

## Liability of college faculty and administrators

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### ABSTRACT

According to a Wall Street Journal/NBC News poll, 59 percent of all adults consider education essential to getting ahead in life. At the same time, an increasing number of adults have begun to blame educators for their failure in life, claiming educational malpractice. Historically, education has been more of an issue at the state and local levels.

Courts do not recognize educational malpractice as a tort because of public policy concerns, saying that claims of “educational malfeasance” are not capable of assessment within the judicial forum. Over 20 years have passed since the California Appellate Court dismissed a case brought for negligent breach of duty to educate in Peter W. v. San Francisco Unified School Dist. (1976). This paper will survey lawsuits involving teachers and administrators brought since Peter. It will also explore some new areas of liability for professors and administrators: conducting study abroad programs and helping graduates gain employment.

Keywords: education, employment agency, liability, malpractice, study abroad, teach

## INTRODUCTION

According to a Wall Street Journal/NBC News poll, 59 percent of all adults consider education essential to getting ahead in life (Hunt, 1997). At the same time, an increasing number of adults have begun to blame educators for their failures in life, claiming educational malpractice. Historically, education has been more of an issue at the state and local levels.

Courts do not recognize educational malpractice as a tort because of public policy concerns, saying that claims of “educational malfeasance” are not capable of assessment within the judicial forum. Over 30 years have passed since the California Appellate Court dismissed a case brought for negligent breach of duty to educate in Peter W. v. San Francisco Unified School Dist. (1976). This paper will survey lawsuits involving teachers and administrators brought since Peter. The cases will be reviewed in the following categories (Standler, 2013):

- (1) “Failure to teach,” involving plaintiffs’ allegations of being graduated from high school despite being functionally illiterate and unable to make a living.
- (2) Misclassification, involving children of normal intelligence being misclassified as retarded.
- (3) Denial of an effective and appropriate education, involving pupils with normal intelligence but a learning disability such as dyslexia.
- (4) Athletic scholarships, involving student athletes who attended college on athletic scholarships but acquired no intellectual skills.
- (5) Health professionals charged with medical malpractice, who in their defense allege having received inadequate instruction. Also, cases involving third-party beneficiary claims under this.
- (6) Private or vocational schools, involving graduates who are unable to find employment in their specialties.

### “FAILURE TO TEACH”

Peter W. v. San Francisco Sch. Dist. (1976), the first reported case involving educational malpractice, involved a plaintiff who graduated from public high school but had a reading ability allegedly at the fifth grade level. There was a California statute in effect that required pupils to read at the eighth grade or above level in order to graduate from high school. Thus, the plaintiff asserted the school’s negligence. The court found that claims of educational malfeasance are not capable of assessment within the judicial forum, based upon the following policy considerations: (1) no standard of care existed for educators, (2) the judiciary should not interfere with the daily administration of the schools, (3) no sufficient nexus existed between the injury and the educator, (4) sufficient administrative remedies existed for the correction of school grievances, and (5) recognition of educational malpractice would expose educators to truly burdensome litigation (Peter, 1976, discussed by Aquila, 1991). Aquila suggests that educational malpractice is not a viable cause of action and reviews the policy considerations that courts have used to deny these claims. He concludes that education is not a profession in the malpractice sense and supports this by noting that the profession is controlled by a lay board and not a professional one, such as law and medicine. Further, he finds that the greatest problem in recognition of educational malpractice as a tort is that teachers themselves cannot agree on a standard of care in a given situation.

Donohue v. Copiaque Union Sch. Dist. (N.Y. 1979), the first reported American case to use the term “educational malpractice,” involved a fact pattern similar to the Peter case. The plaintiff, Donohue graduated from high school despite allegedly being unable to read and write well enough to complete a job application. The Donohue court found that the plaintiff had adequate notice of his ignorance by his failing grades in English and that the plaintiff had not shown that a breach of the alleged common law and statutory duties was the proximate cause of his failure to learn. Additionally, it found that a failure to learn does not mean a failure to teach. There were no allegations that plaintiff’s classmates failed to learn. The court expressed concern over interfering with the administration of the public school system. Justice Suozzi, in his dissenting opinion to Donohue, argues that the plaintiff should have been examined under the New York State regulations which required examination for students who were continuously underachieving or failing.

Brown and Cannon (1993) find the difficulty of the judiciary in assessing a standard of care in education cases no different than in other professions. For example, courts do not hold medical professionals liable for a difference in professional judgment, only for failure to diagnose and treat specific conditions. Brown and Cannon argue that educators at the very minimum should be held liable for not assessing the needs of students who are not progressing, regardless of the reason.

