New Life for Educational Malpractice: Decades of Policy Revisited

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**THESIS**: Increasing public demand for educational accountability should pave the way for resurgence of judicial recognition for the negligence based tort claim of educational malpractice. The drastic need for change and improvement in a system plagued by its failure to educate the nation’s children demands new solutions – educators and educational institutions that face new liability for their failures will be incentivized to perform.

**Overview of Education Malpractice**

“Long ago, legal scholars held a funeral service for the tort of educational malpractice.”

Almost across the board, claims of education malpractice have been summarily dismissed. These types of claims have faced an insurmountable hurdle of repeated overriding public policy considers which the courts have looked to for over 30 years.

Policy considerations include the inability of the courts to identify a educational professional standard of care, and an underlying belief that courts should not intrude on the “educational expertise” of educational institutions. Additionally, courts have cited that plaintiffs will face an inability to establish proximate cause, have alternative administrative remedies available to them and the allowing these claims risk opening the floodgates to educational malpractice suits. This flood of litigation is said to pose an unacceptable burden on both the

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judiciary and the schools. Fear of the resulting impact of allowing these claims resulted in over 30 years of summary dismissal.³

**Benchmark Cases**

*Peter W.*

The earliest case to confront the issue of educational malpractice involved a claim of illiteracy.⁴ *Peter W. v. San Francisco Unified School District* is the most cited case within educational malpractice claims, despite it being over 30 years old.⁵ “Every court facing an educational malpractice claim invokes the rationale in this case almost superstitiously, as if it were a talisman to ward off a storm of calamities that would inevitably descend upon the U.S. judicial system if a court were to recognize a claim of educational malpractice.”⁶

In this California case, a high school graduate alleged that the educators had failed to exercise that degree of professional skill required of an ordinary prudent educator under the same circumstances.⁷ He presented evidence that he had normal intelligence, had attended school regularly for twelve years, had received average grades, had been awarded a diploma and still

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⁵ Abbott, 2002 B.Y.U. Educ. & L.J. at 294


⁷ Culhane, 67 Washington Law Review at 349
only had 5th grade reading skills.  Moreover, he used his success in a post-graduation reading tutoring program as evidence that the district’s negligence rather than his capacity to learn was to blame for his inability to read. He argued that the school district had a duty to provide him with an adequate education.

In Peter W. the court focuses primarily on the public policy obstacles to recognizing the claim. The result of such varying techniques and teaching methods in the field of education creates the basis for the primary concern – that of a lack of a workable standard of care against which the courts can judge educator conduct. A second factor cited in the court’s rationale is that the plaintiff may not be able to point to an identifiable and redressable injury with any reasonable degree of certainty to warrant recognition in the law of negligence. Additionally, the court was concerned that there may be no causal link between the conduct in question and the alleged injury because of the multitude of factors that influence whether a person is able to learn which are external to the teaching process. Finally, the court emphasized that recognizing these types of claims would increase the burden on public schools and flood the courts with litigation to an unacceptable degree.

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9 Id.


11 Id. at 291 at 294

12 Id.

13 Id. at 295

14 Id.
**Donahue**

In 1978, the court first used the phrase “educational malpractice” in a New York Court of Appeals case, *Donahue v. Copiague*. It is the leading case on why courts do not recognize educational malpractice as a tort. In *Donahue*, an 18-year-old former student and his parents brought a “failure to educate” claim against his public school system claiming that school officials (1) should have provided their son with special help, (2) should not have promoted their son from grade to grade, (3) should have advised them of their son’s reading problem, and (4) should have provided appropriate personnel and facilities to respond to their son’s needs. The court ruled in favor of the school system. Although the court recognized that a plaintiff might be able to establish the elements of negligence, they denied the plaintiff recovery on public policy grounds.15

**Main Obstacle – Duty**

The standard of care requirement has been one of the major barriers to educational malpractice suits.16 Ultimately, a student is responsible for his or her own educational success.17 Courts repeatedly cite that crafting professional educational standards would put the judiciary in the awkward position of defining a reasonable educational program and deciding whether that standard has been reached. Thus, the court cannot impose a duty where a standard of care cannot be determined.

