

# Educational Malpractice Law in the USA

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## Keywords

college, education, educational, failure, incompetent, law, learn, learning, legal, malpractice, negligence, school, schools, teach, teaching, university

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## Introduction

This essay is mainly concerned with education in public schools in the USA from the first grade through the end of high school (i.e., grade 12), although a few cases involve undergraduate education in colleges or professional education in a university. Although this essay cites some cases involving pupils with learning disabilities or retardation (so-called “special education”), the emphasis in this essay is on nonhandicapped pupils and students who were allegedly harmed by a school or college.

The first reported cases of educational malpractice were in Louisiana in 1973 and in California in 1976. This area of law began to blossom in the year 1980. From 1 Jan 1995 to 31 Dec 2012, there was an average of 14 judicial opinions per year in the Westlaw databases for opinions from all state and federal courts that mention the phrase “educational malpractice”.<sup>1</sup> This topic is important as a possible way to make the educational bureaucracy in public schools accountable to the pupils that the schools allegedly serve. However, as explained in this essay, judges have rejected nearly all educational malpractice claims against regular schools and colleges. Beginning in the year 2006, there is a line of cases by aviation law attorneys in which an airplane crash *after* the pilot completed flight school is blamed on educational malpractice by the flight school and a few trial judges have accepted the possibility of educational malpractice by flight schools.<sup>2</sup>

I posted the first edition of this essay at my website in January 2000, and the second edition in February 2013. This essay is *mostly* a description of what the current law is, and my criticism of that current law. Beginning at page 58 below, I sketch my opinion of what 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.

During the 13 years that the first edition of this essay was posted at my website, people often sent me e-mail asking me to file an educational malpractice claim in some state where I am not licensed to practice law. They did *not* understand what I clearly said in my essay that the plaintiff nearly always loses, because the tort of educational malpractice is *not* recognized by courts in the USA. They also did not understand that lawyers in the USA are licensed to practice in specific states, and most lawyers are licensed to practice law in only one state. I would be pleased to work with any licensed attorney who wishes to hire me to do legal research on this topic.

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<sup>1</sup> Some of these cases make an incidental mention of “educational malpractice”, which is *not* an issue in that case. Therefore the average number of educational malpractice cases is *less* than 14/year. On the other hand, these Westlaw databases contain few opinions from trial courts.

<sup>2</sup> See cases cited at page 9, below.

### 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. Education law makes a distinction between *pupils*, who are children, and *students*, who are adults, as explained in my essay at <http://www.rbs2.com/eatty.pdf> . I use the word *instructor* to include both teachers in schools and professors in colleges, regardless of rank. The word *institution* refers to any school, college, or university.

### disclaimer

This essay presents general information about an interesting topic in law, but is *not* legal advice for your specific problem. See my disclaimer at <http://www.rbs2.com/disclaim.htm> . Instead of doing amateur legal analysis, potential plaintiffs are encouraged to seek advice of an attorney who is both (1) licensed to practice law in the state where the school or college is located and (2) knowledgeable about education law. Readers are cautioned that the law changes with time, and a correct statement of past law may not be valid in the future.

This essay does *not* contain a list of citations to *all* educational malpractice cases in the USA. In this essay, I am mostly interested in the early cases that shaped the subsequent history of rejecting the tort of educational malpractice.

I list the cases in chronological order in the citations in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, I would use the conventional citation order given in the *Bluebook*.

## Taxonomy of Cases

In 2006, Judge Schreier in South Dakota observed there are generally three broad categories of educational-malpractice claims:

(1) the student alleges that the defendant-school negligently failed to provide him with adequate skills; (2) the student alleges that the defendant-school negligently diagnosed or failed to diagnose the student's learning or mental disabilities; or (3) the student alleges that the defendant-school negligently supervised his training. See *Moore v. Vanderloo*, 386 N.W.2d 108, 114 (Iowa 1986); see also Johnny C. Parker, Educational Malpractice: A Tort Is Born, 39 Clev. St. L.Rev. 301, 303 (1991).

*Sheesley v. The Cessna Aircraft Co.*, 2006 WL 1084103 at \*15 (D.S.D. 2006).

quoted by:

*Dallas Airmotive, Inc. v. FlightSafety Int'l, Inc.*, 277 S.W.3d 696, 699 (Mo.App. 2008);

*Glorvigen v. Cirrus Design Corp.*, 796 N.W.2d 541, 553 (Minn.App. 2011);

*Waugh v. Morgan Stanley and Co., Inc.*, 2012 IL App (1st) 102653 at ¶29, 966 N.E.2d 540, 549 (Ill.App. 2012).

Because there are so many reported cases on educational malpractice, in December 1999 I categorized the leading cases into nine subsets, according to the allegations and issues in each case.

**1. Child with normal intelligence who was misclassified as retarded (i.e., denied the opportunity to receive an education).**

- *Hoffman v. Board of Education*, 410 N.Y.S. 99 (1978), *rev'd*, 400 N.E.2d 317 (N.Y. 1979) (normal child [i.e., IQ between 90 and 94] with speech defect misclassified and spent 11 years in classes with retarded children [i.e., IQ less than 75]);
- *Tubell v. Dade County Public Schools*, 419 So.2d 388 (Fla.App. 1982);
- *Doe v. Board of Education of Montgomery County*, 453 A.2d 814 (Md.App. 1982) (pupil with dyslexia put in class for retarded children for seven years);
- *Torres v. Little Flower Children's Services*, 474 N.E.2d 223 (N.Y. 1984) (Spanish-speaking ward of the state with reading disability misclassified as borderline retarded, sent to regular public schools for eight years, where he never learned to read English.);
- *Agostine v. School District of Philadelphia*, 527 A.2d 193 (Pa.Cmwlth. 1987) (Pupil with learning disability placed in classes for mentally retarded pupils.);
- *DeRosa v. City of New York*, 517 N.Y.S.2d 754 (N.Y.A.D. 1987) (Deaf pupil misclassified as mentally retarded. No cause of action.).

**2. Pupils who were graduated from high school despite being functionally illiterate and unable to earn a living.** These cases are sometimes labeled “failure to teach”, a label that is misleading, as explained below, beginning at page 44.

- *Peter W. v. San Francisco Sch. Dist.*, 131 Cal.Rptr. 854 (1976) (Does *not* mention phrase “educational malpractice”.);
- *Donohue v. Copiague Union Sch. Dist.*, 408 N.Y.S.2d 584 (1977), *aff'd*, 407 N.Y.S.2d 874 (1978), *aff'd*, 391 N.E.2d 1352 (N.Y. 1979);
- *Hunter v. Board of Education*, 439 A.2d 582 (Md. 1982);
- *Denson v. Steubenville Board of Education*, 1986 WL 8239 (Ohio App. 1986);
- *Johnson v. Clark*, 418 N.W.2d 466 (Mich.App. 1987) (high school graduate with dyslexia had reading ability of fourth grade pupil, court held no legal duty to avoid educational malpractice).

**3. Pupil with normal intelligence and a learning disability (e.g., dyslexia) received no special instruction, therefore was denied an effective and appropriate education.**

These cases are generally in federal court under either the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 et seq., or § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

- *D.S.W. v. Fairbanks*, 628 P.2d 554 (Alaska 1981); and *many* subsequent cases. Because I specialize in education law for neither handicapped nor retarded pupils, I am not familiar with this extensive area of law.
- *D.A. ex rel. Latasha A. v. Houston Independent School Dist.*, 629 F.3d 450, 454 (5thCir. 2010) (“The court [in *Monahan v. State of Neb.*, 687 F.2d 1164, 1170-71 (8thCir. 1982)] did not read § 504 [of the Rehabilitation Act, 29 U.S.C. § 794] as creating “general tort liability for educational malpractice” because the Supreme Court in interpreting the IDEA [See, e.g., *Rowley*, 458 U.S. at 181, 102 S.Ct. at 3038 (interpreting EAHCA, the statutory predecessor to IDEA).] has warned against a court’s substitution of its own judgment for educational decisions made by state officials.”).

**4. Student who attended college on an athletic scholarship for four years, but acquired no useful intellectual skills.**

- *Jackson v. Drake University*, 778 F.Supp. 1490 (S.D.Iowa 1991) (Basketball player recruited by University.);
- *Ross v. Creighton University*, 740 F.Supp. 1319 (N.D.Ill. 1990), *aff’d*, 957 F.2d 410 (7thCir. 1992) (Basketball player with standardized test scores in the bottom 1/5 of high school students was given an athletic scholarship. During four years at University, “he maintained a D average and acquired 96 of the 128 credits needed to graduate. However, many of these credits were in courses such as Marksmanship and Theory of Basketball, and did not count towards a university degree.”).

Incidentally, both Jackson and Ross alleged that the coaching staff offered to prepare term papers for them (i.e., the coaches aided and abetted plagiarism, which is a kind of fraud), but the courts ignored these serious allegations.

**5. Physician (or other health care provider) who allegedly committed medical malpractice sues university for inadequate instruction.**

- *County of Riverside v. Loma Linda Univ.*, 173 Cal.Rptr. 371 (1981) (County hospital sought reimbursement of half of a medical malpractice settlement from the medical school who was supervising the people who were negligent.);
- *Swidryk v. St. Michael’s Medical Center*, 493 A.2d 641 (N.J.Super. 1985) (First-year resident who was sued for medical malpractice sues residency program for educational malpractice.).

6. **Victim harmed by negligence of D<sub>1</sub>, sues the school or college that educated D<sub>1</sub>. This is a third-party educational malpractice claim, in which the victim was allegedly a third-party beneficiary of the education of D<sub>1</sub>.**
  - *Salter v. Natchitoches Chiropractic Clinic*, 274 So.2d 490 (La.App. 1973) (Patient, who was injured by chiropractor in Louisiana, sued five defendants, including the Palmer College in Iowa. The suit against Palmer College was dismissed for lack of personal jurisdiction. Does *not* mention phrase “educational malpractice”.);
  - *Moore v. Vanderloo*, 386 N.W.2d 108 (Iowa 1986) (Moore was injured by the alleged negligence of a chiropractor, so Moore also sued the Palmer College, from which the chiropractor had graduated four years before Moore's injury.);
  - *Moss Rehab v. White*, 692 A.2d 902 (Del. 1997) (White was killed in an automobile collision. White's estate sued the driving school that trained the driver of the automobile that caused the fatal collision.);
  - *Johnson v. Indian River School District*, 723 A.2d 1200 (Del.Super. 1998) (Parents of child killed by driver sued the driving instructor who had taught the driver.).
  
7. **Student alleges that school or college failed to stop cheating by other students.**
  - *Gally v. Columbia University*, 22 F.Supp.2d 199 (S.D.N.Y. 1998).
  
8. **Private vocational school allegedly failed to adequately educate — or train — students, who were then unable to find employment in their new specialty.**
  - *Blane v. Alabama Commercial College*, 585 So.2d 866 (Ala. 1991);
  - *Cavaliere v. Duff's Business Institute*, 605 A.2d 397 (Pa.Super. 1992);
  - *Matulin v. Academy of Court Reporting*, 1992 WL 74210 (Ohio App. 1992);
  - *Tolman v. Cencor Career Colleges*, 851 P.2d 203 (Colo.App. 1992), *aff'd*, 868 P.2d 396 (Colo. 1994);
  - *Alsides v. Brown Institute*, 592 N.W.2d 468 (Minn.App. 1999).
  
9. **A private school sued a parent for unpaid tuition, the parent counterclaimed for breach of contract, fraudulent misrepresentation, educational malpractice, ....**
  - *Trustees of Columbia University v. Jacobsen*, 148 A.2d 63 (N.J.Super.A.D. 1959), *aff'd*, 156 A.2d 251 (N.J. 1960) (no mention of “educational malpractice” but Jacobsen did countersue for misrepresentation and fraud by university, trial court dismissed counterclaim, affirmed on appeal), *cert. den.*, 363 U.S. 808 (1960);
  - *Village Community School v. Adler*, 478 N.Y.S.2d 546 (1984);
  - *Wrightwood School v. Fritz*, 1999 WL 240727 (Conn.Super. 1999).

During my revision of this essay in February 2013, two other subsets occurred to me.

**10. Pupil or student alleges that bad advice by a faculty member harmed them (e.g., negligent misrepresentation).**

- *André v. Pace Univ.*, 618 N.Y.S.2d 975 (Yonkers City Ct. 1994), *rev'd*, 655 N.Y.S.2d 777 (Appellate Term 1996);
- *Brown v. Compton Unified School Dist.*, 80 Cal.Rptr.2d 171 (Cal.App. 1998) (Does not mention phrase “educational malpractice”.);
- *Sain v. Cedar Rapids Sch. Dist.*, 626 N.W.2d 115 (Iowa 2001);
- *Hendricks v. Clemson Univ.*, 578 S.E.2d 711 (S.Car. 2003);
- *Scott v. Savers Property and Casualty Insurance*, 663 N.W.2d 715 (Wisc. 2003) (Does not mention phrase “educational malpractice”).

**11. Student — or their next-of kin in a wrongful death case — alleges that negligent instruction, negligent supervision, or failure to teach an essential skill, caused physical injury.** Such torts have long been permitted in the USA, as shown in the following list:

- *Bellman v. San Francisco High School Dist.*, 81 P.2d 894 (Cal. 1938) (school liable for personal injury during high school gymnastics class, where jury found school was negligent);
- *Gardner v. New York*, 10 N.Y.S.2d 274 (N.Y.A.D. 1939) (“We are also convinced that the State was grossly negligent in requiring immature children to perform the head stand.”), *aff'd*, 22 N.E.2d 344 (N.Y. 1939) (school liable for personal injury during physical education class, “failure to instruct” was proximate cause of injuries);
- *Miller v. Macalester College*, 115 N.W.2d 666 (Minn. 1962) (affirming negligence by university when student was injured by collapsing scaffold);
- *Kirchner v. Yale University*, 192 A.2d 641, 643 (Conn. 1963) (allowed claim by student who was injured by woodworking machine: “It was the obligation of the defendants to exercise reasonable care not only to instruct and warn students in the safe and proper operation of the machines provided for their use but also to furnish and have available such appliances, if any, as would be reasonably necessary for the safe and proper use of the machines.”);
- *Dailey v. Los Angeles Unified School Dist.*, 470 P.2d 360, 365 (Cal. 1970) (Negligent supervision of pupils by physical education instructor could be proximate cause of pupil’s death. Death occurred on high school playground during noon recess.);
- *Stehn v. Bernarr MacFadden Foundations, Inc.*, 434 F.2d 811, 814–15 (6thCir. 1970) (affirming negligent supervision when student was injured in wrestling class);
- *Amon v. New York*, 414 N.Y.S.2d 68 (N.Y.A.D. 1979) (affirming university liable to student cut by a table saw);



- *Yarborough v. City University of New York*, 520 N.Y.S.2d 518, 520-521 (N.Y.Ct.Cl. 1987) (“A teacher is under a duty to use reasonable care to prevent injury to students. This responsibility includes the obligation not to direct a student to do that which is unreasonably dangerous, to see that any equipment supplied is reasonably safe for its intended use, and to provide such instruction and supervision as is reasonably required to safely perform the directed tasks or to use the supplied equipment. [many citations omitted]” Judgment for student injured in physical education class.);
- *Delbridge v. Maricopa County Community College Dist.*, 893 P.2d 55, 58 (Ariz.App. 1994) (Community college or school has legal duty to protect students from foreseeable and unreasonable risks of harm.);
- *Palmer v. Mount Vernon Tp. High School Dist. 201*, 662 N.E.2d 1260, 1263 (Ill. 1996) (“A school district’s duty to provide safety equipment that is necessary to protect students from serious injury during school athletic activities was expressly recognized in *Gerrity [v. Beatty]*, 373 N.E.2d 1323 (Ill. 1978).”);
- *Doe v. Yale Univ.*, 748 A.2d 834 (Conn. 2000) (intern contracted HIV while performing arterial puncture without adequate instruction, claim allowed);
- see the 30 cases cited in my essay, *Injuries in School or College Laboratories in USA*, <http://www.rbs2.com/labinj2.pdf> (Nov 1999, revised 18 Mar 2013).
- see the list of cases involving negligent instruction of a student-pilot, which caused an airplane crash, at page 34, below.

