



September 2020

Higher Education Industry Consolidation: Where Does it Leave Students?

Todd M. Inouye Ph.D.

University of Hawai'i at Hilo, todd.inouye@hawaii.edu

Vincent Agnello J.D.

Niagara University, agnello@niagara.edu

Follow this and additional works at: <https://via.library.depaul.edu/jrbe>

Recommended Citation

Inouye, Todd M. Ph.D. and Agnello, Vincent J.D. (2020) "Higher Education Industry Consolidation: Where Does it Leave Students?," *Journal of Religion and Business Ethics*: Vol. 4 , Article 14.

Available at: <https://via.library.depaul.edu/jrbe/vol4/iss1/14>

This Article is brought to you for free and open access by the LAS Proceedings, Projects and Publications at Via Sapientiae. It has been accepted for inclusion in *Journal of Religion and Business Ethics* by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

Higher Education Industry Consolidation: Where Does it Leave Students?

Cover Page Footnote

Barney, J. (1991). Firm resources and sustained competitive advantage. *Journal of Management*, 17(1), 99-120. Beh, H. G. (2000). Student versus university: The university's implied obligations of good faith and fair dealing. *Md. L. Rev.*, 59, 183. Bower, J. L., & Paine, L. S. (2017). The Error at the Heart of Corporate Leadership. *Harvard Business Review*, 95(3), 50-60. Boyd, B. K., Bergh, D. D., & Ketchen Jr, D. J. (2010). Reconsidering the reputation—performance relationship: A resource-based view. *Journal of management*, 36(3), 588-609. Bradley, M., Desai, A., & Kim, E. H. (1988). Synergistic gains from corporate acquisitions and their division between the stockholders of target and acquiring firms. *Journal of financial Economics*, 21(1), 3-40. Carapeto, M., Moeller, S., & Faelten, A. (2009). The good, the bad, and the ugly: A survival guide to M&A in distressed times. Unpublished manuscript. Clark, K., & Ofek, E. (1994). Mergers as a means of restructuring distressed firms: An empirical investigation. *Journal of Financial and Quantitative Analysis*, 29(4), 541-565. Denning, S. (2013, June 26). The Origin of 'The World's Dumbest Idea': Milton Friedman. *Forbes*. Jensen, M. C., Meckling, William H. (1976). Theory of the firm: Managerial behavior, agency costs and ownership structure. *Journal of Finance Economics*, 305-360. Kamasak, R. (2017). The contribution of tangible and intangible resources, and capabilities to a firm's profitability and market performance. *European Journal of Management and Business Economics*. Kavanagh, M. H., & Ashkanasy, N. M. (2006). The impact of leadership and change management strategy on organizational culture and individual acceptance of change during a merger. *British journal of management*, 17(S1), S81-S103. Penrose, E. T. (1959). *The theory of the growth of the firm*. Sharpe, New York. Rothaermel, F. T. (2016). *Strategic management: concepts (Vol. 2)*: McGraw-Hill Education. Schweiger, D. M., & Denisi, A. S. (1991). Communication with employees following a merger: A longitudinal field experiment. *Academy of management journal*, 34(1), 110-135. *Squeri v. Mount Ida College*, No. 19-1624, 2020 U.S. App. LEXIS 9334 (1st Cir. Mar. 25, 2020). Weber, R. A., & Camerer, C. F. (2003). Cultural conflict and merger failure: An experimental approach. *Management science*, 49(4), 400-415. Wernerfelt, B. (1984). A resource based view of the firm. *Strategic Management Journal*, 5(2), 171-180.