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15 Culhane, 67 Washington Law Review at 349
16 DeMitchell, 2003 BYU Educ. & LJ at 485
The court’s refusal to recognize the claim rests heavily on the following statement:

The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might – and commonly does – have his own emphatic views on the subject […] Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, and environmental; they may be present but not perceived, recognized but not identified.18

Policy Revisited

A lack of applicable, measurable teaching standards has been an obstacle to imposing a duty on educators, however this policy argument may no longer be a viable protection if continued research on teaching and learning continues to inform instructional practices.19 Three decades after Peter W. erected a barrier to educational malpractice lawsuits, standards for students and curriculum now exist, and new standards for teaching are in the works.20 These standards could eliminate the main hurdle to successful educational malpractice claims.

As previously noted, an underlying barrier to recognizing the cause of action has been the court’s opinion that causation cannot be established based on the numerous factors affecting the learning environment.21 However, extracurricular factors that contribute to an educational injury

18 Peter W. v. San Francisco School District, 131 Cal. Rptr. 854 (1976)


20 Id.

21 Jennifer Parker, Beyond Medical Malpractice: Applying the Lost Chance Doctrine to Cure Causation and Damages Concerns with Educational Malpractice Claims, University of Memphis Law Review, (2006)
should not preclude an award for injuries that are proximately caused by the educator. In addressing the courts concern for demonstrating causation, it is important to note that multiple cause torts are not a novel concept in the judicial system. Thus, the fact that multiple factors exist in educational malpractice claims should not derail the cause of action. In actuality, very little is the result of a single “cause in fact”, so there are always ways to meet a “but-for” test.

For instance in medical malpractice cases, there are several situations where the plaintiff may not be able to meet the burden of showing the doctor’s conduct more likely than not proximately caused an injury, for instance where a plaintiff has a preexisting condition. In such cases, the lost chance doctrine assists plaintiffs where a doctor’s negligence injures a patient by reducing the patient’s likelihood of recovering from the preexisting condition. The court could similarly adopt the lost chance doctrine to help educational malpractice plaintiffs. Applying this principle, plaintiffs offer evidence that demonstrates that the educator caused an injury by reducing the chance that the student would recover from a preexisting physical, emotional or environmental barrier to learning.

Finally, courts have continually warned that recognizing these claims would have a catastrophic consequence for educational institutions by excessive exposure to tort claims that

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22 Jennifer Parker, Beyond Medical Malpractice: Applying the Lost Chance Doctrine to Cure Causation and Damages Concerns with Educational Malpractice Claims, University of Memphis Law Review, (2006)
23 Id.
24 Id.
25 Id.
26 Id.
27 Id.
would ultimately arise from the countless affected students. These same courts, however, have not provided any support for the claim, but seem only to rely on subjective fears. This particular policy consideration should highlight a greater question of whether it is wise to deny legitimate claims for fear that too many will follow. Revealingly, Prosser is quoted as saying, “It is the business of the law to remedy wrongs that deserve it, even at the expense of a ‘flood of litigation,’ and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds. A potential flood of litigation should not be a basis for avoiding recognition of the cause of action. In fact, the potential for a high number of claims speaks to a systemic problem that needs to be addressed. Recognition of educational malpractice claims could incentivize a higher level of proficiency and performance among educators and discourage the practices that have resulted in injuries. If there is a potential for a flood of litigation, logic suggests that good public policy recognize these claims rather than dismisses them.