**However, there is generally no liability for physical injuries that occur *after* a student completes his/her formal education or training.**

- *Page v. Klein Tools, Inc.*, 610 N.W.2d 900 (Mich. 2000) (utility pole climbing, no liability);
- 11A. A special subcategory includes allegations of “educational malpractice” against either a seller of aircraft or flight school for an **airplane crash** that occurred *after* the pilot completed his training:
- *Sheesley v. The Cessna Aircraft Co.*, 2006 WL 1084103 at \*17-18 (D.S.D. 2006) (no liability for educational malpractice);
  - *In re Cessna 208 Series Aircraft Products Liability Litigation*, 546 F.Supp.2d 1153 (D.Kan. 2008) (allowing negligent instruction claim);
  - *Dallas Airmotive, Inc. v. FlightSafety Int’l, Inc.*, 277 S.W.3d 696 (Mo.Ct.App. 2008) (no legal duty);

- *In re Air Crash Near Clarence Center, New York, on February 12, 2009*, Not Reported in F.Supp.2d, 2010 WL 5185106 at \*6 (W.D.N.Y. 2010) (“Defendants argue that New York's educational malpractice jurisprudence encompasses (and therefore bars) the claims that Plaintiffs allege in this case. But the specific policy considerations underlying New York's educational malpractice decisions are not present here to such a degree that this Court can definitively conclude that Plaintiffs have no chance of successfully asserting their claims.”);
- *Waugh v. Morgan Stanley and Co., Inc.*, 2012 IL App (1st) 102653 at ¶48, 966 N.E.2d 540, 555 (Ill.App. 2012) (“Because the claim challenges the effectiveness of the training provided to [the pilot], it sounds in educational malpractice and is barred as a matter of law.”), *appeal denied*, 979 N.E.2d 890 (Ill. 2012);
- *Glorvigen v. Cirrus Design Corp.*, 796 N.W.2d 541 (Minn.App. 2011) (“A negligence claim against an aviation-training provider is barred under the educational-malpractice doctrine where the essence of the claim is that the provider failed to provide an effective education.”), *aff’d*, 816 N.W.2d 572 (Minn. 2012) (“A pilot may not recover in tort against an airplane manufacturer when the duty owed to the pilot by the manufacturer was imposed only by contract.”).
- *Newman v. Socata SAS*, --- F.Supp.2d --- (M.D.Fla. 13 Feb 2013) (allowing claims against a flight school in Florida for crash in Massachusetts after pilot completed training).

### **plaintiff (nearly) always loses**

In December 1999, when I wrote the first edition of this essay, I found only one case<sup>3</sup> in which plaintiff won, out of a total of more than 80 cases. I then summarized the educational malpractice case law in the USA by noting that *the plaintiff always loses*, because judges do *not* recognize educational malpractice as a viable tort. In fact, the plaintiff usually loses a summary judgment motion, and the case never proceeds to trial. That consistent result speaks louder than any legal reasoning.

Then, in April 2001, the Iowa Supreme Court became the first court in the USA to recognize the validity of educational malpractice. That landmark case is discussed later in this essay, beginning at page 24.

Incidentally, with such a dismal record of success in litigation, one must ask why attorneys continue to file so many court cases that allege “educational malpractice”. I don’t know the answer, but I can suggest three reasons:

1. attorneys for plaintiffs are not doing adequate legal research prior to filing the Complaint, so these attorneys are *unaware* that “educational malpractice” cases are futile. An attorney who is familiar with tort law (but ignorant of education law) will *assume* that courts will recognize “educational malpractice”, because courts routinely recognize analogous malpractice cases against other professions (e.g., physicians, attorneys, accountants, surveyors, engineers, etc.).

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<sup>3</sup> See discussion of *B.M. v. Montana* at page 21, below.

2. plaintiffs have so much anger toward a school or college that they are willing to pay attorney's fees in futile litigation.
3. attorneys for plaintiffs may be engaged in a good-faith exercise of trying to convince the judge to make new law and recognize "educational malpractice". Without such courageous attorneys, the common law would never change.

Occasionally, the plaintiff(s) won an alleged educational malpractice case in a trial court, but then their victory was reversed on appeal. And there are a few reported cases involving fraud or breach of contract, *not* educational malpractice, in which students have won. This essay considers the reasons behind this spectacular failure of educational malpractice in the courts.

### Discussion of Early Cases

Courts in the USA have been almost unanimous in rejecting the new tort of educational malpractice. In most recent cases, the judge simply cites some of the previous cases as justification for the judge's decision to reject educational malpractice again. To understand *why* judges reject educational malpractice claims, one must understand the early cases in this area, which contain the most detailed discussion of the reasons to reject educational malpractice. I discuss the first four educational malpractice cases in the USA, in chronological order, then I give my critical analysis of them.

#### ***Salter v. Natchitoches Chiropractic Clinic, 274 So.2d 490 (La.App. 1973)***

The patient, who was injured by chiropractor in Louisiana, sued five defendants in a Louisiana court, including the Palmer College that is located in Iowa. The suit against Palmer College was dismissed for lack of personal jurisdiction.

Plaintiff's allegations of negligence on the part of Palmer College of Chiropractic are as follows:

- 1) In teaching methods and techniques of cervical and spinal manipulations and adjustments which are contrary to accepted medical standards.
- 2) In teaching methods and procedures of healing or treating patients which fail to conform to the minimum standards required by the local, state, and national medical associations.
- 3) In failing to properly instruct chiropractors as to the potential hazards and dangers of improper cervical or spinal manipulations or adjustments.
- 4) In encouraging the practice of chiropractics within this Parish and State, contrary to the constituted statutes and laws of this state. In encouraging the conduct of practices which may be harmful, dangerous and injurious to public health and welfare.

*Salter*, 274 So.2d at 491.

After briefly reviewing civil procedure of personal jurisdiction, the court stated:

Plaintiff makes a persuasive argument that although one or two of the activities of Palmer College in Louisiana may be insufficient for personal jurisdiction, when all are combined and considered together they show the defendant has engaged in a 'persistent course of conduct' in this state in connection with its business which is that of operating a college of chiropractic.

Nevertheless, we conclude that it would offend traditional notions of justice and fair play and the respective conveniences and inconveniences of the parties, if a college or other institution of education could be sued in any state where its students have caused injury while using, or attempting to use, the knowledge, methods and procedures taught by the college. To hold otherwise would mean that in all kinds of actions based on malpractice in various fields, such as medicine, law, engineering, architecture, dentistry, etc., the colleges attended by the respective alumni could be sued in the state where the injury occurred. We do not think such a result was contemplated by the federal cases cited above. It could result in a serious inconvenience and expense to our institutions of higher education if they had to defend these suits in states thousands of miles from their domiciles.

*Salter*, 274 So.2d at 493-494.

This Louisiana appellate court held that the tort of educational malpractice would be burdensome to colleges, therefore it should not be allowed. The court ignored the obvious comparison that manufacturers of products are routinely hauled into court in all fifty states to defend products liability cases. There may be good reasons for not recognizing educational malpractice cases against colleges, but protecting colleges from potential inconvenience is not one of them. Many colleges, including the Palmer College, deliberately attract students from all fifty states, so they should be subject to jurisdiction in all fifty states.

This Louisiana case is generally ignored in law review articles on educational malpractice,<sup>4</sup> probably because the reported opinion does *not* mention the specific words “educational malpractice” and also because the case was decided on procedural grounds, rather than on the merits.

***Peter W. v. San Francisco Sch. Dist.*, 131 Cal.Rptr. 854 (1976)**

*Peter W.* is often, but *incorrectly*, said to be the first reported case in the USA involving what was later called “educational malpractice”. Note, the phrase “educational malpractice” is nowhere used in *Peter W.*

The plaintiff had spent 12 years in public schools and had graduated from high school, however his reading level was allegedly only at the fifth grade. At that time, California had a state statute requiring pupils to read above the eighth grade level in order to graduate from high school, so the school graduated him in violation of a state statute, a fact that should be evidence of the school’s negligence. The court refused to recognize a legitimate claim for negligence for two reasons. First:

On occasions when the [California] Supreme Court has opened or sanctioned new areas of tort liability, it has noted that the wrongs and injuries involved were both comprehensible and assessable within the existing judicial framework. [citations to two cases omitted] This is simply not true of wrongful conduct and injuries allegedly involved in educational

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<sup>4</sup> An exception is Stewart R. Reuter, “Professional Liability in Postgraduate Medical Education,” 15 JOURNAL OF LEGAL MEDICINE 485, 527 (Dec 1994).

malfeasance. Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. 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. The ‘injury’ claimed here is plaintiff’s inability to read and write. 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, environmental; they may be present but not perceived, recognized but not identified. [footnote deleted]

We find in this situation no conceivable ‘workability of a rule of care’ against which defendants’ alleged conduct may be measured [citation deleted], no reasonable ‘degree of certainty that . . . plaintiff suffered injury’ within the meaning of the law of negligence (... referring to Rest.2d, Torts, § 281), and no such perceptible ‘connection between the defendant’s conduct and the injury suffered,’ as alleged, which would establish a causal link between them within the same meaning. [citation deleted]

These recognized policy considerations alone negate an actionable ‘duty of care’ in persons and agencies who administer the academic phases of the public educational process. Others, which are even more important in practical terms, command the same result. Few of our institutions, if any, have aroused the controversies, or incurred the public dissatisfaction, which have attended the operation of the public schools during the last few decades. Rightly or wrongly, but widely, they are charged with outright failure in the achievement of their educational objectives; according to some critics, they bear responsibility for many of the social and moral problems of our society at large. Their public plight in these respects is attested in the daily media, in bitter governing board elections, in wholesale rejections of school bond proposals, and in survey upon survey. To hold them to an actionable ‘duty of care,’ in the discharge of their academic functions, would expose them to the tort claims — real or imagined — of disaffected students and parents in countless numbers.<sup>5</sup> They are already beset by social and financial problems which have gone to major litigation, but for which no permanent solution has yet appeared. [citations to two cases deleted] The ultimate consequences, in terms of public time and money, would burden them — and society — beyond calculation.

*Peter W. v. San Francisco Sch. Dist.*, 131 Cal.Rptr. 854, 860-861 (1976).

Quoted with approval in *Donohue v. Copiague Union Sch. Dist.*, 407 N.Y.S.2d 874, 878-879 (N.Y.A.D. 1978) (calling the *Peter W.* opinion “comprehensive and well-reasoned”). The judges in *Peter W.* said it was impossible to construct a standard of care for education, a statement that is wrong, as explained on page 43, below. In fact, a California statute — specifically Education Code § 8573 — established one standard: a minimum of an eighth-grade reading ability is required for a high school diploma.

There is a strange remark in *Peter W.* that says: “The science of pedagogy ... any layman might — and commonly does — have his own emphatic views on the subject.” But the standard of care in a professional malpractice case is given by testimony of expert witnesses about what a

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<sup>5</sup> Footnote by Standler: the “countless numbers” remark is another way of expressing opening the floodgates of litigation, a specious reason that is discussed below at page 45.

competent *professional*, with education similar to the defendant, should have done.<sup>6</sup> The three-judge panel, in an embarrassing error,<sup>7</sup> confused this professional malpractice standard with the standard in an ordinary negligence case: what a reasonable man of ordinary prudence<sup>8</sup> (e.g., like the jurors) should have done.

Furthermore, the court did not want to inflict more problems on the beleaguered schools, particularly with the “limitations imposed upon them by their publicly-supported budgets.” *Peter W.* at 861. This is a bogus reason, as explained on page 44, below.

Plaintiff alleged violation of five state statutes, of which I think the most significant is the allegation that Defendants “permitted him to graduate from high school although he was ‘unable to read above the eighth grade level, as required by Education Code section 8573’ ” *Peter W.* at 856. The court quickly disposed of these alleged violations:

We have already seen that the failure of educational achievement may not be characterized as an ‘injury’ within the meaning of tort law. It further appears that the several ‘enactments’ have been conceived as provisions directed to the attainment of optimum educational results, but not as safeguards against ‘injury’ of any kind: i.e., as administrative but not protective. Their violation accordingly imposes no liability under Government Code section 815.6. *Peter W.* at 862.

The court tersely disposed of plaintiff’s allegations that the school made a fraudulent misrepresentation to the parents about their child’s performance.

[Plaintiff alleged:]

‘Defendant school district, its agents and employees, falsely and fraudulently represented to plaintiff’s mother and natural guardian that plaintiff was performing at or near grade level in basic academic skills such as reading and writing . . .’ The representations were false. The charged defendants knew that they were false, or had no basis for believing them to be true. ‘As a direct and proximate result of the intentional or negligent misrepresentation made . . ., plaintiff suffered the damages set forth herein.’

For the public policy reasons heretofore stated with respect to plaintiff’s first count, we hold that this one states no cause of action for Negligence in the form of the ‘misrepresentation’ alleged. The possibility of its stating a cause of action for Intentional misrepresentation, to which it expressly refers in the alternative, is assisted by judicial limitations placed upon the scope of the governmental immunity which is granted, as to liability for ‘misrepresentation,’ by Government Code section 818.8. [citation to two cases omitted]

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<sup>6</sup> RESTATEMENT SECOND OF TORTS § 299A (1965).

<sup>7</sup> John Elson, “A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching,” 73 NORTHWESTERN LAW REVIEW 641, 695 (Nov 1978); Johnny C. Parker, “Educational Malpractice: A Tort Is Born,” 39 CLEVELAND STATE LAW REVIEW 301, 316 (1991).

<sup>8</sup> RESTATEMENT SECOND OF TORTS § 283 (1965).

The second count nevertheless does not state a cause of action, for intentional misrepresentation, because it alleges no facts showing the requisite element of Reliance upon the ‘misrepresentation’ it asserts. [citation omitted] Plaintiff elected to stand upon it without exercising his leave to amend.

*Peter W.* at 862. According to the court, this is a defect in preparing the Complaint.

***Donohue v. Copiague Union Sch. Dist.*, 408 N.Y.S.2d 584 (1977),  
aff’d, 407 N.Y.S.2d 874 (N.Y.A.D. 1978),  
aff’d, 391 N.E.2d 1352 (N.Y. 1979)**

*Donohue* is the first case in the USA to use the phrase “educational malpractice”.

The opinion of the New York Court of Appeals is generally considered to be the leading case on why courts do not recognize educational malpractice as a tort. In this case, the plaintiff received a “graduation certificate” from a state high school, although he allegedly could not read/write well enough to complete an application for employment. The plaintiff alleged that defendant’s “failure to comply with accepted standards constituted educational malpractice.” 408 N.Y.S.2d at 585 The judge in the trial court tersely dismissed the complaint, citing the reasoning in *Peter W.* 408 N.Y.S.2d at 585.

The plaintiff alleged surprise at his ignorance, but the intermediate appellate court noted that his grades in school (including two failing grades in English) gave adequate notice to him and his parents. 407 N.Y.S.2d at 881, 883. The intermediate appellate court held that educators have no legal duty of care to their pupils, meaning educators “may not be sued for damages by an individual student for an alleged failure to reach certain educational objectives.” 407 N.Y.S.2d at 878-79. The intermediate appellate court called *Peter W.* “a comprehensive and well-reasoned opinion”. 407 N.Y.S.2d at 878.

The intermediate appellate court, among other reasons, stated:

Finally, the plaintiff’s complaint must be dismissed because of the practical impossibility of demonstrating that a breach of the alleged common law and statutory duties was the proximate cause of his failure to learn. The failure to learn does not bespeak a failure to teach. It is not alleged that the plaintiff’s classmates, who were exposed to the identical classroom instruction, also failed to learn. From this it may reasonably be inferred that the plaintiff’s illiteracy resulted from other causes. A school system cannot compel a particular student to study or to be interested in education. Here, the plaintiff is not totally illiterate and his academic record indicates satisfactory achievement in several subjects. In addition to innate intelligence, the extent to which a child learns is influenced by a host of social, emotional, economic and other factors which are not subject to control by a system of public education. In this context, it is virtually impossible to calculate to what extent, if any, the defendant’s acts or omissions proximately caused the plaintiff’s inability to read at his appropriate grade level.

*Donohue v. Copiague Union Sch. Dist.*, 407 N.Y.S.2d 874, 881 (N.Y.A.D. 1978).

dissent in *Donohue*

Judge Suozzi wrote a dissent to *Donohue*, which dissent is *not* law, but gives what I believe is a better description of what the law *should* be.

Initially, it must be emphasized that the policy considerations enunciated in *Peter W.*, *supra* do not mandate a dismissal of the complaint. Whether the failure of the plaintiff to achieve a basic level of literacy was caused by the negligence of the school system, as the plaintiff alleges, or was the product of forces outside the teaching process, is really a question of proof to be resolved at a trial. The fear of a flood of litigation, perhaps much of it without merit, and the possible difficulty in framing an appropriate measure of damages, are similarly unpersuasive grounds for dismissing the instant cause of action. Fear of excessive litigation caused by the creation of a new zone of liability was effectively refuted by the abolition of sovereign immunity many years ago, and numerous environmental actions fill our courts where damages are difficult to assess. Under the circumstances, there is no reason to differentiate between educational malpractice on the one hand, and other forms of negligence and malpractice litigation which currently congest our courts.

