University of Baltimore Law Review

Volume 51 | Issue 3 Article 2

5-1-2022

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PREPARING SYLLABI: THE ART OF SELF DEFENSE

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I. INTRODUCTION

Higher education institutions require faculty to provide course syllabi to their students.[1] Syllabi outline university, college, department, and course-specific policies, and may also include an agenda of the required reading, assignments, information regarding exams, and how grades will be awarded.[2] In light of the COVID-19 pandemic, syllabi carry even more importance than in normal times. "Social Distancing" and the "COVID Shift" have entered our

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1. *See, e.g.*, Lipschultz v. Holy Fam. Univ., No. 15-5760, 2017 WL 1331731, at *3 (E.D. Pa. Feb. 17, 2017) (One a faculty handbook requires that "[e]ach faculty member must submit two copies of a course syllabus to the School Dean prior to the first class meeting. Although the form and content of the outline may vary with the subject matter, a common syllabus below displays requirements and offers suggestions to facilitate the preparation of your course outline.").

2. Noah Kupferberg, *Democracy Begins at Home: Agreements, Exchanges, and Contracts in the American Law School*, 57 DUQ. L. REV. 4, 34 (2019); Paul Bateman, *Toward Diversity in Teaching Methods in Law Schools: Five Suggestions from the Back Row*, 17 QUINNIPIAC L. REV. 397, 422–23 (1997) ("Syllabi typically indicate the order of march for the course, including the course materials and the reading assignments for each day or week, and any assignments that have to be handed in during the semester and the nature of their evaluation and their effect on the course grade. There may also be a description of the kind of final examination to be given in that course as well as its date and time. In addition, we probably include other . . . items such as the policy on attendance and other administrative matters affecting the course.").

vocabulary and our lifestyle.[3] Face masks have become part of daily attire outside the home.[4] Discussions among faculty and administrators on campuses across the United States include questions about classroom management.[5]

Will students and faculty resume on-campus classes and respect social distancing? In 2020, some higher education institutions that began with on-campus classes reverted to online delivery because of the number of COVID-19 cases.[6] Can the number of students in the classroom be reduced by alternating half the class online with an in-class presence? If "hybrid" style classes are used what happens if a student does not like the online version and shows up in the classroom? Does the institution or faculty have the right to require students to wear face masks? Do students have the right to require other students or the instructor to wear face masks? Can the institution or faculty change the course delivery venue mid-semester? What happens if a student registered in the course is diagnosed with COVID-19 and comes to class?

These questions and many more questions have arisen because of the current pandemic. In addition, The Wall Street Journal has reported that lawsuits have been filed against educational institutions for refunds of tuition, room and board, and fees after campuses closed and classes moved online.[7] What is the role of syllabi in the face of such uncertainty? One commentator proposes that syllabi

3. *How Cities Can Use Streets to Bolster Social Distancing*, BLOOMBERG CITIES (Apr. 30, 2020), https://bloombergcities.medium.com/how-cities-can-use-streets-to-bolster-social-distancing-4e96e953a8bd [perma.cc/8ENN-SYLP] ("On city sidewalks, the math of social distancing simply doesn't add up. . . . That's one reason why a growing number of cities are beginning to open streets to pedestrians[.]"); *see also* Eleanor Barkhorn, Opinion, *Rules for Using the Sidewalk During the Coronavirus*, N.Y. TIMES (Apr. 5, 2020), https://www.nytimes.com/2020/04/05/opinion/coronavirus-walk-outside.html [perma.cc/4EX3-Y867].

4. *See Masks*, CTRS. FOR DISEASE CONTROL, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/masks.html [perma.cc/5K5T-MBSR] (Aug. 12, 2021) (recommending that face masks should generally be worn in public indoor places).

5. *See, e.g.*, *FAQs: COVID-19 Testing & Classroom Management*, SAN JACINTO COLL., https://www.sanjac.edu/faculty-handbook/quick-links/faqs-covid-19-testing-classroom-management [perma.cc/G8BM-7VTL] (last visited Mar. 30, 2022).

6. Emma Whitford, *August Wave of Campus Reopening Reversals*, INSIDE HIGHER ED (Aug. 12, 2020), https://www.insidehighered.com/news/2020/08/12/hundreds-colleges-walk-back-fall-reopening-plans-and-opt-online-only-instruction [perma.cc/L2Vy-MHCB].

7. Douglas Belkin, *College Students Demand Coronavirus Refunds*, WALL ST. J. (Apr. 10, 2020, 6:00 AM), https://www.wsj.com/articles/college-students-demand-refunds-after-coronavirus-forces-classes-online-11586512803 [perma.cc/6E8H-63YD].

should serve as contracts.[8] In other words, between the instructor and students the syllabi delineate their respective responsibilities guiding their behavior during the course.[9] But, does the case law support that position? This paper explores the nature of syllabi. Are they contracts? If not, what are they? If syllabi are not contracts between the student and the educational institution, then what role do catalogs play? Do catalogs create contracts between a student and the educational institution? More importantly, what should be contained in syllabi to avoid conflict and confusion? How can faculty preparing syllabi practice self-defense? Carefully prepared and well written syllabi serve as important shields regarding possible misunderstandings and litigation related to the course.[10]

We begin our analysis with a review of basic contract law in the academic setting.[11] We then evaluate the opinions of commentators and the rulings of courts that have addressed the role of syllabi and catalogs.[12] Next, we offer a proposed characterization of syllabi, catalogs, and the website content of higher education institutions.[13] Finally, we make some recommendations to afford students fairness, and to avoid conflict based on inadequate notice to students regarding course expectations, or violation of the institution's policies.[14]

II. CONTRACT THEORY – THE SYLLABUS

It is fundamental that the four basic elements of a valid contract are (1) mutual assent,[15] (2) consideration,[16] (3) capacity,[17] and (4)