Mount Ida College, operating as a private non-profit higher education institution, permanently closed on May 17, 2018 after giving six weeks of notice to its existing and recently accepted students. Mount Ida College had two campuses, a small one in Foxboro, Massachusetts and its main campus in Newton, Massachusetts. The Newton campus was sold to the University of Massachusetts Dartmouth and students in good standing were offered automatic acceptance to UMass Dartmouth. Soon afterwards a class action lawsuit was filed by students against Mount Ida College, the Board of Trustees, and seven college administrators based on seven legal claims: breach of fiduciary duty, violation of privacy, fraud, negligent misrepresentation, fraud in the inducement, breach of contract, and violation of Massachusetts General Laws Ch. 93A. This Massachusetts law protects and defends consumers by prohibiting a business or individual from taking part in deceptive, devious, or unfair acts or practices. Contract law and fiduciary duty in the United States arise from what is called common law and is a carryover from old English law. Does a non-profit college or university owe a contractual and/or a fiduciary duty to its students? The case was dismissed at the trial level stating that the students did not have any valid cause of action in this case. The appellate court affirmed the lower court decision. In so affirming, the U.S. Court of Appeals 1st Circuit ruled that students have no contractual claim and that the College and Board of Trustees owes no fiduciary duty to the students. This case raises an interesting question. What duties does an academic institution of higher learning have to its students? The 1st Circuit was clear in affirming the lower court decision to dismiss this case, stating that students are not owed an actionable fiduciary duty and have no contract or tort claims against the school. Could the closure have been avoided by seeking other possible strategic options for Mount Ida College, or was selling the campus was the best choice for the institution?

CASE FACTS

The facts of this case are not in dispute. In August 2017, Mount Ida College submitted a self-study to New England Association of Schools and Colleges, its regional accreditation agency. In that report, it indicated significant enrollment growth, rising admission aptitude scores, and that financially it was current on its debt obligations. Because of prior years of deferred maintenance that need to be addressed, it expected a few years of deficits, but would generate an operating surplus beginning in 2021. It should be noted that several top administrators were receiving pay/benefit increases as the college's debt increased. President Brown made \$446,000 in fiscal year 2016, a raise of 24% over the previous year, Ronald Akie, head of academic affairs topped out at \$261,000 in 2016 while Jeff Cutting, the head of enrollment management went from \$137,000 in 2015 to \$174,000 in

2016.¹ Mount Ida College claimed they were confident in raising sufficient capital to meet its liquidity needs during this shortfall period. Accreditation reports, including this one, are not publicly distributed.

On February 24, 2018 the Mount Ida College president announced via email that in order to create a more robust learning experience it was working on a possible merger with Lasell College. No mention of financial difficulties was included in the email. On March 23, 2018 the president emailed the students and staff to report that there would be no merger and highlighted the fact that Mount Ida was named in the top 30 colleges in the North Region by US News and World Report Rankings and that Mount Ida College had experienced extraordinary growth.

On April 6, 2018 the President announced that the Mount Ida College would cease to exist as an independent college, that it had reached an agreement with University of Massachusetts who agreed to purchase the Newton campus, and that students in good academic standing would be offered automatic acceptance to UMass Dartmouth. At the time of this announcement, Mount Ida had not filed a closing plan with the Massachusetts Department of Higher Education, as required by law.² This law was enacted to protect students, safeguard their opportunities to transfer to other institutions and ensure protection of student records.

In days following the announcement, students began receiving individualized information packets on the students' major, estimated credits, transcripts, and financial aid packages. Mount Ida students had not given prior consent to release its college academic and financial records to Dartmouth. Some programs were not offered by UMass and those students were provided information on other schools that did. By law, Mount Ida College gave notice on April 27, 2018 to the State Attorney General Maura Healey of the sale and requested permission to sell all of its assets to UMass.³ Mount Ida College did not, however, provide the Attorney General with the legally required thirty-day notice, it only gave nineteen days claiming exigency of the circumstances. In the notice it emphasized that if the acceptance was not given by May 16th it would file for bankruptcy because it would be unable to meet its financial obligations. In its May 15, 2018 letter, a copy of which was posted on the AG's website, the Attorney General gave its acceptance

¹ Max Stendahl, "Mount Ida execs got pay increases as debt rose," *Boston Business Journal* April 18, 2018, digital edition, <https://www.bizjournals.com/boston/news/2018/04/18/mount-ida-execs-got-pay-increases-as-deficit.html> (accessed July 25, 2020).

² Massachusetts Department Higher Education, 610 CMR 2.07(3)9(f)(2).

³ Fred Thys, "Mount Ida's Troubles Began When It Lost Half of the Entering Class of 2012, Board Chair Tells Legislators," WBUR.org, May 16, 2018, <https://www.wbur.org/edify/2018/05/16/mount-ida-senate-hearing> (accessed July 15, 2020).

on the 16th deadline, but included in the letter of approval that the closing was “extremely unfair” to the students as well as “disorderly and harmful.”