*Donohue v. Copiague Union Sch. Dist.*, 407 N.Y.S.2d at 883 (Suozzi, J., dissenting).

Judge Suozzi, in his dissent, also specifically identified the key issue in the case, which all the other judges ignored.

Anyone reading the plaintiff's high school transcript would be hard pressed to describe his work as a "satisfactory completion" of a course of study.

Having established that the plaintiff was failing numerous courses, which fact was known to school authorities, the crucial question to be resolved is whether the school had a duty under these circumstances to do more than merely promote this plaintiff in a perfunctory manner from one year to the next.

*Donohue*, 407 N.Y.S.2d at 884 (Suozzi, dissenting).

Judge Suozzi specifically cited a state statute that was violated by the school. Suozzi observes: "To dismiss the complaint, as the majority proposes, without allowing the plaintiff his day in court, would merely serve to sanction misfeasance in the education system." 407 N.Y.S.2d at 884.

Judge Suozzi continued his dissenting opinion:

In my view, the negligence alleged in the case at bar is not unlike that of a doctor who, although confronted with a patient with a cancerous condition, fails to pursue medically accepted procedures to (1) diagnose the specific condition and (2) treat the condition, and instead allows the patient to suffer the inevitable consequences of the disease. Such medical malpractice would never be tolerated. At the very least, a complaint alleging same would not be dismissed upon motion. In the case at bar, the plaintiff displayed, through his failing grades, a serious condition with respect to his ability to learn. Although mindful of this learning disability, the school authorities made no attempt, as they were required to do, by appropriate and educationally accepted testing procedures, to diagnose the nature and extent of his learning problem and thereafter to take or recommend remedial measures to deal with this problem. Instead, the plaintiff was just pushed through the educational system without any



attempt made to help him. Under these circumstances, the cause of action at bar is no different from the analogous cause of action for medical malpractice and, like the latter, is sufficient to withstand a motion to dismiss.

*Donohue*, 407 N.Y.S.2d at 884-885 (Suozzi, dissenting).

Judge Suozzi was the only judge to try to put the brakes on this runaway train in both California (*Peter W.*) and New York State (*Donohue*).

### N.Y. Court of Appeals

The New York Court of Appeals — the highest state court in New York — recognized honestly that the tort of educational malpractice was similar to torts that courts routinely heard for malpractice of physicians, lawyers, architects, and engineers.

It may very well be that even within the strictures of a traditional negligence or malpractice action, a complaint sounding in “educational malpractice” may be formally pleaded. Thus, the imagination need not be overly taxed to envision allegations of a legal duty of care flowing from educators, if viewed as professionals, to their students. If doctors, lawyers, architects, engineers and other professionals are charged with a duty owing to the public whom they serve, it could be said that nothing in the law precludes similar treatment of professional educators. Nor would creation of a standard with which to judge an educator's performance of that duty necessarily pose an insurmountable obstacle. (See, generally, Elson, *A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching*, 73 N.W.L.Rev. 641, 693-744.) As for proximate causation, while this element might indeed be difficult, if not impossible, to prove in view of the many collateral factors involved in the learning process, it perhaps assumes too much to conclude that it could never be established. This would leave only the element of injury and who can in good faith deny that a student who upon graduation from high school cannot comprehend simple English a deficiency allegedly attributable to the negligence of his educators has not in some fashion been “injured”.

The fact that a complaint alleging “educational malpractice” might on the pleadings state a cause of action within traditional notions of tort law does not, however, require that it be sustained. The heart of the matter is whether, assuming that such a cause of action may be stated, the courts should, as a matter of public policy, entertain such claims. We believe they should not.

*Donohue v. Copiague Union Free School Dist.*, 391 N.E.2d 1352, 1353-1354 (N.Y. 1979).

See *Denson v. Steubenville Bd. of Education*, 1986 WL 8239 at \*2 (Ohio App. 1986) (Cox, J., dissenting but concurring in result).

The New York Court of Appeals then unanimously rejected the new tort of educational malpractice because: “Recognition in the courts of this cause of action would constitute blatant interference with the responsibility for the administration of the public school system lodged by Constitution and statute in school administrative agencies.” *Donohue* 391 N.E.2d at 1354. See the discussion later in this essay, in the section on academic abstention that begins on page 48.

The Court of Appeals suggested that parents should consult school administrators (“administrative process”) during the pupil’s progress through twelve years of school, and apparently not wait until graduation to discover the pupil is illiterate. *Donohue*, 391 N.E.2d at 1355. The obvious fix for “failure to teach” is complaints to the supervisor of the instructor. However, in practice, such complaints may be futile if either (1) the instructor has tenure, (2) the administrator *always* supports the instructors, in order to discourage complaints by parents or students, or (3) the school has not enough money to provide an appropriate education for every pupil.

The Court of Appeals ignored the dissenting opinion of Judge Suozzi in the court below.

Prof. Elson at the Northwestern University School of Law had a scathing criticism of the judicial decisions in *Peter W.* and *Donohue*, in which he characterized the decisions as having “summary and dubious reasoning”<sup>9</sup> and “dubious, conclusionary public policy arguments”<sup>10</sup>. My discussion of the judicial reasoning is given at pages 43-58, below.

***Hoffman v. Board of Educ. N.Y. City*, 410 N.Y.S.2d 99 (N.Y.A.D. 1978)  
*rev’d*, 400 N.E.2d 317 (N.Y. 1979)**

Hoffman was a person of normal intelligence (IQ = 90 or 94) who was misdiagnosed as retarded (IQ = 74) by city schools at age 6 years. He spent 11 years in classes “for children with retarded mental development.” (CRMD) A city school psychologist had recommended that plaintiff be retested within two years of the first test, but a second test was not performed until age 18 years. At trial, a jury found the school board was negligent and awarded plaintiff \$ 750,000. The intermediate appellate court ordered a new trial only on the amount of damages, unless plaintiff consented to a \$500,000 award. *Hoffman*, 410 N.Y.S.2d at 100-107.

The majority opinion of the intermediate appellate court says:

Defendant's affirmative act in placing plaintiff in a CRMD class initially (when it should have known that a mistake could have devastating consequences) created a relationship between itself and plaintiff out of which arose a duty to take reasonable steps to ascertain whether (at least, in a borderline case) that placement was proper (see *Schuster v. City of N. Y.*, 5 N.Y.2d 75, 180 N.Y.S.2d 265, 154 N.E.2d 534; *Florence v. Goldberg*, 44 N.Y.2d 189, 404 N.Y.S.2d 583, 375 N.E.2d 763). We need not here decide whether such duty would have required “intelligence” retesting (in view of plaintiff's poor showing on achievement tests) had not the direction for such retesting been placed in the very document which asserted

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<sup>9</sup> John Elson, “A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching,” 73 NORTHWESTERN LAW REVIEW 641, 643 (Nov 1978).

<sup>10</sup> *Ibid.* at 694.

that plaintiff was to be placed in a CRMD class. It ill-becomes the Board of Education to argue for the untouchability of its own policy and procedures when the gist of plaintiff's complaint is that the entity which did not follow them was the board itself.

New York State and its municipalities have long since surrendered immunity from suit. Just as well-established is the rule that damages for psychological and emotional injury are recoverable even absent physical injury or contact (*Ferrara v. Galluchio*, 5 N.Y.2d 16, 176 N.Y.S.2d 996, 152 N.E.2d 249; *Battalla v. State of New York*, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729). Had plaintiff been improperly diagnosed or treated by medical or psychological personnel in a municipal hospital, the municipality would be liable for the ensuing injuries. There is no reason for any different rule here because the personnel were employed by a government entity other than a hospital. Negligence is negligence, even if defendant and Mr. Justice DAMIANI prefer semantically to call it educational malpractice. Thus, defendant's rhetoric constructs a chamber of horrors by asserting that affirmance in this case would create a new theory of liability known as "educational malpractice" and that before doing so we must consider public policy (cf. *Riss v. City of New York*, 22 N.Y.2d 579, 293 N.Y.S.2d 897, 240 N.E.2d 860; *Tobin v. Grossman*, 24 N.Y.2d 609, 301 N.Y.S.2d 554, 249 N.E.2d 419; *Howard v. Lecher*, 42 N.Y.2d 109, 397 N.Y.S.2d 363, 366 N.E.2d 64) and the effects of opening a vast new field which will further impoverish financially hard pressed municipalities. Defendant, in effect, suggests that to avoid such horrors, educational entities must be insulated from the legal responsibilities and obligations common to all other governmental entities no matter how seriously a particular student may have been injured and, ironically, even though such injuries were caused by their own affirmative acts in failing to follow their own rules.

I see no reason for such a trade-off, on alleged policy grounds, which would warrant a denial of fair dealing to one who is injured by exempting a governmental agency from its responsibility for its Affirmative torts. Such a determination would simply amount to the imposition of private value judgments over the legitimate interests and legal rights of those tortiously injured. That does not mean that the parents of the Johnnies who cannot read may flock to the courts and automatically obtain redress. Nor does it mean that the parents of all the Janies whose delicate egos were upset because they did not get the gold stars they deserved will obtain redress. If the door to "educational torts" for nonfeasance is to be opened (see 29 Syracuse L.Rev. 147-152; *Pierce v. Board of Educ. of City of Chicago*, 44 Ill.App.3d 324, 3 Ill.Dec. 67, 358 N.E.2d 67; *Peter W. v. San Francisco Unified School Dist.*, 60 Cal.App.3d 814, 131 Cal.Rptr. 854; cf. *Donohue v. Copiague Union Free School Dist.*, 64 A.D.2d 29, 407 N.Y.S.2d 874), it will not be by this case which involves *misfeasance* in failing to follow the individualized and specific prescription of defendant's own certified psychologist, whose very decision it was in the first place, to place plaintiff in a class for retarded children, or in the initial making by him of an ambiguous report, if that be the fact.

As Professor David A. Diamond noted (29 Syracuse L.Rev. 103, 150-151), when discussing this very case after the judgment at Trial Term, and contrasting it with the Donohue case, upon which Mr. Justice DAMIANI lays so much stress, "the thrust of the plaintiff's case is not so much a failure to take steps to detect and correct a weakness in a student, that is, a failure to provide a positive program for a student, but rather, affirmative acts of negligence which imposed additional and crippling burdens upon a student" and that "it does not seem unreasonable to hold a school board liable for the type of behavior exhibited in Hoffman." I agree.

*Hoffman v. Board of Education of the City of New York*, 410 N.Y.S.2d 99, 109-110 (1978) (majority opinion).

Three judges were in the majority, and two judges (Martuscello and Damiani) dissented. Judge Damiani dissented, urging that the case be dismissed because educational malpractice is not a recognized tort after *Donohue*, 407 N.Y.S.2d 874 (N.Y.A.D. 1978). The intermediate appellate court decided *Hoffman* in Nov 1978. The school then appealed to the New York Court of Appeals. In June 1979, while *Hoffman* was pending before the Court of Appeals, the Court of Appeals decided *Donohue*. In Dec 1979, the Court of Appeals decided *Hoffman*, reversing the judgment and dismissing the case:

At the outset, it should be stated that although plaintiff's complaint does not expressly so state, his cause of action sounds in "educational malpractice". Plaintiff's recitation of specific acts of negligence is, in essence, an attack upon the professional judgment of the board of education grounded upon the board's alleged failure to properly interpret and act upon Dr. Gottsegen's recommendations and its alleged failure to properly assess plaintiff's intellectual status thereafter. As we have recently stated in *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 418 N.Y.S.2d 375, 391 N.E.2d 1352, such a cause of action, although quite possibly cognizable under traditional notions of tort law, should not, as a matter of public policy, be entertained by the courts of this State. (47 N.Y.2d at p. 444, 418 N.Y.S.2d at p. 378, 391 N.E.2d at p. 1354.)

In *Donohue*, this court noted that "(c)ontrol and management of educational affairs is vested in the Board of Regents and the Commissioner of Education [citations to state constitution, state statutes, cases all omitted] In that case, the court was invited to undertake a review not only of broad educational policy, but of the day-to-day implementation of that policy as well. We declined, however, to accept that invitation and we see no reason to depart from that holding today. We had thought it well settled that the courts of this State may not substitute their judgment, or the judgment of a jury, for the professional judgment of educators and government officials actually engaged in the complex and often delicate process of educating the many thousands of children in our schools. (*Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 444, 418 N.Y.S.2d 375, 378, 391 N.E.2d 1352, 1354, *Supra*; *James v. Board of Educ.*, 42 N.Y.2d 357, 366, 397 N.Y.S.2d 934, 941, 366 N.E.2d 1291, 1297.) Indeed, we have previously stated that the courts will intervene in the administration of the public school system only in the most exceptional circumstances involving "gross violations of defined public policy". (*Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 445, 418 N.Y.S.2d 375, 378, 391 N.E.2d 1352, 1354, *Supra*; *Matter of New York City School Bds. Ass'n v. Board of Educ.*, 39 N.Y.2d 111, 121, 383 N.Y.S.2d 208, 214, 347 N.E.2d 568, 574, *Supra*.) Clearly, no such circumstances are present here. Therefore, in our opinion, this court's decision in *Donohue* is dispositive of this appeal.

The court below distinguished *Donohue* upon the ground that the negligence alleged in that case was a failure to educate properly or nonfeasance, whereas, in that court's view, the present case involves an affirmative act of misfeasance. At the outset, we would note that both *Donohue* and the present case involved allegations of various negligent acts and omissions. Furthermore, even if we were to accept the distinction drawn by the court below, and argued by plaintiff on appeal, we would not reach a contrary result. The policy considerations which prompted our decision in *Donohue* apply with equal force to "educational malpractice" actions based upon allegations of educational misfeasance and nonfeasance.

Our decision in *Donohue* was grounded upon the principle that courts ought not interfere with the professional judgment of those charged by the Constitution and by statute with the responsibility for the administration of the schools of this State. In the present case, the

decision of the school officials and educators who classified plaintiff as retarded and continued his enrollment in CRMD classes was based upon the results of a recognized intelligence test administered by a qualified psychologist and the daily observation of plaintiff's teachers. In order to affirm a finding of liability in these circumstances, this court would be required to allow the finder of fact to substitute its judgment for the professional judgment of the board of education as to the type of psychometric devices to be used and the frequency with which such tests are to be given. Such a decision would also allow a court or a jury to second-guess the determinations of each of plaintiff's teachers. To do so would open the door to an examination of the propriety of each of the procedures used in the education of every student in our school system. Clearly, each and every time a student fails to progress academically, it can be argued that he or she would have done better and received a greater benefit if another educational approach or diagnostic tool had been utilized. Similarly, whenever there was a failure to implement a recommendation made by any person in the school system with respect to the evaluation of a pupil or his or her educational program, it could be said, as here, that liability could be predicated on misfeasance. However, the court system is not the proper forum to test the validity of the educational decision to place a particular student in one of the many educational programs offered by the schools of this State. In our view, any dispute concerning the proper placement of a child in a particular educational program can best be resolved by seeking review of such professional educational judgment through the administrative processes provided by statute. (See Education Law, § 310, subd. 7.)

*Hoffman*, 400 N.E.2d 317, 319-320 (N.Y. 1979).

Note that the decision of the New York Court of Appeals to reverse the intermediate appellate court was supported by only four justices. The other three justices dissented, and would have affirmed the intermediate appellate court, which upheld a half-million dollar judgment for plaintiff.

### **Cases Won by Plaintiff**

As mentioned above, at page 10, nearly all educational malpractice cases have been won by the school or college. The few cases where plaintiffs won are discussed in this section of the essay.

#### ***B.M. v. Montana*, 649 P.2d 425 (Mont. 1982)**

A 1982 case in Montana, in which plaintiff used specific features in Montana Constitution and statutes to make a valid claim for educational malpractice. In this case, a normal child had been misdiagnosed by the state as mentally retarded, and negligently placed in a "special education" program. The relevant part of the Montana Constitution says:

It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state.

Montana Constitution, Article X, §1 (1972), quoted in *B. M. by Burger v. State*, 649 P.2d 425, 427 (Mont. 1982).

Because the trial court dismissed plaintiff's case on summary judgment, the Montana Supreme Court could only reinstate the case, but not decide the factual issues. After discussing the state constitution and statutes, the Court held:

The school authorities owed the child a duty of reasonable care in testing her and placing her in an appropriate special education program. Whether that duty was breached here, and assuming a breach, whether the child was injured by the breach of duty, are questions not before this Court. Nor were those issues placed before the trial court in the motion for summary judgment. We therefore reverse the trial court's order and remand for further proceedings.

*B. M. by Burger v. State*, 649 P.2d 425, 427-428 (Mont. 1982).

