

ROSS V. CREIGHTON UNIVERSITY: SEVENTH CIRCUIT RECOGNITION OF LIMITED JUDICIAL REGULATION OF INTERCOLLEGIATE ATHLETICS?

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I. INTRODUCTION

In early 1992, the Seventh Circuit rendered its decision in *Ross v. Creighton University*¹, a case involving a former student-athlete's² educational malpractice claims against the university for which he had participated in intercollegiate basketball competition.³ *Ross v. Creighton* brings into focus critical issues regarding the relationship student-athletes have with their colleges, and the extent to which athletic exploitation exists as a by-product of this relationship⁴. Moreover, *Ross* inquires into the sensitive issue of the judiciary's role in regulating certain aspects of the student-athlete/university relationship.

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1. 957 F.2d 410 (7th Cir. 1992).

2. "Student-athlete" refers to students who, in exchange for their agreement to participate in intercollegiate athletics, are granted athletic scholarships by colleges and universities. Timothy Davis, *Examining Educational Malpractice Jurisprudence: Should a Cause of Action be Created for Student-Athletes?*, 69 DENV. U. L. REV. 57, 58 n.7 (1992); Derek Q. Johnson, Note, *Educating Misguided Student Athletes: An Application of Contract Theory*, 85 COLUM. L. REV. 96 n.1 (1985).

3. *Ross*, 957 F.2d at 411. *Ross* accepted a scholarship to attend Creighton University and to play on its basketball team. *Id.* While at Creighton, *Ross* maintained a D average and acquired only 96 of the 128 credits required for graduation. *Id.* at 412. The circumstances which precipitated *Ross*' lawsuit against Creighton are discussed in detail in Edmund J. Sherman, Note, *Good Sports, Bad Sports: The District Court Abandons College Athletes in Ross v. Creighton University*, 11 LOY. ENT. L.J. 657, 659-61 (1991); Timothy Davis, *An Absence of Good Faith: Defining a University's Educational Obligation to Student-Athletes*, 28 HOUS. L. REV. 743, 744-45 (1991).

4. See Davis, *supra* note 2, at 59 (arguing the *Ross* case implicates issues concerning the exploitation of student-athletes); Sherman, *supra* note 3, at 658 (characterizing the essence of *Ross*' action against Creighton as alleging athletic exploitation).

In affirming the district court's rejection of Ross' tort claims premised on educational malpractice, the Seventh Circuit adhered to the widely held view that it is not a proper function of courts to intervene in matters that require an assessment of the quality of the educational services provided by an academic institution.⁵ However, in recognizing a limited contract right of action, the court arguably enunciates the principle that certain institutional conduct arising out of the student-athlete/university relationship is not immune from judicial scrutiny.⁶ Thus, the Seventh Circuit's decision not only expands the rights of student-athletes, but it impliedly legitimizes a role, albeit limited, for courts to play in regulating the student-athlete/university relationship.

This article begins with a summary of Ross' claims and the district court's disposition of those claims.⁷ Similarly, the examination of the appellate court's decision begins with an analysis of the court's resolution of the issues posited in Ross' complaint.⁸ In engaging in this examination, the article explores the extent to which the Seventh Circuit adheres to existing educational malpractice jurisprudence. The article concludes that, with respect to Ross' causes of action premised on an educational malpractice theory, the court followed a well-defined body of law in refusing to countenance the tort of educational malpractice in the student-athlete/university context.⁹

However, the article proposes that the manner in which the Seventh Circuit holds that a university may be held liable in contract to its student-athletes represents a departure from existing precedent.¹⁰ In addition, the article reaches the conclusion that *Ross* suggests it is appropriate for a court to exercise its discretion in order to imply terms into agreements between student-athletes and universities.¹¹ Moreover, the court's decision may be read as not only requiring colleges and universities to undertake good faith efforts to honor express and implied promises made to student-athletes, but as precluding these institutions from engaging in conduct that might ob-

5. *Ross*, 957 F.2d at 414-15.

6. *Id.* at 415-17. The court affirmed in part and reversed in part the district court's dismissal of Ross' breach of contract claims. *Id.* at 417. See *infra* text accompanying notes 116-62 for a discussion of the court's ruling on Ross' breach of contract claims.

7. See *infra* text accompanying notes 14-46.

8. See *infra* text accompanying notes 47-76.

9. See *infra* text accompanying notes 48-77.

10. See *infra* text accompanying notes 166-67.

11. See *infra* text accompanying notes 168-70.

struct a student-athlete's ability to acquire a meaningful educational experience.¹² Furthermore, the article argues that the Seventh Circuit's ruling indirectly recognizes the need for limited judicial intervention in intercollegiate athletics.¹³

II. DISTRICT COURT FINDS NO JUSTICIABLE CONTROVERSY

A. Rejection of Educational Malpractice Claim

1. *Ross' Negligent Recruitment Claim*

The district court¹⁴ characterized Ross' tort claims as premised on the notion that Creighton was negligent in admitting him to attend school as a student-athlete.¹⁵ According to the lower court, Ross' negligent admission claim¹⁶ combined two substantive theories, negligent infliction of emotional distress and educational malpractice, to create a hybrid tort premised on "negligence in recruiting and repeatedly re-enrolling an athlete utterly incapable—without substantial tutoring and other support—of performing the academic work required to make educational progress. . . ."¹⁷ Plaintiff further asserted that emotional distress resulting from defendant's negligent enrollment of him worsened when Creighton enrolled him in Westside Preparatory School¹⁸ to take remedial courses with grade school children.¹⁹

12. See *infra* text accompanying notes 178-80.

13. See *infra* text accompanying notes 181-84.

14. *Ross v. Creighton Univ.*, 740 F. Supp. 1319 (N.D. Ill. 1990).

15. *Id.* at 1327.

16. The court noted that it deferred to the description of Ross' negligence claim given by his counsel: "It intertwines elements of 'negligent infliction of emotional distress' with 'educational malpractice' to assert defendant's negligence. . . ." *Id.* at 1322-23 (quoting Plaintiff's Supplemental Memorandum).

17. *Id.* at 1323 (quoting Plaintiff's Supplemental Memorandum). Ross alleged specifically that not only did he fail to satisfy the academic requirements for enrollment at Creighton, but his qualifications were substantially below such standards. Amended Complaint at 5, *Ross v. Creighton Univ.*, 740 F. Supp. 1319 (N.D. Ill. 1990) (No. 89-C-6463) [hereinafter *Ross Amended Complaint*]. Ross further alleged Creighton knew or should have known he was "unqualified to perform the academic course work" at the university and that placing a person with his educational capabilities in such an environment could traumatically impact him. *Id.*

18. Westside Preparatory School is a storefront grammar school founded for children by educator Marva Collins. *Id.* at 1322; see also Danny Robbins, *Are There Academic Obligations to Athletes?*, L.A. TIMES, Apr. 12, 1992, at C3. The school has gained national prominence

2. *Disposition of Tort Claims*

a. Educational Malpractice

Separating the two substantive "strands"²⁰ of plaintiff's negligent admission claim, the district court held it would follow the overwhelming majority of courts which reject educational malpractice as a cognizable cause of action.²¹ Before elaborating on the theoretical bases of this rule of law, the court noted that whether to fashion such a substantive right of action was a matter of law dependent largely on whether the university owed a duty to plaintiff.²² The determination of whether to permit tort recovery was ultimately deemed by the court to constitute a matter of public policy.²³

due to the teaching techniques employed by Ms. Collins which result in enhanced performance by students.

19. *Ross*, 740 F. Supp. at 1327. Plaintiff argued that although his reading scores increased as a result of his enrollment at Westside, they remained unsatisfactory for a well-functioning adult. Moreover, his attendance at Westside with students half his age allegedly was psychologically damaging. According to Plaintiff, he incurred severe depression due to attendance at both Creighton and Westside. Plaintiff's Memorandum of Law in Opposition to Motion to Dismiss at 3, *Ross v. Creighton Univ.*, 740 F. Supp. 1319 (N.D. Ill. 1990) (No. 89-C-6463). In short, Ross alleged temporary and permanent mental disability resulting from defendant's wrongful conduct. *Ross Amended Complaint* at 10.

20. *Ross*, 740 F. Supp. at 1327 (educational malpractice and negligent infliction of emotional distress were identified as the two strands of plaintiff's negligence claim).

21. *Id.* at 1329.

22. *Id.* at 1327. The court properly pointed out that the legitimacy of a tort cause of action is dependent in part on the existence of a duty between the parties. *Id.* As pointed out in a recent student note, "[a] malpractice action is a claim of professional negligence, and the proponent of such an action must assert and prove the four elements of tort negligence: duty, breach of duty, proximate causation, and damages." Sherman, *supra* note 3, at 664; *accord*, Davis, *supra* note 2, at 74 (a legally recognizable duty is a threshold element of a negligence cause of action); W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164-65 (5th ed. 1984).