Only 250 students out of 1389 transferred to UMass Dartmouth. There were many reasons students did not accept the automatic admission to Dartmouth. That campus was a one-hour drive from the Newton campus. Aside from travel issues, many students were unable to transfer their credits to Dartmouth or other institutions, complete their degrees on time, or receive comparable financial aid and scholarships from UMass or other institutions. This was particularly troublesome for the recently accepted students who planned to start in fall. Their second and third choice schools were no longer accepting new students or had already distributed their scholarship money. Clearly, Mount Ida College publicly painted a bright future throughout the period prior to sale. Students were caught off guard and relied on the representations made by the College. As a result, a class action lawsuit was filed against Mount Ida College.⁴

COURT ANALYSIS AND DECISION

Current and accepted students brought a class action lawsuit against Mount Ida College, its Board of Trustees, and seven Mount Ida administrators. The students sought relief for seven claims under Massachusetts State Law alleging the defendants knew Mount Ida College was on the brink of insolvency, but concealed information about its financial difficulties and assured current and prospective students that Mount Ida was financially stable. Both the US District Court and the U.S. Court of Appeals (1st Cir) dismissed the students’ class action lawsuit.⁵

The main argument in this case was that Mount Ida College, its officers, and trustees breached their fiduciary duty to its current and prospective students. The trial court disagreed, and the court’s decision makes it clear that a higher education institution, its officers, and trustees do not owe a fiduciary duty to its students. The court explained that Mount Ida College officers and trustees did have a fiduciary duty, but the fiduciary duty is owed only to the institution, not to its students. The fiduciary duty owed to the institution is imposed by statute, and the court explained that it would not expand that duty in this case.

Was the Court misguided in its interpretation of the law? Are students not owed a fiduciary duty? Is the relationship between the student and higher education

⁴ Squeri v. Mount Ida College, 954 F3rd 56 (2020).

⁵ Ibid.

institution contractual? If so, can students pursue contractual claims for breach of contract? Is the institution liable to students for fraud or misrepresentation? Does the common law right of privacy extend to student records? Was the Family Educational Rights and Privacy Act⁶, referred to as FERPA, violated and should it have been pursued by the plaintiffs? In this suit, everyone who could have protected the students failed to do so. The President of Mount Ida College, the Board of Trustees, the trial court judge, the appellate court, and the Massachusetts Attorney General all sided with the College and against the interests of the students.

STRATEGIC DISCUSSION

By analyzing the resources available to Mount Ida College at the time, one can gain insight into the strategic options and possible motivations for action by Mount Ida College as an institution of higher education. The resource-based view (RBV) is a theory from strategic management which considers all firms as unique bundles of tangible and intangible resources.⁷⁸⁹ Managers, or in this case, Mount Ida's Board of Trustees and administrators would have several strategic options for how to proceed in the allocation of the resources available.

Mount Ida College had significant tangible resources, having recently renovated its Newton campus. As reported on its IRS form 990 for 2016, the endowment was just over \$23.5 million, which is relatively small for an institution like theirs.¹⁰ As reported by Laura Krantz in the Boston Globe on April 6, 2018, the campus was located on a 72-acre lot in Newton, MA with 24 buildings, 820 beds, with additional classrooms, labs, dining areas, and athletic fields. The college also had \$55-70 million in debt which was eventually paid off by financing from UMass. The college had 1,389 enrolled students, a third of which were first generation college students, and competed in NCAA Division III as part of the Great Northeast Athletic Conference. The Newton, MA location is about a 20-minute drive to Boston, MA with easy access to city life, internships, and amenities.

In general, tangible resources are not as likely to lead to superior performance or results as intangible resources due to the fact that most tangible

⁶ 34 CFR § 99

⁷ Jay Barney, "Firm resources and sustained competitive advantage," *Journal of Management*, 17(1), 99-120 (1991).

⁸ Edith T. Penrose, *The theory of the growth of the firm* (New York: Oxford University Press, 1951).

⁹ Birger B. Wernerfelt, "A resource based view of the firm," *Strategic Management Journal*, 5(2), 171-180 (1984).