8. Gerald F. Hess, *Collaborative Course Design: Not My Course, Not Their Course, but Our Course*, 47 WASHBURN L.J. 367, 374 (2008) (citations omitted) ("[T]he syllabus should serve as a contract between teacher and students, which delineates their respective responsibilities and guides their behavior during the course. All of the course design decisions . . . are part of the contract. A comprehensive syllabus will address expectations, policies, and timing.").
9. *Id.*
10. *See* discussion *infra* Parts III, V.
11. *See* discussion *infra* Part II.
12. *See* discussion *infra* Part III.
13. *See* discussion *infra* Parts IV–VI.
14. *See infra* Part VII.
15. *See, e.g.*, Knox Energy, L.L.C. v. Gasco Drilling, Inc., 738 F. App'x 122, 124 (4th Cir. 2018) (citation omitted) ("[A] valid contract cannot exist unless the parties to the contract intentionally entered into an *agreement*—that is, the parties mutually assented to the formation of a contract."); *accord*, I.C.E. Contractors, Inc. v. Martin & Cobey Constr. Co., 58 So. 3d 723, 725 (Ala. 2010) (citation omitted) ("In Alabama, one of the requisite elements of a valid contract is mutual assent to the essential terms of the contract.").
16. *E.g.*, Miller v. Dombek, 390 S.W.3d 204, 207 (Mo. Ct. App. 2012) (citations omitted) ("A valid contract contains the essential elements of 'offer, acceptance, and bargained

legality.[18] Mutual assent is the modern version of the concept "meeting of the minds."[19] In other words, the parties to the contract must agree to its terms. Generally, mutual assent is analyzed in terms of offer and acceptance.[20] The Restatement defines an offer as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."[21] Acceptance of an offer is defined as "a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer."[22] Yet, the exchange of offer and acceptance does not occur with regard to syllabi.

The instructor prepares syllabi in accordance with institutional rules and provides syllabi to the students, and generally, there are no negotiations over the content or policies.[23] The student has four

for consideration.' 'Consideration' . . . generally consists either of a promise (to do or refrain from doing something) or the transfer or giving up of something of value to the other party.").

17. *E.g.*, Brumfield v. Paul, 145 So. 2d 46, 47 (La. Ct. App. 1962) (citation omitted) ("One of the requisites for a valid contract is that the parties are legally capable of contracting. This relates to the capacity to make a contract in its inception.").
18. *E.g.*, Omni USA, Inc. v. Parker-Hannifin Corp., 798 F. Supp. 2d 831, 842 n.5 (S.D. Tex. 2011) ("For a valid contract, plaintiff 'must show . . . legality of object . . . .'").
19. *See, e.g.*, Trendwest Resorts, Inc. v. Ford, 12 P.3d 613, 616 (Wash. Ct. App. 2000) (citation omitted) ("Mutual assent, the modern expression for the concept of a 'meeting of the minds,' is required for the formation of a valid contract."), *rev'd*, 43 P.3d 1223 (Wash. 2002).
20. *Id.*
21. RESTATEMENT (SECOND) OF CONTS. § 24 (AM. L. INST. 1981).
22. *Id.* § 50.
23. Terrence Leas, *The Course Syllabus: Legal Status and Implications for Practitioners*, 177 EDUC. L. REP. 771, 772–73 ("The department or the faculty member develops the curriculum, and the faculty member develops a course syllabus incorporating that curriculum and the rules governing the faculty member's course. In rare cases, a faculty member will permit students to negotiate some of the elements of the course; generally, however, the faculty member dictates the substantive elements of the course and consigns the student to 'take it or leave it.'"); *but see* Anne Ruggles Gere & Lindsay Ellis, *Composition, Law, and ADR*, 10 LEGAL WRITING: J. LEGAL WRITING INST. 91, 103 (2004) (citation omitted) ("Having recently read Roger Fisher and William Ury's classic, *Getting to Yes*, and taken a course in civil mediation, [Lindsay] decided to overtly negotiate the course syllabus with her students. Why? As Fisher and Ury state on the first page of their introduction, 'Everyone wants to participate in decisions that affect them; fewer and fewer people will accept decisions dictated by someone else.' Not only did Lindsay believe that students would be more invested in the course and complete more of their assignments if they had some hand in designing the syllabus, but she also believed that because students differ, and students differ from her, a co-constructed syllabus would meet students' needs better than any she

choices: (1) complete the course satisfactorily according to the syllabi policies and requirements; (2) not enroll in the course; (3) drop the course; or (4) remain in the course, not meet the syllabi requirements, and either fail or receive a lower grade. Negotiations are limited to a discussion of whether the student has met the course requirements, or the grade on an assignment or exam, not what requirements will be in syllabi. Thus, it seems counterintuitive to assert that the contract principle of mutual assent has been met with regard to syllabi.

Consideration has been defined as a bargained-for exchange.[24] Contracts may be classified as bilateral or unilateral.[25] A bilateral contract involves a promise in exchange for a promise.[26] An offer made in a bilateral contract is accepted by a return promise.[27] The bilateral contract does not seem to fit the situation with syllabi. Syllabi are published by the instructor and provided to the students on the first day of class. As noted above, the student has several options, none of which include making a promise.[28]

In a unilateral contract there is a promise juxtaposed with an action.[29] In other words, the unilateral offer is accepted by performance.[30] One might argue that syllabi constitute offers and that performance of their requirements is the acceptance that creates a contract. However, a search of the case law did not reveal precedent for this position.[31] Additionally, the requirements of agreement,

could construct individually. A negotiated syllabus could take her and her students' differences and pre-existing conflicts of interest into account.").

24. Ross v. May Co., 880 N.E.2d 210, 215 (Ill. App. Ct. 2007) (citing RESTATEMENT (SECOND) OF CONTS. § 71 (AM. L. INST. 1981)) ("The essential element of consideration is a bargained-for exchange of promises or performances that may consist of a promise, an act, a forbearance, or the creation, modification, or destruction of a legal relation. A bargained-for exchange exists if one party's promise induces the other party's promise or performance."), *aff'g in part* No. 04 L 5796, 2004 WL 5613992 (Ill. Cir. Ct. Jan. 1, 2004).

25. *E.g.*, Cook v. Johnson, 221 P.2d 525, 527 (Wash. 1950) ("The law recognizes, as a matter of classification, two kinds of contracts—bilateral and unilateral.").

26. *Id.* ("A bilateral contract is one in which there are reciprocal promises. The promise by one party is consideration for the promise by the other. Each party is bound by his promise to the other.").

27. *Id.*

28. Leas, *supra* note 23, at 772–73.

29. *Cook*, 221 P.2d at 527 ("A unilateral contract is a promise by one party—an offer by him to do a certain thing in the event the other party performs a certain act.").

30. *Id.* ("The performance by the other party constitutes an acceptance of the offer and the contract then becomes executed.").