The majority opinion does *not* mention "educational malpractice". However, a concurring opinion by the Chief Justice says:

This is not a case of educational malpractice of the genre of *Peter W. v. San Francisco Unified School Dist.* (1976), 60 Cal.App.3d 814, 131 Cal.Rptr. 854, or *Donohue v. Copiague Union Free School Dist.* (1979), 47 N.Y.2d 440, 418 N.Y.S.2d 375, 391 N.E.2d 1352, 1 A.L.R.4th 1133, involving negligent failure to adequately educate a child in basic academic skills. No action lies for this type of claim for public policy reasons, and Annot, Tort Liability of Public Schools and Institutions of Higher Learning for Educational Malpractice, 1 A.L.R.4th 1133 (1980). Here the claim involves violation of mandatory statutes alleged to constitute negligence and denial of procedural due process.

I agree with the majority's remarks regarding sovereign immunity. However, the statutes make it clear that the governmental employer will ultimately bear the burden of liability for torts committed by its employees in the scope of their employment.

*B. M. by Burger v. State*, 649 P.2d 425, 428 (Mont. 1982) (Haswell, C.J., concurring in result). Despite what Chief Justice Haswell said, this case *does* involve an alleged error in professional judgment by educators, hence the label "educational malpractice" is appropriate. There are many types of situations that might produce an educational malpractice claim.

Three of the seven justices dissented, and would have barred the plaintiff's claims, citing educational malpractice cases from other states. A third dissenter also believed the legislature should "impose an appropriate limit in this type of litigation."

After remand, the trial judge again granted summary judgment for the state, this time because of "clear admissions by the plaintiff and her guardian in their depositions that no real injury had been suffered." This case was again appealed to the Montana Supreme Court. *B.M. by Berger v. State*, 698 P.2d 399, 400 (Mont. 1985) (affirming summary judgment because there was no "genuine issue of material fact with respect to the claim for damages"). One judge dissented and gave examples of injury suffered by the child. *B.M.*, 698 P.2d at 402 (Hunt, J., dissenting).

The 1982 judicial opinion in this case may no longer be good law in Montana, because the Montana Supreme Court has changed its interpretation of the sovereign immunity law. *Hayworth v. School Dist. No. 19, Rosebud County*, 795 P.2d 470, 473 (Mont. 1990).

This Montana case has been generally ignored by courts outside of Montana. A few exceptions have noted the peculiar features of the Montana case:

- *Moore v. Vanderloo*, 386 N.W.2d 108, 114 (Iowa 1986) (“With the exception of one case, *B.M. v. State*, 649 P.2d 425 (Mont. 1982), [footnote omitted] the courts in each of these three types of actions have unanimously failed to recognize a cause of action for educational malpractice. These decisions generally hold that such a cause of action seeking damages for acts of negligence in the educational process is precluded by considerations of public policy, ....”);
- *Ross v. Creighton University*, 957 F.2d 410, 414 (7th Cir. 1992) (“However, the overwhelming majority of states that have considered this type of claim have rejected it. [footnote omitted] Only Montana allows these claims to go forward, and its decision was based on state statutes that place a duty of care on educators, a circumstance not present here. *B.M. v. State*, 200 Mont. 58, 649 P.2d 425, 427-28 (1982).”);
- *Brantley v. District of Columbia*, 640 A.2d 181, 183 (D.C. 1994) (“With but a single exception, the courts which have addressed the issue here presented have declined to entertain actions for educational malpractice. See, e.g., [citations to 7 cases omitted]; but cf. *B.M. v. State*, 200 Mont. 58, 649 P.2d 425, 427-28 (1982).” Footnote four says: “In *B.M.*, a plurality of three justices sustained the complaint, a fourth justice concurred in the result, and three justices dissented. With little analysis and with no discussion of precedents from other jurisdictions, the plurality stated that ‘[w]e have no difficulty in finding a duty of care owed to special education students .... The school authorities owed the child a duty of reasonable care in testing her and placing her in an appropriate special education program.’ 649 P.2d at 427. The dissenters would have dismissed the complaint on the strength of the authorities from New York and Alaska which are cited in the text of this opinion.”);
- *Doe v. Town of Framingham*, 965 F.Supp. 226, 230 (D.Mass. 1997) (“... many other courts have reviewed such claims and have rejected them. *Ross v. Creighton Univ.*, 957 F.2d 410, 414 (7th Cir. 1992) (stating that “the overwhelming majority of states that have considered [an educational malpractice] claim have rejected it.”); [citations to three cases omitted]. But see, *B.M. v. State of Montana*, 200 Mont. 58, 649 P.2d 425, 427–28 (1982) (allowing such a claim to go forward but basing its decision on state statutes that place a duty of care on educators).”).

Clearly, it would be risky to rely on *B.M. v. Montana*, even though I believe the 1982 opinion was well-reasoned and better law than the nationwide consensus.

***Snow v. N.Y.*, 469 N.Y.S.2d 959 (1983),  
*aff'd without opinion*, 475 N.E.2d 454 (N.Y. 1984).**

There is one case in New York State in which a deaf child was *misclassified* as retarded, and plaintiff won a judgment of \$ 1.5 million. This singular victory was possible because the plaintiff's attorney skillfully argued the case as medical malpractice, *not* educational malpractice. The *Snow* case should be compared with *Hoffman v. Board of Education*, 410 N.Y.S. 99 (1978), *rev'd*, 400 N.E.2d 317 (N.Y. 1979), in which a child misclassified because of a speech defect received nothing. The difference between *Snow* and *Hoffman* is the difference between medical malpractice and educational malpractice.

***Sain v. Cedar Rapids Sch. Dist.*, 626 N.W.2d 115 (Iowa 2001)**

In April 2001, the Iowa Supreme Court recognized educational malpractice in the context of a high school guidance counselor who gave bad advice to a pupil, which resulted in the pupil losing an athletic scholarship to college.

Bruce Sain was a high school student in Cedar Rapids, Iowa during 1994-1996. During his senior year, he was required to take three English classes that were approved by the National Collegiate Athletic Association (NCAA). On the suggestion of Sain's guidance counselor, Sain took a new class in Technical Communications that was not yet approved by the NCAA to fulfill one of the three required classes. Sain alleges, but the defendant disputes, that the counselor told Sain that Technical Communications "would be approved by the NCAA as a core English course." Sain satisfactorily completed Technical Communications and two other English classes. However, "The school failed to include the Technical Communications course on the list of classes submitted to the NCAA for approval." Sain had "accepted a full five-year basketball scholarship at Northern Illinois University beginning in the fall semester of 1996." However, after graduation from high school, Sain was informed that Technical Communications was not approved by the NCAA, and therefore Sain was not eligible to play college basketball during the 1996-1997 academic year. "As a result, Sain was unable to attend Northern Illinois University during the 1996-97 school year and compete in basketball for the school." Sain then sued his high school. *Sain*, 626 N.W.2d at 118-120 (stating facts alleged by Sain).

The Iowa Supreme Court explained the history of the case:

The action against the school district was based on separate claims of negligence and negligent misrepresentation under the RESTATEMENT (SECOND) OF TORTS § 552(1) (1977). Sain claimed [the guidance counselor] breached a duty to provide competent academic advice concerning the eligibility to participate in Division I sports as a freshman. [Sain] also claimed the school district was negligent in failing to submit the "Technical Communications" course to the NCAA for pre-approval.



The school district moved for summary judgment. The district court granted the motion. It found the negligence theory was a claim for educational malpractice, and determined the claim was required to be dismissed because a school counselor has no duty to a student as a matter of law to use reasonable care in providing course information. It also found the claim for negligent misrepresentation did not apply to an educational setting, but was limited to commercial or business transactions.

*Sain*, 626 N.W.2d at 120.

Sain then appealed to the Iowa Supreme Court, which explained:

We begin by considering the nature of Sain's claim. We have refused to recognize a cause of action in Iowa for educational malpractice. *Moore v. Vanderloo*, 386 N.W.2d 108, 113-15 (Iowa 1986). Consequently, the district court properly dismissed the action under *Moore* if Sain's theory of recovery in this case falls within the parameters of educational negligence.

In *Moore*, we recognized three categories of educational malpractice. *Id.* at 113. The first category involves basic academic instruction or misrepresentation of the level of academic performance. The second category deals with placing or failing to place a student in a specific educational setting. The third category concerns supervision of student performance. We identified five policy reasons for our refusal to make these categories actionable. These reasons include the absence of an adequate standard of care, uncertainty in determining damages, the burden placed on schools by the potential flood of litigation that would probably result, the deference given to the educational system to carry out its internal operations, and the general reluctance of courts to interfere in an area regulated by legislative standards. *Id.* at 114-15.

The school district argues Sain's action falls within the placement and supervision categories of educational malpractice. It asserts the action involves the supervision of a student by a guidance counselor and the placement of a student in a particular class.

Although there is no established definition of educational malpractice, our three recognized categories reveal the action centers on complaints about the reasonableness of the conduct engaged in by educational institutions in providing their basic functions of teaching, supervising, placing, and testing students in relationship to the level of academic performance and competency of the student. See Dan B. Dobbs, *THE LAW OF TORTS* § 259, at 690-91 (2000) [hereinafter Dobbs]; Timothy Davis, *Examining Educational Malpractice Jurisprudence: Should a Cause of Action Be Created for Student-Athletes?*, 69 *DENV. U.L.REV.* 57, 61 (1992) [hereinafter Davis]. The theory alleges professional misconduct analogous to medical and legal malpractice, and seeks to impose a duty on schools to provide a level of education appropriate for the student. Davis, 69 *Denv. U.L.Rev.* at 61.

Educational malpractice is almost universally rejected as a cause of action because the issues framed by the claim must necessarily be answered in the context of those principles of duty and reasonableness of care associated with the tort law of negligence. *CenCor, Inc. v. Tolman*, 868 P.2d 396, 399 (Colo. 1994). As we recognized in *Moore*, these tort principles can be extremely difficult, if not nearly impossible, to apply to an academic setting for a variety of reasons. See *Moore*, 386 N.W.2d at 114-15; see also *Gupta v. New Britain Gen. Hosp.*, 239 Conn. 574, 687 A.2d 111, 119 (1996). This, and the other policy considerations discussed in *Moore*, support the rejection of a duty of care within an academic environment.

Although the claim in this case generally relates to the educational functions of supervision and placement, it is unrelated to most of the policy concerns identified in *Moore*. Unlike the categories of malpractice described in *Moore*, the claim of misrepresentation in this case does not challenge classroom methodology or theories of education. It is also unrelated

to academic performance or the lack of expected skills. It does not intervene into the internal operations, curriculum or academic decisions of an educational institution, or any assigned function of a school under state law. Finally, it does not interfere with the legislative standards and policies of competency. Instead, the thrust of the action asserts a specific act of providing specific information requested by a student under circumstances in which the school knew or should have known the student was relying upon the information to qualify for future educational athletic opportunities. In this context, the resolution of the claim does not require courts to interfere in the daily operation of the school or challenge the policies of education. See *Dobbs* § 259, at 690. Furthermore, there is little fear that an appropriate standard of care cannot be articulated. See *id.* The claim is more compatible with other claims for misrepresentation against professionals by clients who have sought out their expertise. In this case, under the state of the facts we must accept, Sain looked to advice from [the guidance counselor], who was in a position to provide the requested advice. Thus, the same difficulties of applying negligence standards to claims of educational malpractice do not exist in this case.

We must be careful not to reject all claims that arise out of a school environment under the umbrella of educational malpractice. *Id.* at 692. Instead, the specific facts of each case must be considered in light of the relevant policy concerns that drive the rejection of educational malpractice actions. See *id.* In light of those policy considerations, we conclude this case is distinguishable from *Moore* by its facts.

Our failure to recognize claims for educational malpractice actually represents a determination that the duty of care of a school does not extend to the circumstances which we recognize fall within the categories of educational malpractice. We, of course, recognize a school has a duty of care to a student under different circumstances. Thus, schools or schoolteachers can be subject to liability for negligence in failing to exercise reasonable care in supervising students or maintaining dangerous conditions. See *Anderson v. Webster City Cmty. Sch. Dist.*, 620 N.W.2d 263, 266 (Iowa 2000); *City of Cedar Falls v. Cedar Falls Cmty. Sch. Dist.*, 617 N.W.2d 11, 17-18 (Iowa 2000). A school clearly owes a duty of reasonable care to a student. The question we face in this case is whether the duty to exercise reasonable care extends to either providing information to a student under the circumstances alleged in this case or submitting courses to the NCAA.

*Sain*, 626 N.W.2d at 121-122.

The Iowa Supreme Court discussed the tort of negligent misrepresentation:

As with all negligence actions, an essential element of negligent misrepresentation is that the defendant must owe a duty of care to the plaintiff. In the context of negligent misrepresentation, this means the person who supplies the information must owe a duty to the person to whom the information is provided. Although the RESTATEMENT [(SECOND) OF TORTS § 552(1)] supports a broader view, we have determined that this duty arises only when the information is provided by persons in the business or profession of supplying information to others. *Hendricks v. Great Plains Supply Co.*, 609 N.W.2d 486, 492 (Iowa 2000); see *Meier v. Alfa-Laval, Inc.*, 454 N.W.2d 576, 581 (Iowa 1990) (providing false information is not actionable if the person is not in the business or profession of supplying information). [footnote omitted] Thus, when deciding whether the tort of negligent misrepresentation imposes a duty of care in a particular case, we distinguish between those transactions where a defendant is in the business or profession of supplying information to others from those transactions that are arm's length and adversarial. [citations to five Iowa cases omitted] We recognize the former circumstances justify the imposition of a duty of care because a transaction between a person in the business or profession of supplying information and a person seeking information is compatible to a special relationship. See *Meier*, 454 N.W.2d at

581; see also 2 Fowler V. Harper et al., *THE LAW OF TORTS* § 7.6, at 412-13 (2d ed.1986) [hereinafter Harper] (“remedy for negligent misrepresentation [is] principally against those who advise in an essentially nonadversarial capacity”). A special relationship, of course, is an important factor to support the imposition of a duty of care under a claim for negligence. [citation omitted] Moreover, a person in the profession of supplying information for the guidance of others acts in an advisory capacity and is manifestly aware of the use that the information will be put, and intends to supply it for that purpose. See *RESTATEMENT (SECOND) OF TORTS* § 552 cmt. a; see also *Dobbs* § 472, at 1350-51; 2 Harper § 7.6, at 405-06. Such a person is also in a position to weigh the use for the information against the magnitude and probability of the loss that might attend the use of the information if it is incorrect. *RESTATEMENT (SECOND) OF TORTS* § 552 cmt. a. Under these circumstances, the foreseeability of harm helps support the imposition of a duty of care. [citation omitted] Additionally, the pecuniary interest which a person has in a business, profession, or employment which supplies information serves as an additional basis for imposing a duty of care. See *RESTATEMENT (SECOND) OF TORTS* § 552 cmts. c, d. On the other hand, information given gratuitously or incidental to a different service imposes no such duty. [citation omitted]

....

We conclude that the context of the transaction in this case does not draw the case outside the scope of the tort of negligent misrepresentation. Instead, our task, as in other cases which assert a claim of negligent misrepresentation, is to determine if the defendant — a high school counselor in this case — is in the profession of supplying information to others.

In deciding this question, we observe that those same characteristics which exist when a person is found to be in the business of supplying information to others also exist in the case of a high school counselor. The counselor and student have a relationship which extends beyond a relationship found in an arm's length transaction. It is advisory in nature and not adversarial. The school counselor does not act for his or her own benefit, but provides information for the benefit of students. Furthermore, in matters that involve matriculation from high school to college, a high school counselor clearly assumes an advisory role, is aware of the use for the information, and knows the student is relying upon the information provided. Additionally, the counselor is paid by the school system to provide such advice, and has an indirect financial interest in providing the information. See *RESTATEMENT (SECOND) OF TORTS* § 552 cmt. d (pecuniary interest may be indirect). Thus, the counselor does not provide gratuitous information that the counselor would not expect the student to rely upon. Furthermore, the information is not incidental to some more central function or service provided by the counselor. [citation omitted]

Considering the rationale which supports the imposition of a duty of care on a person in the business or profession of supplying information, we discern no reason why a high school counselor should not fall within the category as a person in the profession of supplying information to others to support the imposition of a duty of reasonable care in the manner he or she provides information to students. We should not confine the tort to traditional commercial transactions when the rationale for the tort allows it to be applied beyond those factual circumstances which originally gave rise to the tort. In *Ryan* we indicated the tort applies not only to accountants, but logically can be extended to other professional purveyors of information. *Ryan*, 170 N.W.2d [395] at 402 [Iowa 1969] (tort could also apply to attorneys and abstractors); see *Fry*, 554 N.W.2d at 265. For the purposes of the tort of negligent misrepresentation, we conclude a high school counselor is also a person in the profession of supplying information to others.