¹⁰ Max Stendahl, "Mount Ida spent \$30M to upgrade campus that will be sold to UMass," *Boston Business Journal* April 22, 2018 digital edition, <https://www.bizjournals.com/boston/news>.

resources are easy to copy or can be purchased by competitors.¹¹¹²¹³ Mount Ida College had minimal intangible resources. The private college had a long history dating back to 1899 and had its current name since the early 1980s. Associated with its history is an institution's brand. A brand reputation is one of the most important resources¹⁴ and as some evidence of its brand, Mount Ida had been ranked as high as 27th in the *US News and World Report* for regional colleges in the North. With an acceptance rate of 60-70%, the college was also seen as somewhat selective.

Based on the resources available to the institution, Mount Ida College had several strategic options. First, they could have done what they did and sell the campus with all its debt to a buyer such as UMass. UMass, as a state institution, had a much better financial base than Mount Ida College with a much stronger brand. Being acquired by UMass would satisfy Mount Ida's debt and provide its students with a well-known branded institution where they can transfer. On the other hand, a small private university experience is clearly not the same as a large public university experience and there was no way for Mount Ida College or UMass to know which students would be supportive and which would not. There was also no way for Mount Ida College to know if its current faculty and staff would be welcomed in the Massachusetts State system. The indication is that State employment in a public institution would be much more restrictive and bureaucratic than at a small independent private college.

Another option for Mount Ida College was to do nothing and continue operations as they had been. This would allow the institution to keep its identity and continue its long history. There would be minimal adjustments for students who would no longer need to transfer or find comparable fields of study. However, this option would require the college to find a way to pay off its debt to avoid bankruptcy. According to an institution report submitted by Mount Ida to the New England Association of Schools and Colleges, the Board of Trustees around 2012 laid out a \$30 million plan to boost enrollment by renovating physical assets like its buildings and classrooms. This renovation totaled more than the entire Mount Ida College endowment. The plan was to be funded using part of the endowment, bonds, and some additional vendor financing. Enrollment did rise by approximately 350 students during the tenure of Barry Brown since he took over as president in

¹¹ Jay Barney, "Firm resources and sustained competitive advantage," *Journal of Management*, 17(1), 99-120 (1991).

¹² Rifat Kamasak, "The contribution of tangible and intangible resources, and capabilities to a firm's profitability and market performance," *European Journal of Management and Business Economics*. Vol. 26 No.2 pp 252-275 (2017).

¹³ Frank T. Rothaermel, "Strategic management: concepts," (Vol. 2): New York: McGraw-Hill Education (2016).

¹⁴ Brian K. Boyd et. al., "Reconsidering the reputation—performance relationship: A resource-based view," *Journal of Management*, 36(3), 588-609 (2010).

2012,¹⁵ but the reality of this option is that Mount Ida College would need to avoid bankruptcy with any tuition or donations received in order to remain operational.

A third option would have been to merge with another institution. Mount Ida College did consider a merger with Lasell College also in Newton, MA. Lasell had 2,100 students at the time and Mount Ida had 1,400. Mergers were common practice at the time¹⁶ in New England where many small private colleges and universities were considering merging out of competitive necessity. Another merger that took place just a couple of years prior was Boston Conservatory and Berklee College of Music in 2016. The possible benefits of a merger include the pooling of resources and finding synergies where value can be created and costs can be reduced by eliminating redundancies. That said, the benefits of mergers are often overestimated with the potential risks underestimated.¹⁷ Merging firms tend to overlook factors such as differences in culture and often attribute the failure of mergers to what the other partner did incorrectly. While the merger with Lasell College was eventually called off, the New England region is littered with small private universities and colleges, many of which would have been motivated to consider merging with Mount Ida College.

STRATEGIC CONCLUSIONS

From a resource-based perspective, Mount Ida had at least three strategic options to choose from, each with unique risk and potential benefit: selling the campus, continuing current operations, or merging with another institution. Mount Ida eventually decided to sell the campus to UMass and ended up laying off over 280 faculty and staff.¹⁸ The facts of the case are described in this manuscript and based on the court results. Mount Ida completed the sale as planned and successfully avoided any litigation from impacted parties. While the publicity fallout from job losses, student sentiment, loss of reputation, etc. caused from the sale had to be dealt with, the financial impact was relatively small given support from the courts in denying student claims. Had the plaintiffs successfully pursued Mount Ida's violation of the FERPA law, however, the choice to sell may have had significantly larger negative financial impacts.