23. *Ross*, 740 F. Supp. at 1328. The existence of a tort duty turns on the analysis of numerous factors which assist courts in determining whether the relationship between the parties warrants the creation of a duty. Sherman, *supra* note 3, at 664 (quoting *Raymond v. Paradise Unified Sch. Dist.*, 31 Cal. Rptr. 847 (Ct. App. 1963) where the court delineated the relevant factors:

An affirmative declaration of duty simply amounts to a statement that two parties stand in such relationship that the law will impose on one a responsibility for the exercise of care toward the other. Inherent in this simple description are various and sometimes delicate policy judgments. The social utility of the activity out of which the injury arises, compared with the risks involved in its conduct; the kind of person with whom the actor is dealing; the workability of a rule of care, especially in terms of the parties' relative ability to adopt practical means of preventing injury; the relative ability of the parties to bear the financial burden of injury and the availability of means by which the loss may be shifted or spread; the body of statutes and judicial precedents which color the parties' relationship; the prophylactic effect of a rule of liability; in the case of a public agency defendant, the extent of its powers,

Having defined the parameters for its inquiry, the court's refusal to approve of Ross' educational malpractice claim was strongly influenced by the various policy justifications articulated in cases addressing educational malpractice in other factual contexts. These public policy considerations include: (1) the subjective and collaborative nature of the educational process and the resulting difficulties plaintiffs would invariably encounter in attempting to establish the causal connection between the alleged malpractice and a student's educational failure;²⁴ (2) the potential financial and administrative costs that would burden educational institutions if educators are forced to litigate the adequacy of their educational instruction to students;²⁵ and 3) the deluge of litigation which would ensue due to the immense scale on which educational services are rendered in contrast to other professional services.²⁶ Applying the factors outlined above, the court concluded it was compelled to reject educational malpractice as a cognizable tort claim.

the role imposed upon it by law and the limitations imposed upon it by budget; and finally, the moral imperatives which judges share with their fellow citizens—such are the factors which play a role in the determination of duty.

Raymond, 31 Cal. Rptr. at 851-52.

24. *Ross*, 740 F. Supp. at 1328. The district court noted "[t]he practical impossibility of proving that the alleged malpractice of the teacher proximately caused the learning deficiency of the plaintiff student," because "[f]actors such as the student's attitude, motivation, temperament, past experience and home environment may all play an essential and immeasurable role in learning." *Id.* at 1328 (quoting *Donohue v. Copiague Union Free Sch. Dist.*, 391 N.E.2d 1352, 1355 (N.Y. 1979)).

This policy rationale is critically examined in *Davis*, *supra* note 2, at 81-82; William F. Foster, *Educational Malpractice: A Tort for the Untaught?*, 19 U. BRIT. COLUM. L. REV. 161, 237 (1985); Terrence P. Collingsworth, *Applying Negligence Doctrine to the Teaching Profession*, 11 J.L. & EDUC. 479 (1982); Richard P. Funston, *Educational Malpractice: A Cause of Action in Search of a Theory*, 18 SAN DIEGO L. REV. 743, 784-90 (1981); Catherine D. McBride, Note, *Educational Malpractice: Judicial Recognition of a Limited Duty of Educators Toward Individual Students; A State Law Cause of Action for Educational Negligence*, 25 U. ILL. L. REV. 475, 487 (1990); Alice J. Klein, Note, *Educational Malpractice: Can the Judiciary Remedy the Growing Problem of Functional Illiteracy?*, 27 SUFFOLK U. L. REV. 27, 45-48 (1979).

A detailed discussion of this policy factor in the context of the student-athlete/university relationship can be found in *Sherman*, *supra* note 3, at 680-81.

25. *Ross*, 740 F. Supp. at 1328. The court stated that imposing a duty of care would place insufferable strains on educators, "forcing them to 'litigate every suit claiming negligence in the selection of curriculum, teaching methods, teachers or extracurricular activities. . .'" *Id.* (quoting *Wilson v. Continental Ins. Co.*, 274 N.W.2d 679 (Wis. 1979)).

Detailed discussions and critical evaluations of this policy rationale can be found in *Davis*, *supra* note 2, at 78-79; *Funston*, *supra* note 24, at 801-11; *Sherman*, *supra* note 3, at 682-83; *Klein*, *supra* note 24, at 58-61.

26. *Ross*, 740 F. Supp. at 1329. The potential flood of litigation was viewed by the court as illustrating the "disutility of the proposed remedy." *Id.*

b. Sui Generis²⁷ Tort

In addition to urging the court to adopt educational malpractice as a substantive cause of action, plaintiff unsuccessfully argued that the unique nature of the student-athlete/university relationship justified creating a *sui generis* tort to protect the interests of student-athletes.²⁸ According to Ross, "the present case is so unique and egregious that despite the lack of precedent, a cause of action should be found to exist."²⁹ Elaborating further on the rationale underlying the proposed new tort, Ross stated the special tort would be solely for the benefit of student-athletes who ordinarily would not possess the academic qualifications to attend college.³⁰ Finally, Ross argued this *sui generis* tort would not implicate the adequacy of the instruction or methodology, but it would challenge "whether [he] should ever have been admitted to Creighton and whether, once admitted, Creighton had a duty to truly educate [him] and not simply maintain his eligibility for basketball."³¹

The district court was unpersuaded by Ross' argument. Emphasizing that the creation of such a *sui generis* tort lacked support in existing precedent, the court added the proposed rule could not be "fairly deduced from existing doctrine. . . ."³² To bolster its rejection of plaintiff's proposed rule, the court noted the new cause of action would burden schools with having to engage in the virtually impossible task of predicting the mental condition of potential recruits.³³ After questioning the fairness of limiting the right of action to student-athletes,³⁴ the court indicated it might discourage universities and colleges from admitting marginally qualified students for fear of

This policy rationale is critically assessed in Davis, *supra* note 2, at 78-79; Foster, *supra* note 24, at 192-93; Collingsworth, *supra* note 24, at 503-04; Funston, *supra* note 24, at 795-96; Sherman, *supra* note 3, at 682-84.

27. A *sui generis* tort is defined as one "[o]f its own kind or class." BLACKS LAW DICTIONARY 1434 (6th ed. 1990).

28. Ross, 740 F. Supp. at 1330.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* The court has been criticized for asserting this proposition on grounds that it fails to take into account the differences between student-athletes and non-athlete students. Davis, *supra* note 3, at 785-86. For example, the terms of the express contract between student-athletes and their institutions impose obligations on the former that exceed those imposed on lay students by virtue of the implied contracts which they enter with their institutions. *Id.* at 786. See *infra* text accompanying notes 119-25, where the nature of the contractual relationships between student-athletes and non-student athletes and colleges and universities is described.

later being subjected to a lawsuit.³⁵ Based on the foregoing reasons and the policy factors that motivated the court's denial of Ross' educational malpractice claim, the district court refused to create a *sui generis* tort action.³⁶

c. Negligent Infliction of Emotional Distress

The court also dismissed Ross' negligent infliction of emotional distress claim. It held the facts placed Ross' claim outside the parameters of Illinois law which recognizes a right of action for negligent infliction of emotional distress only if a plaintiff can demonstrate physical injury or that he or she was in the zone of danger of incurring physical injury.³⁷

B. Rejection of Contract Causes of Action

1. Ross' Contract Claims

Ross' breach of contract claim was premised in part on the notion that a duty of good faith and fair dealing was implied into his relationship with Creighton. By virtue of this duty, Creighton was allegedly obligated "to provide a reasonable opportunity to the plaintiff to obtain a meaningful college education and degree, including for the defendant to do what was reasonably necessary to enable the plaintiff to obtain a meaningful college education and degree"³⁸ (including, but not limited to, providing tutoring services, financial assistance as needed, and time for the plaintiff to study).

2. Disposition of Contract Claims

The district court deemed the contract claim subject to dismissal insofar as it attacked the quality of the education.³⁹ The court also confronted the issue of whether Ross' contract claim asserted breach of express contractual provisions. Once again, the court found plain-

35. *Ross*, 740 F. Supp. at 1330.

36. *Id.*

37. *Id.*

38. *Id.* at 1331 (quoting Ross Amended Complaint at ¶ 26 of Count II). In addition to the foregoing allegations of breach, Ross alleged Creighton breached its contract with him by: a) failing to provide adequate and competent tutoring services; b) failing to require that he attend tutoring sessions; c) failing to provide him with an opportunity to take advantage of tutoring services; and d) refusing to allow him to redshirt for one year so he could focus on academics. Ross Amended Complaint at 11-12.

39. The court cited authority that rejects breach of contract claims which are mere repleading of the tort of educational malpractice. *Ross*, 740 F. Supp. at 1331. The court adopted the position of these authorities that argue this conclusion is required to avoid circumvention of the rule against educational malpractice. *Id.*

tiff's allegations did not present a cognizable contract claim because they challenged the educational process. The court illustrated this point by noting Ross did not allege Creighton failed to provide tutoring services but rather challenged the sufficiency of the tutoring.⁴⁰ The court maintained this and similar factual allegations asserting breach of express promises implicated the educational process and, as such, amounted to disguised attempts to assert an educational malpractice claim.⁴¹

The court further considered whether Ross alleged Creighton breached implied duties existing between the parties.⁴² Ross argued the duty of good faith provided the doctrinal basis for the court to imply terms into the agreement upon which the parties had not expressly agreed.⁴³ While recognizing the duty of good faith as a mechanism providing courts with discretion to imply terms into the agreement, the court declined to do so.⁴⁴ Specifically, the district court refused to incorporate into the contract a term that imposed a duty on the university to provide Ross with an opportunity to obtain a meaningful education. This exercise of judicial restraint was influenced by the fundamental concern that the judiciary, unlike institutions such as the NCAA, lacks the competency and expertise to supervise the student-athlete/university relationship.⁴⁵ The district court found it would be appropriate to imply terms into the agreement only where the contract contained a specific provision permitting such intervention.⁴⁶

III. SEVENTH CIRCUIT RECOGNIZES CONTRACT CAUSE OF ACTION

A. Rejection of Tort Claims

Adhering to the district court's proceedings, the Seventh Circuit found that Ross' tort claims were premised on three substantive theories of recovery: (1) educational malpractice; (2) negligent infliction of emotional distress; and (3) negligent admission.⁴⁷ As the

40. *Id.*

41. *Id.*

42. *Ross*, 740 F. Supp. at 1331.