....

Thus, liability for negligent misrepresentation is limited to harm suffered by a person for whose benefit and guidance the counselor intended to supply the information or knew the recipient intended to supply it and to loss suffered through reliance upon the information in a transaction the counselor intended the information to influence. [citations to two cases omitted] Additionally, we observe that the tort applies only to false information and does not apply to personal opinions or statements of future intent. [footnote omitted, citations omitted] Finally, the standard imposed is only one of reasonableness, and the elements of proximate cause and damage must also be shown. RESTATEMENT (SECOND) OF TORTS § 552B (limited damages for negligent misrepresentation). Thus, these limitations will help to continue to promote the important public policy of encouraging interaction between high school counselors and students, and maintain the flow of necessary information to the students. We also observe that some states have enacted statutes giving schools and teachers immunity from any liability. See *Brown v. Compton Unified Sch. Dist.*, 68 Cal.App.4th 114, 80 Cal.Rptr.2d 171, 172 (1998) (immunity from misrepresentations made within scope of employment); *Hendricks v. Clemson Univ.*, 339 S.C. 552, 529 S.E.2d 293, 297 (S.C.Ct.App. 2000) (tort claims act shields educational institutions from liability for negligent acts); see also Dobbs § 259, at 689.

In this case, we find Sain has submitted sufficient facts to withstand summary judgment on the claim that the guidance counselor negligently told him that a specific English course would be certified by the NCAA Clearinghouse. The relationship between the high school counselor and the student, together with the activity engaged in by Sain and the counselor in this case, is sufficient to give rise to a duty for the counselor to use reasonable care when informing a student that a class will be approved by the NCAA. We continue to confine the tort of negligent misrepresentation to persons in the business or profession of supplying information to others, but find that a high school counselor falls within that language because the policies which support the imposition of a duty of care on such a person applies to a high school counselor.

*Sain*, 626 N.W.2d at 124-128.

Sain also alleged that the high school negligently failed to submit the Technical Communications class to the NCAA for approval: “Sain asserts the internal policies of the school to submit all courses for approval by the NCAA Clearinghouse supports such a duty.” *Sain*, 626 N.W.2d at 128. The Iowa Supreme Court affirmed the trial court's summary judgment for defendants on this claim:

Nevertheless, a duty of care is imposed to protect against the foreseeable risk of harm. The failure of a school district to submit a course for approval by the NCAA Clearinghouse would not increase the hazard of a student taking an unapproved course. If a school fails to submit a course, the course would not be included on the approved list. The absence of the course from the list would not induce reliance, and would not make it foreseeable that harm would result to a student by taking an unapproved course under the belief that the course was in fact approved. Thus, there is no duty to students for a school district or a high school counselor to submit courses to the NCAA Clearinghouse. See *Garofalo*, 616 N.W.2d at 654 (failure to follow policy of fraternity does not give rise to an actionable tort); *Smith v. City of Dubuque*, 376 N.W.2d 602, 605 (Iowa 1985) (breach of internal procedures does not give

rise to a cause of action). We conclude the district court properly granted summary judgment on this claim.

*Sain*, 626 N.W.2d at 128-129.

I suggest the Iowa Supreme Court is wrong here. The only reason to have classes in school is to benefit pupils. When the school failed to submit Technical Communications to the NCAA for approval, the school destroyed the benefit of that class to Sain. Note that Sain was taking Technical Communications not because he wanted to learn the subject matter, he was taking the class to satisfy a requirement imposed by the NCAA.

The Iowa Supreme Court's opinion ignored Sain's claim that "Additionally, [the counselor] told Sain that the course would be approved by the NCAA as a core English course." *Sain*, 626 N.W.2d at 119.

Two of the seven justices on the Iowa Supreme Court dissented, and argued that this was an educational malpractice claim that should be forbidden.

The question is, when academic advice goes awry, should a student be permitted to seek relief from the courts? The answer to date, as the majority concedes, has always been "no." Good reasons abound for this decision. See *Moore v. Vanderloo*, 386 N.W.2d 108, 113-15 (Iowa 1986) (dismissing alleged claim of educational malpractice). Courts are ill-equipped to pass judgment on the wisdom and value of a school's chosen curriculum. *Id.* We have thus been historically disinclined to do so.

The majority effectively jettisons this sound doctrine by theorizing that guidance counselors, being in the business of furnishing information, come within the ambit of section 552 of the RESTATEMENT (SECOND) OF TORTS. They may be liable, the majority holds, for the tort of negligent misrepresentation. For liability to attach under the rule, however, misinformation must be supplied "for the guidance of others in their business transactions." RESTATEMENT (SECOND) OF TORTS § 552 (emphasis added). It is here, I think, that the majority's logic flies in the face of experience.

*Sain*, 626 N.W.2d at 129 (Neuman, J., dissenting).

I believe the dissent is wrong, because this case does *not* ask the court to "pass judgment on the wisdom and value of a school's chosen curriculum." Sain is not asking a court whether the NCAA *should* have approved Technical Communications. Instead, Sain is complaining because the school told Sain that Technical Communications would be approved by the NCAA, and then the school negligently failed to submit Technical Communications for approval.

The two dissenting justices were also concerned about opening the floodgates of litigation. *Sain*, 626 N.W.2d at 130 (Neuman, J., dissenting). They were apparently wrong, because in the next 12 years no case similar to *Sain* has been reported in Iowa.

Sain settled the case “for a nominal amount” before trial,<sup>11</sup> so there is no subsequent judicial opinion in this case.

Note that the cost of tuition and fees plus on campus room and board at Northern Illinois University for an out-of-state student like Sain is approximately \$23,500 for the 2013-2014 academic year, which is probably *much less* than the attorney’s fees for a trial and appeal, making a case like *Sain* a pyrrhic victory for plaintiff.

The victory for the pupil in Iowa raises the important question of why bad advising that results in the loss of a college athletic scholarship is more worthy of recognition than educational malpractice that results in a defective education or *inappropriate* education. At first glance, this result in Iowa, contrasted with the nationwide failure of previous educational malpractice claims, seems to suggest that judges believe the purpose of high schools is to prepare athletes for college scholarships, *not* to educate pupils in academic skills (e.g., reading, writing, arithmetic and algebra, history, science, ...). However, the case in Iowa had several features that make it easy to find educational malpractice:

1. the cause of the injury was two specific incidents (i.e., (1) one advising session, (2) the failure of the school to submit Technical Communications for NCAA approval), *not* an accumulation of negligent acts by many people over many years.
2. the injury occurred soon after the cause, so there is no statute of limitations problem.
3. any lack of effort (or ability) by the pupil was *not* an issue in *Sain*.
4. the economic value of the injury was easy to determine: it was the value of the lost college scholarship.
5. “Unlike the categories of malpractice described in *Moore*, the claim of misrepresentation in this case does not challenge classroom methodology or theories of education. It is also unrelated to academic performance or the lack of expected skills. It does not intervene into the internal operations, curriculum or academic decisions of an educational institution, or any assigned function of a school under state law.” *Sain*, at 122.
6. “[Sain’s] claim is more compatible with other claims for misrepresentation against professionals by clients who have sought out their expertise.” *Sain*, at 122.

Remarkably, *Sain* has attracted little attention from judges outside of Iowa. In January 2013, about 12 years after *Sain*, I could find only two cases outside of Iowa that mention *Sain*. These two cases are discussed below.

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<sup>11</sup> Personal communication from Matthew Novak, attorney for the Cedar Rapids School District in *Sain*, 15 Feb 2013.

*Scott*, (Wisc. 2003)

Two years after *Sain*, there was a similar case in Wisconsin. A high school guidance counselor advised Ryan Scott that a particular course was approved by the NCAA. The counselor was wrong — the course was *not* approved by the NCAA for four consecutive years — and the University of Alaska subsequently rescinded Scott's athletic scholarship to play hockey. Scott sued the school for negligence, breach of contract, and promissory estoppel. The negligence claim and promissory estoppel claim were barred by governmental immunity in Wisconsin. The breach of contract claim was barred because the counselor had a legal duty to provide advice, hence there was no contract. The only mention of *Sain* is one footnote in *Scott* that distinguishes the two cases:

The plaintiffs fail to cite any case in support of their argument that a public school district is bound by contract to perform governmental services required by law. The plaintiffs' reliance on *Sain v. Cedar Rapids Community School District*, 626 N.W.2d 115 (Iowa 2001), to support any of its claims is misplaced. Although the facts in *Sain* are remarkably similar to those in the present case, the Iowa Supreme Court's reasoning in *Sain* does not support either the plaintiffs' contract or negligence claim. The Iowa supreme court did not rely on contract doctrines to hold the school district liable. The Iowa supreme court permitted a tort claim of negligent misrepresentation against the school district to proceed in *Sain* under Iowa law, but specifically observed that "some states have enacted statutes giving schools and teachers immunity from any liability." *Sain*, 626 N.W.2d at 127. As we have previously held, Wis. Stat. § 893.80(4) is just such a statute.

*Scott v. Savers Property and Casualty Insurance Co.*, 663 N.W.2d 715, 728, n.33 (Wis. 2003).

The majority opinion in *Scott* openly admits the *unjustness* of the law, but nevertheless applies the law:

The plaintiffs correctly point out that Ryan Scott has suffered greatly, and he has no avenue for redress. The outcome of this case is harsh, and the harshness of our holding is especially palpable because the negligence is so clear. Imposing liability in the present case would therefore not serve the policy underlying the doctrine of immunity.

*Scott*, 663 N.W.2d 715, 725-726 at ¶ 37 (Wisc. 2003). Although the majority is clearly sympathetic to Scott, the mechanical application of the immunity statute means that Scott lost this litigation. A concurring opinion in *Scott* says:

Although my sentiments are with the dissent, I concur only because I feel compelled by *stare decisis* to do so.

....

Here, Scott did nothing wrong. In fact, he did everything right. Scott sought out the appropriate individual to assist him in choosing courses to fulfill the requirements for his NCAA scholarship. Scott relied on the advice of his high school guidance counselor, the school official who was privy to the information Scott requested; regrettably, it was to his detriment. The law should not allow such an injustice. Although the majority denies Scott any relief, I believe he should have a legal remedy. Accordingly, I respectfully concur. *Scott* 663 N.W.2d 715, 731, ¶61, 63 (Wis. 2003) (Bablitch, J., concurring).

*Key v. Coryell*, (Ark.App. 2004)

One case from an intermediate appellate court in Arkansas cited *Sain*:

Most out-of-state cases that have addressed this issue reject the existence of an “educational malpractice” cause of action. [citations omitted] The cases dealing with this issue generally hold that a cause of action seeking damages for acts of negligence in the educational process is precluded by considerations of public policy, among them being the absence of a workable rule of care against which the defendant's conduct may be measured, the inherent uncertainty in determining the cause and nature of any damages, and the extreme burden that would be imposed on the resources of the school system and the judiciary. See *Hunter v. Board of Educ. of Montgomery County*, 292 Md. 481, 439 A.2d 582 (1982); *Rich v. Kentucky Country Day, Inc.*, 793 S.W.2d 832 (Ky.Ct.App. 1990). On the other hand, the Supreme Court of Iowa recognized such a cause of action in limited situations in *Sain v. Cedar Rapids Community School District*, 626 N.W.2d 115 (Iowa 2001).

We find the majority view more persuasive and choose not to recognize a cause of action for educational malpractice in Arkansas.

*Key v. Coryell*, 185 S.W.3d 98, 106-107 (Ark.App. 2004).

### **physical injury cases**

In a typical educational malpractice case in the USA during the 1980s and 1990s, the plaintiff graduated with less knowledge than he/she should have acquired. The injury to plaintiff was typically an inability to be qualified for appropriate employment. Judges commonly rejected such educational malpractice claims as *not* stating a valid cause of action.

There is a long line of cases in the USA in which negligent instruction, negligent supervision, or failure to teach an essential skill, caused a physical injury to a pupil or student. Judges distinguish cases involving physical injury from other educational malpractice cases, because of the well-established common-law duty to avoid “physical harm resulting from ... failure to exercise reasonable care”. RESTATEMENT SECOND OF TORTS § 323 (1965). For citations to cases, see the list above at Nr. 11 in my taxonomy, at page 8.

*Doe v. Yale Univ.*, (Conn. 2000)

In a landmark case in 2000, the Connecticut Supreme Court distinguished permitted physical injury torts from forbidden educational malpractice torts:

We recognize that, at first blush, the distinction between an educational malpractice claim, rejected in *Gupta*, and a cognizable negligence claim arising in the educational context, permitted in *Kirchner [v. Yale University]*, 192 A.2d 641 (Conn. 1963)], may not always be clear. We conclude, however, that the distinction lies in the duty that is alleged to have been breached. If the duty alleged to have been breached is the duty to educate effectively, the claim is not cognizable. *Gupta v. New Britain General Hospital*, supra, 239 Conn. at 593-94, 687 A.2d 111. If the duty alleged to have been breached is the common-law duty not to cause physical injury by negligent conduct, such a claim is, of course, cognizable. That common-



law duty does not disappear when the negligent conduct occurs in an educational setting. This principle underlies this court's decision in *Kirchner*. The duty of an educator or supervisor to use reasonable care so as not to cause physical injury to a trainee during the course of instruction or supervision is not novel. [FN17]

[FN17] The plaintiff directs our attention to a myriad of cases that demonstrate this principle. See, e.g., *Stehn v. Bernarr MacFadden Foundations, Inc.*, 434 F.2d 811, 814–15 (6th Cir. 1970) (adult wrestling class student stated cause of action where injury resulted from inadequate instruction and supervision); *Brigham Young University v. Lillywhite*, 118 F.2d 836, 841 (1941) (college chemistry student entitled to recover for injury resulting from professor's inadequate instruction and supervision); *Delbridge v. Maricopa County Community College District*, 182 Ariz. 55, 59, 893 P.2d 55 (1994) (college required to exercise reasonable care to protect student from injury); *Ahern v. Livermore Union High School District*, 208 Cal. 770, 781, 284 P. 1105 (1930) (Preton, J., dissenting) (shop class student entitled to recover for injury based on inadequate instruction and supervision); *Morehouse College v. Russell*, 109 Ga.App. 301, 320, 136 S.E.2d 179 (1964) (estate of college student killed in swimming class entitled to recover based on inadequate instruction and supervision); *Barbin v. Louisiana*, 506 So.2d 888, 893 (La.App. 1987) (shop class student entitled to recover for injury based on inadequate instruction and supervision); *Garrett v. Northwest Mississippi Junior College*, 674 So.2d 1, 3–4 (Miss. 1996) (same); *Yarborough v. City University of New York*, 137 Misc.2d 282, 285–86, 520 N.Y.S.2d 518 (Ct.Cl. 1987) (adult physical education student entitled to recover for injuries based on inadequate instruction); *DeMauro v. Tusculum College, Inc.*, 603 S.W.2d 115, 120 (Tenn. 1980) (student in college golf class entitled to recover if he could prove injury resulted from improper instruction or supervision); *Sewell v. London*, 371 S.W.2d 426, 427 (Tex.Civ.App. 1963) (shop class student stated cause of action for injury resulting from inadequate supervision and instruction); *Jay v. Walla Walla College*, 53 Wash.2d 590, 597, 335 P.2d 458 (1959) (chemistry lab student entitled to recover for injury caused by teacher's failure to supervise).  
*Doe v. Yale University*, 748 A.2d 834, 847 (Conn. 2000).

*Fry v. Cessna Aircraft*, (Tarrant Cty. 2005)

A Cessna aircraft experienced icing and crashed, killing four occupants of the aircraft in 2002. In a wrongful death litigation in Texas state court,

Plaintiffs allege that (1) FlightSafety negligently failed to properly instruct the pilots of the Cessna Caravan on how to avoid ice accumulation, the unusual dangers of airframe icing associated with the Cessna Caravan and how to control the Cessna Caravan should ice accumulation occur, and FlightSafety failed to exercise reasonable care in performing flight training services; (2) FlightSafety fraudulently failed to disclose information about icing conditions with the Cessna Caravan; and (3) FlightSafety breached express and implied warranties to plaintiffs concerning FlightSafety's training and safety instructions and the aircraft itself.

