Educational Malpractice in the USA, Part 2

Introduction

The first reported cases of educational malpractice in the USA were in Louisiana in 1973 and in California in 1976. This area of law began to blossom in the year 1980. Because I am an attorney who is interested in education law, I read every page of more than 80 reported court opinions in the USA on the subject of educational malpractice in December 1999 and wrote an essay on that subject at http://www.rbs2.com/edumal.htm . That essay concentrates on what the current law in the USA actually is.

The present essay describes what I believe the law should be. I hope that parents, students, and employers will urge state legislatures to enact a statute permitting educational malpractice torts under certain limited conditions, as a way of making the educational bureaucracy accountable and responsible, just as other professionals and corporations are held accountable in courts.

definitions

In this essay, I use the words *pupil* and *teacher* to refer to people in elementary schools and high schools, and the words *student* and *professor* to refer to people in colleges and universities. The word *instructor* includes both teachers and professors. The word *institution* refers to elementary schools, high schools, colleges, and universities.

My Suggestions for Allowing Educational Malpractice

Note that the remarks in this section are *not* the current law in the USA, but only my idea of what the law should be.

Unlike the majority of courts in the USA, I do believe that educational malpractice should be a valid tort claim in some specific types of situations. It is helpful to consider two subsets of allowable educational malpractice claims: institutional malpractice (i.e., the defendant is a school, but specific instructors are *not* named as defendants) and wrongs perpetrated by specific instructors.

I believe that it is *generally* preferable for plaintiffs to sue schools or colleges, *not* individual instructors, because (a) the pupil's or student's educational experience was at a succession of different instructors and it would be difficult to prove that deficiencies were caused by one or two

specific instructors and (b) under the doctrine of *respondeat superior*, recognizing that the school or college selected and supervised the instructors.

institutional malpractice

1. Misclassifying a pupil of normal intelligence as retarded *or* misclassifying a retarded pupil as normal intelligence.

2. Giving a pupil all *A, B,* or *C* marks, then, at the end of 12 years of school, the pupil either:
   A. can not earn a high school diploma because of inability to pass the state's competency examination,
   B. pupil is functionally illiterate, or
   C. pupil can not do basic arithmetic and computational skills.

3. Promotion to the next grade in school when the pupil is not ready for the lessons in the next level of the curriculum.

instructor malpractice

In general, I suggest that an instructor be sued personally *only* when that instructor has personally engaged in misconduct beyond an alleged "failure to teach".

1. Failure of an instructor to follow written policy requirements promulgated by either the educational institution, accrediting organization, or state department of education. The failure to obey the policy must have *caused* plaintiff significant harm, as with any other kind of tort.

2. Allegations that a teacher or professor was engaged in fraud, plagiarism, or misappropriation of a pupil's or student's work, thereby robbing the pupil or student of recognition for their work. Such allegations may be more appropriately argued under another legal theory (e.g., fraud or copyright infringement), but the possibility of educational malpractice should be kept open for negligent conduct or intentional misconduct that does not fit an established legal theory.

3. Allegations that an instructor or administrator ignored evidence that other pupils or students were engaged in fraud, plagiarism, cheating, etc., thereby effectively penalizing honest students, since the honest pupils or students were at a competitive disadvantage to the cheaters.

4. Allegations that an instructor or an administrator acted with malice or bad faith toward a pupil or student, or that a decision of an instructor or an administrator was irrational, arbitrary, or capricious – below the minimum standard of care used by professional educators.
   An example of such conduct is given in *Smith v. Adkins,* 622 So.2d 795 (La.Ct.App. 1993)

(Professor called student a "slut" during a lecture.).

5. Wrongful acts by graduate student's advisor or dissertation committee, for example: imposing requirement(s) on the wronged student that are not customarily imposed on similarly situated students; malicious, arbitrary, or capricious evaluation of the student's work.

My Suggestions for Rejecting Educational Malpractice

I believe that courts are correct in holding that educational malpractice **fails to state a claim upon which relief can be granted** (hence, grant a summary judgment motion for the defendant educational institution or instructor) in the following types of cases:

1. **Claim(s) arising out of failure to receive a diploma, when the pupil or student had a series of bad marks** (e.g., *D* or *F*) **over the years.** The pupil's parent(s) or the student had adequate notice of *un*satisfactory performance, and an expected consequence of such poor performance is expulsion for academic reasons or denial of a diploma.

2. **Claim(s) that a pedagogical method was *in*effective.**
   Methods of grading (e.g., requiring or not requiring a term paper), amount of homework, lecture style, and other such choices are properly within the prerogative of each instructor. If the choice is *un*reasonable, then the school or college administration can direct the instructor to change to a reasonable method, or simply terminate the instructor's employment.
   As a practical matter, different people learn in different ways, and a style or method of teaching that is appropriate for one pupil/student may not be appropriate for another pupil/student. In large classes, which are common in American educational institutions, there is no opportunity for instructors to tailor educational methods to the individual needs of each pupil or student.

3. All **third-party educational malpractice claims**, unless there was a written contract between the plaintiff and a vocational school for the education or training (i.e., if an employer contracts with a vocational school for education of employees, then that employer should be able to allege educational malpractice).

4. **Claim(s) of an *in*adequate education at the college level.** I explain my reasons for this immunity in the next section of this essay.

I believe that disputes about a grade in a class or about the acceptability of a thesis or dissertation are best resolved in an appeals process internal to the educational institution. However, if such internal appeals have been exhausted, or can be proven to be futile, then it *might* be desirable to hear such disputes in court.