Public Climate

Where it is public policy to provide quality education to our children, why is it that holding educators accountable to the standards of other professionals in their field contravenes

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28 Jennifer Parker, Beyond Medical Malpractice: Applying the Lost Chance Doctrine to Cure Causation and Damages Concerns with Educational Malpractice Claims, University of Memphis Law Review, (2006)

29 Id.

30 Id.

31 Peter W. at 857

32 Jennifer Parker, Beyond Medical Malpractice: Applying the Lost Chance Doctrine to Cure Causation and Damages Concerns with Educational Malpractice Claims, University of Memphis Law Review, (2006)
public policy? Those charged with educating the nation’s children should be held to a high standard of accountability. “Sain proves that public policy considerations do not have to be lethal to educational malpractice suits.” Accountability for educational outcomes has become the new public policy, leading to the possibility that the barriers to a lawsuit for educational malpractice may now be crumbling.

Accountability is a driving force changing the public school system both in operational aspects and in policy-making. The accountability movement stems from many factors that merged in the mid-1980’s and 2000’s, including, among other things - the publication of books, articles and reports proposing needed reform in public education, sustained publication of national data showing the performance of our students, the growing consumer attitude of the public and a shift towards measuring outputs, establishment of statewide academic standards and connecting student academic performance indicators to school accreditation, and implementation of state mandated exit examinations. The result of the increased demand for accountability in the new millennium is a looming public pressure to achieve accountability driven objectives such as; (1.) Ensuring taxpayers dollars are being wisely spent on education, (2.) Demonstrating a


34 Id.


38 Id.
positive return, (3.) Showing that quality control measures are in place to hold school officials, administrators, and teachers directly accountable for student achievement or lack thereof.  

The economic state of the country may increasingly strain students and colleges in situations regarding the adequacy of the educational services provided. In the products liability area, the courts eventually fashioned a new cause of action in direct response to societal demands. Considering the demand for accountability, the poor performance of students, and the belief that monetary compensation will spur improvements in a supposedly failing educational system, the new tort of educational malpractice may eventually be recognized. As long as American society must endure the reality that students are graduating from our schools but unable to read their diplomas, unrest will continue. These failures and demands for change could lead to educational reform through the law, specifically the adoption of an educational malpractice cause of action.

**Room for Future Success**

Recent case law suggests that creative framing of the issue may be the key to pushing the envelope in asserting successful educational malpractice claims. These claims may fall under the classification of medical malpractice if they involve misdiagnosis and where the plaintiff can point to a contract with specified services.

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New standards are being developed in the education arena relating to quality and student learning outcomes are emerging. 78 college and university administrators are developing recommendations for a “Voluntary System of Accountability.” The recommendation is for schools to start compiling data about “student campus engagement” to create a bundle of measures that would be available to the public. These standards could open the door to educational malpractice. If the government establishes, and schools follow, some reasonable standard of care for colleges and universities, courts could overcome their public policy grounds for refusing to decide what constitutes a reasonable standard of care, and enforce the standard without creating their own.

Development of a reasonable standard of care would create court enforceable standards without the typical policy problems. Educational malpractice lawsuits could be validated if universal standards are written and adopted. When other businesses adopt standards, deviation from the industry-wide standards is used as evidence of negligence. This concept can easily be applied in the education realm, and higher education institutions may find themselves being held to the developed standards.

42 Id.
43 Id.
44 Id.
45 Id.
46 Id.
If educational malpractice claims gain more traction, one case in Florida suggests that students may be entitled to monetary damages. A fourth year medical student sued his university when he failed his final required course and was dismissed from his program. The jury ruled that the decision was arbitrary and capricious, and found that it was appropriate to consider the possibility of lost future earnings in addition to tuition reimbursement. However, damages could be limited to compensatory damages where a student would merely receive additional schooling, thus shielding schools from excessive awards.