43. *Id.* at 1332.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Ross*, 957 F.2d at 412.

following discussion reveals, the court refused to deviate from existing precedent and rejected claims premised on these theories.

1. Rejecting Educational Malpractice as a Cognizable Cause of Action

The appellate court's analysis of Ross' educational malpractice claim began with its acknowledgement that, with the exception of one state,⁴⁸ jurisdictions have uniformly rejected educational malpractice claims.⁴⁹ After citing jurisprudence involving educational malpractice, the court delineated and discussed policy factors that motivated its refusal to recognize the tort of educational malpractice.

2. The Court's Policy Rationale

a. Absence of Standard of Care

The court identified the unavailability of a standard of care for evaluating educators as a principal policy factor militating against

48. The Montana Supreme Court in *B. M. v. State*, 649 P.2d 425, 427-28 (Mont. 1982), permitted an educational malpractice claim to go forward. The Seventh Circuit correctly distinguished *B.M.* from the present case. While the duty imposed in *B.M.* was premised on a state statute which recognized a duty of care on educators, such circumstances are absent in *Ross*. *Ross*, 957 F.2d at 414.

B.M. is more fully discussed in *Davis*, *supra* note 2, at 64-65. There it is argued *B.M.* is of negligible value in providing support for recognition of an educational malpractice cause of action. This conclusion arises from the reliance by the *B.M.* court on the mandatory state statute in imposing the duty as well as the uncertainty concerning whether plaintiff's claims therein actually challenged the educational process and asserted a true claim for educational malpractice. *Id.*

49. *Ross*, 957 F.2d at 414 n.2. The court cited cases from eleven jurisdictions that have rejected educational malpractice claims including: *Blane v. Alabama Com. College, Inc.*, 585 So.2d 866 (Ala. 1991); *D.S.W. v. Fairbanks North Star Borough Sch. Dist.*, 628 P.2d 554 (Alaska 1981); *Peter W. v. San Francisco Unified School Dist.*, 131 Cal. Rptr. 854 (Cal. Ct. App. 1976); *Smith v. Alameda County Soc. Servs. Agency*, 153 Cal. Rptr. 712 (Ct. App. 1979); *Tubell v. Dade County Public Schools*, 419 So. 2d 388 (Fla. Dist. Ct. App. 1982); *Wickstrom v. North Idaho College*, 725 P.2d 155 (Idaho 1986); *Moore v. Vanderloo*, 386 N.W.2d 108 (Iowa 1986); *Rich v. Kentucky Country Day, Inc.*, 793 S.W.2d 832 (Ky. Ct. App. 1990); *Hunter v. Board of Educ.*, 439 A.2d 582 (Md. 1982); *Swidryk v. St. Michael's Med. Ctr.*, 493 A.2d 641 (N.J. Super. Ct. Law Div. 1985); *Donohue v. Copiague Union Free Sch. Dist.*, 391 N.E.2d 1352 (N.Y. 1979); *Hoffman v. Board of Educ.*, 400 N.E.2d 317 (N.Y. 1979); *Helm v. Professional Children's Sch.*, 431 N.Y.S.2d 246 (N.Y. App. Term 1980); *Wilson v. Continental Ins. Cos.*, 274 N.W.2d 679 (Wisc. 1979). The foregoing cases are discussed in the context of the jurisprudence of educational malpractice in *Davis*, *supra* note 2.

judicial recognition of educational malpractice.⁵⁰ In this regard, the court noted the difficulty in creating a standard of care that would arise in part due to the lack of uniformity in theories of education.⁵¹ In addition, it concluded that "different but acceptable scientific methods of academic training [make] it unfeasible to formulate a standard by which to judge the conduct of those delivering the services."⁵²

*Smith v. Alameda County Social Services Agency*⁵³ was specifically identified by the court as postulating this justification for denying an educational malpractice claim.⁵⁴ However, unlike Ross, the plaintiff in *Smith* did not question the adequacy of the educational instruction provided, but rather alleged the school district negligently placed him in classes for the mentally retarded notwithstanding actual or constructive knowledge that he was not retarded.⁵⁵ Thus, plaintiff's allegations focused on negligent placement rather than the process of educating.⁵⁶ The *Smith* court, like most courts and commentators, nevertheless characterize plaintiff's allegations as asserting an educational malpractice claim.⁵⁷ It relied on justifications set forth in

50. *Ross*, 957 F.2d at 414. A case specifically cited by the court as supporting this reasoning is *Swidryk v. St. Michael's Med. Ctr.*, 493 A.2d 641 (N.J. Super. Ct. Law. Div. 1985), where rejection of a physician's educational malpractice claim against his medical school for alleged inadequate training during his residency, was premised on policy concerns articulated in *Peter W. v. San Francisco Unified Sch. Dist.*, 131 Cal. Rptr. 854 (Ct. App. 1976). See *Davis*, *supra* note 2, at 71, for a discussion of the facts of *Swidryk* and a comparative analysis of it and other educational malpractice cases.

51. *Ross*, 957 F.2d at 414.

52. *Id.* (quoting *Swidryk*, 493 A.2d at 643). One commentator describing this policy factor stresses that courts afford considerable weight to what is perceived as "the difference in opinion over educational methods within the education profession and among people within the United States." Sherman, *supra* note 3, at 667.

53. 153 Cal. Rptr. 712 (Ct. App. 1979).

54. *Ross*, 957 F.2d at 414.

55. *Smith*, 153 Cal. Rptr. at 718.

56. Cases involving the process of educating have been viewed as those that bring into question the adequacy or competency of the instruction or methodology employed. Cases based on negligent placement have been analogized to those involving special education programs. *Davis*, *supra* note 2, at 63 n.50.

57. *Smith*, 153 Cal. Rptr. at 718-19. Educational malpractice suits have typically arisen in two contexts. In one group of cases students allege negligent conduct that resulted in the provision of inadequate educational instruction. These cases implicate the quality of the educational instruction conveyed. The second group of cases involves allegations of improper placement in special education programs. *Smith* falls within the second category of cases. Cases that fall within the first grouping can be coined "pure educational malpractice" cases. However, the second group of cases fails to assert inadequacies in the process of educating. For a discussion of the distinctions between these groups of cases and the differences in the nature of the alleged improper conduct refer to *Davis*, *supra* note 2, at 62-63; *Funston*, *supra*

the seminal educational malpractice case of *Peter W. v. San Francisco Unified School District*,⁵⁸ which involved allegations challenging the adequacy of the educational instruction provided, to reject plaintiff's claim.⁵⁹ These policy reasons included the absence of a manageable standard of care against which a school district's conduct can be measured.⁶⁰

b. Difficulty of Establishing Causation

In order to recover on a malpractice claim a plaintiff must establish proximate causation.⁶¹ In rejecting plaintiff's malpractice claim, the court's attention next shifted to this element of a tort action. It maintained the "inherent uncertainties" involved in determining causation and damages in an educational malpractice case constituted additional policy reasons for not imposing such a duty of care on colleges and universities.⁶²

This conclusion was further strengthened by what the Seventh Circuit called the "collaborative nature" of the educational process.⁶³ In this regard, it quoted from *Donohue v. Copiague Union Free School District*,⁶⁴ which summarized this policy rationale as follows:

Factors such as the student's attitude, motivation, temperament, past experience and home environment may all play an essential and immeasurable role in learning. . . . Consequently, it may be a 'practical impossibility [to] prov[e] that the alleged malpractice of

note 24, at 758 (arguing cases such as *Smith* should not be conceptualized as educational malpractice cases but are more akin to cases involving liability of schools in relation to special education programs).

The Seventh Circuit, citing *Smith*, apparently joins those courts which conclude that any distinction between the categories of educational malpractice claims is irrelevant for purposes of rejecting the theory as a cognizable cause of action.

58. 131 Cal. Rptr. 854 (Cal. Ct. App. 1976). For a discussion of *Peter W.* and other articles commenting on that landmark case see Davis, *supra* note 2, at 63-64.

59. *Smith*, 153 Cal. Rptr. at 715.

60. *Id.* at 719.

61. See Sherman, *supra* note 3, at 664; Funston, *supra* note 24, at 785; Davis, *supra* note 2, at 76.

62. *Ross*, 957 F.2d at 414. In support of this conclusion, the court cited to *Helm v. Professional Children's Sch.*, 431 N.Y.S.2d 246 (N.Y. App. Term. 1980) where the court extended the rule disallowing educational malpractice actions against public schools to a suit against a private school. *Id.* at 246-47. In so doing, the court in *Helm* adopted and relied on authority which posited the difficulty of establishing the causal link between the alleged malpractice and the injury suffered by the dissatisfied student as a significant policy reason for rejecting educational malpractice claims. *Id.* at 246.

63. *Ross*, 957 F.2d at 413.

64. 391 N.E.2d 1352 (N.Y. 1979).

the teacher proximately caused the learning deficiency of the plaintiff student.⁶⁵ (citation omitted).