¹⁵ Max Stendahl, "Mount Ida spent \$30M to upgrade campus that will be sold to UMass," Boston Business Journal April 22, 2018 digital edition (accessed July 23, 2020).

¹⁶ Marie H. Kavanagh and Neal M. Ashkanasy, "The impact of leadership and change management strategy on organizational culture and individual acceptance of change during a merger. *British Journal of Management*," 17(S1), S81-S103 (2006).

¹⁷ Roberto A. Weber and Colin F. Camerer, "Cultural conflict and merger failure: An experimental approach," *Management Science*, 49(4), 400-415 (2003).

¹⁸ Brian Dowling and Kathleen McKiernan, "Mount Ida deal hit kids 'like a ton of bricks'," Boston Herald April 8, 2018 Digital copy update November 17, 2018 (accessed July 29, 2020).

Assuming Mount Ida College would have successfully avoided bankruptcy, continuing operations would have saved jobs and perpetuated the institution's long history. Given the steadily increasing enrollments, the college may have been able to remain solvent if they were willing to engage stakeholders appropriately.¹⁹ The fact that President Brown was paid \$446,000 in salary and benefits in 2016 demonstrates that this strategic option was not thoughtfully considered. The college would not have been able to ask faculty and staff to make sacrifices and lower labor expenses while at the same time increasing the pay of its top administrators in such a significant manner. A better approach would be for the President to reduce his salary to \$100,000 and have administrators cut their salary by 25% and then ask faculty for a temporary three year salary reduction of 20% as a means of covering the short fall. Labor is often one of the largest expenses and some strategies other colleges have successfully employed have been early retirement packages and hiring freezes. Combining this with an emergency request to the State for a grant or long term loan would make the likelihood of government more plausible. Of course, making it known that the college was in financial distress may have lowered enrollment or caused employees to leave for more stable institutions which would have increased the risk of bankruptcy so these factors must also be taken into account. It would have at least been better to try than to abruptly close at the end of the semester.

The other strategic option for Mount Ida College would have been to continue pursuing a merger or even an alliance with other likeminded institutions in the North region. Mergers were relatively common given the climate of higher education at the time as well as the relative abundance of colleges and universities in the area. That said, there is a real risk in this option in that no suitable partner would be found (after the deal with Lasell had fallen through) which may have resulted in bankruptcy anyway. Even if a suitable partner was identified and an initial merger announced, it does not mean the merger or alliance would have been successful. A significant number of mergers fail due to cultural differences or ineffective resource allocation post-merger.²⁰ The reality is that a merger or acquisition may even hasten poor performance²¹ or impending bankruptcy.

The potential benefits of a successful merger or alliance might instead lead to increased enrollment when students from the partner institution have easier

¹⁹ David M. Schweiger and Angelo S. DeNisi, "Communication with employees following a merger: A longitudinal field experiment," *Academy of Management Journal*, 34(1), 110-135 (1991).

²⁰ Roberto A. Weber and Colin F. Camerer, "Cultural conflict and merger failure: An experimental approach," *Management Science*, 49(4), 400-415 (2003).

²¹ Maria Carapeto et.al., "The good, the bad, and the ugly: A survival guide to M&A in distressed times," Unpublished manuscript (2009).

access to transfer in to Mount Ida or at a minimum take classes offered there that are not offered at their home institution. There are other potential benefits like reduction of cost from eliminating redundancies such as low enrolled courses being combined or the reallocation of administrative positions to drive new growth initiatives and synergies.²² The initial excitement of an announced merger also offers the potential for increased differentiation, as united campuses offer applicants access to new degree possibilities and other benefits like internships or job placements. The fact that Mount Ida was ranked in the top 30 for regional colleges in the North offers real value to other institutions who desire to be ranked or to improve their current standing so the institution would have been an attractive candidate for mergers/alliances.

LEGAL ANALYSIS

Corporations are formed under state law. Most are for-profit business corporations engaged in the business of selling goods or providing services. They are owned by their stockholders who are seeking to profit from their investment. The stockholders elect a board of directors whose duty is to manage the corporation for the benefit of the stockholders. Directors owe a fiduciary duty to the stockholders to act in their best interest.