5. **Disputes about a grade in a class.** If such complaints are to be allowed in court, I suggest that plaintiff have a very high initial burden, such as submitting affidavits from at least three professors, each of whom is personally qualified to teach the subject matter of the class, and each of whom expresses an opinion that the grade is at least one letter grade too low. The grade might be too low because of the instructor's method of evaluating the student's work was flawed (e.g., negligent preparation or grading of an examination, or negligent grading of a term paper). For grades in schools, the affidavits should be prepared by three professors at an accredited college or university, and who testify that the pupil's answer was correct and the teacher's grading was wrong. It may also be desirable for the three affidavits to come from professors at three different colleges or universities, to avoid a personal vendetta against the accused instructor.

6. **Disputes about the acceptability of a thesis or dissertation.** If such complaints are to be allowed in court, I suggest that plaintiff have a very high initial burden, such as submitting affidavits from at least three professors, each of whom has both personal and recent research experience in the subject matter of the dissertation, and each of whom says that he/she has carefully read the entire dissertation and finds that the dissertation is acceptable in its present form. It may also be desirable for the three affidavits to come from professors at three different colleges or universities, to avoid a personal vendetta against the accused professor(s).

Distinguish Schools from Colleges

In the following paragraphs, I explain why elementary schools and high schools should be held accountable under the tort of educational malpractice, but that colleges and professors should *generally* be immune from this same tort. There are several key issues that distinguish schools from colleges in the context of educational malpractice:

1. **Compulsory Attendance.** Pupils are compelled by statute to attend school in grades 1 to 12. Because most parents can not afford tuition at private schools, the pupil is compelled to attend the one public school that is chosen by the administration of the local public school system. The lack of choice suggests to me that courts should hold that school accountable for offering a fair opportunity to each pupil to receive an appropriate education. In contrast, students have a real choice of a variety of colleges. If a student believes that a college has poor curriculum or poor educational facilities, the student is free to transfer during his/her first two years of undergraduate college or at the end of his/her first year of graduate education, without significant harm.

2. **Blind Reliance on Teachers.** A pupil is certainly not in a good position to determine if he/she is being properly educated. Many parents, particularly those without a college education, are also in a poor position to determine if the school is properly educating their children. In contrast, I believe that any student who belongs in college can determine for him/herself whether he/she is receiving a good education, for example, by also reading the

textbooks that are used at prestigious colleges (e.g., Massachusetts Institute of Technology, California Institute of Technology, Harvard, etc.). If a student does not understand the material in the syllabus, then the student – on his/her own initiative – should read additional books, assign him/herself projects as "intellectual finger exercises", or transfer to a college with a more challenging academic program. Students – unlike pupils – are adults, hence students are personally responsible for making good choices, instead of blaming professors.

3. **Academic Freedom.** It would be an intrusion on institutional academic freedom for courts to regulate the curriculum at a college. I discuss institutional academic freedom in more detail in my essay on academic freedom at http://www.rbs2.com/afree.htm , including a discussion of why academic freedom does *not* apply to elementary schools and high schools.

   The issue of academic freedom is rarely mentioned in the many opinions of courts that have considered the possibility of a new tort for educational malpractice. (Maybe that's not surprising, given my opinion that academic freedom in the USA is mostly an illusion in the law.) The following courts did mention academic freedom in educational malpractice cases:
   • *Moore v. Vanderloo,* 386 N.W.2d 108, 115 (Iowa 1986);
   • *Bindrim v. Univ. Mont.,* 766 P.2d 861, 863 (Mont. 1988);
   • *Swartley v. Hoffner,* 734 A.2d 915, 921 (Pa.Super. 1999).

   If litigation for educational malpractice were permitted at the college level, it could help raise academic standards in the USA, which would be a good result. However, the end does *not* justify the means. Maybe I am an optimist, but it seems to me that, if high schools graduated better-educated people, then colleges would automatically raise their standards and offer a more intellectually challenging program.

While I favor generally holding colleges and professors immune from educational malpractice torts, I do believe that students should be able to justifiably rely on a college's assertion of "highest academic standards", or that "our graduates are well prepared" in written material, regardless of whether it is in the college catalog or in promotional material directed to prospective students. In a commercial context, such statements might be regarded by courts as mere puffing, statements that a sophisticated person would reject as a self-congratulatory opinion. I favor holding colleges to a higher standard of communication than, for example, a used-car dealer. However, being responsible for such representations is *not* an issue of educational malpractice, but of conventional contract law or consumer-protection law.

Remedies for Educational Malpractice

As an appropriate remedy for educational malpractice in public schools, I believe that schools should at least provide free remedial education to pupils (even past age 21 y, if necessary) who have been harmed by the school's educational program.

An appropriate remedy for educational malpractice in private schools is refund of tuition paid, *or* compensatory tutoring or education at no additional cost, whichever the pupil's parents prefer.

While many plaintiff's attorneys have sued for the lost value of a pupil's time, or for emotional distress to the pupil, it is difficult to calculate the value of such injury. A pupil does not have a substantial earning potential, since he/she is a child. So remedial education – not money – is the best way to rehabilitate a pupil who was injured by educational malpractice. The injury can be minimized by the parent's prompt action, instead of waiting many years to file a complaint.

On the other hand, a graduate student's time can be valued at the fair market rate for someone with a bachelor's degree and comparable experience.

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this document is at `http://www.rbs2.com/edumal2.pdf`
My most recent search for court cases on educational malpractice was in Nov 1999.
revised 5 April 2003

go to my essay on the current law, *Educational Malpractice in the USA,* at
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