Applying this reasoning, the court concluded that difficulty in establishing causation is a principal reason for not recognizing educational malpractice claims.

c. Potential Burden Placed on Educational Institutions

The court also pointed to the enormous burden that educational malpractice litigation could conceivably impose upon schools as yet another factor supporting its denial of an educational malpractice cause of action.⁶⁶ Adopting the reasoning articulated by the lower court, the Seventh Circuit focused on the financial and administrative burdens that might result from the flood of litigation likely to arise due to the immense scale on which educational services are rendered in contrast to other professional services.⁶⁷ The court in *Peter W.* expressed this policy factor as follows: “[schools] are already beset by social and financial problems which have gone to major litigation, but for which no permanent solution has yet appeared. (citations omitted) The ultimate consequences, in terms of public time and money, would burden them—and society—beyond calculation.”⁶⁸

In a similar vein, the court in *Moore v. Vanderloo*⁶⁹ warned that educational malpractice litigation could deplete resources in the form of time and money, because institutions would be required to defend such suits.⁷⁰ Plaintiff in *Moore* suffered a stroke while undergoing a chiropractic procedure.⁷¹ In addition to suing the chiropractor, who had performed the procedure, plaintiff sued the college from which defendant received his chiropractic training.⁷² Plaintiff asserted the college committed educational malpractice in failing properly to instruct the defendant doctor on risks associated with certain chiropractic procedures.⁷³

Due to the factual circumstances before it, the court in *Moore* cautioned that any malpractice action against a professional could

65. *Ross*, 957 F.2d at 414.

66. *Id.*

67. *Id.*

68. *Peter W.*, 131 Cal. Rptr. at 861.

69. 386 N.W.2d 108 (Iowa 1986).

70. *Id.* at 115.

71. *Id.* at 111.

72. *Id.*

73. *Id.* at 113.

conceivably result in the filing of two lawsuits: an underlying action brought by an aggrieved client against a professional rendering services and a subsidiary action brought by the defendant professional against the college or university that provided his or her professional training.⁷⁴ The *Moore* court used this scenario to illustrate the potentially adverse financial and administrative impact on learning institutions if an educational malpractice action is recognized. Relying on this reasoning, the Seventh Circuit adopted the district court's conclusion that these considerations suggest the impropriety of a common-law tort duty to deal with problems involving inadequate education.⁷⁵

d. Lack of Competence and Expertise

Influenced by other educational malpractice cases, the Seventh Circuit expressed doubts over the judiciary's competence to oversee the day-to-day operations of schools if an educational malpractice claim is permitted.⁷⁶ Once again, the *Ross* court adopted the expression of this policy consideration set forth in *Donohue*. There the court ruled questions of academic achievement rest within the discretion of those individuals and institutions, such as "the chancellor, the board of education and, ultimately that of the Commissioner of Education, rather than in the courts."⁷⁷ The Seventh Circuit was convinced by the *Donohue* court's statement of the principle that the judiciary should exercise restraint in matters of educational policy.

3. *Analysis of Educational Malpractice Ruling*

The Seventh Circuit held that the "Illinois Supreme Court would find the experience of other jurisdictions persuasive and, consequently, that these policy considerations are compelling. Consequently, the Illinois Supreme Court would refuse to recognize the tort of educational malpractice."⁷⁸ As previously observed, in disposing of *Ross*' educational malpractice claim, the Seventh Circuit aligned itself with the weight of existing precedent that rigidly rejects educational malpractice as a cognizable cause of action.⁷⁹ Like the

74. *Id.* at 114-15.

75. *Ross*, 957 F.2d at 414.

76. *Id.* at 414-15.

77. *Donohue*, 391 N.E.2d at 1354. See Sherman, *supra* note 3, at 667-68.

78. *Ross*, 957 F.2d at 415.

79. See Sherman, *supra* note 3, at 669 (noting the rigid refusal of courts to allow educational malpractice claims despite the outrageous and damaging nature of the wrong suffered by the student).

district court, the appellate court, relying on precedent arising primarily in the secondary school context, failed to engage in independent scrutiny of these concerns in the unique context of the student-athlete/university relationship.⁸⁰

In addition to criticisms focusing on the broader implications of the rejection of educational malpractice claims, commentators have questioned the specific public policy factors that underlie this rule of law. While a detailed discussion of these criticisms are beyond the scope of this article, they can be summarized as follows.⁸¹

With respect to the policy factor coined as the inability to establish a standard of care, most commentators concede such apprehension is warranted due to the amorphous nature of the educational process.⁸² Nevertheless, these critics maintain the judiciary has failed to make a concerted effort to formulate such a standard of care.⁸³ Moreover, they argue it is likely, as in the case of other types of professional malpractice, that experts could agree on a model standard of care.⁸⁴

Advocates of an educational malpractice cause of action also believe courts have exaggerated the difficulty they would encounter in establishing the causation element of an educational malpractice claim and have misinterpreted the prevailing standard of proof.⁸⁵ Criticism of the approach courts have taken on this issue typically centers on the nature of the burden imposed on plaintiffs. As one commentator stated, "the test for causation is one of significance, rather than of quantity."⁸⁶ Thus, proponents of an educational

80. By adhering to what has become a blanket rule of non-liability for educational malpractice, courts automatically preclude meritorious claims from consideration. This is particularly disturbing given that victims of educational malpractice incur real and measurable injuries. . . . Equally disturbing is that undue reliance on these dubious policy considerations channels the judiciary away from the ultimate issue—whether a particular plaintiff's interests are entitled to protection against the defendant's conduct.

Davis, *supra* note 2, at 81-82.

81. See Davis, *supra* note 2, for a detailed discussion of the criticisms levied against courts for rejecting an educational malpractice cause of action.

82. See Davis, *supra* note 2, at 75; Funston, *supra* note 24, at 780; Collingsworth, *supra* note 24, at 494; Klein, *supra* note 24, at 39; McBride, *supra* note 24, at 484.

83. See Davis, *supra* note 2, at 75; Foster, *supra* note 24, at 190-91; Collingsworth, *supra* note 24, at 489.

84. See Davis, *supra* note 2, at 75-76; Foster, *supra* note 24, at 221; Collingsworth, *supra* note 24, at 496; Joan Blackburn, *Educational Malpractice: When Can Johnny Sue?* 7 *FORDHAM URB. L.J.* 117, 126-27 (1978); Kimberly A. Wilkins, Note, *Educational Malpractice: A Cause of Action in Need of a Call for Action*, 22 *VAL. U.L. REV.* 427, 457 (1988); Sherman, *supra* note 3, at 680.

85. See Davis, *supra* note 2, at 76-77.

86. See Blackburn, *supra* note 84, at 131.

malpractice claim maintain that a plaintiff in an educational malpractice action would only be required to show that the institution's conduct was a substantial factor—not the sole cause of his or her injury.⁸⁷

In addition, critics argue courts have exaggerated their perceived lack of competence to address the issues that would arise in educational malpractice suits. They point to the judiciary's competence to address matters concerning other professional fields and the fact that courts have interceded in desegregation and school financing cases that require assessment of the quality of the education.⁸⁸

The concern regarding the potential exposure to excessive litigation has not escaped criticism. Although this concern is recognized as legitimate,⁸⁹ critics argue that it fails to justify leaving a deserving plaintiff without a remedy.⁹⁰ Moreover, they assert that the economic realities of the costs associated with bringing a lawsuit would reduce the number of lawsuits.⁹¹

As observed above, advocates of a cause of action for educational malpractice acknowledge the legitimacy of the public policy considerations courts rely on to deny such claims. Yet they ultimately conclude these policy factors, when scrutinized, fail to make a compelling case for the conviction with which courts reject educational malpractice claims. Consequently, they maintain these factors provide insufficient justification for the breadth of the judicial restraint that has thus far been exercised in the educational malpractice context.

4. *Refusal to Create Tort of Negligent Admission*

Having disposed of the educational malpractice strand of Ross' negligence claim, the court next considered the merits of Ross'

87. See Davis, *supra* note 2, at 77.

88. See Davis, *supra* note 2, at 78; Robert H. Jerry II, *Recovery in Tort for Educational Malpractice: Problems of Theory and Policy*, 29 KAN. L. REV. 195, 203 (1981); John Elson, *A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching*, 73 NW. U.L. REV. 641, 670 (1978); Klein, *supra* note 24, at 38; McBride, *supra* note 24, at 489; Wilkins, *supra* note 84, at 440.

89. See Funston, *supra* note 24, at 801; Klein, *supra* note 24, at 36, 41; McBride, *supra* note 24, at 492.

90. See Collingsworth, *supra* note 24, at 504; Wilkins, *supra* note 24, at 439; Nancy L. Woods, Comment, *Educational Malfeasance: A Cause of Action for Failure to Educate*, 14 TULSA L.J. 383, 395 (1978).