*In re Cessna 208 Series Aircraft Products Liability Litigation*, 546 F.Supp.2d 1153, 1157 (D.Kan. 2008). The case was initially filed in state court in Ft. Worth, Texas. There, defendant FlightSafety moved for summary judgment because plaintiff's claim was a forbidden "educational malpractice" claim. In August 2005, Judge Cosby in a Texas state trial court denied summary judgment in a one-page, unpublished opinion. *Fry, Galaway, Randolph, Silvey v. Cessna*,

067-199130-03 (Tarrant Cty., Texas 29 Aug 2005). After the case was removed to federal court and then transferred to a federal District Court in Kansas that was hearing a group of cases against Cessna, the judge in Kansas refused to revisit the unpublished decision from Texas. *In re Cessna 208 Series Aircraft Products Liability Litigation*, 546 F.Supp.2d 1153, 1158-1159 (D.Kan. 2008). Because of the importance of the unpublished decision in Texas, I searched the docket in the Kansas case (2:05-md-01721-KHV, document Nr. 241)<sup>12</sup> and found copies of some of the earlier Texas documents, which I posted at my website:

<http://www.rbs2.com/Fry050829.pdf> (Judge Cosby's 29 Aug 2005 decision)

Because Judge Cosby's one-page decision gives no reasons for denying summary judgment on the educational malpractice issue, I also downloaded Plaintiff's Brief of 14 Oct 2004 in support of denying summary judgment: <http://www.rbs2.com/FryPresponse041014.pdf> .

The judge in Kansas explained that Judge Cosby made his decision on the basis of *Doe v. Yale University*, (Conn. 2000) and on the basis of the dissenting opinion in *Page v. Klein Tools*, (Mich. 2000). See *In re Cessna 208 Series Aircraft Products Liability Litigation*, 546 F.Supp.2d 1153, 1158 (D.Kan. 2008). I believe these two cases are weak authority: *Doe* is distinguishable in that the physical injury happened on campus, and the dissenting opinion in *Page* is **not** law.

Each of the plaintiffs in *Fry* settled with defendant FlightSafety,<sup>13</sup> the operator of the flight school, so there was no trial on this issue.

#### flight-school cases

An alternative reason for Judge Cosby's decision is a line of cases that establishes duty for flight schools to properly train pilots. This line of cases goes back to the 1950s, long before attorneys began arguing about "educational malpractice":

- *Weadock v. Eagle Indemnity Co.*, 15 So.2d 132, 139-140 (La.App. 1943) ("It is axiomatic, as a legal principle, that in the undertakings of life, the greater the hazard involved the greater the degree of care and prudence on the part of those who choose to conduct such undertakings. .... Therefore, we hold that [the instructor's] negligence in the respects herein discussed was actionable and constitutes the proximate cause of the accident.");
- *Lunsford v. Tucson Aviation Corp.*, 240 P.2d 545, 546 (Ariz. 1952) ("The defendants for the purpose of this appeal concede that a training school owes to its students the same standard of care as is owed by a common carrier by air towards its passengers.");

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<sup>12</sup> Note that the document numbers mentioned in the FEDERAL SUPPLEMENT opinion from Kansas do *not* correspond to the online document numbers in Feb 2013.

<sup>13</sup> *Fry v. Cessna*, Order Summarizing Proceedings, 2:05-md-01721-KHV, document Nr. 978 at p. 2 (D.Kansas 11 Mar 2010).

- *Farish v. Canton Flying Services*, 58 So.2d 915, 918 (Miss. 1952) (airplane crash during flying lessons: “It was also a question for the jury, on this record, whether or not appellee failed to train and instruct [decedent] sufficiently, and, if so, whether or not such failure proximately caused or contributed to his injury and death.”);
- *De Rienzo v. Morristown Airport Corp.*, 146 A.2d 127, 131 (N.J. 1958) (airplane crash during flying lessons: “The plaintiff’s inexperience; the undertaking of the defendant to teach him to fly; [defendant’s] admitted practice of locking the controls, making a safe flight impossible; its failure to instruct the student about this practice or to warn him; its furnishing a plane with, according to Miller’s testimony, the controls locked, with knowledge that the student was unaware of the condition because he had never been apprised of it; the representation at the time of the preflight inspection by an agent of the defendant that everything was all right — all these, taken in combination and as they reflect one upon the other, in our opinion presented a question of fact which should only have been determined by the jury.”);
- *Lange v. Nelson-Ryan Flight Service, Inc.*, 108 N.W.2d 428, 432 (Minn. 1961) (“Although a trainee, whether or not fully licensed, is responsible for his own negligence when flying solo, when flying with a flight instructor a trainee is a passenger, and the responsibility of the flying school to him is measured by the legal standard of a carrier.”);
- *Furumizo v. U.S.*, 245 F.Supp. 981, 991 (D.Hawaii 1965) (airplane crash during flying lessons: “Therefore Baker [aircraft seller and trainer] was negligent in not having furnished an instructor who was so fully aware of such dangers that he would have avoided taking off when and under the circumstances he did.”), *aff’d*, 381 F.2d 965, 967, 969 (9thCir. 1967);
- *Allegheny Airlines, Inc. v. U.S.*, 504 F.2d 104, 115 (7thCir. 1974) (airplane crash during flying lessons, holds that claim that student pilot was “improperly instructed” is to be resolved by a jury, not a directed verdict);

However, in this line of cases, the student-pilot was injured or killed *during* a flight lesson. In *Fry*, the pilot was killed *after* he had completed his flight training. That fact may make *Fry* distinguishable from cases in which the injury occurred during education or training.

Note that *Fry* is an *unreported* opinion of a trial court, which is *not* precedent anywhere. Because of Judge Cosby’s one-page summary opinion without reasons, I suggest *Fry* is *not* even persuasive authority. The following case (*Dallas Airmotive*), with similar facts to *Fry*, is in the mainstream in that plaintiff was forbidden to make educational malpractice claims.

*Dallas Airmotive*, (Mo.App. 2008) (plaintiff lost)

In a Missouri case, *Dallas Airmotive* alleged that a pilot was negligently trained in a flight simulator that was “unrealistic and inadequate”, and, as a consequence of this negligence, an airplane crashed, killing the five occupants. The intermediate state court in Missouri held that this was actually a case of educational malpractice, which was forbidden.

The distinction between an educational malpractice claim and a cognizable negligence claim arising in the educational context may not always be clear. The duty not to cause physical injury by negligent conduct “does not disappear when the negligent conduct occurs in an educational setting.” *Vogel*, 754 A.2d [824] at 828 [(Conn.App. 2000) (quoting *Doe v. Yale*, 748 A.2d 834, 847 (Conn. 2000))]. The duty pertains to an educator or supervisor using reasonable care so as not to cause physical injury to a trainee during the course of instruction or supervision. *Id.* For instance, a woodworking shop instructor has a duty “to exercise reasonable care not only to instruct and warn students in the safe and proper operation of the machines provided for their use but also to furnish and have available such appliances, if any, as would be reasonably necessary for the safe and proper use of the machines.” *Kirchner v. Yale Univ.*, 150 Conn. 623, 192 A.2d 641, 643 (1963). The duty recognized was the duty owed by an educator not to cause physical injury by negligent conduct *in the course*<sup>14</sup> of instruction. *Id.* Another example is the duty of a medical school residency program to train a resident in needle safety and supervise him, in the course of his instruction, while performing a procedure involving needles. *Doe v. Yale Univ.*, 252 Conn. 641, 748 A.2d 834, 846–50 (2000). It is the duty of an educator or supervisor to use reasonable care so as not to cause physical injury to a trainee during the course of instruction or supervision. *Id.*

This is not a case of an injury during the instruction. It is not a case in which an improperly maintained flight simulator malfunctioned, causing an electrical shock injury to the student. Nor does the case involve failure to properly maintain the premises of the instruction, causing a student to fall and suffer injury. This is a case about the quality of the instruction. *Dallas Airmotive, Inc. v. FlightSafety Intern., Inc.*, 277 S.W.3d 696, 700-701 (Mo.App. 2008).

Four years after *Dallas Airmotive*, an intermediate Illinois appellate court agreed with *Dallas Airmotive*:

These same public policy concerns have persuaded courts to dismiss claims based on educational malpractice against flight training schools and flight instructors. See *Dallas Airmotive*, 277 S.W.3d 696. [footnote omitted] The *Dallas Airmotive* court addressed the distinction between a noncognizable educational malpractice claim and an ordinary negligence claim in the educational context. It began by noting that, even in the educational context, there remains a duty not to cause physical injury by negligent conduct. *Dallas Airmotive*, 277 S.W.3d at 700 (citing *Vogel*, 754 A.2d [824] at 827 n. 7 [(Conn.App. 2000.)]). However, the “duty pertains to an educator or supervisor using reasonable care so as not to cause physical injury to a trainee during the course of instruction or supervision.” *Dallas Airmotive*, 277 S.W.3d at 700 (citing *Vogel*, 754 A.2d at 828).<sup>15</sup> It then gave examples such as: “a

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<sup>14</sup> Italics in *Dallas Airmotive*.

<sup>15</sup> Footnote by Standler. *Vogel* took the quotation from *Doe v. Yale*, 748 A.2d 834, 847 (Conn. 2000).

woodworking shop instructor has a duty ‘to exercise reasonable care not only to instruct and warn students in the safe and proper operation of the machines provided for their use but also to furnish and have available such appliances, if any, as would be reasonably necessary for the safe and proper use of the machines.’ ” *Dallas Airmotive*, 277 S.W.3d at 700-01 (quoting *Kirchner v. Yale University*, 150 Conn. 623, 192 A.2d 641, 643 (1963)). “The duty recognized was the duty owed by an educator not to cause physical injury by negligent conduct *in the course* of instruction.” (Emphasis in original.) *Dallas Airmotive*, 277 S.W.3d at 701.

*Waugh v. Morgan Stanley and Co., Inc.*, 966 N.E.2d 540, 552, ¶38 (Ill.App. 2012), *appeal denied*, 979 N.E.2d 890 (Ill. 2012) .

#### conclusion about physical injury

When a pupil or student receives a physical injury as a result of either (1) negligent supervision by an instructor or (2) failure to teach an essential skill, courts in the USA allow a claim. See the list above at Nr. 11 in my taxonomy, at page 8. Most of these physical injuries occurred during either athletic activities, chemistry experiments, or shop classes, but some physical injuries occurred during aircraft flying lessons. The Connecticut Supreme Court summarized traditional tort law, which also applies to educational institutions:

If the duty alleged to have been breached is the common-law duty not to cause physical injury by negligent conduct, such a claim is, of course, cognizable. That common-law duty does not disappear when the negligent conduct occurs in an educational setting. This principle underlies this court's decision in *Kirchner [v. Yale Univ.]*, 192 A.2d 641, 643 (Conn. 1963)].

The duty of an educator or supervisor to use reasonable care so as not to cause physical injury to a trainee during the course of instruction or supervision is not novel [footnote citing cases]. *Doe v. Yale University*, 748 A.2d 834, 847 (Conn. 2000). Educational institutions *do* have a legal duty to avoid physical injuries caused by negligence of the institution or its instructors.

In sharp contrast, when a pupil or student receives a defective education or an inadequate education, there is a strong judicial consensus that courts should reject the claim. These are the typical educational malpractice cases. Judges rejecting educational malpractice claims typically hold that the school or college has *no legal duty* to the plaintiff.<sup>16</sup>

But notice that the physical injury cases that are permitted involve a kind of educational malpractice, in that the instructor was negligent. In these physical injury cases the judge and jury will need to consider some academic issues, such as whether the benefit of the experiment is worth the risk to the pupil/student, whether the written instructions were negligent, whether the instructor's supervision was negligent, etc. While some law review articles have noticed the permissibility of physical injury cases, judges have generally done a poor job of distinguishing allowed physical injury cases from forbidden educational malpractice cases. No one seems to have noticed the *inconsistency* of allowing physical injury cases against educational institutions, but denying educational malpractice claims.

The obvious question is "Why do courts regard physical injury as more worthy of compensation than intellectual injury?" Lack of education can reduce one's earning potential at least as much as loss of an arm. I suggest that the answer is that courts traditionally required physical injury as a condition for a negligence claim, and only relatively recently began to accept claims for emotional distress and other nonphysical injuries. In an analogous area of law, judges were reluctant to recognize emotional distress claims unless the emotional distress was accompanied by a physical injury.<sup>17</sup> For nonphysical injuries, judges have been concerned about

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<sup>16</sup> See, e.g., *Peter W. v. San Francisco Unified Sch. Dist.*, 131 Cal.Rptr. 854, 861 (Cal.App. 1976) ("These recognized policy considerations alone negate an actionable 'duty of care' in persons and agencies who administer the academic phases of the public educational process."); *Donohue v. Copiague Union Free School District.*, 407 N.Y.S.2d 874, 878 (N.Y.A.D. 1978) ("Upon our own examination and analysis of the relevant factors discussed above, which are involved in determining whether to judicially recognize the existence of a legal duty of care running from educators to students, we, like the court in *Peter W.*, hold that no such duty exists."), *aff'd on public policy grounds*, 391 N.E.2d 1352 (N.Y. 1979); *Nalepa v. Plymouth-Canton Community School Dist.*, 525 N.W.2d 897, 904 (Mich.App. 1994) ("Michigan law is clear that the duty does not extend to educational malpractice."); *Dallas Airmotive, Inc. v. Flightsafety Int'l, Inc.*, 277 S.W.3d 696, 699 (Mo.App. 2008) ("Missouri, along with most other jurisdictions that have considered the issue, has found that educational malpractice claims are not cognizable because there is no duty.").

<sup>17</sup> See, e.g., *Abouzaid v. Mansard Gardens Associates, LLC*, 23 A.3d 338, 343-344 (N.J. 2011) (From 1900 until 1965, New Jersey allowed claims for negligent infliction of emotional distress only if there was also "a contemporaneous physical injury"); *R.J. v. Humana of Florida, Inc.*, 652 So.2d 360, 362 (Fla. 1995) (Since 1893, Florida allows claims for emotional distress only if it was caused by a physical injury, or if it was an intentional infliction of emotional distress.); *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 438 (Minn. 1983) ("Our past reluctance to provide a direct remedy through the recognition of an independent tort [of emotional distress] reflects a policy consideration that an independent claim of mental anguish is speculative and so likely to lead to fictitious allegations that there is a considerable potential for abuse of the judicial process. Although our support of the

the possibility of fraudulent claims, because nonphysical injuries (e.g., infliction of emotional distress) were difficult to verify. Further, the amount of money damages for nonphysical injuries are somewhat speculative. Lack of an education is *not* yet accepted as an injury for which tort law will provide a remedy.

As I write this in February 2013, it is currently *unsettled* law whether a plaintiff can sue a flight school for negligent instruction, or failure to teach an essential skill, that caused an airplane crash *after* the pilot completed his formal training.

### States Rejecting Educational Malpractice

As of January 2013, courts in each of the following states have barred the use of educational malpractice claims. The following list contains decisions of state supreme courts, plus a few important states (e.g., California) that have disposed of this issue at an intermediate appellate court level. I have *not* made a comprehensive effort to find and to include intermediate appellate court cases from *all* fifty states, but I did search in 18 states, mostly in the Northeastern USA. I emphasize that the following list is *not* a complete list of states that have rejected the tort of educational malpractice.<sup>18</sup>

In the following list, for each state, I put state supreme court decisions first, then intermediate state appellate court decisions, and federal court decisions at the end. Federal courts can *not* make common law for states, a federal court can either (1) predict what a state court would do or (2) certify a question to the state supreme court.

An attorney for a potential litigant wishing to make an educational malpractice claim *should* do current research in the relevant jurisdiction to find the current law, and — if the educational malpractice claim is barred — then a current search in all fifty states in an attempt to find citations to cases that would either (1) distinguish a claim from the forbidden educational malpractice or (2) support an assault on the barring of educational malpractice claims.

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policy of protecting the judicial process from trivial and speculative claims by restricting tort recoveries for mental distress is undiminished, ...."); *Payton v. Abbott Labs*, 437 N.E.2d 171, 176-181 (Mass. 1982) (reviewing history of tort of emotional distress); *Farmer v. United Broth. of Carpenters and Joiners of America, Local 25*, 430 U.S. 290, 302 (1977) ("Although recognition of the tort of intentional infliction of emotional distress is a comparatively recent development in state law, see W. Prosser, *LAW OF TORTS*, § 12, pp. 49-50, 56 (4th ed. 1971), ...."). See also W. Page Keeton et al., *PROSSER AND KEETON ON THE LAW OF TORTS* § 54, at 363 (5th ed. 1984); *RESTATEMENT (SECOND) OF TORTS* § 436A comment *b* (1965) (skepticism of claims for emotional disturbance without physical injury).

<sup>18</sup> Joel E. Smith, Annotation, Tort Liability of Public Schools and Institutions of Higher Learning for Educational Malpractice, 1 A.L.R.4th 1139 (1980). See also the articles cited in the bibliography to this essay, beginning at page 66, below.

**Alabama:**

- *Blane v. Alabama Commercial College, Inc.*, 585 So.2d 866 (Ala. 1991);
- *Christensen v. Southern Normal School*, 790 So.2d 252 (Ala. 2001).