In Sheesley v. Cessna Aircraft Co., et. al, 2006 WL 1084103 (D.S.D., April 20, 2006) the plaintiffs asserted that Flight Safety International failed to train the pilots who crashed a plane in the proper procedure for handling icing conditions. In refusing to allow a claim for educational malpractice, the Sheesley court quoted Page v. Klein Tools, Inc., 610 N.W. 2d 900, 903 (Mich 2000):

- (1) the lack of a satisfactory standard of care by which to evaluate an educator;
- (2) the inherent uncertainties about causation and the nature of damages in light of such intervening factors as a student’s attitude, motivation, temperament, past experience, and home environment;
- (3) the potential for a flood of litigation against schools;
- and (4) the possibility that such claims will “embroil the courts into overseeing the day-to-day operations of schools.” Id. at 903 (quoting Alsides, 592 N.W.2d at 472).

## MISCLASSIFICATION

A prevalent issue in court cases involving educational malpractice is the misclassification of children of normal intelligence as retarded. In Hoffman v. Board of Education (N.Y. 1979), the plaintiff, a normal child with an IQ between 90 and 100 and a speech defect, was misclassified. Although the psychologist recommended that the plaintiff’s IQ be re-evaluated within two years, this was not done. As a result of this, he spent eleven years in classes with retarded children (IQs less than 75). In 1978 the plaintiff’s mother requested a re-test when her son was transferred to Queens Occupational Training Center, a manual and shop training center for retarded youths. The re-test showed that the plaintiff had an IQ of 94. He filed suit against the Board of Education of the City of New York for negligence in its original assessment and the board’s failure to re-test him pursuant to the psychologist’s earlier recommendation. The plaintiff was awarded \$750,000 in damages at the trial level. This was reversed on appeal, with the appellate court noting that public policy precluded recovery and that the court ought not to

interfere with the professional judgment of those charged with the administration of public schools.

The facts in B.M. v. State (Mont. 1982) were very similar to Hoffman. In this case the plaintiff relied on a mandatory attendance clause in the Montana Constitution and the administrative statutes describing procedures for school districts to administer special education programs, and was successful.

The plaintiff in Doe v. Board of Education of Montgomery (Md. App. 1982) suffered from dyslexia and was placed in a class for retarded students for seven years, despite a private physician notifying the school board in 1968 that the student suffered from dyslexia and was not brain-injured. The Maryland District Court of Appeals and the trial court disallowed any recovery, finding that there was no cause of educational malpractice in Maryland. However, the dissent argued that the negligence in this case was more medical than educational and asserted that public policy considerations did not apply. O'Hara (1984) notes this also and finds that arguments against educational placement cases are not as strong as arguments against educational malpractice cases.

## **DENIAL OF AN EFFECTIVE AND APPROPRIATE EDUCATION**

In D.S.W. v. Fairbanks North Star Borough School Dist. (Alaska, 1981) several plaintiffs brought suit claiming that the school system had failed to properly evaluate their children and place them in appropriate educational programs. A state statute required school authorities to place children in educational programs according to their mental ability. Plaintiffs were suffering from dyslexia. They were provided with some special education courses to overcome this, but these were discontinued despite defendants' awareness that the plaintiffs had not overcome the dyslexia. Plaintiffs claimed a loss of education, loss of employment opportunities and earning abilities, loss of an opportunity to attend college, and mental anguish. The court cited Peter W. v. San Francisco Sch. Dist. (1976) and Smith v. Alameda County School Services Agency (1979) and found that it was impossible to determine causation. Further, it found that the statute provided for alternative administrative remedies with no money damages.

McJesty (1995) argues that these types of statutes are helpful, as they constitute implied terms in teaching contracts, although there are problems with calculating damages. However, the U.S. Supreme Court in Franklin v. Gwinnett County Public Schools (1992) recognized monetary damages as a permissible remedy under Title IX of the Education Amendment of 1972 for students who have been intentionally denied their rights under the statutes. Brown and Cannon interpret this as having implications for other federal statutes such as Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitative Act of 1973, and the Individuals with Disabilities Education Act (IDEA).