31. *See* Leas, *supra* note 23, at 772–73 (characterizing the relationship between the institution and the student as "one-sided," but noting the "unique nature of the

capacity, and legality must still be met to form a valid and enforceable contract.[32]

The third leg of a contract is capacity.[33] Capacity is the legal ability of a party to enter into an agreement.[34] With regard to the question of whether syllabi form contracts, the underlying issue involves the authority of a faculty member to bind the institution in contract.[35] One would need to review the various laws, rules, and other documents related to the educational institution's internal governance.[36] This may vary among the states and whether the institution is public or private. While there may be institutional policies and collective bargaining agreements that define the authority of faculty, it seems illogical that faculty members would have the legal authority or capacity to bind the institution in contract absent specific authorization in a particular matter.[37] Rather, if a faculty member lacks authority to bind the school in contract, then such a contract arguably would be unenforceable against the institution.[38]

Legality is the fourth leg of a valid contract, meaning that the object or subject of the contract must not be violative of law or public policy.[39] While the policies and requirements of syllabi would generally seem to be consistent with law, the issue of the authority of

academic setting has led many judges to be wary of wholesale application of commercial contract principles").

32. *E.g.*, J. Caldarera & Co. v. La. Stadium & Exposition Dist., 750 So. 2d 284, 288 (La. Ct. App. 1999) ("There are four necessary elements for a valid contract: capacity, consent, object and lawful cause.").
33. *Id.*
34. Whitehead v. Malcom, 129 S.E. 769, 770 (Ga. 1925) ("[T]he law is that such capacity need be only so much as gives to the party a clear and full understanding of his acts and the consequences thereof, relative to the contract and the subject-matter thereof.").
35. *See, e.g.*, Baker v. Or. City Schs., No. L–11–1109, 2012 WL 762482, at *3, (Ohio Ct. App. Mar. 9, 2012) (citation omitted) ("[The school] argued that appellants have not identified any evidence that supports their claim that a contract existed in this case because there was no evidence that the program was approved by the board of education[.] [Ohio law] provides in pertinent part: 'No contract shall be binding upon any board unless it is made or authorized at a regular or special meeting of such board.' [The school] submitted [an affidavit] attest[ing that] the board of education never expressly approved the marketing materials and course syllabi at a regular or special meeting.").
36. *See id.* at *4–5.
37. *See id.* at *5.
38. *See id.* at *3 (citing Ohio law).
39. *E.g.*, J. Caldarera & Co. v. La. Stadium & Exposition Dist., 750 So. 2d 284, 289 (La. Ct. App. 1999).

faculty to bind the institution in contract would make the legality, or enforceability, of the agreement questionable.[40] To summarize the perspective from the rules of contract law, one writer has stated, "there is no room for either offer or acceptance with respect to the syllabus. Consideration is absent."[41]

Finally, there is no mutual assent, because a student has no choice but to accept and abide by the syllabus if he or she is to succeed in the course.[42] Syllabi are by their nature imposed by the instructor and not subject to negotiation, and any such contract that may be formed could be challenged on the basis of adhesion and unconscionability.[43]

Yet, a number of commentators have concluded that syllabi are contracts.[44] One writer noted, "[w]hile it may seem strange at first to consider a syllabus a contract, scholars have been doing so for years."[45] One scholar suggests that "the syllabus should serve as a contract between teacher and students, which delineates their respective responsibilities and guides their behavior during the course."[46] Interestingly, the commentators do not cite case law for the proposition that the syllabi form contracts with students.[47] At best, it may be said that these scholars are simply positing by analogy.

40. *Baker*, 2012 WL 762482, at *3; *cf.* Johns Hopkins Univ. v. Ritter, 689 A.2d 91, 101 (Md. Ct. Spec. App. 1997) (ruling that the university department director was not authorized to bind the university to assurance of tenure for professors at the medical school).

41. Kupferberg, *supra* note 2, at 35.

42. *Id.*

43. *Id.*

44. *See* Bateman, *supra* note 2, at 422 ("[T]he reality is that we all have a student learning contract in place by means of our course syllabi . . . ."); Kevin H. Smith, *"X-File" Law School Pedagogy: Keeping the Truth Out There*, 30 LOY. U. CHI. L.J. 27, 40 (1998) ("The syllabus is, in essence, a contract between you and your students."); Jeff Todd, Comment, *Student Rights in Online Course Materials: Rethinking the Faculty/University Dynamic*, 17 ALB. L.J. SCI. & TECH. 311, 333 (2007) ("[T]he syllabus is a contract.").

45. Kupferberg, *supra* note 2*,* at 35.

46. Hess, *supra* note 8, at 374.

47. The case law does not support the position of the commentators. *See* Orzechowitz v. Nova Se. Univ., No. 13–62217–CIV, 2014 WL 1329890, at *3 n.2 (S.D. Fla. Mar. 31, 2014) ("[T]he undersigned finds no legal support for the proposition that a course syllabus creates a binding contract between a student and his or her professor or with the university. Accordingly, the plaintiff cannot maintain a breach of contract claim based on policies contained in the course syllabus.").

III. CASE LAW – SYLLABI

In contrast to the commentators, the courts addressing this subject have generally taken the position that syllabi do not form contracts.[48] In *Vilbon v. Boston University*, the plaintiff was a student at Metropolitan College of Boston University, enrolled in a master's degree program.[49] In the course at issue, the professor had posted a syllabus indicating that the final exam would account for fifteen percent of the final grade.[50] Apparently, at the end of the course the professor emailed the student that all papers were graded, and final grades had been posted without a final exam.[51] The student received a "B" for the course and his resulting grade point average was below what was required to graduate.[52] His contention was that if the final exam had been given, and it was weighted fifteen percent as stated in the syllabus, he would have received a higher grade in the class and would have been able to graduate.[53]

The court rejected as conjecture the student's assertion that, if he had taken a final exam in the class, he ultimately would have received a sufficiently high course grade to attain the grade point average required for graduation.[54] Accordingly, the complaint was properly dismissed based on its speculative nature.[55] The court summarily dismissed the contract theory stating that "[t]he course syllabus cannot reasonably be viewed as a contract or an enforceable promise; nor can the conduct of the defendant reasonably be viewed as unfair or deceptive . . . ."[56] The court did not provide its reasoning for this conclusion on the contract claim.[57] Since the court found the student's claim to be speculative, one may view the ruling on the contract claim as mere *dicta*. Yet, the court clearly states that syllabi are not contracts.[58]