**Alaska:**

- *D.S.W. v. Fairbanks North Star Borough School Dist.*, 628 P.2d 554 (Alaska 1981).

**California:**

- *Peter W. v. San Francisco Unified School Dist.*, 131 Cal.Rptr. 854 (Calif.App. 1976);
- *Smith v. Alameda County Social Services Agency*, 153 Cal.Rptr. 712 (Calif.App. 1979).

**Colorado:**

- *CenCor, Inc. v. Tolman*, 851 P.2d 203 (Colo.App. 1992), *aff'd*, 868 P.2d 396 (Colo. 1994).

**Connecticut:**

- *Gupta v. New Britain General Hospital*, 687 A.2d 111 (Conn. 1996);
- *Doe v. Yale University*, 748 A.2d 834 (Conn. 2000);
- *Bell v. Board of Education of City of West Haven*, 739 A.2d 321, 324-326 (Conn.App. 1999);
- *Vogel v. Maimonides Academy of Western Connecticut, Inc.*, 754 A.2d 824 (Conn.App. 2000).

**Florida:**

- *Tubell v. Dade County Public Schools*, 419 So.2d 388 (Fla.App. 1982);
- *Armstrong v. Data Processing Institute, Inc.*, 509 So.2d 1298 (Fla.App. 1987).

**Idaho:**

- *Wickstrom v. North Idaho College*, 725 P.2d 155 (Idaho 1986).

**Illinois:**

- *Lewis E. v. Spagnolo*, 710 N.E.2d 798 (Ill. 1999) (Illinois Constitution does not give pupils a legal right to “an adequate education.” Does *not* mention “educational malpractice”.);
- *Waugh v. Morgan Stanley and Co., Inc.*, 2012 IL App (1st) 102653, 966 N.E.2d 540, 549-554 (Ill.App. 2012) (“We ... therefore hold that claims sounding in educational malpractice, that is, claims alleging negligent instruction, are not cognizable in Illinois.”), *appeal denied*, 979 N.E.2d 890 (Ill. 2012);
- *Ross v. Creighton Univ.*, 957 F.2d 410, 415 (7thCir. 1992) (“We believe that the Illinois Supreme Court would find the experience of other jurisdictions persuasive and, consequently, that these policy considerations are compelling. Consequently, the Illinois Supreme Court would refuse to recognize the tort of educational malpractice.”).



**Kansas:**

- *Finstad v. Washburn University of Topeka*, 845 P.2d 685 (Kan. 1993).

**Maine:**

- *Ambrose v. New England Ass'n of Schools and Colleges*, 252 F.3d 488, 499 (1stCir. 2001) (“On much the same policy grounds, courts consistently have rejected students' claims of ‘educational malpractice’ against schools. See *Ross v. Creighton Univ.*, 957 F.2d 410, 414, n.2 (7thCir. 1992) (collecting cases). We agree with the amici that these policy reasons counsel just as strongly in favor of rejecting students' claims of negligent accreditation. More importantly, we believe that the Maine Supreme Judicial Court would give great weight to these factors. We predict, therefore, that Maine would not now recognize a cause of action by or on behalf of a disgruntled student (or former student) for negligent accreditation.”).

**Maryland:**

- *Hunter v. Board of Education*, 439 A.2d 582 (Md. 1982);
- *Doe v. Board of Education, Montgomery Co.*, 453 A.2d 814 (Md. 1982);

**Massachusetts:**

- *McLaughlin v. City of Lowell*, 8 Mass.L.Rptr. 343, Not Reported in N.E.2d, 1998 WL 224929 at \*15 (Mass.Super. 1998) (“See also, *Doe v. Town of Framingham*, 965 F.Supp. 226, 229-230 (D.Mass. 1997) (there is no common law tort of educational malpractice under Massachusetts law), and cases cited.”);
- *Doe v. Town of Framingham*, 965 F.Supp. 226, 230 (D.Mass. 1997) (“Both federal and Massachusetts law provide regulatory remedies to deal with what might be termed educational malpractice. The administrative process provides an expeditious means of resolving educational disputes in which both parents and administrators are involved. In an area specifically addressed by such meticulous regulation, there is no need to construct what is likely to be a redundant and clumsy common law remedy. Massachusetts has not done so, and it does not appear likely that it would.”).

**Michigan:**

- *Page v. Klein Tools, Inc.*, 610 N.W.2d 900 (Mich. 2000);
- *Johnson v. Clark*, 418 N.W.2d 466 (Mich.App. 1987);
- *Nalepa v. Plymouth-Canton Community School Dist.*, 525 N.W.2d 897 (Mich.App., 1994).

**Minnesota:**

- *Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 468, 472-473 (Minn.App. 1999);
- *Glorvigen v. Cirrus Design Corp.*, 796 N.W.2d 541, 552-555 (Minn.App. 2011), *aff'd on other grounds*, 816 N.W.2d 572 (Minn. 2012);
- *Zinter v. University of Minnesota*, 799 N.W.2d 243 (Minn.App. 2011).

**New Hampshire:**

as of Jan 2013, no reported cases in New Hampshire decided “educational malpractice”.

**New York:**

- *Donohue v. Copiague Union Free School Dist.*, 391 N.E.2d 1352 (N.Y. 1979);
- *Hoffman v. Board of Education*, 400 N.E.2d 317 (N.Y. 1979);
- *Torres v. Little Flower Children's Services*, 474 N.E.2d 223 (N.Y. 1984);
- *Paladino v. Adelphi University*, 454 N.Y.S.2d 868 (N.Y.A.D. 1982);
- *Helbig v. City of New York*, 622 N.Y.S.2d 316 (N.Y.A.D. 1995);
- *Sirohi v. Lee*, 634 N.Y.S.2d 119 (N.Y.A.D. 1995);
- *Alligood v. County of Erie*, 749 N.Y.S.2d 349 (N.Y.A.D. 2002);
- *McGovern v. Nassau County Dept. of Social Services*, 876 N.Y.S.2d 141 (N.Y.A.D. 2009);
- *Introna v. Huntington Learning Ctrs., Inc.*, 911 N.Y.S.2d 442, 445-446 (N.Y.A.D. 2010);
- *Papelino v. Albany College of Pharmacy of Union University*, 633 F.3d 81, 93-94 (2dCir. 2011).

**Ohio:**

- *Denson v. Steubenville Board of Education*, Not Reported in N.E.2d, 1986 WL 8239 at \*1 (Ohio App. 1986);
- *Poe v. Hamilton*, 565 N.E.2d 887, 889 (Ohio App. 1990);
- *Malone v. Academy of Court Reporting*, 582 N.E.2d 54, 58 (Ohio App. 1990) (dictum);
- *Lawrence v. Lorain County Community College*, 713 N.E.2d 478, 480 (Ohio App. 1998);
- *Leiby v. Univ. of Akron*, Not Reported in N.E.2d, 2006-Ohio-2831 at ¶27, 2006 WL 1530152 (Ohio App. 2006).

**Pennsylvania:**

- *Aubrey v. School Dist. of Philadelphia*, 437 A.2d 1306 (Pa.Cmwlth. 1981);
- *Agostine v. School Dist. of Philadelphia*, 527 A.2d 193 (Pa.Cmwlth. 1987);
- *Cavaliere v. Duff's Business Inst.*, 605 A.2d 397 (Pa.Super. 1992);
- *Swartley v. Hoffner*, 734 A.2d 915 (Pa.Super. 1999).

**Vermont:**

As of Jan 2013, no reported cases in Vermont mention “educational malpractice”.

**Virginia:**

- *Sellers v. School Board of the City of Manassas*, 960 F.Supp. 1006, 1012-1014 (E.D.Va. 1997), *aff'd*, 141 F.3d 524, 526-527 (4thCir. 1998);
- *Ogbaegbe v. Hampton University*, 141 Fed.Appx. 100 (4thCir. 2005).

**Wisconsin:**

*Wilson v. Continental Ins. Cos.*, 274 N.W.2d 679 (Wis. 1979).

The list above shows that it is now very well established law that educational malpractice is *not* a viable tort in the USA.

### **Why judges reject educational malpractice**

In 1992, the U.S. Court of Appeals for the Seventh Circuit summarized the four public policy grounds that judges used to reject educational malpractice claims:

- (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.

*Ross v. Creighton Univ.*, 957 F.2d 410, 414 (7thCir. 1992).

These reasons have met with widespread approval amongst judges, and were quoted by:

- *Finstad v. Washburn University of Topeka*, 845 P.2d 685, 694 (Kan. 1993) (paraphrase);
- *Brantley v. District of Columbia*, 640 A.2d 181, 184 (D.C. 1994);
- *Alsides v. Brown Institute*, 592 N.W.2d 468, 472 (Minn.App. 1999);
- *Christensen ex rel. Hatcher v. Southern Normal School*, 88 F.Supp.2d 1310, 1318 (M.D.Ala. 2000);
- *Page v. Klein Tools, Inc.*, 610 N.W.2d 900, 903 (Mich. 2000);
- *Dallas Airmotive, Inc. v. FlightSafety Intern., Inc.*, 277 S.W.3d 696, 701 (Mo.App. 2008);
- *Glorvigen v. Cirrus Design Corp.*, 796 N.W.2d 541, 554 (Minn.App. 2011);
- *Waugh v. Morgan Stanley and Co., Inc.*, 2012 IL App (1st) 102653 at ¶37, 966 N.E.2d 540, 552 (Ill.App. 2012).

### **standard of care for teaching**

Courts repeatedly asserted that evaluation of education was *impossible* in a court room, ignoring a glaring *inconsistency* in their reasoning: courts routinely deal with similar technical issues with conflicting facts in both medical malpractice and products liability claims. As the courts noted, good teaching does not guarantee good learning, since the pupil and his/her parents control many of the factors in learning. But this situation is no different from some medical malpractice cases, in which the physician prescribes appropriate therapy, but the patient does not take prescribed medicine, the patient does not do orthopedic exercises, the patient misses medical appointments, .... then the patient complains of a bad result. Similarly, the situation is no different from plaintiffs in products liability cases where the plaintiff misused the product or the plaintiff failed to follow the manufacturer's instructions, ... then the plaintiff blames the manufacturer for an injury.

Courts complain that it is too difficult for them to set a standard of care in teaching. Courts routinely set a standard of care for physicians and surgeons, so let's compare teaching with medicine. A person can teach in public school with a mere bachelor's degree in "education", which takes only 4 years of full-time study to earn. Furthermore, every parent has some experience teaching their children. On the other hand, a physician must have a minimum of a bachelor's degree in science, four grueling years of medical school, and complete a residency (i.e., apprenticeship) of at least three years, for a total of 11 years of education. This comparison shows that, of the two professions, medicine is by far the more technical, and the more remote from the experience of the judge and members of the jury. Courts' conclusory assertion that it is impossible to formulate a standard of care for teaching is patently ridiculous, when courts routinely establish a standard of care for medical malpractice.

### **failure to teach ?**

The judges often *mischaracterized* the issue as "failure to teach", which made it easy for the judges to dispose of this case, since good teaching does not guarantee good learning. But, as Judge Suozzi noted, the key issue in the *Donohue* case was the continued promotion of the pupil to the next grade level, despite the pupil's lack of competence with the material, and the pupil's eventual graduation from high school. It is a matter for future courts to decide whether this automatic promotion and graduation of *incompetent* pupils is negligence or fraud.

The label "failure to teach" is misleading, in that it *inaccurately* characterizes the nature of education. In claims alleging a defective education, I believe that it is a mistake to focus solely on "failure to teach" or "educational malpractice". Education is *not* something that teachers install in pupils, like screwing a light bulb into a socket. Education is *not* something that can be absorbed passively by sitting in a classroom chair. Education is something that pupils must *do* for themselves: by reading, by writing, by doing homework problems, by doing science experiments, .... In fairly evaluating claims of a defective education, courts will need to also consider the ability of pupils, the effort of pupils, any handicaps of pupils (e.g., dyslexia, hearing impairment, etc.). Expert testimony from psychologists, psychiatrists, physicians, and teachers will be essential.

### **financial drain on beleaguered schools**

The courts were concerned about the financial drain of malpractice litigation on public schools, again ignoring a glaring *inconsistency* in their reasoning: courts see no problem with holding either manufacturers liable for alleged defects in their products or physicians liable for injuries allegedly caused by their negligence. (Indeed, tort lawyers claim that such litigation makes products and medical care safer, thereby benefiting the entire public.) The reasons that the court gave to shield public schools from liability were precisely the reasons that courts across the nation had earlier rejected, in ending immunity for torts committed by state and local governments, see, e.g.,

- *Muskopf v. Corning Hosp. Dist.*, 359 P.2d 457 (Calif. 1961);

- *Ayala v. Philadelphia Board Edu.*, 305 A.2d 877 (Pa. 1973);
- *Mayle v. Penn. Dept. Highways*, 388 A.2d 709 (Pa. 1978).

The state and local government budget is the constitutional responsibility of the executive and legislative branches of government, *not* the judiciary. While a judge *might* make a valid argument that financial drain on schools in educational malpractice claims is a valid consideration in determining the *amount* of an award, financial drain can *not* be a valid consideration in whether to allow the tort of educational malpractice.

### **floodgates of litigation**

The previous specious reason was concerned about financial burden on public schools. An alternative specious reason is to be concerned about burdening courts with more torts: allegedly recognizing the new tort of educational malpractice as valid will “open the floodgates of litigation”, which will burden the courts.

To quote an old legal maxim, the proper role of the courts is: “*Fiat justitia, ruat coelum.* (Let justice be done, though the heavens fall.)” *Hoffman v. Board of Education*, 410 N.Y.S. 99, 111 (N.Y.A.D. 1978), *rev’d on other grounds*, 400 N.E.2d 317 (N.Y. 1979).

A venerable torts textbook remarks about the reluctance of judges to “open the floodgates of litigation” in the context of infliction of mental distress:

... this is a poor reason for denying recovery for any genuine, serious mental injury. 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.

PROSSER ON TORTS, § 12, p. 51 of Hornbook edition (4th ed. 1971);

PROSSER AND KEETON ON TORTS, § 12, p. 56 of Hornbook edition, (5th ed. 1984).

cited with approval in *Doe v. Board of Education of Montgomery County*, 453 A.2d 814, 823 (Md. 1982) (Eldridge, J., dissenting).

The *only* job of courts is to adjudicate disputes between people. The refusal of judges to hear complaints against schools effectively gives schools a license to misbehave and harm pupils, since the schools are then *not* accountable to their pupils in a court. Nonetheless, the possibility of a flood of litigation against schools has bothered judges from the beginning of educational malpractice claims, as shown by the following citations.

To hold [public schools] to an actionable ‘duty of care,’ in the discharge of their academic functions, would expose them to the tort claims — real or imagined — of disaffected students and parents in countless numbers.

*Peter W. v. San Francisco Unified Sch. Dist.*, 131 Cal.Rptr. 854, 861 (Cal.App. 1976). This sentence from *Peter W.* was quoted in:

*Donohue v. Copiague Union Free School District.*, 407 N.Y.S.2d 874, 878 (N.Y.A.D. 1978);

*D. S. W. v. Fairbanks North Star Borough School Dist.*, 628 P.2d 554, 556 (Alaska, 1981);

*Hunter v. Board of Educ. of Montgomery County*, 439 A.2d 582, 584 (Md. 1982);  
*Brantley v. District of Columbia*, 640 A.2d 181, 185 (D.C. 1994);  
*Bell v. Board of Educ. of City of West Haven*, 739 A.2d 321, 325, n.9 (Conn.App. 1999);  
*Simonian v. Fowler Unified School Dist.*, 473 F.Supp.2d 1065, 1068 (E.D.Cal. 2007).

In 1990, a federal trial judge wrote:

It also must be remembered that education is a service rendered on an immensely greater scale than other professional services. If every failed student could seek tort damages against any teacher, administrator and school he feels may have shortchanged him at some point in his education, the courts could be deluged and schools shut down. See *Donohue*, 418 N.Y.S.2d at 379, 391 N.E.2d at 1355; *Wilson*, 274 N.W.2d at 686. The Court believes that Illinois courts would avert the flood and the educational loss.

*Ross v. Creighton University*, 740 F.Supp. 1319, 1329 (N.D.Ill. 1990), *aff'd in part*, 957 F.2d 410, 414 (7thCir. 1992) ("A third reason for denying this cause of action is the potential it presents for a flood of litigation against schools. *Moore v. Vanderloo*, 386 N.W.2d 108, 114-15 (Iowa 1986). As the district court noted, 'education is a service rendered on an immensely greater scale than other professional services.' *Ross v. Creighton Univ.*, 740 F.Supp. 1319, 1329 (N.D.Ill. 1990). The sheer number of claims that could arise if this cause of action were allowed might overburden schools. *Id.*"). The District Court was quoted with approval in *Finstad v. Washburn University of Topeka*, 845 P.2d 685, 693 (Kan. 1993).