Professional Malpractice

Professionals in other fields are subject to liability for malpractice based on the quality of the services they provide. Doctors, lawyers and accountants are accountable for failures to perform in accordance with the skills required for their jobs. The standard of care they are subject to is that recognized by their profession. While lawyers and doctors are exposed to malpractice liability, the judicial system does not subject educators to similar liability. The argument is that education is different from other professions – it is collaborative, requiring heightened interaction between the educator and the student. Unlike other professions, without effort on the part of the pupil, he cannot be educated. Extending professional negligence to the educational

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48 Id.
49 DeMitchell, 2003 BYU Educ. & L.J. at 485
50 Id.
system will require a finding that the instructional context is similar enough to other professional contexts for existing standards to be applied without fashioning an entirely new cause of action.\footnote{Parker at 19}

\section*{Pursuing Alternate Theories}

\subsection*{Misclassification}

Misclassification or misdiagnosis involves negligence in the placement or removal from special education programs or an initial misclassification of a student with an educational handicap. Plaintiffs allege that misdiagnosis of the student’s abilities or disabilities led to a tragic misplacement and injury.\footnote{John G. Culhane, \textit{Reinvigorating Educational Malpractice Claims: A Representational Focus}, 67 Washington Law Review 349, 391 (1992)}

The allegations in \textit{Hoffman v. Board of Education} typify these cases.\footnote{Id.} In \textit{Hoffman}, kindergarten student Daniel Hoffman was tested by a certified school clinical psychologist for potential educational handicap.\footnote{Id.} Daniel’s intelligence quotient led to a recommendation for placement in a class for the mentally retarded. Because of Daniel’s speech impediment (which made the IQ assessment questionable), a re-evaluation was recommended within two years.\footnote{Id.} Ten years passed and no re-evaluation took place. When the school did retest, they learned he was not retarded. As a result, Daniel was not re-admitted to the school he had attended for 13

\footnotetext[1]{Parker at 19}{Parker at 19}\footnotetext[2]{John G. Culhane, \textit{Reinvigorating Educational Malpractice Claims: A Representational Focus}, 67 Washington Law Review 349, 391 (1992)}\footnotetext[3]{Id.}{Id.}\footnotetext[4]{Id.}{Id.}\footnotetext[5]{Id.}{Id.}
years because he no longer met eligibility requirements. The plaintiff alleged that the school board was negligent in its initial assessment of Daniel’s intellectual ability and in its placement of Daniel in a special education classroom, as well as in its failure to re-test Daniel as per the recommendation of the school psychologist. Daniel claimed injury as a result of severe emotional detriment and lower intellectual attainment as well as reduced future employment opportunities. Although the trial court awarded damages of $750,000 and the appellate court affirmed the verdict as to liability (reducing the damage award to $500,000), the New York Court of Appeals reversed the lower court decisions relying on Donohue.

A case with facts strikingly similar to those in Hoffman, involving misdiagnosis was successful when the court was able to construe the claim as one of medical malpractice relating to diagnosis and testing of disabilities rather than of educational quality. This case (Snow v. State) is reviewed below.

**Representations**

Where courts find that educational institutions make express representations that were not delivered upon, the educational institution may be found liable. The Supreme Court of Iowa demonstrated this and extended the tort of negligent misrepresentation from commercial transactions to include counselor-student transactions.

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56 Id.
57 Id.
58 Id.
59 Id.
To demonstrate a cause of action for negligent misrepresentation the plaintiff needs to show negligent disclosure, knowledge on the part of the defendant that the plaintiff came to the defendant for information, plaintiff’s resulting reliance on the information, and injury stemming from that reliance. See Sain v. Cedar Rapids Community School for successful application of these factors.

**Contract**

Despite court hostility towards educational malpractice claims, they generally will consider them where specific agreements provide for particular educational services.\(^60\) Where courts can identify a specific undertaking to deliver educational services, recovery under a contract theory holds promise – especially for private schools.\(^61\)

Courts have held that documents used in education such as school catalogs, course catalogs, manuals, bulletins, handbooks, institutional regulations, registration materials, degree requirements and syllabi can amount to contracts under the law.\(^62\) It follows then that courts have been more willing to find that students are entitled to the promises embodied within the school documents as contractual claims.\(^63\) In Miller v. Loyola University of New Orleans the court noted that an identifiable contractual promise such as instructional hours, or taking tuition money and then offering no instruction may support a breach of contract claim.\(^64\)

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\(^{61}\) Culhane, 67 Washington Law Review at 349


\(^{63}\) Id.