## **ATHLETIC SCHOLARSHIPS**

Another recurring type of educational malpractice case involves student athletes who have attended college on athletic scholarships but acquired few intellectual skills. The plaintiff in Ross v. Creighton University (6th Cir. 1992) scored in the "bottom fifth percentile" of college-bound seniors taking the American College Test. The average Creighton University freshman scored in the upper twenty-seventh percent. Mr. Ross alleged that he was induced to attend Creighton and play basketball. He was assured that he would receive sufficient tutoring to

receive a meaningful education at Creighton. Mr. Ross attended Creighton from 1978 until 1982 and maintained a D average, acquiring 96 out of 128 credits that he needed to graduate. Although Mr. Ross took courses on the advice of Creighton's Athletic Department, many of these did not count toward a university degree. The Athletic Department employed a secretary to read Mr. Ross's assignments and prepare and type his papers. Upon leaving Creighton, Mr. Ross had the language skills of a fourth grader and the reading skills of a seventh grader. Creighton paid for a year of remedial education at Westside Preparatory School in Chicago for Mr. Ross. He later enrolled in Roosevelt University in Chicago, but was forced to withdraw because of lack of funds. He suffered a depressive episode and filed suit against Creighton for negligence and breach of contract. The district court rejected Ross's tort claims on the basis of educational malpractice stating that it is not a proper function of courts to intervene in matters of academic assessment. The Seventh Circuit did recognize the right of student athletes to sue for breach of contractual promises. It reversed and remanded Ross's contractual claims to the trial court, stating that they did not involve any second-guessing of professional judgment.

### **HEALTH PROFESSIONALS CHARGED WITH MALPRACTICE, WHO ALLEGE INADEQUATE INSTRUCTION**

A number of educational malpractice cases involve health care professionals charged with malpractice suing their instructors or institutions for inadequate instruction. In Swidryk v. St. Michael's Medical Center (N. J. Super. 1985), the plaintiff, a first-year resident in obstetrics and gynecology, was being sued for his alleged participation in the delivery of a child later found to have severe brain damage. Dr. Swidryk brought suit against Dr. Smith, Director of Medical Education at St. Michael's claiming inadequate supervision of the intern and resident program. The court granted Dr. Smith's motion for summary judgment, finding that the complaint failed to state a cognizable tort or breach of contract. The court cited Peter and Donohue, finding that educational malpractice is not a recognizable tort. Further, it found that the public policy considerations that barred the tort claim also barred the contract claim.

Third parties harmed by a defendant's negligence also sue the institution that educated the defendant. In Salter v. Natchitoches (La. App. 1973), the plaintiff—who was injured by a chiropractor—sued, among others, Palmer College in Iowa. The court dismissed the suit against Palmer for lack of personal jurisdiction, saying that it would be against notions of justice and fair play to allow an institution of higher education to be sued in any state where its students have caused injury.

### **PRIVATE OR VOCATIONAL SCHOOL GRADUATES UNABLE TO FIND EMPLOYMENT IN THEIR SPECIALTIES**

Another issue in educational malpractice cases involves suits by graduates against private or vocational schools when they are unable to find employment in their specialties. The Alabama Supreme Court in Geraldine Blane v. Alabama Commercial College (Ala. 1991) considered the case of a plaintiff who after completing a 26-week secretarial course and meeting the requirement of typing 35 words per minute for certification was unable to find a job in her new vocation. Ms. Blane sued the college alleging breach of contract, fraud, and educational malpractice. The trial court entered a summary judgment in favor of the college saying that there was no genuine issue of material fact and that the moving party was entitled to summary

judgment as a matter of law. The Alabama Supreme Court found no fraudulent representation had been made by the college. It represented only that it would provide Ms. Blane with the minimum skill to compete in the job market and that it considered this minimum skill for clerical positions to be the ability to type 35 words per minute. There was no evidence that anyone from the college guaranteed Blane a job or gave her assurance that she would find one upon completion of the course. The court refused to recognize any claim of “educational malpractice,” finding no case establishing such a cause of action.

However, in some cases students have alleged fraud or breach of contract, rather than educational malpractice, and have won. In Joyer v. Albert Merrill School (NY City Civ. Ct. 1978), the plaintiff was successful in his breach-of-contract and fraud claims against a college. They had promised him a \$10,000-a-year job on completion of a particular program.

## STUDY ABROAD

Schools and administrators have always faced liability when students are injured on school premises. Now that colleges and universities are touting overseas study, there are even more possibilities for liability. In addition participation in activities carefully planned by faculty, students certainly expect to do some site seeing while abroad. Institutions often arrange these activities with local providers. How much liability can be attributed to the institution from the negligence of these third party providers? A recent case will help illustrate this.

Following the “Semester at Sea tragedy,” the University of Pittsburg became a defendant in a 1996 wrongful death suit brought by the families of several students. The Institute for Shipboard Education has arranged study abroad trips for many years which involve a semester at sea. In 1996, it arranged a semester at sea for students with India as one of the destinations. Transportation was arranged with a local provider to see some of the country, including the Taj Mahal. While traveling by motor coach, four students, an adult chaperone, and an employee of the bus company were killed in an accident on the Grand Trunk Road (considered one of the most dangerous roads in the world, according to plaintiffs in the ensuing lawsuits). Many other students were also injured when the vehicle went off the road and over an embankment.