48. *See, e.g.*, Vilbon v. Bos. Univ., 47 N.E.3d 53, at *1 (Mass. App. Ct. 2016) ("The course syllabus cannot reasonably be viewed as a contract or an enforceable promise[.]").
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* (citing Iannacchino v. Ford Motor Co., 888 N.E.2d 879, 890 (Mass. 2008)).
56. *Id.* (plaintiff was asserting a claim under both contract theory and a consumer protection law dealing with unfair practices).
57. *See id.*
58. *Id.*

Another case based on contract theory is *Odemena v. Devlin*.[59] The *Odemena* court laid out the requirements for a breach of contract claim:

> To state a claim for breach of contract, a "complaint must allege (1) the existence of a valid and binding contract; (2) that plaintiff has complied with the contract and performed his own obligations under it; and (3) breach of the contract causing damages."[60]

Odemena had been a student at the Massachusetts School of Law at Andover (MSL).[61] He had taken a contract law class in which he alleged that the professor made grading errors.[62] The *Odemena* court then analyzed the facts and concluded that the syllabus did not constitute a contract.[63] Odemena contended that the course syllabus for his contract law class was a valid and binding contract, and that the professor (and MSL, as the professor's employer) breached it.[64]

More specifically, Odemena asserted that the syllabus stated that review/quiz sessions would be optional.[65] Odemena did not take the "optional" quizzes, but the professor later counted quizzes that Odemena did not take in determining his final grade.[66] Odemena claimed that this amounted to a breach of contract.[67] In rejecting the contract claim the court stated:

> The Court declines to treat the course syllabus as a valid and binding contract. Other courts that have considered this issue have similarly concluded that a course syllabus is not a contract. *See Orzechowitz v. Nova Se. Univ.*, No. 13-62217-CIV, 2014 WL 1329890, at *3 n.2 (S.D. Fla. Mar. 31, 2014) ("[T]he undersigned finds no legal support for the proposition that a course syllabus creates a binding contract between a student and his or her professor or with the university. Accordingly, the plaintiff cannot maintain a

59. Odemena v. Devlin, No. 14-CV-12591-ADB, 2015 WL 13376541, at *1, *3–4 (D. Mass. June 24, 2015).
60. *Id.* at *3 (quoting Persson v. Scotia Prince Cruises, Ltd., 330 F.3d 28, 34 (1st Cir. 2003)).
61. *Id.* at *1.
62. *Id.*
63. *Id.* at *4.
64. *Id.* at *3.
65. *Id.*
66. *Id.*
67. *Id.*

> breach of contract claim based on policies contained in the course syllabus."); *Gabriel v. Albany Coll. of Pharmacy & Health Sciences*, No. 2:12-CV-14, 2012 WL 4718678, at *7 (D. Vt. Oct. 3, 2012) (concluding that "[a] course syllabus—which commonly outlines reading requirements, test dates and the like—does not have any [of the] attributes" of a valid contract); *Yarcheski v. Univ. of Med. & Dentistry of New Jersey*, No. A-1865-07T3, 2008 WL 5133687, at *4 (N.J. Super. Ct. App. Div. Dec. 9, 2008) (affirming the trial court's decision that a course syllabus did not constitute a legally enforceable contract). Therefore, the amended complaint fails to state a claim for breach of contract.[68]

In *Allison v. Howard University*, the court found that any breach of contract claim that may have arisen from representations made through syllabi about how student's grade would be determined to be accrued on the date that the student was notified of his failing grade in the course.[69] The applicable statute of limitations required that a claim be brought within three years of that date, thus the claim was time-barred as a matter of law when not brought within that period.[70] By deciding the case based on the statute of limitations, the court did not address the merits of the contract claim.[71]

However, in *Gabriel v. Albany College of Pharmacy & Health Sciences - Vermont Campus*, the court explicitly stated that syllabi are not contracts:

> The court finds no legal support for treating a course syllabus as a contract. The few courts that have considered the issue have concluded that a syllabus does not constitute a contract. *See, e.g.*, *Yarcheski v. Univ. of Medicine and Dentistry of New Jersey*, 2008 WL 5133687, *4 (N.J. Super. Dec. 9, 2008) (affirming lower court's ruling that course syllabus did not constitute legally enforceable contract); *Collins v. Grier*, 1983 WL 5148, at *2 (Ohio. App. July 27, 1983) ("there is no contract between a professor or instructor and a student created by the syllabus or university guidelines"). Indeed, a valid contract requires several

68. *Id.* at *4.
69. Allison v. Howard Univ., 209 F. Supp. 2d 55, 60 (D.D.C. 2002).
70. *Id.*
71. *See id.* at 60.

> elements, including mutual agreement and valuable consideration. *See, e.g.*, *Manley Bros. v. Bush*, 169 A. 782, 783 (Vt. 1934). A course syllabus—which commonly outlines reading requirements, test dates and the like—does not have any such attributes. Gabriel's breach of contract claim based upon the course syllabus is therefore DISMISSED.[72]

Moreover, in *Orzechowitz v. Nova Southeastern University*, the court analyzed a claim related to a policy concerning make-up examinations for emergency medical situations that appeared on a course syllabus and not in the student handbook.[73] Contrasting the legal significance of a student handbook with that of the syllabus, the court noted:

> While the terms of a contract may arise from a student handbook or other university publication, the undersigned finds no legal support for the proposition that a course syllabus creates a binding contract between a student and his or her professor or with the university. Accordingly, the plaintiff cannot maintain a breach of contract claim based on policies contained in the course syllabus.[74]

There would appear to be ample legal support for the proposition adopted by the *Orzechowitz* Court that the student handbook may create a contractual relationship between the educational institution

72. Gabriel v. Albany Coll. of Pharm. & Health Scis.–Vt. Campus, No. 2:12-CV-14, 2012 WL 4718678, at *7 (D. Vt. Oct. 3, 2012) (cleaned up).

