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EDUCATIONAL MALPRACTICE AND ACADEMIC DAMAGES**Overview**

More than a decade ago, Collis observed: "...given a climate of heavy criticism of the public schools, it should not be a surprise that frustrated individuals who believe they have been academically damaged by the educational system may turn to the courts for redress." (Collis, 1990) Even though the 1970's and 1980's did produce a few unsuccessful academic damages-type cases (often referred to in the literature as "failure to learn," or "educational malpractice" cases), the author's prediction regarding the 1990's failed to materialize.

A review of current literature in school law reveals a renewed interest in exploring issues of educational malpractice. In these articles the consistent opinion expressed by most authors is that in the mid-to-late 2000's, as a direct result of the student academic standards/ professional accountability movement, a new wave of educational malpractice cases will emerge. (DeMitchell and DeMitchell, 2003)

Malpractice: What Is It?

Simply stated, *malpractice* means bad practice. (Black's Law Dictionary, 1999) Within the context of public schools, some experts use the term *instructional negligence* to more accurately characterize this area of education law. (McCarthy, Cambron-McCabe, and Thomas, 1998)

Up to the present, the overwhelming majority of claims of educational malpractice have not involved claims of "educational or instructional negligence." Traditionally, judges were reluctant to recognize failure to learn claims as being justiciable. Since most malpractice law involved professionals in other fields (e.g., physicians, dentists, nurses, accountants) there were no recognized rules and principles of tort law applicable to situations involving school administrators and teachers. The only available standards of analysis were those involving physical injury of students. (Vacca and Bosher, 2003)

Today, however, the legal landscape is changing. Public education now exists in an atmosphere dominated of standards and accountability, where student promotion from grade to grade and receipt of a high school diploma are directly linked to student academic progress and achievement, the accreditation of each school in a public school system is directly linked to student standardized test results, and parents and the community receive detailed report cards regarding student academic performance and school accreditation. In my opinion it is highly likely that a new type of educational malpractice (i.e., *educational negligence/failure to learn*) case could

burst onto the scene. And, since educational accountability focuses attention on professional competence and expertise, both the quality of *administrative leadership* and *classroom teacher instruction* will serve as the primary focal points of the new lawsuits.

Emerging Issues

Who is at fault when an individual school falls below specified standards for accreditation? Who is at fault when an individual student is not promoted from grade to grade, or fails an end of course examination and is denied a high school diploma?

The judicial analysis applied in future educational malpractice (failure to learn/educational negligence) suits will be the same as the analysis applied in physical injury tort claims. In seeking remedy for academic damages, a parent must show that the educator in question: (1) owed their child a duty (in this type of claim the duty owed would be *instruction*), (2) breached their duty (an act of omission or commission), and (3) the breach of duty was the *proximate cause* of the injury suffered by the student. (Vacca and Boshier, 2003) Thus, to prevail in court, a number of issues must be resolved if the parents are to succeed. For example:

Do professional educators possess a recognized legal duty to educate students (i.e., a *results* oriented duty), or is their legal duty simply to provide each student with equal access to adequate, meaningful, and appropriate educational opportunities (i.e., a *process* oriented duty)?

- Who decides and upon what evidence is a decision made that a student has or has not received an adequate, meaningful, and appropriate education?
- Are standardized test scores alone the evidence needed to establish the academic success or failure of a student?
- Can a direct connection (proximate cause) be made between student academic success and the quality educational leadership provided by the building principal?
- Can a direct connection (proximate cause) be made between student academic success and the quality of instruction provided by a specific classroom teacher or teachers?
- If a student has failed to learn, can “fault” be fixed on anyone in particular other than the student himself or herself (a form of contributory negligence)?
- Do such factors as levels of education of parents, parental involvement in their child’s education, socio-economic condition of the family, quality and condition of school buildings and classrooms, age and condition of classroom equipment, student-teacher ratio, funding levels of educational programs, security and disciplinary atmosphere in school buildings and classrooms, impact on the ability of teachers to teach and students to learn?
- If educational negligence can be established, what is appropriate remedy to request (money damages, enrollment of the student in remedial programs, dismissal of the school principal and classroom teachers)?

