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Educational Malpractice

One of the central issues in public education and education law is the methodology schools use to teach children. At times, the method that a school or teacher selects—or one that particular parents demand in its stead—leads to litigation.[1] In the past, this column has addressed curricular controversies concerning how or what is taught,[2] including tort liability claims of educational malpractice.[3] The following case and the accompanying question-and-answer discussion provide an update on educational malpractice and other methodology-based court decisions.

The Case

For two consecutive school years, an elementary school in West Haven, Connecticut, used a responsive classroom method that emphasizes social skills rather than discipline and academics. The principal, who worked as a consultant to the Massachusetts firm from which the school purchased this method, had publicly stated that she "does not believe in rewarding academic excellence."

Three parents, who each had more than one child enrolled in the school, objected to what they perceived as a disruptive and dangerous school situation resulting from this method's lack of discipline. They contended that the resulting fear was depriving their children of a meaningful education comparable to that of children attending other elementary schools in the district and state.

When their complaints went unheeded, the parents filed suit in state court, claiming that the school district and its officials, including the principal, were liable for educational malpractice and intentional infliction of emotional distress. The trial judge granted the defendants' motion to dismiss the suit, and the plaintiff-parents appealed.

Questions and Answers

What do you think the appeals court decision was in this case?

The appellate court partially affirmed and partially reversed the trial court's dismissal of the suit.[4] First, the court, citing the broad line of existing case law, jettisoned the educational malpractice claim as being contrary to public policy.[5] To the extent that the plaintiff-parents tried to escape this long line of cases by labeling the claim as negligence, the court concluded that the possible exception for breach of contract did not apply.[6]

Second, the appeals court reversed and remanded to the trial court the claim for intentional infliction of emotional distress, concluding that the plaintiff had made sufficiently specific allegations of the requisite essentials:

1. The defendants intended or should have known that their conduct would result in emotional distress;
2. The conduct was extreme and outrageous;
3. The conduct was the cause of the plaintiffs' emotional distress; and
4. The resulting distress was severe.

More specifically, the appeals court viewed the combination of allegations, including the references to "chaos, disruptiveness, and violence" for a two-year period, as providing a broad enough foundation for a jury to find the conduct to be outrageous and causal. In remanding the case for trial, the court stated, "We can think of no reason why our society could or should countenance or suffer this type of conduct in a place of learning."

Thus, the parents' claim for educational malpractice failed short of a trial but the intentional tort claim survived the dismissal stage, still facing slim odds of preponderantly proving all of the essential elements of this claim. We do not know whether the parents withdrew or settled this second claim or, if not, what the outcome of the trial was, but the legal lesson of the appellate decision is that educational malpractice in almost all cases is not a viable claim against public schools and that intentional infliction of emotional distress is a low-odds alternative for curricular challenges, limited to outrageous circumstances.

Have there been other methodology challenges in the general education context?

There have been very few beyond the aforementioned[7] educational malpractice cases. In the early 1990s, the federal courts summarily rejected a civil rights claim that the New York City public school curriculum was systematically biased against black students.[8] More recently, in response to a challenge based on the First Amendment establishment clause, a federal court in Michigan upheld the constitutionality of the Moral Focus Curriculum and related religion-oriented practices at a public charter school.[9] Most of the related published case law concerns curricular materials rather than methods, with the courts usually similarly deferring to school authorities.[10]

Would the disposition of the parents' claims have been different in the context of special education?

The odds in favor of the parents' intentional tort claim would be better only if the particular facts were specific to the disability status of the children.[11] Even so, the judicial outcome of a claim of educational malpractice or negligence would very likely have been identical for the same public policy reasons.[12] Although the Montana courts have developed a narrow exception based on the state's constitution and limited to misplacement,[13] the more likely and viable

basis for such claims would be the Individuals with Disabilities Education Act (IDEA),[14] which provides an individual right to "free and appropriate public education" (FAPE), recourse to an impartial hearing, and remedies of compensatory education and tuition reimbursement rather than money damages.[15]

If the parents of a child with disabilities filed a challenge to the methodology that the district used for the child's FAPE, would the odds be favorable for them?

Not as a general matter. Although IDEA cases will always depend on the individual child's circumstances, the general posture of hearing officers and courts is to defer to the school authorities when the issue is purely one of methodology. Most of the published cases to date concern reading methodologies for students with a specific learning disability[16] and specialized approaches for students with autism.[17] Districts have won the majority of these cases.

If the plaintiff was a teacher who had lost her job for insisting on a methodology different from the one required by the district, would the odds favor her on the grounds of academic freedom?