73. Orzechowitz v. Nova Se. Univ., No. 13-62217-CIV, 2014 WL 1329890, at *6 (S.D. Fla. Mar. 31, 2014).

74. *Id.* at *3 n.2.

and the student.[75] This legal theory will be explored more fully later in this Article.[76]

An Ohio court, while rejecting the contract theory, addressed how an instructor's failure to abide by the syllabus may be actionable.[77]

> [T]here is no contract between a professor or instructor and a student created by the syllabus or university guidelines. A professor or instructor's failure to abide by the syllabus or university guidelines will be actionable only under the same circumstances that any other academic evaluation decision is justiciable: that is, when the conduct is alleged to be arbitrary or capricious or to constitute bad faith.[78]

The court in *Yarcheski v. University of Medicine and Dentistry of New Jersey* concluded that the University's course syllabus did not constitute a legally enforceable contract to the student enrolled in that class.[79] Rather, the syllabus merely described the goals of the class and how student performance would be evaluated and graded.[80] The overwhelming legal authority supports the argument that syllabi are not considered contracts between students and the institution.

IV. WHAT ARE SYLLABI?

Do syllabi fall into the category of memoranda of understanding? In one case the court provides a thorough analysis of this concept:

75. *See* Wilson v. Ill. Benedictine Coll., 445 N.E.2d 901, 906 (Ill. App. Ct. 1983) (citations omitted) ("A college or university and its students have a contractual relationship; the relevant terms of the contract are set forth in the university's catalogs. A contract between a private institution and a student confers duties upon both parties which cannot be arbitrarily disregarded and may be judicially enforced. A student may have a remedy when it is alleged that an adverse decision concerning the student, supposedly for academic deficiencies, was made arbitrarily and capriciously and in bad faith; thus a university may not act maliciously or in bad faith by arbitrarily and capriciously refusing to award a degree to a student who fulfills its degree requirements. In the instant case, the parties agree that the Bulletin constitutes a contract between them; their disagreement concerns the interpretation of that contract and whether any ambiguities exist in it.").

76. *See infra* Part VI.

77. Collins v. Grier, No. A-8103605, 1983 WL 5148, at *2 (Ohio Ct. App. July 27, 1983).

78. *Id.*

79. Yarcheski v. Univ. of Med. & Dentistry of N.J., No. C-358-06, 2008 WL 5133687, at *1 (N.J. Super. Ct. App. Div. Dec. 9, 2008).

80. *Id.*

> A "memorandum of understanding" ("MOU") has been defined as "a document that describes the general principles of an agreement between parties, but does not amount to a substantive contract." Collins English Dictionary. Another definition is: "An agreement between two parties, usually two companies, outlining the rights and responsibilities each has for a particular venture or project. A memorandum of understanding is intentionally vague and is usually the first step toward a full contract. Negotiations usually continue after the MOU is signed. However, an MOU is more formal and legally binding than a handshake agreement and is enforceable in a court of law." Yet another definition or explanation is: "A document that expresses mutual accord on an issue between two or more parties. Memoranda of understanding are generally recognized as binding, even if no legal claim could be based on the rights and obligations laid down in them. To be legally operative, a memorandum of understanding must (1) identify the contracting parties, (2) spell out the subject matter of the agreement and its objectives, (3) summarize the essential terms of the agreement, and (4) must be signed by the contracting parties. Also called letter of intent.[81]

However, no cases were found that correlated syllabi with memoranda of understanding. Additionally, because of the proximity of memoranda of understanding to binding contracts, we posit that a court faced with the question would conclude, as the majority have with contract theory, that syllabi do not constitute memoranda of understanding.[82]

One definition of "syllabus" in the Merriam-Webster Law Dictionary is "a summary outline of a discourse, treatise, or course of study or of examination requirements."[83] Another definition of syllabus is "a catalog or list."[84] In one case the court referenced the testimony of a professor regarding the syllabus, stating that "the professor is simply supplying a road map for the course and subject

81. Spencer Trask & Co. v. Spencer Trask Collaborative Innovations, L.L.C., No. FSTCV166028288, 2016 WL 8115547, at *2 (Conn. Super. Ct. Oct. 19, 2016) (footnotes omitted) (citations omitted).

82. *See* discussion of case law *supra* Part III.

83. *Syllabus*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/syllabus [perma.cc/2YQQ-3TQY] (last visited Mar. 30, 2022).

84. *Syllabus*, BLACK'S LAW DICTIONARY (11th ed. 2019).

matter . . . ."[85] Perhaps syllabi may be viewed as the implementation of the instructor's policies for the course.[86] In light of the case law clearly holding that syllabi are not contracts, and based on the referenced definitions, it seems reasonable to conclude that syllabi are road maps for the course of study and examination requirements, the implementation of the educational institution's policy, and the instructor's policies and requirements for the course.

V. POTENTIAL SAND TRAPS FOR UNWARY FACULTY

Even though syllabi are not contracts, there are potential traps for unwary faculty. Some examples illustrate. An Iowa State professor was required to change "her syllabus after informing her students that they could not submit work that opposes" various social advocacy proponents.[87] The university reportedly released a statement saying that content in the professor's "syllabus was inconsistent with the university's standards and its commitment to the First Amendment rights of students."[88] In another example, Syracuse University reportedly placed a professor on leave after the manner in which his syllabus referred to the Coronavirus.[89]

85. Cameron v. Ariz. Bd. of Regents, No. 1 CA-CV 10-0323, 2012 WL 1468517, at *5 (Ariz. Ct. App. Apr. 26, 2012).

86. *See* Mikhail v. Manchester Univ., Inc., No. 17-CV-269, 2019 WL 2060620, at *2 (N.D. Ind. May 9, 2019) (quoting professor as having emphasized to plaintiff "the need to follow the policy documented in the syllabus" so that all students could be treated fairly and consistently); Garcia v. Metro. State Univ. of Denver, No. 19-CV-02261, 2020 WL 886219, at *3 (D. Colo. Feb. 24, 2020) (finding that professor told students that they could contact her "pursuant to the appeal policy detailed in her syllabus"); *cf. Cameron*, 2012 WL 1468517, at *5 (quoting expert testimony in a syllabus plagiarism case downplaying the role of the syllabus).

87. Yaron Steinbuch, *Iowa State Professor Forced to Change Syllabus After Banning Criticism of BLM*, N.Y. POST, https://nypost.com/2020/08/19/iowa-state-professor-forced-to-change-syllabus-after-banning-criticism-of-blm/ [perma.cc/E2BG-L5CE] (Aug. 19, 2020, 6:52 AM).