\(^{64}\) *Miller v. Loyola University of New Orleans*, 829 So. 2d 1057, (La. App. 2002)
Contract claims disguising educational malpractice claims are largely confined to trade schools, but this may not be the case for long.\textsuperscript{65} In Village Community School \textit{v. Adler} the court allowed one mother’s counterclaims against a private school to survive a motion to dismiss where she alleged the school breached its contract to provide services for children with learning disabilities.\textsuperscript{66} “When [the school] promised to detect learning disabilities, [it] effectively…made [detection] a requirement for full contract performance.”\textsuperscript{67} Also, the court permitted the claim for fraudulent misrepresentation.\textsuperscript{68}

In \textit{Ross \textit{v. Creighton University}} the Seventh Circuit established requirements for showing an educational malpractice breach of contract claim, and the court conceded that the relationship between the student and the university was contractual in nature.\textsuperscript{69} However, to show educational malpractice, there must be a breach of a particular promise to the student: “To state a claim for breach of contract, the plaintiff must do more than simply allege that the education was not good enough. Instead, he must point to an identifiable contractual promise that the defendant failed to honor.”\textsuperscript{70}

In one recent case, the United States District Court for the District of Connecticut denied the University’s motion to dismiss the plaintiff’s action. The plaintiff was a medical student who


\textsuperscript{66} Culhane, 67 Washington Law Review at 349

\textsuperscript{67} Id.

\textsuperscript{68} Id.


\textsuperscript{70} Id.
sued the University for breach of contract and negligent misrepresentations.\textsuperscript{71} The court cited that two situations warranted a court to entertain a cause of action for breach of contract for educational services. First, the plaintiff must show that the educational program failed in some fundamental aspect, and second, the institution must have failed to fulfill a specific contractual promise. Here, the court held the plaintiff’s claims fell within the second category. Specifically, the student failed his licensing exam twice, and was dismissed from the University. The handbook required that he be permitted to take the exam 3 times.

\textit{Constitutional claims}

Montana includes education among the professions liable for malpractice.\textsuperscript{72} In Montana a constitutional provision gives rise to a private right of action for negligence.\textsuperscript{73} In \textit{B.M. v. State} the Supreme Court of Montana held that school employees have a statutory duty of reasonable care when testing and placing special education students. The plaintiff’s mother was not informed that her child had been segregated and placed in a program for the educable mentally retarded.\textsuperscript{74} She brought suit for negligence in misclassifying her daughter and in segregating her. The existence of duty was grounded on Montana constitutional provisions, as implemented by various statutes requiring (1) education of all citizens; (2) a mandatory attendance statute to

\textsuperscript{71} \textit{Morris v. Yale University School of Medicine}, 477 F. Supp. 2d 450 (2007)

\textsuperscript{72} Jennifer Parker, \textit{Beyond Medical Malpractice: Applying the Lost Chance Doctrine to Cure Causation and Damages Concerns with Educational Malpractice Claims}, University of Memphis Law Review, (2006)

\textsuperscript{73} Culhane, 67 Washington Law Review at 349

\textsuperscript{74} Id.
implement this guarantee; and, (3) numerous administrative statutes outlining special education administrative program procedures.\textsuperscript{75}

\textit{Special Relationships- Protected Classes}

\textbf{Special Education}

Even in \textit{Peter W}., the plaintiff attempted to persuade the court that there was a special relationship between students and teachers that give rise to a duty of care.\textsuperscript{76} In \textit{Snow v. State}, the plaintiff was a deaf boy who was given an IQ test that did not account for his deafness.\textsuperscript{77} Based on the results, he was placed in institutions for the retarded for nine years.\textsuperscript{78} The record demonstrated that his teachers believed him to be “very bright.” The courts found that his prolonged placement in inappropriate educational programs was caused by negligence in his initial evaluation and delay in re-evaluating him.\textsuperscript{79} The court distinguished this case from \textit{Hoffman} however, because there was considerable evidence of the initial misdiagnosis.\textsuperscript{80} Moreover, the failure to re-test “constituted a discernible act of medical malpractice” rather than

\textsuperscript{75} Culhane, 67 Washington Law Review at 349

\textsuperscript{76} Id.