91. See Davis, *supra* note 2, at 79; Foster, *supra* note 24, at 192-93; Jay M. Pabian, Note, *Educational Malpractice and Minimal Competency Testing: Is There a Legal Remedy at Last?*, 15 NEW ENG. L. REV. 101, 108 (1979-1980); *but see* Funston, *supra* note 24, at 796.

negligent admission claim. The Seventh Circuit characterized this claim as alleging Creighton owed a duty to Ross "to recruit and enroll only those students reasonably qualified and able to academically perform at Creighton."⁹² The court held that the Illinois Supreme Court would reject such a claim for the same policy reasons that support rejection of Ross' educational malpractice claim. The court specifically noted the difficulty the judiciary would likely encounter in defining a workable standard of care.⁹³ It further stated this difficulty would become manifest once an attempt was made to determine who constituted a "reasonably qualified student."⁹⁴ Moreover, the court reasoned such a determination would require evaluation of subjective factors such as the "nature and quality of the defendant institution and the intelligence and educability of the plaintiff."⁹⁵ It concluded the judiciary lacks the expertise and competence to render such decisions.⁹⁶

The Seventh Circuit also pointed to policy considerations in addition to those it relied upon to reject Ross' educational malpractice claim. Like the district court, it pointed to the preclusive effect that the proposed tort action might have on a college's willingness to admit marginally qualified students.⁹⁷ In this regard it stated, "if universities and colleges faced tort liability for admitting an unprepared student, schools would be encouraged to admit only those students who were certain to succeed in the institution. Therefore, the opportunities of marginal students to receive an education would likely be lessened."⁹⁸ The foregoing concern influenced the court to conclude that recognition of a *sui generis* tort could result in detriment to society since disadvantaged students might be denied access to colleges and universities.⁹⁹

The perceived external consequences of creating a *sui generis* tort for student-athletes may not be as compelling as the court suggests inasmuch as the potential risks are uncertain. Likewise, even assuming that colleges decrease their recruitment and admittance of marginally qualified athletes, the consequences to society of such a

92. *Ross*, 957 F.2d at 415 (quoting *Ross* Amended Complaint at ¶ 24).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

course of action are unclear. Indeed, by pointing to this concern as a justification for not creating a *sui generis* tort, the court interjected itself into a vociferous debate regarding whether society as a whole and individual student-athletes benefit when institutions admit marginally qualified students with remote prospects of succeeding academically.

This debate has occurred largely in the context of the disadvantaged black student-athlete.¹⁰⁰ For example, a recent study indicates that participation in intercollegiate athletics correlates into post-college economic benefits for many student-athletes, including black student-athletes from disadvantaged backgrounds.¹⁰¹ This conclusion comports with views expressed by educators and administrators, who believe sports is a realistic avenue out of poverty for many black students.¹⁰² A college president recently observed that college sports

100. See Douglas Lederman, *Blacks Make Up Large Proportion of Scholarship Athletes, Yet Their Overall Enrollment Lags at Division I Colleges*, CHRON. HIGHER EDUC., June 17, 1992, at A30. Recently, this debate has engendered considerable attention as administrators and educators study the implications of the disproportionately high numbers of black student-athletes enrolled in many colleges as compared to non-athlete black students. *Id.* This disparity came to light in a recent survey conducted by the Chronicle of Higher Education. This survey revealed, *inter alia*, that while blacks comprise 60% of all basketball scholarship student-athletes, they comprise only 6% of the full time undergraduate students at 245 NCAA Division I colleges and universities. *Id.* at A1. This survey also revealed that 15% of black males attending these institutions were on athletic scholarships compared to 2.3% of white males. *Id.* At certain institutions, over half of the black male students are athletes. *Id.*

101. CLIFFORD ADELMAN, DEPARTMENT OF EDUCATION, LIGHT AND SHADOWS ON COLLEGE ATHLETES 16-17 (1990). This study, which questions the degree to which student-athletes are actually exploited, finds support in anecdotal comments from student-athletes such as Mike Garret, who played football for USC. He believes obtaining a scholarship to play football provided him with the opportunity to attend college which was "absolutely the best thing that happened to [him]." Phil Taylor & Shelley Smith, *Southern Cal: Exploitation or Opportunity?*, SPORTS ILLUS., Aug. 12, 1991, at 46.

102. Lederman, *supra* note 100, at A30. This view is often expressed as dependent on a college's commitment to providing a meaningful educational opportunity to student-athletes. *Id.* Professor Gary Sailes, a former student-athlete who now teaches sociology at Indiana University, believes college sports is an "avenue for upward mobility for young blacks." *Id.* at A34. In support of this proposition, Professor Sailes points to the higher rates of graduation for black student-athletes as compared to non-athletes. *Id.* However, comparing graduation rates of student-athletes with non-athletes should be done cautiously because such rates fail to consider that student-athletes are unlikely to face the heavy financial pressures that cause many non-athletes to terminate their college careers. In addition, non-athletes do not receive the intensive tutoring many sports programs offer to student-athletes. *Id.* See Davis, *supra* note 3, at 754 n.63 (discussing the illusory aspects of comparing graduation rates). In explaining why student-athletes might graduate at higher rates than non-athletes, Clifford Adelman commented "athletes also have a 'safety net' of support and tutoring that is not generally available to other students. Also . . . athletes are much likelier than other students to go directly to college from high school—a move that . . . is 'one of the strongest predictors' of college success." Douglas Lederman, *Survey Suggests Many Division I Colleges Fail to Graduate Their Black Athletes*, CHRON. HIGHER EDUC., Jul. 22, 1992, at A31.

have been important "not only in providing access but in providing role models, emblems of success, for African-Americans. College sports have played an enormously valuable role in bringing equal opportunity to a lot of people through athletics. . . ." ¹⁰³ Thus, the chance to participate in college athletics may constitute a real vehicle for providing access to the educational opportunity that would otherwise evade many students from disadvantaged backgrounds. ¹⁰⁴

The foregoing opinions contrast sharply with views held by educators and commentators, who maintain a central feature of intercollegiate athletic competition, particularly since its increased commercialization, is exploitation of student-athletes. ¹⁰⁵ Professor Harry Edwards argues many disadvantaged black student-athletes are likely to experience harsh social and economic consequences from their failure to effectively participate in a school's academic curriculum. ¹⁰⁶ He suggests that student-athletes with little chance of benefiting academically may be better off never having attended college. Other critics add that colleges convey "destructive messages by appearing to show more interest in black athletes than in other blacks. Such disparities . . . foster the stereotype that blacks are better suited to physical activities than to intellectual pursuits, and discourage young blacks who are not athletes by suggesting that it's easier to get to college if you play ball." ¹⁰⁷ Similar concerns are

103. Lederman, *supra* note 100, at A34.

104. *Id.* at A30. Some argue the mere fact that college sports creates such opportunities undercuts criticisms directed towards colleges that have a higher proportion of black student-athletes on their campuses than black students who are not athletes. *Id.*

105. Detailed discussions of the current state of intercollegiate athletics and the degree, if any, to which student-athletes are exploited can be found in Davis, *supra* note 3, at 751-68, and Sherman, *supra* note 3, at 672-78.

106. Davis, *supra* note 3, at 759; Harry Edwards, *The Black "Dumb Jock": An American Sports Tragedy*, 131 C: BOARD REV. 8, 9 (1984). Professor Edwards argues, "[t]he frustration and anger caused by a feeling of exploitation contributes to such extreme expressions of trauma as 'antisocial behavior, substance abuse, [and] nervous breakdowns.'" *Id.* at 9. Edwards also identifies a cost to society associated with affording preferential treatment to black student-athletes over non-athlete black students. He argues that giving admission and scholarship preference to the student-athlete "erodes the integrity of the academic process. . . . It tells [non-athletes] that they are not valued, that education is a farce, that the notion that struggling to get an education as the way to achieve is a lie." Lederman, *supra* note 100, at A34. Edwards points to the low graduation rates for black student-athletes as supporting his view that colleges are more interested in blacks for their athletic rather than their intellectual abilities. *Id.* at A32. According to Edwards, "[s]omewhere between 60 and 70 per cent of black athletes never graduate. . . . Under those circumstances there is no way to justify the set of arrangements that find colleges recruiting black athletes more intensely than they pursue other black students." *Id.*

107. Lederman, *supra* note 100, at A1.

expressed by Arthur Ashe who believes a correlation exists between the increased willingness of colleges to admit marginally qualified student-athletes and the willingness of black student-athletes to prioritize sports over academics.¹⁰⁸

The foregoing discussion highlights the considerable uncertainty that surrounds the societal costs and benefits of enrolling significant numbers of marginally qualified and disadvantaged student-athletes into colleges. Therefore, the potential harm to society stands on shallow ground as a basis for the court's rejection of a *sui generis* tort action.¹⁰⁹

5. *Rejection of Emotional Distress Claim*

Like the district court, the Seventh Circuit summarily disposed of Ross' intentional infliction of emotional distress claim. Citing Illinois precedent,¹¹⁰ it concluded "the Illinois Supreme Court made clear that the 'essential question' when evaluating whether a complaint states a claim for negligent infliction of emotional distress 'is whether the plaintiff properly alleged negligence on the part of defendant.'" ¹¹¹ Applying this reasoning, the court concluded the viability of Ross' negligent infliction of emotional distress claim was dependent, as a threshold matter, on whether Creighton owed a duty of care to Ross.¹¹² Pointing to the same policy concerns that supported its dismissal of Ross' other tort claims,¹¹³ the court concluded Illinois courts would not impose such a duty of care.¹¹⁴ Accordingly, the

108. *Id.* at A30.

109. See Sherman, *supra* note 3, at 684-87 (identifying the adverse consequences to society and to student-athletes flowing from judicial rejection of educational malpractice claims).

110. The court cited to *Cordan v. Muehling*, 574 N.E.2d 602 (Ill. 1991), in which the Illinois Supreme Court enunciated the standard for determining when a plaintiff alleges a legally sufficient negligent infliction of emotional distress claim. The *Cordan* court rejected the zone-of-danger test as establishing the standard for determining whether a direct victim of alleged negligent infliction of emotional distress possessed a right to recover. *Id.* at 606. Rather, it held the "essential question is whether the plaintiff properly alleged negligence on the part of the defendant." *Id.* This question turns in part on a plaintiff's ability to establish the defendant owes her a duty of care. The Illinois Supreme Court concluded the facts demonstrated that the defendant psychologist who engaged in sexual intercourse with plaintiff owed her such duty. Consequently, plaintiff stated a cause of action for negligent infliction of emotional distress. *Id.* at 606.

111. *Ross*, 957 F.2d at 415.