The lawsuits lasted over fifteen years, finally culminating in a three-week trial. The Institute for Shipboard Education (and its Director of Field Programs), the Semester at Sea program, and the University of Pittsburg (academic sponsor) were all named as defendants. According to attorney Steven Zoffer (2011) of Dickie, McCamey & Chilcote, defense counsel for the Institute of Shipboard Education and the University of Pittsburg, some important lessons for risk and liability can be learned from these lawsuits:

- (1) Rely on third party providers who have the expertise and familiarity with customs and the geographic area to provide applicable standards of care in conducting the program.
- (2) Use due diligence in the hiring and monitoring of contractors, as educational institutions may also have responsibility for the actions of subcontractors.
- (3) Incorporate contractual disclaimers, indemnity agreements, and exculpatory clauses to negate liability, although contractual provisions may be enforced differently in different jurisdictions.
- (4) Audit providers and insurance coverage involved in study abroad programs.

## EMPLOYMENT AGENCY

While faculty members have always provided references for students, they are now encouraged at many institutions to take a more active part in helping students obtain employment. Many states now fund educational institutions through formulas that encourage retention and graduation. The “carrot” of a job upon obtaining a degree is a natural incentive for the retention and graduation of students.

Although educational institutions have career placement centers, in many professions—e.g., accounting, finance, law—faculty sometimes actively participate in helping place students. Faculty encourage students to join professional clubs to help them meet employers through planned activities—e.g., golf matches, speaking engagements. When recruiting, employers are encouraged to make the acquaintance of faculty members since they are familiar with the students’ work and qualifications (Teal, 1992; see also Elder & Sneed, 2011). Faculty members are, thus, caught in the middle, giving references at the request of students and providing references at the request of employers. What many faculty members do not recognize is that they may be considered employment agencies under Title VII of 42 U.S.C. § 2000e-2 (1991), which states that

It shall be unlawful for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privilege of employment, because of such individual’s race, color, religion, sex, or national origin . . .

Federal, state and local governments and private employers with fifteen or more employees are covered under the Act. Employer is defined under the act to include employment agencies (42 U.S.C.A. 2000e). Employment agencies are defined as “. . .any person regularly undertaking with or without compensation to procure for employees an employer or to procure for employees opportunities to work for an employer and include an agent of such person.” Thus, professors, administrators and universities could be liable for discrimination as employment agencies under Title VII (Elder & Sneed, 2011). Under this law, an employer (including an employment agency) can be liable for either intentional (disparate treatment) or unintentional (disparate impact) discrimination.

Disparate treatment occurs when an employer policy is discriminatory and employees are treated differently (negatively) under Title VII. A claimant would have to show only that the treatment occurred without a reason other than discrimination under Title VII. An example of this would be refusing to refer an African-American student as a candidate for an auditor position.

Disparate impact occurs when an employer’s policy has an adverse effect on a group under protected Title VII. An employer would be liable for discrimination if it were unable to show a legitimate business necessity for the policy. A policy requiring auditors to be a certain minimum height would unnecessarily eliminate most women and some minority groups from consideration and is discrimination by disparate impact.

Faculty members would be well advised to ensure that all jobs are advertised through the university career placement office. If faculty members become aware of jobs and refer only students in the academic organization that they sponsor, or refer only students who they deem qualified for the job, they may effectively be eliminating certain minority groups from the available applicant pool.

## RECOMMENDATIONS

The primary sources for an educational malpractice study are some 80 cases in different jurisdictions, including state and federal cases involving fraud, misrepresentation, breach of contract, consumer fraud, deceptive trade practices, as well as the traditional negligence theory. Factors considered by courts—especially those which have led to successful recovery—should be recognized by administrators and faculty members, in order to develop policies and procedures to avoid future claims. Some of the successful cases in this area have involved failure to assess a student at a correct educational level and place them correctly in the educational process. The recent emphasis on “outcomes assessment” or “assurance of learning”—as much by public schools as by collegiate accreditation bodies, such as the Association to Advance Collegiate Schools of Business (AACSB)—may provide more ammunition for such cases.

While study abroad experiences are increasingly sought by students and educational institutions seeking to accommodate them, risk and liability should be carefully considered when making arrangements. While one cannot contract away one’s tort liability, careful planning with insurance, indemnity and/or exculpatory clauses can help reduce the risk. Individual faculty members should also consider the potential personal liability arising from their participation in study abroad programs.

Faculty have always provided references for students seeking employment, but some new state funding formulas may place faculty in a more active position in the employment process. Faculty, especially those sponsoring student professional organizations, should be careful to allow job placement to flow through the university career placement office. To do otherwise may subject them to classification as an “employment agency” under Title VII and liability under its provisions.

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