\textsuperscript{77} Id. at 392

\textsuperscript{78} Id.

\textsuperscript{79} Id.

\textsuperscript{80} Id. at 393
educational.\textsuperscript{81} Apparently framing the claim as one involving medical malpractice avoided the policy barriers posed by earlier cases.\textsuperscript{82}

**Student-Athletes**

Since it is now accepted that to use the term educational malpractice in a cause of action is to doom it to dismissal, it came as a surprise when an Iowa Supreme Court ruling in 2001 seemingly revived the tort by denying the defendant Cedar Rapids Community School District’s motion for summary judgment.\textsuperscript{83}

*\textit{Sain}* involved a high school student who was a gifted basketball player who was planning on getting a scholarship to finance his college education.\textsuperscript{84} To be eligible to play basketball in college he had to satisfy course requirements for the NCAA.\textsuperscript{85} In his senior year, he still needed three approved English courses.\textsuperscript{86} He met with his high school guidance counselor to find him a substitute class for one of the courses he disliked.\textsuperscript{87} The counselor suggested a new course and assured him that the NCAA would approve the course.\textsuperscript{88} The school failed to include the course in their list of classes to the NCAA.\textsuperscript{89} The student accepted a basketball scholarship to Northern

\textsuperscript{81} Culhane, 67 Washington Law Review at 393
\textsuperscript{82} Id.
\textsuperscript{83} Abbott, 2002 B.Y.U.Educ. & L.J. at 291
\textsuperscript{84} *Sain v. Cedar Rapid Community School District*, 626 N.W.2d 115 (2001)
\textsuperscript{85} Id. at 118
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Id. at 119
Illinois, but learned soon after graduation that the course the guidance counselor had recommended was not approved. He lost his scholarship and was unable to attend college. He sued for negligently failing to submit the course to the NCAA and for negligent misrepresentation by the counselor in providing false information about courses that would satisfy the requirements. The Iowa Supreme Court reversed the District Court’s dismissal of the negligent misrepresentation claim, stating:

Tort of negligent misrepresentation is broad enough to include a duty for a high school counselor to use reasonable care in providing specific information to a student when the guidance counselor has knowledge of the specific need for the information and provides the information to the student in the course of a counselor-student relationship, and a student reasonably relies upon the information under circumstances in which the counselor knows the student is relying upon the information.

The court made clear that the public policy considerations which proved lethal to educational malpractice claims did not apply to this case. The court deemed that a standard of care could be articulated, because the situation was comparable to misrepresentation by professionals. It is clear that the court intended to limit those to whom the school had a duty, and it may be that it was merely creating a cause of action exclusively for student-athletes.

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90 Sain v. Cedar Rapid Community School District, 626 N.W.2d 115, 118 (2001)
91 Id.
92 Id. at 120
93 Id. at 129
95 Id. at 298
96 Id.
Sain illustrates that misrepresentation is one theory that shows promise and which could potentially be expanded beyond the context of guidance counselors to a broader category of educators. Many legal scholars note that the unique needs of student-athletes provide the basis for expanding the schools’ duty to protect their interests.97 The essential basis for the existence of a special relationship is the mutual dependence between a school and its athletes. Athletes generate revenue and notoriety from which the school benefits, while the student expects to receive an education from the school. The athlete is subject to the will of the coach and staff and even may change a course of study that is too rigorous to fit with the demands of an athletic schedule.98 The resulting dependence requires that the school protect the academic interests of their athletes.99 Schools should be discouraged from exploiting their student-athletes, and judicial intervention may be necessary to correct any resulting abuse of power on the part of the school.100

