch. V. Commonwealth, Dep't of Educ.*, 179 A.3d 128, 139 (Pa. Commw. Ct. 2018) (holding that contractual provision requiring party to comply with the law does not preclude them from challenging the validity of the law); *People ex rel. R. T. Ford Co. v. Lewis*, 159 A.D. 612, 618 (NY App. Div. 1913) (holding that a provision requiring work "in compliance with all laws of the state of New York" was an enforceable term); *Chrysler Fin. Co. v. Cloutier*, 785 So.2d 255, 260 (La. App. 3 Cir. 2001) (holding "The contract's default provision specifically required that Chrysler comply with Louisiana law; and the parties were barred from derogating from it contractually or otherwise."); *APAC-Carolina, Inc. v. Greensboro-High Point Airport Auth.*, 431 S.E.2d 508, 515 (N.C. App. 1993) (holding that contractual provisions "require the contractor to comply with environmental laws and regulations"); *Breeze Constr., Inc. v. CGU Ins. Co.*, No. CV-03-2452, 2010 WL 475107 at *5 (E.D.N.Y. Feb. 5, 2010) (holding "Under the terms of the contract, Breeze

was required to 'comply with laws, ordinances, rules, regulations and orders of public authorities bearing on performance of the Work.'"); *c.f. Student Loan Servicing All. v. D.C.*, 351 F. Supp. 3d 26, 63-64 (D.D.C. 2018) (holding that contractual provisions requiring compliance with state law are not enforceable when federal law preempts state law).

### *3. Palmer's promise to refrain from age discrimination is concrete and enforceable, and is not akin to an educational malpractice claim*

Petro agrees that illusory or aspiration promises in handbooks are not enforceable. However, the contract provisions that courts have found to be illusory or aspirational are easily distinguished from Palmer's promise to refrain from age discrimination. Because our legal system has an established framework for proving age discrimination, the promise to refrain from age discrimination is concrete and enforceable.

Palmer cites two cases that hold illusory or aspiration promises in handbooks are not enforceable. In *Ullmo ex rel. Ullmo v. Gilmour Academy*, the plaintiffs "sought to enforce language contained in the Philosophy section of the Handbook, which states that 'Gilmour teachers mirror the Holy Cross tradition as they work for the full development of their students, in and out of the classroom, respecting pupils' differing abilities and learning styles.'" 273 F.3d 671, 676-77 (6th Cir. 2001). The Sixth Circuit

correctly concluded that this promise was illusory and aspirational, and therefore unenforceable. *Id.* This promise is starkly different from Palmer's promise to refrain from age discrimination. Unlike the nebulous task of evaluating whether an education institution "respect[ed] pupils' differing abilities and learning styles," and whether the teachers "mirror[ed] the Holy Cross tradition," there is an established legal framework for determining whether a defendant engaged in age discrimination. *See id.*; *e.g. Channon v. United Parcel Service, Inc.*, 629 N.W.2d 835, 861-62 (Iowa 2001) (recognizing jury instructions in a discrimination case).

In *Gally v. Columbia University*, the plaintiff claimed the school "breached its promise to abide by the SDOS Code of Conduct and to 'prepare students with an understanding of the social, economic, societal and ethical aspects of the profession.'" 22 F.Supp.2d 199, 207 (S.D.N.Y. 1998). The Court found that attempting to enforce this promise was akin to an educational malpractice claim because consideration of this claim would "require the Court to engage in an evaluation of the process of learning and school administration." *Id.* In this case, Petro's claim that Palmer violated its promise to refrain from age discrimination does not implicate the same concerns raised by educational malpractice claims.

This Court has identified five policy reasons for not allowing claims of educational malpractice:

> [A]bsence of an adequate standard of care, uncertainty in determining damages, the burden placed on schools by the potential flood of litigation that would probably result, the deference given to the educational system to carry out its internal operations, and the general reluctance of courts to interfere in an area regulated by legislative standards.

*Sain v. Cedar Rapids Community School Dist.*, 626 N.W.2d 115, 121 (Iowa 2001). Allowing Petro to enforce Palmer's promise to refrain from age discrimination does not implicate any of these policy concerns. Determining whether Palmer engaged in age discrimination does not require the Court to create a new standard of care and the Court can resort to established principals of contract law to determine Petro's damages.[1] Because most claims of discrimination will be preempted by state or federal discrimination laws, enforcing promises to refrain from discrimination is not likely to result in a flood of litigation. Finally, deference to the educational system has never prevented courts from attempting to eliminate discrimination. *See Brown v. Board of Education*, 347 U.S. 483 (1954). Petro's breach of contract claim based on Palmer's promise to refrain from age discrimination

[1] Petro is seeking only economic damages in connection with his breach of contract claim.

is not an educational malpractice claim, and does not implicate the policy concerns that lead this Court to reject the creation of such a cause of action.

#### *4. Palmer had a good faith duty to provide Petro with an education in Chiropractic Sciences*

Petro also alleges a breach of the implied duty of good faith in Palmer's execution of the contract between Petro and Palmer. (APP.000115 ¶ 62) The implied duty of good faith and fair dealing inheres in all contracts and cannot be disclaimed. *Alta Vista Properties, LLC v. Mauer Vision Center, PC*, 855 N.W.2d 722, 730 (Iowa 2014). "The underlying principle is that there is an implied covenant that neither party will do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Id.*

It is important to remember the procedural posture of this case. Palmer filed a motion for summary judgment five days after a stay of the case had been lifted, and before any written discovery had been exchanged or depositions had been taken. This motion was more akin to a motion to dismiss and therefore all of Petro's factual allegations are taken as true and must be construed in a light most favorable to Petro. *See Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600, 604 (Iowa 2012) (holding "When reviewing a motion to dismiss, we accept the facts alleged in the petition as true."); *Nelson v. Lindaman*, 867 N.W.2d

1, 6 (Iowa 2015) (holding that when reviewing a motion for summary judgment, "We view the evidence in the light most favorable to the nonmoving party, who is entitled to every legitimate inference that we may draw from the record.").

In this case, Palmer and Petro entered into a contract where Petro promised to pay tuition and Palmer promised to provide an education in the field of chiropractic sciences according to the terms of their Handbook. (APP.000115 ¶ 58) Palmer breached the good faith duty to provide Petro with an education by intentionally discriminating and harassing Petro, forcing him to withdraw, and keeping the tuition money he had paid. (APP.00082-00085) These actions had the effect of destroying Petro's right to receive the fruits of the contract. (*Id.*; APP.000115 ¶ 62)

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.

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## CERTIFICATE OF FILING AND SERVICE

I certify that on **MAY 14, 2019** I electronically filed this Final Reply 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 5,740 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**