88. *Id.*

89. Chris Carlson, *Syracuse University Places Professor on Administrative Leave After Syllabus Refers to Coronavirus as 'Wuhan Flu'*, SYRACUSE.COM, https://www.syracuse.com/coronavirus/2020/08/syracuse-university-places-professor-on-administrative-leave-for-referring-to-coronavirus-as-wuhan-flu.html [perma.cc/ZR2E-5LVL] (Aug. 25, 2020, 8:35 PM).

VI. AN ALTERNATE THEORY – INSTITUTION'S PUBLICATIONS AS A POSSIBLE CONTRACT

If syllabi are not contracts, and "[s]yllabi are by their nature handed down from above,"[90] then what is the alternative? There is ample support in the case law for the argument that an educational institution's catalog, along with those terms published on the institution's website, may form a contract between a student and the institution.[91]

"Under Florida law, a student and a private university have a contractual relationship."[92] Courts in other states have reached similar results.[93] Accordingly, it is generally accepted that an academic catalog in effect at the time of enrollment may provide the terms and conditions of that contractual relationship.[94] These holdings have been held to apply to public institutions of higher education as well.[95] In fact, the mutual assent contractual requirement is satisfied when the institution makes an admission offer and the student accepts by enrolling in the institution. However, with very few exceptions, the nature of the contractual relationship has been interpreted as being implied-in-fact as opposed to express.[96]

In *Kashmiri v. Regents of University of California*, California's Court of Appeal for the First District thoroughly analyzed the difference between an express contract and one implied-in-fact in the context of the contractual relationship between students and

90. Kupferberg, *supra* note 2, at 35.

91. *See, e.g.*, Steinberg v. Chi. Med. Sch., 371 N.E.2d 634, 639–40 (Ill. 1977) (citations omitted) ("A contract between a private institution and a student confers duties upon both parties which cannot be arbitrarily disregarded and may be judicially enforced."); Eisele v. Ayers, 381 N.E.2d 21, 25–26 (Ill. App. Ct. 1978) (quoting *Steinberg* and concluding that course catalogs are contracts).

92. Jarzynka v. St. Thomas Univ. Sch. of L., 310 F. Supp. 2d 1256, 1268 (S.D. Fla. 2004).

93. *See, e.g.*, Zumbrun v. Univ. of S. Cal., 101 Cal. Rptr. 499, 504 (Ct. App. 1972) ("The basic legal relation between a student and a private university or college is contractual in nature. The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract."); Univ. of Tex. Health Sci. Ctr. at Houst. v. Babb, 646 S.W.2d 502, 506 (Tex. App. 1982) ("[A] school's catalog constitutes a written contract between the educational institution and the patron, where entrance is had under its terms.").

94. *Jarzynka*, 310 F. Supp. 2d at 1268.

95. Kashmiri v. Regents of Univ. of Cal., 67 Cal. Rptr. 3d 635, 646 (Ct. App. 2007) (holding that courts have recognized that a contractual relationship applies equally to state universities).

96. *Id.* at 650.

institutions of higher education.[97] In so doing, the Court found that unless an educational institution or its website expressly state that it intends to be bound by the terms of the catalog or the website, then no express contract is created.[98] Nevertheless, the Court found that such statements may become part of the enrollment agreement if they are found to be "implied-in-fact" terms of a contractual relationship.[99]

At that point, the analysis shifts to what is reasonable under the circumstances, and what the expectations of the parties were at the time that the contractual relationship was established, as is necessarily true of all terms of an implied-in-fact contract.[100] An implied-in-fact contract arises from the facts and circumstances of the case and is derived from the presumed intention of the parties as indicated by their conduct.[101] Whether such a contract or agreement exists, therefore, is a question of fact that must be determined by the trier of fact.[102]

Like the *Kashmiri* Court, most courts are likely to hold that unless express and definite language intending to create a contractual relationship is found in an educational institution's catalog or website, statements found therein will not create an express contract between students and the institution.[103] However, courts are likely to find that an implied-in-fact contract has been created as a result of students relying on statements in an educational institution's catalog or website. The students' conduct in accepting the educational institution's offer of admission by enrolling constitutes acceptance of the institution's offer and creates an implied-in-fact contract. The contractual relationship arises at the time of the student's admission to the educational institution.[104] As one court notes:

97. *See id.* at 645–60 (discussing the application of contract principle of express and implied contracts).
98. *See id.* at 650.
99. *See id.* (providing that the existence of an implied-in-law contract is a question of fact).
100. *Id.* at 649–50.
101. Rockaway Beverage, Inc. v. Wells Fargo & Co., 378 F. Supp. 3d 150, 161 (E.D.N.Y. 2019) (quoting Leibowitz v. Cornell Univ., 548 F.3d 487, 506–07 (2d Cir. 2009)).
102. *See Kashmiri*, 67 Cal. Rptr. 3d at 650.
103. *See* RESTATEMENT (SECOND) OF CONTS. § 203 cmt. e (AM. L. INST. 1981) ("[I]n case of conflict the specific or exact term is more likely to express the meaning of the parties with respect to the situation than the general language.").
104. Steinberg v. Chi. Med. Sch., 371 N.E.2d 634, 639 (Ill. 1977). This date is key since the reasonable expectations and intent of the parties will be determined as of this time. *See id.* at 639–40.

> At the time an applicant accepts an offer of admission, that person is assumed to have reviewed the University's offer of admission, as well as the materials and publications made available by the University. By accepting the offer of admission, the student has chosen to forgo opportunities to attend other schools or pursue other options.[105]

These foregone opportunities constitute sufficient consideration to support an implied-in-fact contract.

Sufficient consideration for a contract is found where, as here, the educational institution (promisor) obtains a benefit from its offer of admission to a student, or where there is a loss or detriment to the student (promisee).[106] Benefit means that the educational institution (promisor), in return for its promise of admission, has acquired a legal right to collect tuition from the student, a right to which it was not previously entitled.[107] Detriment means that the student (promisee), in return for his/her promise to enroll in the educational institution, forbears from exercising his/her legal right to enroll in and attend another educational institution, a legal right which the student was previously entitled to exercise.[108] The detriment which will constitute consideration for a promise need not be an actual loss to the student (promisee).[109] It is enough if the student does something that they are not legally bound to do, like enroll in the educational institution in our example.[110]

Having found that the "act of matriculation, together with payment of required fees[]"[111] creates an implied-in-fact contract between a student and an educational institution,[112] we now explore the terms of

105. Luquetta v. Regents of the Univ. of Cal., No. CGC-05-443007, 2012 WL 1499040, at *8 (Cal. Ct. App. Apr. 30, 2012).

106. Wells Fargo Bank, N.A., v. Baldwin, No. CA2011-12-227, 2012 WL 3064495, at *2 (Ohio Ct. App. July 30, 2012) (citing Yardmaster, Inc. v. Orris, No. 9-305, 1984 WL 7415, at *2 (Ohio Ct. App. Jun. 29, 1984)).