No. The same deference doctrine favors the district and the list of published court decisions where nonrenewed or terminated teachers have lost claims based on academic freedom and other methodology defenses is getting longer.[18] The limited exception is in religion cases, where the dispute is based on the district's—not the teacher's—orthodoxy.[19]

Conclusion

The case law to date provides ample room for leadership rather than paranoia or paralysis. In general, whether the potential plaintiff is a parent or a teacher, the odds favor the school authorities in cases claiming educational malpractice, thus providing latitude for principals in providing instructional leadership. Nevertheless, the principal must make sure that the selected methodology is in accord with district policy and does not represent offensive extremes, religious or otherwise. Special education is indeed special, providing distinct opportunities for parental participation, team decisions, and dispute resolution.

As the illustrated case exemplifies and various other court decisions have elaborated, malpractice and related reactions to instructional leadership are a matter of perception. In the end, the principal has rather roomy legal discretion to stipulate and enforce pedagogical methods within the broad mission of the public schools. Within these broad legal boundaries, the concerns are and should be pedagogical, professional, pecuniary, and—with a similar lower-case "p"—political.

Notes

1. In light of the relatively limited case law, "method" and "methodology" are used here interchangeably and very broadly.
2. *See, e.g.*, Zirkel, P. (2006, January/February). Teacher evangelism: An update. *Principal*, 10-11; Zirkel, P. (2001, November/December). Controversial materials. *Principal*, 50-51.
3. Zirkel, P., & Gluckman, I. (1991, September/October). Educational malpractice. *Principal*, 63-65.
4. *Bell v. Bd. of Educ. of W. Haven*, 739 A.2d 321 (Conn. Ct. App. 1999).
5. *See, e.g., Daniel B. v. Wisconsin Dep't of Pub. Instruction*, 581 F. Supp. 585 (E.D. Wis.1984), *aff'd mem.*, 776 F.2d 1051 (7th Cir. 1985); *Thomas v. Charlotte-Mecklenburg Bd. of Educ.*, 2006 WL 3257051 (W.D.N.C. 2007); *D.S.W. v. Fairbanks N. Star Sch. Dist.*, 628 P.2d 554 (Alaska 1981); *Tirpak v. Los Angeles Unified Sch. Dist.*, 232 Cal. Rptr. 61(Ct. App. 1986); *Peter W. v. San Francisco Unified Sch. Dist.*, 131 Cal. Rptr. 854 (Ct. App. 1976); *Lotto v. Hamden Bd. of Educ.*, 2006 WL 618361 (Conn. Super. Ct. 2006); *Brantley v. Dist. of Columbia*, 640 A.2d 181 (D.C. Ct. App. 1984); *Tubell v. Dade County Pub. Sch.*, 419 So.2d 388 (Fla. Dist. Ct. App. 1982); *Hunter v. Bd. of Educ.*, 439 A.2d 582 (Md. 1982); *Donohue v. Copiague Union Free Sch. Dist.*, 418 N.Y.S.2d 375 (1979); *Aubrey v. Sch. Dist. of Philadelphia*, 437 A.2d 1306 (Pa. Commw. Ct. 1981). The reasons, which the courts have applied as well to college/university defendants, include "(1) a lack of measurable standard of care; (2) inherent uncertainties as to the cause and nature of damages; (3) the potential for a flood of litigation; and (4) the courts' overseeing the day-to-day operation of the schools." *Finstad v. Washburn Univ.*, 845 P.2d 685, 694 (Kan. 1993).
6. This exception is rather narrow. *See, e.g., Jamieson v. Vatterott Educ. Ctr.*, 473 F. Supp. 2d 1153 (D. Kan 2007). The other alternative for nondisabled students would be a federal civil rights suit. *See, e.g., Simonian v. Fowler Unified Sch. Dist.*, 473 F. Supp. 2d 1065 (S.D. Cal. 2007). For students with or without disabilities, state discrimination legislation provides a limited third possibility. *See, e.g., Mumid v. Abraham Lincoln High. Sch.*, 2006 WL 640510 (D. Minn. 2006).
7. *See* notes 4-6.
8. *Grimes v. Sobol*, 832 F. Supp. 704 (S.D.N.Y. 1993), *aff'd mem.*, 37 F.3d 857 (2d Cir. 1994).
9. *Daugherty v. Vanguard Charter Sch. Acad.*, 116 F. Supp. 2d 897 (W.D. Mich. 2000).
10. For the earlier case law, *see, e.g.*, Zirkel, P. (1992, January). Will they sue? Will they win? The legal audit of curriculum. *International Journal of Educational Reform*, 32-45. For more recent case law, *see, e.g., Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49 (2d Cir. 2001); *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022 (9th Cir. 1998); *Stanley v. Carrier Mills-Stonefort Sch. Dist.*, 459 F. Supp. 2d 766 (S.D. Ill. 2006); *Borger v. Bisciglia*, 888 F. Supp. 97 (E.D. Wis. 1995). For establishment clause challenges, *see, e.g.*, Zirkel, P. (1995, January/February). Religious challenges to curricula. *Principal*, 62-63.
11. For recent examples of such suits on behalf of a student with disabilities, where the negligence/malpractice claim did not survive dismissal but the results differed as to the intentional tort claim, compare *Scaggs v. New York Dep't of Educ.*, 2007 WL 1456221 (E.D.N.Y. 2007), with *J.S. v. E. End Sch. Dist.*, 47 IDELR ¶ 254 (E.D. Ark. 2007).
12. *See, e.g., Amy S. v. Danbury Local Sch. Dist.*, 174 Fed. Appx. 896 (6th Cir. 2006); *Myslow v. New Milford Sch. Dist.*, 2006 WL 473735 (D. Conn. 2006); *Hoffman v. Bd. of Educ.*, 424 N.Y.S.2d 376 (1979). More generally, see Fossey, R., and Zirkel, P. (1994, Winter). Educational malpractice and students with disabilities: Special cases of liability? *Journal of Law & Education*, 25-46.
13. *B.M. v. State*, 649 P.2d 425 (Mont. 1982).
14. *See, e.g., Parini v. Missoula County High Sch. Dist. No. 1*, 944 P.2d 199 (Mont. 1997).
15. *See, e.g., A.W. v. Jersey City Pub. Sch.*,