112. *Id.*

113. *Id.*

114. *Id.*

Seventh Circuit dismissed Ross' negligent infliction of emotional distress claim.¹¹⁵

B. Disposition of Contract Claims

The Seventh Circuit summarized Ross' breach of contract claims as asserting that in exchange for his promise to play on its basketball team, Creighton promised Ross an opportunity to meaningfully participate in its academic program notwithstanding his deficient academic background.¹¹⁶ Ross' contract claim also alleged that Creighton's breach of certain commitments¹¹⁷ it made to Ross denied him any real opportunity to participate in and benefit from Creighton's academic program.¹¹⁸

The court began its analysis of Ross' contract claims by pointing to the contractual nature of a student's relationship with his or her institution.¹¹⁹ In this regard, it found that Illinois courts recognize the contractual relationship between students and colleges as comprised in part of the latter's "catalogues, bulletins, circulars, and regulations."¹²⁰ The court also inferentially acknowledged the contractual basis of student-athletes' relationships with their institutions.¹²¹

The foregoing conclusions are in accord with the prevailing view that characterizes the non-athlete student/university relationship as premised on an implied contract,¹²² and the student-athlete/university

115. *Id.*

116. *Id.* at 415-16.

117. *Id.* at 416. These commitments allegedly included Creighton's failure to: (a) provide adequate tutorial assistance; (b) require Ross to attend tutorials; (c) afford Ross the reasonable opportunity to avail himself of tutorial services; (d) allow Ross to red-shirt for a year; and (e) provide funds for the completion of Ross' college education. *Id.* (citing Count II, ¶ 28 & 31, and Count III, ¶ 26 & 29 of Ross Amended Complaint).

118. *Id.*

119. *Id.* at 416. The court indicated that there "appears to be 'no dissent' from this proposition." *Id.*

120. *Id.* at 416.

121. *Id.* at 417.

122. One writer comments that "[t]he totality of the 'contract' between the student and the university is contained in a number of documents and oral assertions. It is an implied, or quasi-contract with the relationship being contractual in nature even without an express contract." Virginia Davis Nordin, *The Contract to Educate: Toward a More Workable Theory of the Student-University Relationship*, 8 J. C. & U.L. 141, 155-56 (1981-82). The author cited *Zumbrun v. University of Southern California*, 101 Cal. Rptr. 499, 504 (Ct. App. 1972), where the court held the contractual relationship arose from oral and written elements—the latter being comprised of catalogues, bulletins, circulars and regulations; see also Jonathan F. Buchter, Note, *Contract Law and The Student-University Relationship*, 48 IND. L.J. 253 (1973) (char-

as premised on an express contract.¹²³ With respect to the latter relationship, it is comprised not only of the documents that provide the core of the implied contract between colleges and non-athlete students, but of additional documents, principally the Statement of Financial Aid¹²⁴ and The National Letter of Intent.¹²⁵

1. *Contract Claims Alleging Educational Malpractice*

Although it adopted the contractual view of the student-university relationship, the court carefully circumscribed the scope of its adherence to this principle. In this regard, it noted, "Illinois would not recognize all aspects of a university-student relationship as subject

acterizing the relationship as based on an implied contract); Victoria J. Dodd, *The Non-Contractual Nature of the Student-University Contractual Relationship*, 33 KAN. L. REV. 701, 702 (1985) (concluding the implied contract between students and their colleges arises from various documents promulgated by colleges including catalogues, bulletins and circulars); Theodore C. Stamatakos, Note, *The Doctrine of In Loco Parentis, Tort Liability and the Student-College Relationship*, 65 IND. L.J. 471, 477 (1990) (stating the relationship between a student and college has been defined as contractual); Robert Faulkner, *Judicial Deference to University Decisions Not to Grant Degrees, Certificates, and Credit—The Fiduciary Alternative*, 40 SYRACUSE L. REV. 837, 850-51 (1989) (noting that as early as 1891, courts recognized the contractual basis of the relationship); Eugene L. Kramer, Note, *Expulsion of College and Professional Students—Rights and Remedies*, 38 NOTRE DAME L. REV. 174 (1962-1963).

As exemplified by *Zumbrun*, courts also view the student-university relationship as premised on an implied contract. See, e.g., *Peretti v. Montana*, 464 F. Supp. 784, 786 (D. Mont. 1979) (finding there is virtually no dissent from the proposition that the student-university relationship is contractual in nature); *Lyons v. Salve Regina College*, 422 F. Supp. 1354, 1359 (D.R.I. 1976) (citing dictum in *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir. 1961) (that relationship is a matter of contract); *Smith v. Ohio State Univ.*, 557 N.E.2d 857, 859 (Ohio Ct. Cl. 1990) (deeming the relationship contractual); *Wickstrom v. North Idaho College*, 725 P.2d 155, 157 (Idaho 1986) (concluding it is well settled that the student-college relationship is contractual).

123. See, e.g., Davis, *supra* note 3, at 786; Michael N. Widener, *Suits by Student-Athletes Against Colleges for Obstructing Educational Opportunity*, 24 ARIZ. L. REV. 467, 468-69 (1982); Michael J. Cozzillio, *The Athletic Scholarship and the College National Letter of Intent: A Contract by Any Other Name*, 35 WAYNE L. REV. 1275, 1319 (1989); Nordin, *supra* note 122, at 155-56.

124. This document outlines the terms and conditions under which institutions extend scholarships to its student-athletes. Widener, *supra* note 123, at 469; Cozzillio, *supra* note 123, at 1290; Davis, *supra* note 3, at 771-72.

125. The Letter of Intent further manifests the commitment between student-athletes and their schools. Cozzillio, *supra* note 123, at 1290. "The student-athlete promises to attend a particular college and to participate in athletics when he signs a Letter of Intent. In exchange for this commitment, the university promises to provide financial assistance in the form of an athletic scholarship." Davis, *supra* note 3, at 771.

A detailed discussion of the history and significance of the Letter of Intent to the student-athlete/university contractual relationship is set forth in Cozzillio, *supra* note 123, at 1291-93, 1362-63; Davis, *supra* note 3, at 771-73.

to remedy through a contract action."¹²⁶ Specifically, the court found that the judiciary will not review decisions that involve an institution's exercise of discretion relating to academic matters such as the qualifications of students.¹²⁷ The justification for this conclusion lies principally in the doctrine of academic abstention, which has been used to avoid the strict application of contract principles to the contractual relationship between students and colleges.

The academic abstention concept is grounded in the belief that the expertise of faculties and governing bodies warrants judicial deference to them in educational matters.¹²⁸ The Seventh Circuit, in adopting this position, quoted from *DeMarco v. University Health Sciences*.¹²⁹ There the court held that "a decision of the school authorities relating to the academic qualification of the students will not be reviewed. . . . [C]ourts are not qualified to pass an opinion as to the attainments of a student . . . and . . . courts will not review a decision of the school authorities relating to academic qualifications of the students."¹³⁰ Though *Demarco* did not involve issues of educational malpractice, it lends support to the proposition adopted by the *Ross* court that, notwithstanding the contractual nature of the student/university relationship, the academic abstention concept mandates that the judiciary not treat such contracts like typical commercial contracts. Against this historical and theoretical backdrop

126. *Ross*, 957 F.2d at 416. *Accord*, *Abbariao v. Hamline Univ. Sch. of Law*, 258 N.W.2d 108, 113 (Minn. 1977) (acknowledging the contractual nature of the relationship, but rejecting the rigid importation of contract doctrine into the relationship).

127. *Ross*, 957 F. 2d at 416.

128. *Davis*, *supra* note 3, at 783. In analyzing the applicability of traditional contract doctrine to this relationship, Professor Dodd concluded, "only some aspects of contract law are to be applied in the student-university context and . . . such law never can be strictly applied. . . . Part of the explanation for this rather unusual view of contract law may be that courts traditionally have ruled that the actions of colleges and universities are to be deferred to, particularly when the actions concern academic affairs or private schools." *Dodd*, *supra* note 122, at 709-10.

Accord Audrey Wolfson Latourette & Robert D. King, *Judicial Intervention in the Student-University Relationship: Due Process and Contract Theories*, 65 U. DET. L. REV. 199, 242 (1988) (pointing out that while courts view as settled doctrine the contractual nature of the student-university relationship, they are particularly reluctant to apply traditional contract doctrine to this relationship when academic matters are in dispute); *Kramer*, *supra* note 122, at 175 (concluding the unique setting of the university precludes adoption of strict contract doctrine in regulating the relationship).

129. 352 N.E.2d 356 (Ill. App. Ct. 1976) (involving the propriety of a medical school's refusal to award a degree to a student).

130. *Ross*, 957 F.2d at 416 (quoting *Demarco v. University Health Sci.*, 352 N.E.2d 356, 361-62 (Ill. App. Ct. 1976)).

the court proceeded to analyze the justiciability of Ross' contract claims.

Addressing Ross' contract claims, the court first rejected any breach of contract theory to the extent that it repackages an educational malpractice claim.¹³¹ Following the reasoning of *Wickstrom v. North Idaho College*,¹³² the court pointed out that courts considering this issue have wisely concluded that the same policies which argue against judicial recognition of a tort action for educational malpractice apply with equal weight to a breach of contract action that attacks the quality of the academic instruction.¹³³

Wickstrom is representative of the handful of cases that have addressed the right of a plaintiff to challenge the quality and adequacy of the educational instruction provided by a college or university.¹³⁴ There, several students alleged the college failed to comply with promises set forth in the college bulletin requiring the school to provide a certain level of educational instruction.¹³⁵ The court, in dictum, stated claims alleging breach of express contractual promises are to be contrasted with claims that assail the educational process and thereby implicate subjective factors such as teaching methodology.¹³⁶ While the *Wickstrom* court strongly suggested that a student may possess a legally sufficient claim alleging breach of an express promise, it would not extend this right so as to allow the student to assert educational malpractice under the guise of a contract action.¹³⁷

131. *Ross*, 957 F.2d at 416.