Private Institutions

The greatest number of successful educational malpractice claims has arisen in the private school context because there is less judicial fear of trampling state prerogative.101

Commentators are noting a seeming rise in the courts willingness to view colleges as standing in loco parentis to the student and as such they may be more willing to find that these

98 Id. at 301
99 Id.
100 Id. at 303
101 Culhane, 67 Washington Law Review at 349
institutions owe a duty to the student. Where the court sees that there is a heightened student/university relationship they may impose a duty.

The number and complexity of state and federal regulations of U.S. institutions of higher education is on the rise.\textsuperscript{102} There is an increasing public demand for greater accountability from colleges for the fulfillment of their core missions, demonstrable value, results and efficiency.\textsuperscript{103} The economy has altered the relationship between students, families, the government and higher education.\textsuperscript{104}

Consumerism, soaring tuition costs, growing student loan debt and the high expectations of helicopter parents are all converging to put higher education under increased scrutiny.\textsuperscript{105} Novel consumer litigation lies in the area of educational malpractice.\textsuperscript{106} Students are likely to feel like they are not getting their money’s worth. Consumer protection is increasingly important, and colleges are designing policies that are consumer focused and appropriate to preserve their primary mission.\textsuperscript{107} Still, the more higher education institutions act like corporations the more courts may be willing to see their policies and practices as contracts with their customers or


\textsuperscript{104} Id.

\textsuperscript{105} Id.

\textsuperscript{106} Robert Hendrickson, \textit{The College, the Constitution, and the Consumer Student, Association for Study of Higher Education}, (1987)

\textsuperscript{107} Id.
clients - i.e. the students.\textsuperscript{108} If educational institutions act like corporations then judicial deference to professional educators’ judgment may be diminished.

Even absent applicable standards there is a trend for courts to apply a contractual analysis to determine whether colleges are delivering the goods they promise to students.\textsuperscript{109} Proprietary institutions are particularly vulnerable to these lawsuits because they promise that their students will acquire specific skills and they are profit seeking institutions.\textsuperscript{110}

In fact, a Minnesota Appeals Court in \textit{Alsides v. Brown Institute} held a trade school liable for failing to provide specifically promised educational services, which included an array of issues impacting the general quality of education such as instructors’ attendance, lack of hands on training, and a shortage of hours of instructions; 40 students could have been entitled to money damages on their contract based claims.\textsuperscript{111} Notably, the issues that survived on appeal seemed to relate to the general quality of education.\textsuperscript{112} Therefore, this case could have implications extending to traditional academic institutions.\textsuperscript{113}

Principles of academic freedom prevent the outsourcing of educational decisions to judges and juries, but the reality of educating students in this highly commercial environment


\textsuperscript{110} Id.

\textsuperscript{111} Id.

\textsuperscript{112} Donna Euben, \textit{Educational Malpractice: Faculty Beware?}; Academe (2003)

ensures that cases will continue to show up in court. The more education is sold as a product, and the more students are treated as clients and schools as businesses, the less deference courts will give to the professional judgment of educators and institutional autonomy.

Conclusions

Commentators suggest that it would be premature to dismiss educational malpractice claims as dead. Law is amorphous and repeated rejection of a nascent cause of action may actually be a precursor to acceptance. When the U.S. District Court dismissed an action for negligent educational malpractice in Bishop v. Indiana Tech the court did not deny the cause of action but merely stated that there was no federal cause of action. Therefore, state courts can hear educational malpractice claims as a matter of state law. Based on the above, it is unlikely that state courts will soon see an end to educational malpractice cases. Public sway and demand for change and accountability may finally move the courts to abandon 30 years of stubborn dismissal of these suits.


118 Id.