In an article in the *New York Times* on September 13, 1970, by economist and Nobel laureate, Milton Friedman, he stated that the social responsibility of business is to increase its profits.²³ This had a profound impact on the way corporate actions were viewed.²⁴ Corporate officers and directors should focus solely on increasing profits of the corporation.²⁵ In the United States, corporations are treated as separate entities created and authorized to operate under the state laws where each was incorporated. In the recent case brought by Citizens United, the U.S. Supreme Court ruled that these entities enjoy the same rights as individuals and are able to make political donations to promote their causes.²⁶

In all states, there are various types of corporations, each formed to address a specific purpose. While most are formed for the purposes of increasing the wealth of its shareholders, some are not-for-profit corporations formed specifically to

²² Michael Bradley et.al., "Synergistic gains from corporate acquisitions and their division between the stockholders of target and acquiring firms," *Journal of Financial Economics*, 21(1), 3-40 (1988).

²³ Steve Denning, "The Origin of 'The World's Dumbest Idea': Milton Friedman," *Forbes* June 26, 2013

²⁴ Michael C. Jensen and William H. Meckling, "Theory of the firm: Managerial behavior, agency costs and ownership structure," *Journal of Finance Economics*, 305-360 (1976).

²⁵ Joseph L. Bower and Lynn S. Paine, "The Error at the Heart of Corporate Leadership," *Harvard Business Review*, 95(3), 50-60 (2017).

²⁶ *Citizens United, Appellant v. Federal Election Commission*, 558 U.S. 310 (2010).

benefit society in some way. Recent changes in state corporation law now allow businesses to incorporate as social benefit corporations. Maryland was the first state to enact a social benefit law in 2010. As of July 2020, thirty-six states have amended their laws and five more are in the process of doing so as reported on the Benefit Corporation.net website. These corporations have a double bottom line and are formed not only to generate profits for the stockholders, but able to provide some direct social benefit to society. In most states, including Massachusetts, the state attorney general's office is charged with overseeing non-profit corporations.²⁷ All colleges and universities are formed under corporate law in the state where they operate either as non-profit or for-profit corporation. They are also regulated by its respective state education department.

The students alleged that Mount Ida College committed fraud, negligent misrepresentation, and fraud in the inducement by its actions immediately prior to its closing announcement. The legal arguments in this case are primarily based on common law contract and tort law. These laws are well established in English law and were incorporated in our legal system when the United States was formed. Both contract and tort common law generally accepted rules have been published by the American Law Institute in a legal treatise entitled Restatement of Contracts and Restatement of Torts. These books are universally accepted by the legal profession including judges in making legal decisions.

Common law fraud requires the plaintiffs to prove that the defendants intentionally made a false statement of a fact that was material and significant in such a way as to induce the plaintiff to enter into the contract. Plaintiff must prove that the false statement was reasonably relied upon to their detriment. Intentional false statements made to the students and parents would be classified as fraud. Conduct creating a false impression would be fraud in the inducement in Massachusetts. The plaintiffs argued that they were falsely induced to either enroll at Mount Ida or to pay their tuition for the upcoming semester. Mount Ida held itself out as a viable institution by email messaging, accepting new students and their deposits. It advertised for new students, awarded substantial scholarships, and scheduled student admittance days. It advised, registered, and billed current students for fall courses. All of this occurred immediately prior to the public announcement that it was closing and that the campus was sold to UMass. Students alleged that these statements and conduct by Mount Ida were all done in an effort to induce students to enroll at Mount Ida. In return for acquiring the Newton campus, UMass agreed to pay off all of Mount Ida's liability including its compensation obligations to its faculty and staff. In Mount Ida's letter to the state attorney general office seeking approval of the sale, it stated that if approval was

²⁷ Massachusetts G.L.c180§8A(c).

not given by May 16th, it would file bankruptcy. Mount Ida would be hard pressed to argue that it was not aware of its financial problems and inability to continue operations. As discussed in the following paragraphs, Mount Ida's actions were intentional or at least negligent. The court, however, held that the plaintiffs failed to show how and when the contract was made and found no false statements by Mount Ida by its administrators.