486 F.3d 791 (3d Cir. 2007). The other alternative, which provides the possibility of money damages in more jurisdictions but still a hurdle higher than mere educational malpractice, is Section 504. *See, e.g., Smith v. Special Sch. Dist. No. 1,* 184 F.3d 764 (8th Cir. 1999); *Alex G. v. Bd. of Trustees,* 387 F.Supp.2d 1119 (E.D. Cal. 2005).

16. *See, e.g.,* Rose, T., & Zirkel, P. (in press). Orton-Gillingham methodology for students with reading disabilities: 25 years of case law. *Journal of Special Education.* For more recent cases, *see Casey K. v. St. Anne Cmty. High Sch. Dist. No 302,* 46 IDELR ¶ 102 (C.D. Ill. 2006); *Matrejek v. Brewster Cent. Sch. Dist.*, 471 F. Supp. 2d 415 (N.D.N.Y. 2007); *Miller v. Bd. of Educ. of Albuquerque Pub. Sch.*, 46 IDELR ¶ 162 (D.N.M. 2006).
17. *See, e.g.*, Choutka, C., Doloughty P., & Zirkel, P. (2004). The 'discrete trials' of ABA for children with autism: The outcome-related factors in the case law." *Journal of Special Education, 38,* 95-103. For limits to the deference doctrine in such cases, *see Deal v. Hamilton County Dep't of Educ.*, 392 F.3d 840 (6th Cir. 2004).
18. *See, e.g., Greenshields v. Indep. Sch. Dist. 1-1016*, 174 Fed. Appx. 426 (10th Cir. 2006); *Lacks v. Ferguson Reorganized Sch. Dist.*, 147 F.3d 718 (8th Cir. 1998); *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998); *Calef v. Budden*, 361 F. Supp. 2d 493 (D.S.C. 2005); *Erskine v. Bd. of Educ.*, 207 F. Supp. 2d 407 (D. Md. 2002); *Murray v. Pittsburgh Bd. of Pub. Educ.*, 919 F. Supp. 838 (W.D. Pa. 1996); *Bernstein v. Norwalk City Sch. Dist. Bd.* of Educ., 726 N.Y.S.2d 474 (App. Div. 2001); *cf. Mayer v. Monroe County Cmty. Sch. Corp.*, 373 F.3d 477 (7th Cir. 2006) (elementary school teacher's expression of anti-war views during current events class). For earlier case law, see Zirkel, P. (1993, March). Academic freedom: professional or legal right? *Educational Leadership*, 42-43.
19. *See, e.g., Cowan v. Strafford R-VI Sch. Dist.,* 140 F.3d 1153 (8th Cir. 1998); *Cole v. Maine Sch. Admin. Dist. 1,* 350 F. Supp. 2d 143 (D. Me. 2004). For a more comprehensive look, *see, e.g.*, Zirkel, P. A. (2005, November). Academic freedom. *Principal Leadership*, 57-61.

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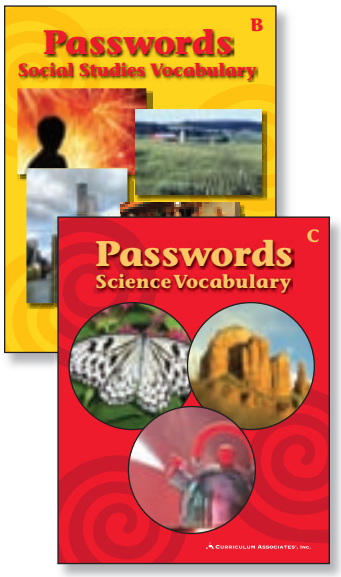

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