107. *See id.*

108. *See id.*; *see also Luquetta*, 2012 WL 1499040, at *8.

109. *See Wells Fargo Bank*, 2012 WL 3064495, at *2–3.

110. Mangus v. Present, 135 So. 2d 417, 418 (Fla. 1961) (per curiam).

111. Kashmiri v. Regents of Univ. of Cal., 67 Cal. Rptr. 3d 635, 646 (Ct. App. 2007).

112. It is important to note that although a majority of courts throughout the country have reached this conclusion, there are a minority of courts that have held otherwise. *See* Montany v. Univ. of New England, 858 F.3d 34, 44 (1st Cir. 2017) (noting an absence of authority under Maine law for a contractual relationship between students and universities); Shaw v. Elon Univ., 400 F. Supp. 3d 360, 366 (M.D.N.C. 2019); Doe v. Marymount Univ., 297 F. Supp. 3d 573, 587–88 (E.D. Va. 2018) (footnote omitted) ("Under Virginia law, a University's student conduct policies are not binding, enforceable contracts; rather, they are behavior guidelines that may be unilaterally

that contract, and how the educational institution's catalog and website fit into that analysis. First and foremost, there is no "one size fits all" approach to the analysis. Much will depend on state contract law and other issues that are beyond the scope of this paper.[113]

A natural starting point is that a student suing the educational institution for breach of an implied-in-fact contract must identify specific terms found in the catalog or website that were violated by the educational institution.[114] Not all terms in a catalog or website create enforceable obligations.[115] Only those that are specific, concrete, and sufficiently explicit to create reasonable expectations of an implied-in-fact contract will be enforced by the courts.[116] Courts will look to the reasonable expectations of the parties at the time that the contract became effective[117]; in our example, when the student accepted the educational institution's offer of admission. In order to do so, the totality of the circumstances must be analyzed by the court.[118] In particular, courts will analyze the acts and conduct of the parties, and the reasonableness of the conduct and actions in light of the language in the catalog and website.[119] "The reasonableness of the student's expectations is measured by the definiteness, specificity, or explicit nature of the representation at issue."[120]

revised by [a University] at any time."); Nickel v. Stephens Coll., 480 S.W.3d 390, 397 (Mo. Ct. App. 2015) (footnote omitted) ("The parties and the Court have not found a case in Missouri that has held that an implied contract for educational services arises between a student and University."); Tedeschi v. Wagner Coll., 404 N.E.2d 1302, 1305–06 (N.Y. 1980) (declining to determine whether a contract existed between the school and the student in deciding the case).

113. For example, this paper does not explore sovereign immunity and the role that it plays in contractual disputes between students and public universities. Lee v. Univ. of N.M., 449 F. Supp. 3d 1071, 1153 (D.N.M. 2020) (holding that New Mexico statutes grant governmental entities immunity from actions based on contract, except actions based on a valid written contract). In the context of a dispute between a student and a public university, the court reasoned that if confronted with the question, the New Mexico Supreme Court would limit New Mexico's sovereign immunity waiver for implied-in-fact contracts to instances where there is already an existing contractual relationship. *Id.*

114. *See id.* at 1146–47.

115. *Id.* at 1147.

116. Reynolds v. Sterling Coll., Inc., 750 A.2d 1020, 1022 (Vt. 2000).

117. *See id.*

118. *See Lee*, 449 F. Supp. 3d at 1121.

119. Kashmiri v. Regents of Univ. of Cal., 67 Cal. Rptr. 3d 635, 652 (Ct. App. 2007).

120. *Id.*

General or vague statements in catalogs and websites have been held not to create contractual obligations.[121]

Another important factor that must be considered in any implied-in-fact contract dispute between a student and an educational institution is that its publications provide both academic and non-academic terms of such implied-in-fact contracts. Courts are reluctant to interfere with or substitute their judgment for those of academic institutions when it comes to those issues that are of an academic nature.[122] Such decisions are rarely overturned or questioned absent an abuse of discretion since students are expected to conform their conduct to the educational institution's rules and regulations upon admission.[123] "The foundation of these relationships between [educational institutions, their students, and faculty] is the understanding that the students will abide by and adhere to the disciplinary regulations *and* the academic standards established by the faculty and the university[.]"[124] "The student-university relationship is unique, and it should not be and cannot be stuffed into one doctrinal category."[125] Courts are reluctant to get involved in the day-to-day operations of an academic institution where it would necessarily implicate intrusion into academic freedom and autonomy; this is particularly true in cases involving challenges to academic and disciplinary decisions.[126]

In disputes between a student and an educational institution, contract law is not rigidly applied because "[t]here is a widely accepted rule of judicial non-intervention into the academic affairs of schools."[127] However, there has been no reluctance by the courts to apply contract law when a university makes a specific promise that is non-academic in nature.[128] Such as, the failure to deliver a certain number of hours of instruction,[129] the failure to judge applicants by stated criteria,[130] the refusal to grant academic degree based on non-academic reasons,[131] a specific promise to provide modern

121. *See, e.g.*, Basch v. George Washington Univ., 370 A.2d 1364, 1367 (D.C. 1977).
122. *See* McCawley v. Universidad Carlos Albizu, Inc., 461 F. Supp. 2d 1251, 1257 (S.D. Fla. 2006).
123. *See id.*
124. Bilut v. Northwestern Univ., 645 N.E.2d 536, 542 (Ill. App. Ct. 1994).
125. Slaughter v. Brigham Young Univ., 514 F.2d 622, 626 (10th Cir. 1975).
126. *See* Ross v. Creighton Univ., 957 F.2d 410, 414–15 (7th Cir. 1992).
127. Paulsen v. Golden Gate Univ., 602 P.2d 778, 781 (Cal. 1979).
128. *See, e.g.*, Reynolds v. Sterling Coll., Inc., 750 A.2d 1020, 1022 (Vt. 2000).
129. *E.g.*, Paladino v. Adelphi Univ., 89 A.D.2d 85, 92 (N.Y. App. Div. 1982).
130. *E.g.*, Steinberg v. Chi. Med. Sch., 371 N.E.2d 634, 640 (Ill. 1977).
131. *E.g.*, DeMarco v. Univ. of Heath Scis., 352 N.E.2d 356, 362 (Ill. App. Ct. 1976).