Case Law

In an effort to predict how future courts might react to claims of educational malpractice (instructional negligence/failure to learn), a look back to an existing, albeit limited, body of case law is appropriate. What have the courts said?

In Peter W. v San Francisco U.S.D. (Cal., 1976), a high school graduate (who could not demonstrate an ability to read or write) unsuccessfully sued a public school system claiming that he had received “inadequate instruction and negligent teaching.” He also alleged that school officials engaged in false representation by

promoting him from grade to grade, and falsely represented to his mother that he was performing at or near grade level.

The court did not rule in his favor. In the court's opinion, classroom methodology affords no readily acceptable standards of care, or cause, or injury; and "the science of pedagogy is fraught with different and conflicting theories." What is more, said the court, a student's achievement in school is influenced by a host of factors from outside the formal teaching process.

Donohue v Copiaque Union Free School District (N.Y., 1979), involved a high school graduate who, at age eighteen, could not comprehend English at a level to successfully complete an employment application, read a restaurant menu, and pass the written portion of a drivers test. He unsuccessfully sued his former school system claiming, among other things, that the school system failed in its duty to properly educate him, failed to provide personnel properly trained to help him while he was in school, and failed throughout his education to properly advise his parents of their child's academic difficulties.

The court held that there was no cognizable claim of educational malpractice in tort law. To enter this area of law, said the court, would place judges in a position of "judging the day-to-day operations of schools." Moreover, said the court, because there are so many collateral factors involved in the learning process (e.g., student motivation and temperament, home environment, and others), proximate causation of a student's failure to learn would be difficult in not impossible to prove.

In a Maryland case, Hunter v Board of Education (1981), an appellate court rejected the malpractice claim of a student who alleged that he had been improperly placed, taught, and evaluated. In reaching its conclusion, the court cited two reasons. First, courts may neither decide the curriculum nor the degree of proficiency needed by a student to advance from grade-to-grade. Second, courts are not the proper forums in which to resolve such controversies.

More recently, a federal district court in Massachusetts saw no common law cause of action for educational malpractice in that State's common law (Doe v Town of Framingham, 1997); a Connecticut court refused to recognize either "reckless instruction" or "improper instruction" as actionable (Vogel v Maimonides Academy, 2000); an Iowa court held that such matters as poor academic instruction, failure to place a general education student in an appropriate educational setting, failure to supervise students, teaching and evaluation methods, and curricular or academic decisions made by educators are non-actionable in educational malpractice tort suits (Sain v Cedar Rapids Community School District, 2001); and, the United States Supreme Court stated, in a case involving students grading their peers on quizzes and tests, that classroom methodologies and techniques are matters best left to teachers and not the courts (Owasso I.S.D. v Falvo, 2002).

Implications for Policy

In my opinion, judges will continue to show a reluctance to recognize educational malpractice as actionable in negligent tort law. However, the potential for parents to sue school systems, administrators, and classroom teachers is real in this era of high stakes testing. As DeMitchell and DeMitchell suggest, a "statutory duty to educate" is emerging. (2003)

It behooves educational policy makers to reexamine existing policies in an effort to keep academic matters from needlessly transforming into time consuming and expensive legal matters. What follow are some suggestions for consideration as the policy audit moves forward. Be certain that school system policies:

- Clearly state goals and objectives for student academic progress and achievement, including expectations for student performance (accountability).
- Link, align, and integrate school system curricular goals, objectives, & content with statewide mandates.
- Clearly state the role and responsibilities (accountability) of the school principal as instructional leader as they relate to student academic progress and achievement.
- Clearly state the role and responsibilities (accountability) of classroom teachers as they relate to student academic progress and achievement.
- Include a clear intent to regularly measure “professional productivity.”
- Show the place of professional assessment and evaluation in the assignment and retention of principals, teachers, and other professional personnel.
- Clearly state expectations for student academic progress and achievement (including sanctions for unsatisfactory performance) as they relate to promotion from grade-to-grade and graduation from high school.
- Emphasize the school system’s expectations for continuous involvement and support of parents in the education of their child.

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Note: The views expressed in this commentary are those of the author.