Contracts are enforceable promises, the breach of which the court may award an appropriate remedy.²⁸ Contracts can be express contracts, where the terms of the contracts are formed by words of one or both parties to the contract. Implied contracts are formed by conduct of the parties and its terms are determined strictly by conduct of the parties. Both are equally valid and fully enforceable. The simple act of paying the tuition and the institution accepting the payment creates an implied contract. Similarly, agreeing to award scholarships in return for a student's acceptance of admission are contractual. A student accepting an admission letter by the institution gives the student a claim for breach if admission is later denied. A student who accepts admission is liable for tuition charged by the institution.

Courts over the years have accepted the premise that a contract is formed between the student and the institution. This is especially so in suits against the institution for failing to protect student from violence on campus²⁹. Courts have generally dismissed lawsuits based on a poor education. These suits are dismissed because it is difficult to prove that the student-plaintiff performed their obligation to study and complete all assignments in good faith, and not because of lack of a contract.³⁰

The findings of the court on breach of student rights of privacy are difficult to justify. The court held that Mount Ida turned over the student records to UMass out of necessity. It is well established that student records are private and access to them by others is severely limited by FERPA.³¹ As adults over the age of 18, student consent is required before disclosing these records. Even within the institution, student records are to be secured and access limited. Mount Ida has the right to allow others at the College to review these records for student advisement each semester and for review of academic progress by Deans and records offices. However, these are based on operational and a need to know basis. In general, schools must have written permission from a student in order to release any information from their education record. However, FERPA allows schools to

²⁸ Restatement (Second) of Contracts § 1 (1981).

²⁹ Regents of University of California v. Superior Court, 4 Cal. 5th 607, 413 P.3d 656 (2018)

³⁰ Hazel G. Beh, "Student versus university: The university's implied obligations of good faith and fair dealing," Maryland Law Review, Vol. 59, Issue 1 p. 183 (2000).

³¹ 34 CFR § 99

disclose those records, without consent, to the following parties or under the following conditions:³²

- School officials with legitimate educational interest;
- Other schools to which a student is transferring;
- Specified officials for audit or evaluation purposes;
- Appropriate parties in connection with financial aid to a student;
- Organizations conducting certain studies for or on behalf of the school;
- Accrediting organizations;
- To comply with a judicial order or lawfully issued subpoena;
- Appropriate officials in cases of health and safety emergencies; and
- State and local authorities, within a juvenile justice system, pursuant to specific State law.

Of these exceptions, the one which most closely fits with Mount Ida's circumstance is where a school is allowed to disclose student records to "other schools to which a student is transferring." In the sale to UMass, student records were transferred prior to the closing announcement and without student consent. Mount Ida did this specifically for their own benefit to show students that they can easily transfer to UMass Dartmouth. There were no exigent circumstances that would justify doing this prior to seeking consent of the students. Mount Ida did not have the authority to transfer all of its students to UMass without student consent. There was no agreement between Mount Ida and UMass to automatically transfer students, and obligating them to become UMass students. Selecting an institution is complicated. There are many issues that must be evaluated and addressed to find the best fit to meet a student's specific needs. The court simply held that the release of financial and academic records was done by Mount Ida out of necessity. If the issue was how many students would qualify for the transfer absent student consent, it could have been completed by deleting student names from the files. It is clear that the courts either disregarded FERPA altogether, or that they hold an extremely liberal view of its mandates. In the end, only 250 out of 1,389 students actually transferred to UMass.

³² <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html> (accessed July 23, 2020).

LEGAL CONCLUSIONS

The claim of breach of fiduciary duty begs the question, “what duty does the academic institution owe to its students?” For there to be a breach, it must first be established that there is a special trust relationship between Mount Ida and the students it serves. That relationship would require the college to then act in the students’ best interests and avoid any conflict of interest or self-dealing. In a for-profit corporation, the stockholders as owners have a direct say in management of the corporation through its annual election of the Board of Directors. The Board has a fiduciary duty to the corporation to act in its best interest, which in turn benefits the stockholders. A non-profit academic institution of higher learning, such as Mount Ida, is managed by its board of trustees. They serve as trustees of the institution. The court in the Mount Ida case correctly said that the Board serves at the benefit of the institution. What was not stated in the court’s decision is that in actuality, as a not-profit corporation, Mount Ida was formed not for the benefit of itself, but for the benefit of its students. This disconnect comes from the fact that the students, although the main beneficiary of the corporation, are not owners of the institution, nor do they have a say in selection of the members of the board of trustees.