functioning equipment and computer training,[132] and when a university increased fees for continuing students when its published materials expressly provided that fees would not be increased.[133]

VII. CONCLUSION

A review of the case law reveals that syllabi, although mandatory in nature, do not create contracts between students and the instructor or the educational institution.[134] However, it seems reasonable to conclude that syllabi are road maps for the course of study and examination requirements, as well as the implementation of the educational institution's policy, and the instructor's policies and requirements for the course.[135] In a narrow sense, an educational institution's catalog or website do not create a contract between a student and the educational institution.[136]

The offer of admission by an educational institution, coupled with a student's acceptance through matriculation and the payment of required fees, according to the majority of courts, creates a contract between the educational institution and the student.[137] That contract may be express if there is unequivocal and definite language in the educational institution's publications to that effect.[138] However, since most publications contain disclaimers or other language that disavows any such intent, the contractual relationship between a student and the educational institution will likely be implied-in-fact. As such, the language in the educational institution's publications at the time the contractual relationship is created will control any future contractual disputes.[139]

This necessarily requires a case-by-case factual analysis, and the outcome will not only depend on whether an educational institution is private or public, but also on the express language of its publications.[140] More importantly though is whether the dispute is academic in nature or deals with non-academic terms of the contract. If the dispute is academic in nature, courts will be reluctant to get involved, and great deference will be shown towards the educational

132. *E.g.*, *Reynolds*, 750 A.2d at 1022.
133. *E.g.*, Kashmiri v. Regents of Univ. of Cal., 67 Cal. Rptr. 3d 635, 638 (Ct. App. 2007).
134. *See supra* Part III.
135. *See supra* notes 85–86 and accompanying text.
136. *See supra* notes 97–98 and accompanying text.
137. *See supra* notes 103–12 and accompanying text.
138. *See supra* notes 98, 103 and accompanying text.
139. *See supra* notes 114–21 and accompanying text.
140. *See supra* notes 94–96, 115–16 and accompanying text.

institution's decision.[141] Absent arbitrary and capricious conduct by the educational institution, most academic decisions are likely to be upheld.[142] With non-academic decisions, courts will look to the intent of the parties at the time the contract was entered into and the reasonableness of the conduct in light of the language in the educational institution's publications.[143]

While the law is not settled on this issue, it appears that the majority of courts will find that there is an implied-in-fact contract between students and the educational institution, the terms being the specific and unambiguous language in the educational institution's publications (excluding class syllabi) at the time that the student matriculated. When an educational institution's academic or disciplinary decisions are challenged, the educational institution is likely to prevail unless there is no rational basis for its decision. When an educational institution's non-academic and non-disciplinary decisions are challenged, in reaching a decision, courts will look to the specific words in the educational institution's publications at the time that the student matriculated at the institution, paying particular attention to the reasonableness of the parties' conduct in light of their expectations based on the published documents.[144] In these situations, either party may prevail after what would likely be a lengthy trial.[145]

To protect themselves, first and foremost, institutions of higher education should have clear and unequivocal disclaimers in all their publications. Second, educational institutions should avoid specific promises or references in their publications, always reserving the right to make modifications based on changing circumstances. Lastly, educational institutions should make decisions that are reasonable and not arbitrary or capricious, always treating students equally and enforcing rules and standards uniformly. This should lead to decreased challenges to an educational institution's decisions and help to avoid lengthy and costly litigation.

Even though syllabi are not contracts, in our litigious society, a safe practice would be to treat syllabi as if they are contracts. However, referring to syllabi as contracts opens a Pandora's Box of potential breach of contract lawsuits. Thus, while treating syllabi as

141. *See supra* notes 122–26 and accompanying text.
142. *See supra* notes 122–23 and accompanying text.
143. *See supra* notes 100, 128 and accompanying text.
144. *See supra* notes 111–21 and accompanying text.
145. *See, e.g.*, Paladino v. Adelphi Univ., 454 N.Y.S.2d 868 (N.Y. App. Div. 1982) (highlighting how lengthy non-academic and non-disciplinary challenges and trials can be, as the case spanned from 1979 to 1982).

contracts they should not be referenced as contracts. The institution should have syllabi requirements and guidelines. A good starting point is to review the educational institution's policies regarding syllabi. These requirements, guidelines and policies should be the foundation or basic template for syllabi. The course description in syllabi should match the course description in the student catalog. During the COVID-19 pandemic, academic institutions across the country made the shift to remote delivery of instruction in response to the pandemic.[146] In light of possible circumstances requiring change, it is especially important in syllabi to reserve the right to modify, supplement, or make course changes, including mode of delivery, as needs arise.

If changes are necessary, fairness to the students should be a consideration prior to any implementation. As we suggested regarding the educational institution, faculty should make decisions that are reasonable and not arbitrary or capricious. Faculty should treat students equally and enforce course policies uniformly. This should lead to decreased challenges to an instructor's decisions and help to avoid miscommunication and conflict. If it is a policy, it should be part of the syllabi.

When framing syllabi, the above analysis strongly suggests caution. The probability of misunderstanding and legal conflict increase as the importance increases to the students, that is, as they are closer to satisfying the degree requirements.[147] Carefully prepared and well written syllabi, adhering to all the institution's policies and guidelines, serve as important shields regarding possible misunderstandings and litigation related to the course. By constructing legally sound syllabi, an instructor will be practicing the art of self-defense.

146. Ryan Petersen, *Reimagining Education in the Shift to Remote Learning*, EDTECH (Apr. 28, 2020), https://edtechmagazine.com/higher/article/2020/04/reimagining-education-shift-remote-learning [perma.cc/G2JA-FJXV].

147. *See, e.g.*, *supra* notes 49–53 and accompanying text.