132. 725 P.2d 155 (Idaho 1986). The court also relied on *Hunter v. Board of Educ.*, 439 A.2d 582 (Md. 1982) and *Torres v. Little Flower Children's Serv.*, 474 N.E.2d 223 (N.Y. 1984), *cert. denied*, 474 U.S. 864 (1985).

133. *Ross*, 957 F.2d at 416.

134. Other cases that have addressed this issue include: *Moore v. Vanderloo*, 386 N.W.2d 108 (Iowa 1986) (following the reasoning of cases such as *Peter W.* and *Donohue*, the court rejected plaintiff's educational malpractice cause of action); *Woodruff v. Georgia State Univ.*, 304 S.E.2d 697 (Ga. 1983) (adopting the principle that tort claims challenging school curriculum are subject to dismissal); *Wilson v. Continental Ins. Co.*, 274 N.W.2d 679 (Wis. 1979) (suit by former law student alleging educational malpractice was dismissed); *See also* *Beaman v. Des Moines Area Comm. College, No. 158532, Polk County, Iowa* (Sept. 28, 1976) (plaintiffs' action alleging college failed to follow standards regarding teacher qualifications dismissed for inability to establish duty element of negligence cause of action); *Huckabay v. Netterville*, 263 So.2d 113 (La. Ct. App. 1972) (court disposes of educational malpractice claim without having to reach determination of the justiciability of such a cause of action). These cases are discussed in detail in *Davis, supra*, note 2, at 61-82.

135. *Wickstrom*, 725 P.2d at 156.

136. *Id.* at 157; *accord* *Woodruff v. Georgia State Univ.*, 304 S.E.2d 697, 698-99 (Ga. 1983) (tort and contract claims questioning the adequacy of the school curriculum, for policy reasons, failed to present justiciable controversy); *Davis, supra* note 2, at 72.

137. The dissenting judge argued that plaintiffs' claims attacked the adequacy of the

A similar approach was taken by the court in *Paladino v. Adelphi University*,¹³⁸ where the Plaintiff alleged a private elementary school's failure, *inter alia*, to provide a quality education constituted a breach of contract.¹³⁹ After reviewing educational malpractice jurisprudence, the court concluded that an educational malpractice claim would not lie even though formulated in contract.¹⁴⁰ The court went on to distinguish a legitimate breach of contract claim against an educational institution from one which is premised on educational malpractice. As was seen in *Wickstrom*, the court in *Paladino* concluded a breach of contract claim "predicated upon the quality and adequacy of the course of instruction" would not be recognized.¹⁴¹ It added that where the essence of the complaint is that the institution provided no services or failed to provide certain specified services, a plaintiff may possess a cognizable contract claim.¹⁴² The court summarized its analysis by noting that the critical determinant is whether the "claims entail an analysis of the education function."¹⁴³

Paladino and *Wickstrom* are consistent with the approach taken by courts that have permitted students to sue universities for breach of contract in situations where the issue of educational malpractice was not addressed. The leading case cited by the Seventh Circuit in *Ross* is *Zumbrum v. University of Southern California*,¹⁴⁴ which involved an action by a student alleging that the university breached its promise that a certain course would be a full and complete course with a final examination.¹⁴⁵ The course instructor, as part of a faculty strike protesting U.S. involvement in Cambodia, refused to teach the course and to conduct a final examination.¹⁴⁶ All students in the class

instruction provided and consequently no breach of contract claim would lie. *Wickstrom*, 725 P.2d at 160; see Davis, *supra* note 2, at 72-73, for a discussion of the implications of the court's dictum and of the dissent's disapproval of the majority's attempt to distinguish between contract and tort claims.

138. 454 N.Y.S.2d 868 (1982)

139. *Id.* at 870.

140. *Id.* at 871-72. The court's holding was based on the policy considerations courts traditionally rely on to reject educational malpractice claims. *Id.* at 870-71. See *supra* text accompanying notes 50-77.

141. 454 N.Y.S.2d at 873.

142. *Id.*

143. *Id.* The court held that plaintiff's claims that questioned the quality of instruction and the competency of teachers implicated the educational process. Similarly, contract claims challenging the sufficiency of tutorial services and assessment of the student's academic performance were not subject to judicial review.

144. 101 Cal. Rptr. 499 (Ct. App. 1972).

145. *Id.* at 502.

146. *Id.*

received the grade "B".¹⁴⁷ Acknowledging the contractual nature of the student/university relationship, the court concluded that the plaintiff had not received what she bargained for when she enrolled in the course.¹⁴⁸ Consequently, she possessed a cognizable contract action arising from defendant's agent's failure to teach a substantial portion of the stated number of lectures.¹⁴⁹

2. *Breach of Express Promises*

The Seventh Circuit adopted the principle proposed by the foregoing authorities that a student may possess a legally cognizable breach of express contract claim against a college or university.¹⁵⁰ Like these authorities, the court carefully defined the circumstances under which it is appropriate to judicially recognize such a claim.

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. Thus, as we suggested in *Paladino*, if the defendant took tuition money and then provided no education, or alternately, promised a set number of hours of instruction and then failed to deliver, a breach of contract action may be available.¹⁵¹

The court's careful exposition of the parameters of a justiciable breach of contract claim was principally motivated by its desire to avoid the suggestion that a plaintiff can attack the adequacy of the education provided in such a way that the subjective factors that militate against recognizing education malpractice claims become subject to judicial review.¹⁵²

3. *Employing Duty of Good Faith to Create Contract Claim*

Having enunciated the above guidelines, the Seventh Circuit proceeded to examine the allegations of Ross' complaint to determine if they alleged something more than "that the education was not good enough."¹⁵³ It held Ross' breach of contract claim stated issues extending beyond questioning the quality of the education that

147. *Id.*

148. *Id.* at 505.

149. *Id.*; accord *Peretti v. Montana*, 464 F.Supp. 784 (D. Mont. 1979); *Stad v. Grace Downs Model and Air Career Sch.*, 319 N.Y.S.2d 918 (N.Y. City Civ. Ct. 1971).

150. *Ross*, 957 F.2d at 417.

151. *Id.* at 416-17.

152. *Id.*

153. *Id.* at 415-16.

Creighton delivered to him.¹⁵⁴ According to the court, Ross alleged that Creighton possessed knowledge of his lack of qualifications to effectively participate in the University's academic curriculum.¹⁵⁵ "Creighton made a specific promise that he would be able to participate in a meaningful way in that program because it would provide certain specific services to him."¹⁵⁶

The court concluded that this allegation, when combined with the allegations that Creighton's breach of such promises precluded him from "any participation in and benefit from the University's academic program,"¹⁵⁷ presented a legally cognizable contract claim.¹⁵⁸ The court's willingness to permit an action was influenced to a considerable extent by its view that evaluating these allegations would not require an assessment of the quality of the educational instruction provided by Creighton.¹⁵⁹ To the contrary, the court found that allegations of this nature should be viewed as merely requiring an objective judicial determination of whether Ross had "any real access to [Creighton's] academic curriculum at all."¹⁶⁰ Carefully seeking to circumscribe the newly created duty, the court also pointed out that this issue was capable of consideration "without second-guessing the professional judgment of the University faculty on academic matters."¹⁶¹ It held Ross' allegations provided a sufficient basis for remanding the case to the district court for a determination of the limited issue of whether Creighton's conduct effectively barred Ross from any opportunity to participate in the university's academic program.¹⁶²

4. *Analysis of Court's Ruling on Contract Issues*

a. *Breach of Express Promises*

As the foregoing discussion illustrates, the *Ross* court did not step into uncharted terrain in recognizing that a student-athlete might possess a breach of contract action arising from an institution's failure to perform a specific contractual promise. As observed above,

154. *Id.* at 417.

155. *Id.* at 417.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

the court merely followed existing precedent that recognizes the right of any student to sue a college or university for breach of an express promise.¹⁶³ Also, such a contract claim is not premised on a theory of educational malpractice (whether in tort or contract) inasmuch as the sufficiency or quality of the education or instruction provided is not subjected to judicial consideration.¹⁶⁴ As the Seventh Circuit astutely pointed out:

In these cases, the essence of the plaintiff's complaint would not be that the institution failed to perform adequately a promised educational service, but rather that it failed to perform that service at all. Ruling on this issue would not require an inquiry into the nuances of educational processes and theories, but rather an objective assessment of whether the institution made a good faith effort to perform on its promise.¹⁶⁵

In short, this type of contract claim merely requires judicial consideration of whether an institution failed to fulfill an express commitment. Consequently, the Seventh Circuit's legitimization of this type of contract claim neither imposes new duties on universities nor expands the rights of student-athletes.

b. Exercising Discretion to Imply Contract Terms

Despite the court's efforts to confine its holding within the strictures of existing precedent, the opinion may be read as exposing universities to unprecedented contractual liability to their student-athletes. As noted above, the court attempted to support and limit the scope of its ruling by pointing to cases in which an educational institution failed to make any effort to perform express promises.¹⁶⁶ To reiterate, following this line of reasoning, a student-athlete's contract claim could go forward only to determine if an institution's breach of specific promises effectively denied the athlete an opportunity to participate in and benefit from a school's academic program.¹⁶⁷ However, it is arguable that such a narrow reading of the court's holding ignores language that suggests that the scope of the proposed inquiry may not be limited to breach of express promises.