The decision not to give students special standing is a long tradition stemming from the 1819 United States Supreme Court opinion in Trustees of Dartmouth College v. Woodward, 17 US 518 (1819). In that case, the Board of Trustees of Dartmouth College challenged a state-mandated change to their corporate structure and the conversion of the college into a university. While recognizing the important aggregate interests of the Dartmouth students, Chief Justice Marshall declared that “[t]he students are fluctuating, and no individual among our youth has a vested interest in the institution, which can be asserted in a court of justice.” The other obstacle courts raise to giving students standing to sue is the lack of any direct, measurable student injury resulting from alleged university administrator misdeeds. Instead, the Court left representation and protection of the students’ interests with the government body charged with protecting the public’s interest in enforcing the charitable purpose for which it was formed. That duty generally falls upon the state attorney general’s office who is given the power to oversee non-profit corporations to guard against improper actions.

In the Mount Ida College case, the Massachusetts Attorney General Maura Healey approved the sale of the College to UMass deeming the sale of the campus a fair transaction. The Attorney General’s Office was inundated with complaints from students and parents. In the May 15, 2018 letter approving the sale, the Attorney General expressed its deep disappointment with the decision to close “without a school closing plan and without appropriate notice to students, faculty, staff, and regulators. Your treatment of your own students is particularly upsetting

and extremely unfair to them.” The approval also invoked several conditions to soften the hardship placed on students regarding transfer credits, fees, and devising a plan to allow Mount Ida College seniors the opportunity to finish their last year of studies, still receiving a degree from the College. All conditions set by the Attorney General were subject to the approval of the Massachusetts Department of Higher Education, since they were outside of the normal rules for either institution or customary practice. Without any right of standing on the issue of breach of fiduciary duty and failure of the court to rule in favor of students on the contract and tort claims, Mount Ida students were left with no opportunity to seek any redress from anyone for the closing decision.

On the issue of breach of contract, the incoming students had formed a contract and paid a deposit to pursue their studies at Mount Ida. Clearly, Mount Ida breached its duty to provide an educational opportunity for them. On the issue of fraud and misrepresentation, the intentional actions of Mount Ida to hide their financial inability to perform from the students constitutes active fraud and is actionable. Had the plaintiff’s been anyone other than students, the case would have proceeded to trial. If Mount Ida committed fraud on UMass or breached their contract to conclude the sale, the courts would not have hesitated to proceed to trial on the facts.

The only student claims that appear to succeed in court are academic institutions who fail to protect the students from harm, and in rare cases, where the Trustees are alleged to have embezzled funds. In the latter instance, the suit is derivative, a suit filed by the students on behalf of the academic institution, where if successful, the judgment proceeds would be paid directly to the institution.

Regarding Mount Ida, UMass agreed to cover all outstanding debts of Mount Ida in return for the sale. Student deposits were refunded by any cash received in the sale or by UMass directly refunding student deposits. What was not covered was the money spent on lost credits for courses that did not transfer, lost income opportunity by not completing their degree on time, or the increased cost (transportation, change in programs, time spent) of students completing their education.

Clearly, courts overall have shown no inclination to provide students with standing in these types of cases. Students are being treated differently from everyone else. From an ethical point of view, the different treatment of students by the judicial system cannot be justified. The courts are protecting the academic institution and, as in the case of Mount Ida College, the board of trustees and the administrators at the expense of the student. The Attorney General stated that even though it believed that the President and the Board of Trustees failed in their fiduciary duty to Mount Ida College students and that their false statements and

conduct amounted a violation of Massachusetts General Laws Ch. 93A it would not pursue legal because the College is now closed and without assets.³³ Again, the Attorney General failed to protect students by not pursuing the action against the administrators who in the last few years reaped major pay increases, nor against the Board who neglected their duties to the College, the students, and the general public under state charities law. Students should be warned, it is *caveat emptor* or *let the buyer beware* when selecting a college or university.

³⁴ Laura Krantz, "AG won't sue Mount Ida officials," *Boston Globe*, March 13, 2019, <https://www.bostonglobe.com/metro/2019/03/13/won-sue-mount-ida-officials/qvcFQ TkQcLuxdsQBco9tJO/story.html> (accessed July 23, 2020).