163. See *supra* text accompanying notes 136-51.

164. See Davis, *supra* note 2, at 67-68 (arguing claims alleging breach of express contractual commitments do not invoke the issues involved in educational malpractice suits).

165. Ross, 957 F.2d at 417.

166. The court cited *Paladino* and *Zumbrun* as illustrative of cases defining the circumstances under which students might successfully assert contract claims against their schools. *Id.*

167. *Id.*

This conclusion is derived in part from the court's statement that "its inquiry would be limited to whether the University had *provided any real access to its academic curriculum at all.*"¹⁶⁸ Note the court's attempt to narrow the scope of its inquiry to exclude consideration of matters related to the adequacy of the instruction provided. Also note, however, the court's failure to comment on whether this determination should be limited solely to examining an institution's good faith efforts to perform express promises made to student-athletes. Indeed, the foregoing language seems to focus on the broader conduct of an institution and the impact of such conduct on a student-athlete's ability to take advantage of a school's academic program. This could conceivably require consideration of matters and conduct extending beyond the express promises a school has made to its student-athletes.

The following additional language supports the inference that the court did not intend to limit the scope of this inquiry to express promises: "We recognize 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 (emphasis added).'"¹⁶⁹ It is reasonable to read the foregoing as indicating the Seventh Circuit, unlike the district court,¹⁷⁰ recognizes the propriety of exercising its discretion to imply terms into a student-athlete/university agreement.

The court neglected to explicitly identify the source of its right to imply terms into the agreement. However, it is vested with such discretion by virtue of the duty of good faith, which is recognized in Illinois as implied into every contract¹⁷¹ and as providing a basis for implying terms into the agreement.¹⁷² Despite its varied concep-

168. *Id.*

169. *Id.* (quoting *Wickstrom*, 725 P.2d at 157).

170. The lower court held that it possessed the authority to imply certain obligations into the agreement, but felt given the incompetence of the judiciary in matters involving intercollegiate athletics, it would not be a judicious exercise of discretion. *Ross*, 740 F. Supp. at 1332.

171. *Martindell v. Lake Shore National Bank*, 154 N.E.2d 683 (Ill. 1958) (holding that every contract implies a duty of good faith between the parties to it); *accord Greer Properties, Inc. v. LaSalle National Bank*, 874 F.2d 457, 460 (7th Cir. 1989) (stating Illinois law recognizes the implied duty of good faith and fair dealing in every contract); *Vincent v. Doebert*, 539 N.E.2d 856, 862 (Ill. App. Ct. 1989) (holding the covenant of good faith and fair dealing is implied into every contract as a matter of law unless the parties expressly agree otherwise); *Foster Enter. v. Germania Fed. Sav.*, 421 N.E.2d 1375, 1380 (Ill. App. Ct. 1981) (noting the concept that a covenant of good faith and fair dealing is implied into every agreement is a part of Illinois' statutory and common law heritage).

172. *See Williams v. Jader Fuel Co.*, 944 F.2d 1388, 1394 (7th Cir. 1991) (covenant of good

tualizations, the duty of good faith is viewed as a means of effectuating the intentions of parties through a process of interpretation and implication.¹⁷³

The good faith concept also precludes parties to the agreement from engaging in efforts by one to deprive the other of his or her reasonable expectations.¹⁷⁴ Thus, where the contract expressly fails to articulate all the terms that reflect the parties' expectations, gaps exist as to the precise manner in which performance obligations will be fulfilled. The existence of such gaps or omissions affords one party discretion as to the proper manner in which to perform its contractual obligations.¹⁷⁵ The duty of good faith requires the party vested with this contractual discretion to exercise it reasonably and in accord with the parties' respective expectations.¹⁷⁶ As one commentator stated, "[g]ood faith in performance makes it possible in certain cases to identify the boundaries of performance under a contract that fails to describe them explicitly. It thus serves to demarcate, in part, the expectation interest."¹⁷⁷

The process of implication that the Seventh Circuit validates in the student-athlete/university context, authorizes a court to determine the expectations of the parties. This would operate as a preliminary

faith is a mechanism that aids and furthers the express terms of the agreement); *Foster Enter. v. Germania Fed. Sav.*, 421 N.E.2d 1375, 1382 (Ill App. Ct. 1981) (contract terms implied by virtue of duty of good faith can supplement but not supplant express terms); *Bonfield v. Aamco Transmissions, Inc.*, 708 F. Supp. 867, 884-885 (N.D. Ill. 1989) (noting that implied terms cannot supplant express contract terms).

173. Steven J. Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 IOWA L. REV. 497, 499 (1984); Davis, *supra* note 3, at 777, 779.

174. Burton, *supra* note 173, at 372-73; Eric G. Andersen, *Good Faith in the Enforcement of Contracts*, 73 IOWA L. REV. 299, 326 (1988); E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666, 669 (1963).

175. Andersen, *supra* note 174, at 325; Burton, *supra* note 173, at 501; Davis, *supra* note 3, at 775.

176. Andersen, *supra* note 174, at 325-26; Davis, *supra* note 3, at 775-76; Burton, *supra* note 173, at 499. The Illinois judiciary has adopted this function of the good faith doctrine. *Foster Enter.*, 421 N.E.2d at 1381 (defining good faith in part as requiring a party to exercise its contractual discretion reasonably and consistently with contract expectations); *accord* *Labovitz v. Dolan*, 545 N.E.2d 304, 309 (Ill. App. Ct. 1989); *Greer Properties, Inc. v. LaSalle Nat'l. Bank*, 874 F.2d 457 (7th Cir. 1989); *Munoz v. Expedited Freight Sys., Inc.*, 775 F. Supp. 1181, 1190 (N.D. Ill. 1991).

177. Andersen, *supra* note 174, at 326. The significance of the good faith doctrine can also be summarized as insulating "the parties' bargain from attempts by one party or the other to evade or undermine it. It imposes upon the parties an obligation to cooperate in achieving the benefits that they expected to flow from their bargain." Davis, *supra* note 3, at 776 (citations omitted).

step to evaluating the need to imply rights and obligations necessary to further these expectations. In addition, courts would be authorized to undertake the task of determining the extent to which the conduct of either party undermines these implied rights such that the expectations on which they are based are thwarted. Such an inquiry could conceivably result in the creation and imposition of obligations on the part of a university only to engage in affirmative conduct to fulfill both *express* obligations and *implied* obligations to student-athletes. Moreover, the implication process could require colleges to avoid engaging in conduct that interferes with a student-athlete's access to an institutions's academic curriculum.¹⁷⁸ This conclusion is predicated on the view of the good faith doctrine as an excluder¹⁷⁹ of conduct that frustrates one party's ability to take advantage of the contractual benefits which he or she expected to obtain at the time of contract formation.¹⁸⁰

The fundamental question that arises from the forgoing propositions is to what extent a court can engage in making these determinations without inquiring into the educational policy of institutions towards their student-athletes. It is reasonable to conclude that such an inquiry might involve evaluation of the substance and adequacy of the educational instruction or curriculum provided. Moreover, would a court be capable of relying on "custom and usages"¹⁸¹ as a basis for incorporating specific terms into the student-athlete/university contract without undertaking an examination of the educational function¹⁸² of colleges and universities, the actual nature of the student-athlete/university relationship, and how these operate to mold the resulting academic expectations of student-athletes. This ultimately leads to the question of whether a court's exercise of such discretion will result in judicial supervision of the relationship between

178. For a discussion of the types of conduct that universities engage in which arguably limits the access of student-athletes to benefit from a school's academic program see Sherman, *supra* note 3, at 679-80; Davis, *supra* note 2, at 90-91.

179. Davis, *supra* note 3, at 774 (RESTATEMENT (SECOND) OF CONTRACTS has adopted the excluder view of the good faith doctrine developed by Professor Summers); Robert S. Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 202 (1968); RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979).

180. Davis, *supra* note 3, at 776 (citations omitted) (the good faith doctrine imposes obligations on parties requiring them to cooperate so as to enable each to achieve the benefits that they expected would arise out of their contractual relationship).

181. *Ross*, 957 F.2d at 417 (noting custom and usages through implication can provide basis for incorporating specific contractual terms in the student/university agreement).

182. Education of its students has been denominated as the primary function of colleges and universities. Davis, *supra* note 3, at 780.

colleges and student-athletes or the creation of new relationships between these parties,¹⁸³ as the district court warned.

III. CONCLUSION

Although the Seventh Circuit's opinion leaves certain issues unresolved, it represents a significant, albeit limited, expansion of the rights of student-athletes against their institutions. First, it recognizes the right of student-athletes to sue for breach of express promises. More importantly, the decision appears to validate the exercise of judicial discretion to engage in the process of determining whether or not to imply obligations to promote the academic expectations of student-athletes. This exercise of discretion may lead to the imposition of new duties and obligations on universities relating to institutional conduct which both impedes and fails to support student-athletes' efforts to benefit from the academic curriculum of their institutions. Ultimately, the importance of the decision may be realized in its countenance of limited judicial intervention in the regulation of intercollegiate athletics to the extent necessary to protect the academic expectations of student-athletes.¹⁸⁴

183. *Ross*, 740 F. Supp. at 1332.

184. On April 27, 1992, Creighton University announced a settlement of Ross' lawsuit. Under the terms of the settlement, Creighton admitted no liability and agreed to pay Ross a sum of \$30,000. *Sportsline*, USA TODAY, April 28, 1992.