Also see:

- *Gally v. Columbia University*, 22 F.Supp.2d 199, 208 (S.D.N.Y. 1998) ("... does not create a valid cause of action. To hold otherwise would be to open the floodgates to a slew of claims by students who found their professors' techniques personally offensive.");
- *Hendricks v. Clemson Univ.*, 578 S.E.2d 711, 715 (S.Car. 2003) ("unwise" to recognize educational malpractice because of "the great potential for embroiling schools in litigation");
- *Jamieson v. Vatterott Educational Centers, Inc.*, 259 F.R.D. 520, 535-536 (D.Kan. 2009) ("Allowing a court or jury to determine what sort of "entry level education" is appropriate would directly implicate *Finstad's* concern about court interference in the operation of schools. It would also open the floodgates of litigation to any student dissatisfied with their employment prospects, notwithstanding the fact that the student's own efforts and abilities are a significant factor in the "highly collaborative process" of education.").

### bandwagon

Judges have been eager to dispose of this political hot potato. In most of the recent cases involving alleged educational malpractice, the courts simply cited the holdings of *Peter W.* and the *Donohue* cases, chanted the dogma that courts refuse to recognize “educational malpractice” as a valid claim, then dismissed plaintiff’s claim(s). Thus, these two early cases, which I characterized above as a “runaway train”, have effectively blocked later plaintiffs from having a court consider the merits of their claim(s). By 1982, judges could cite many cases in which other courts had refused to permit claims of educational malpractice. See, e.g.,:

- *Hunter v. Board of Education*, 439 A.2d 582, 583-84 (Md. 1982) (citing 5 cases).
- *Paladino v. Adelphi Univ.*, 454 N.Y.S.2d 868, 870 (1982) (“The courts have uniformly refused, based on public policy considerations, to enter the classroom to determine claims based upon educational malpractice.”) (citing 7 cases).
- *Swidryk v. St. Michael's Medical Center*, 493 A.2d 641, 642, n.1 (N.J.Super. 1985) (citing 9 cases).
- *Moore v. Vanderloo*, 386 N.W.2d 108, 113 (Iowa 1986)(citing 13 cases).
- *Ross v. Creighton University*, 957 F.2d 410, 414, n.2 (6thCir. 1992) (citing 14 cases in 11 states).
- *Moss Rehab v. White*, 692 A.2d 902, 906, n.7 (Del. 1997) (citing 15 cases).
- *Doe v. Yale University*, 1997 WL 766845, \*1 (Conn.Super. 1997) (citing 12 cases).

These long strings of citations look impressive, until one realizes that all of these cases simply parrot the specious reasoning in the *Peter W.* and *Donohue* cases.<sup>19</sup> The courts are *not* making an independent assessment, starting from basic principles of tort law, with analogies to medical malpractice, but are simply following judges who disposed of earlier educational malpractice claims. I would hope that the first appellate court in each state that considers the new issue of educational malpractice would make its own independent assessment, instead of taking the easy way and merely copying decisions from other states. When later judges follow earlier judges, whether wisely or foolishly, there is little significance to a long string of citations that say the same thing.

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<sup>19</sup> Terrence P. Collingsworth, “Applying Negligence Doctrine to the Teaching Profession,” 11 JOURNAL OF LAW & EDUCATION 479, 483 (Oct 1982) (“Unfortunately, only a few of the decisions actually grapple with the difficult issues involved. The rest of the courts jump on the bandwagon and take the easy way out, to avoid a difficult, but resolvable issue.”).

### **scholarly articles**

The nearly unanimous refusal of judges to permit educational malpractice claims is in stark contrast to the scholarly commentary in legal journals by professors of law and by practicing attorneys. At least one court took note of this discrepancy, then — of course — chose to go with the runaway train of court cases. *Ross v. Creighton University*, 740 F.Supp. 1319, 1327 (N.D.Ill. 1990) (“Educational malpractice is a tort theory beloved of commentators, but not of courts. While often proposed as a remedy for those who think themselves wronged by educators ..., educational malpractice has been repeatedly rejected by the American courts ....”); quoted with approval in *Finstad v. Washburn Univ.*, 845 P.2d 685, 692 (Kan. 1993).

The bibliography of this essay, beginning at page 66, contains a list of scholarly articles in law reviews, all of which conclude that the new tort of educational malpractice is consistent with traditional notions of tort law and that judges are *unjustified* in rejecting *all* educational malpractice claims.

Note that there is a huge dichotomy between basic principles of tort law (which would permit educational malpractice claims) and the refusal of judges to hear educational malpractice claims. The highest state court in Maryland specifically recognized that legal commentary sometimes diverges from the actual law: “Examples of other legal principles which are heavily criticized but which are firmly established in our law include the following: ... the refusal to recognize a cause of action for ‘educational malpractice,’ ....” *Maryland v. Adams*, 958 A.2d 295, 351 (Md. 2008).

### **academic abstention**

Professor Nordin<sup>20</sup> gave the name *academic abstention* to the poorly articulated doctrine that judges will defer to schools and universities in all disputes involving purely academic matters. In legal jargon, *abstention* indicates the refusal of judges to resolve disputes where the court has jurisdiction. I have written a separate essay about academic abstention at <http://www.rbs2.com/AcadAbst.pdf>. While automatic dismissal of all claims of educational malpractice is consistent with the doctrine of academic abstention, the doctrine of academic abstention does *not* explain *why* courts refuse to hear academic matters.

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<sup>20</sup> See, e.g., Harry T. Edwards and Virginia Davis Nordin, HIGHER EDUCATION AND THE LAW, pp. 14-17, 601 (1979); Virginia Davis Nordin, “The Contract to Educate,” 8 J. COLLEGE & UNIVERSITY LAW 141 (1981).



In one of the early educational malpractice cases, the highest court in New York State rejected the tort of educational malpractice:

.... To entertain a cause of action for “educational malpractice” would require the courts not merely to make judgments as to the validity of broad educational policies a course we have unalteringly eschewed in the past but, more importantly, to sit in review of the day-to-day implementation of these policies. Recognition in the courts of this cause of action would constitute blatant interference with the responsibility for the administration of the public school system lodged by Constitution and statute in school administrative agencies. (*James v. Board of Educ.*, 42 N.Y.2d, at p. 367, 397 N.Y.S.2d at p. 942, 366 N.E.2d at p. 1298, *Supra.*) ....  
*Donohue v. Copiague Union Free School Dist.*, 391 N.E.2d 1352, 1354 (N.Y. 1979).

The sentence about “blatant interference” was quoted with approval in:

*D. S. W. v. Fairbanks North Star Borough School Dist.*, 628 P.2d 554, 556 (Alaska 1981);  
*Aubrey v. School Dist. of Philadelphia*, 437 A.2d 1306, 1307 (Pa.Cmwlth. 1981)<sup>21</sup>;  
*Hunter v. Board of Educ. of Montgomery County*, 439 A.2d 582, 585 (Md. 1982);  
*Swidryk v. Saint Michael's Medical Center*, 493 A.2d 641, 643 (N.J.Super.L. 1985);  
*Finstad v. Washburn University of Topeka*, 845 P.2d 685, 693 (Kan. 1993);  
*Bittle v. Oklahoma City University*, 6 P.3d 509, 514 (Okla.Civ.App. 2000);  
*Miller v. Loyola University of New Orleans*, 829 So.2d 1057, 1061 (La.App. 2002).

Of course, any decision that follows the reasoning in *Donohue* approves of this academic abstention argument.

In 1986, the Iowa Supreme Court wrote:

A fourth reason related by the courts in denying educational malpractice claims that is applicable here is that recognizing such a cause of action would force the courts blatantly to interfere with the internal operations and daily workings of an educational institution. *Donohue*, 47 N.Y.2d at 445, 418 N.Y.S.2d at 378, 391 N.E.2d at 1354. This concern is particularly appropriate in the area of higher education. As the Supreme Court stated in *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225, 106 S.Ct. 507, 513, 88 L.Ed.2d 523, 532 (1985):

When judges are asked to review the substance of a genuinely academic decision ... they should show great respect for the faculty’s professional judgment. [Footnote to *Horowitz*, 435 U.S. 78 (1978) omitted.]

It has been recognized that academic freedom thrives on the autonomous decision-making by the academy itself. See *Regents of the University of California v. Bakke*, 438 U.S. 265, 312, 98 S.Ct. 2733, 2759-60, 57 L.Ed.2d 750, 785 (1978). In essence, plaintiffs are asking this court to pass judgment on the curriculum of Palmer [College of Chiropractic]. We decline to do so.

*Moore v. Vanderloo*, 386 N.W.2d 108, 115 (Iowa 1986).

This passage in *Moore* was cited with approval in: *Jackson v. Drake University*, 778 F.Supp. 1490, 1494 (S.D.Iowa 1991) and *Ross v. Creighton University*, 957 F.2d 410, 415 (7thCir. 1992). Similar concerns are raised in *Swartley v. Hoffner*, 734 A.2d 915, 921 (Pa.Super. 1999).

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<sup>21</sup> This passage from *Aubrey* is quoted with approval in *Agostine v. School Dist. of Philadelphia*, 527 A.2d 193, 196, n.8 (Pa.Cmwlth. 1987).

In 1996, the Connecticut Supreme Court wrote in a case involving a physician challenging his dismissal from a hospital's surgical residency training program:

The plaintiff's claim that the hospital failed to provide him adequate training must be put into context. "Where the essence of the complaint is that [an educational institution] breached its agreement by failing to provide an effective education, the court is ... asked to evaluate the course of instruction [and] called upon to review the soundness of the method of teaching that has been adopted by [that] educational institution." (Internal quotation marks omitted.) *Ross v. Creighton University*, 957 F.2d 410, 416 (7th Cir. 1992). This is a project that the judiciary is ill equipped to undertake. See *id.*; *Donohue v. Copiague Union Free School District*, 47 N.Y.2d 440, 445, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979); *Cavaliere v. Duff's Business Institute*, 413 Pa.Super. 357, 370, 605 A.2d 397 (1992).

*Gupta v. New Britain General Hospital*, 687 A.2d 111, 119 (Conn. 1996).

In *Gupta*, the Court held that the plaintiff failed to offer evidence of "arbitrary, capricious, and bad faith conduct" by the Hospital.

As with the plaintiff's claim of deficiencies in his hospital training, we approach with caution, and with deference to academic decisionmaking, the plaintiff's challenge to the motivation of the hospital in terminating his residency. "Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Board of Curators v. Horowitz*, supra, 435 U.S. at 90, 98 S.Ct. at 955; see also *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225-26, 106 S.Ct. 507, 513, 88 L.Ed.2d 523 (1985); *Doherty v. Southern College of Optometry*, 862 F.2d 570, 576 (6th Cir. 1988), cert. denied, 493 U.S. 810, 110 S.Ct. 53, 107 L.Ed.2d 22 (1989); *Lekutis v. University of Osteopathic Medicine & Health Sciences*, 524 N.W.2d 410, 413 (Iowa 1994); *Abbariao v. Hamline University School of Law*, 258 N.W.2d 108, 112 (Minn. 1977); *Olsson v. Board of Higher Education*, 49 N.Y.2d 408, 416, 402 N.E.2d 1150, 426 N.Y.S.2d 248 (1980); cf. *Mahavongsanan v. Hall*, 529 F.2d 448, 450 (5th Cir. 1976) (for dismissal grounded in disciplinary, rather than academic, reasons, courts appropriately may engage in more thorough due process analysis).

Judicial circumspection is particularly warranted in the context of academic decisions concerning medical competency. Put simply, "courts are not supposed to be learned in medicine and are not qualified to pass opinion as to the attainments of a student in medicine." [footnote omitted] *Connelly v. University of Vermont & State Agricultural College*, 244 F.Supp. 156, 160-61 (D.Vt. 1965); see also *Jansen v. Emory University*, 440 F.Supp. 1060, 1063 (N.D.Ga. 1977), aff'd, 579 F.2d 45 (5th Cir. 1978) (per curiam); *Burke v. Emory University*, 177 Ga.App. 30, 32, 338 S.E.2d 500 (1985); cf. *Owens v. New Britain General Hospital*, 229 Conn. 592, 606, 643 A.2d 233 (1994) (judicial deference accorded hospital administration's decision to revoke staff privileges).

*Gupta v. New Britain General Hospital*, 687 A.2d 111, 120-121 (Conn. 1996).

In a 1999 case involving a graduate student whose doctoral dissertation was rejected, the intermediate appellate court in Pennsylvania affirmed the trial court's grant of summary judgment to the faculty on the dissertation committee and the college:

¶ 22 On the outset, we note that it is not the place of this Court to second-guess academic decisions and judgments made in colleges and universities of this Commonwealth. We are not now and will never be experts in each and every academic field open to scholarly pursuit. We are extremely cognizant that “[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself.” *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n. 12, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985). As a result, our Court abides by a general policy of nonintervention in purely academic matters. See *Schulman v. Franklin and Marshall College*, 371 Pa.Super. 345, 538 A.2d 49, 52 (1988) (en banc) (“A college is a unique institution which, to the degree possible, must be self-governing and the courts should not become involved in that process unless the process itself has been found to be biased, prejudicial or lacking in due process.”).

¶ 23 When presented with cases involving essentially academic decisions, such as the present case, our standard of review is well established. As the United States Supreme Court stated:

When judges are asked to review the substance of a genuinely academic decision ... they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

*Ewing*, 474 U.S. at 225, 106 S.Ct. 507 (citations and footnotes omitted). “University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation.” *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 96 n. 6, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978) (Powell, J. concurring). ....

*Swartley v. Hoffner*, 734 A.2d 915, 921 (Pa.Super. 1999).

These cases — *Donohue*, *Moore*, *Gupta*, and *Swartley* — show the great deference that judges in the USA have for academic decisions.

### legal protection for students is nonexistent

There is a long line of judicial decisions that *say* a pupil or student can challenge an academic decision (e.g., bad grade, rejection of a thesis or dissertation, expulsion for poor academic performance) if the academic decision is either malicious, made in bad faith, arbitrary, or capricious.<sup>22</sup> But when a pupil or student attempts to challenge an academic decision, judges since the mid-1990s often grant the defendant's motion for summary judgment on grounds that plaintiff is attempting to make a forbidden educational malpractice claim, as explained below, beginning at page 56.

Since the early 1980s, it has been conventional dogma in education law that the relationship between a student and a college is basically contractual.<sup>23</sup> However, many courts have rejected a so-called "rigid" or "strict" application of contract law in cases between college and student, which leaves the student — already the weaker party in the transaction with the college — with essentially no legal protection.<sup>24</sup> Judges are so deferential to colleges that they sometimes allow the college to make unilateral changes in the contract.<sup>25</sup> Allowing unilateral changes in a contract is atrocious: it defies the whole concept of formation of a contract, including voluntary assent. In my view, students should have the legal rights under the contract that existed on the day when the student accepted the university's offer of admission. If the admission was for a fixed-length program (e.g., four years for a bachelor's degree, three years for a law degree) and the student needs more time to complete the course requirements, then the contract may be modified in exchange for giving the student more time.

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<sup>22</sup> See case citations in *Connelly v. University of Vermont & State Agricultural College*, 244 F.Supp. 156, 159-161 (D.Vt. 1965); *Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 91-92 (1978); *Gupta v. New Britain General Hosp.*, 687 A.2d 111, 120-122 (Conn. 1996).

<sup>23</sup> Virginia Davis Nordin, "The Contract to Educate: Toward a More Workable Theory of the Student-University Relationship," 8 JOURNAL OF COLLEGE AND UNIVERSITY LAW 141 (1981).

<sup>24</sup> See, e.g., Victoria J. Dodd, "The Non-Contractual Nature of the Student-University Contractual Relationship," 33 UNIV. KANSAS. LAW REVIEW 701 (Summer 1985).

<sup>25</sup> Allowing unilateral changes in contract by the college: *Mahavongsanan v. Hall*, 529 F.2d 448, 450 (5th Cir. 1976); *Nuttelman v. Case Western Reserve Univ.*, 560 F.Supp. 1, 3 (N.D. Ohio 1981) (citing *Mahavongsanan v. Hall*), *aff'd without opinion*, 708 F.2d 726 (6th Cir. 1982); *Doherty v. Southern College of Optometry*, 862 F.2d 570, 577 (6th Cir. 1988) ("Furthermore, we are of the opinion that implicit in the university's general 'contract' with its students is a right to change the university's academic degree requirements if such changes are not arbitrary or capricious."); *Jallali v. Nova Southeastern Univ.*, 992 So.2d 338, 342-343 (Fla.App. 2008) (college can change contract if changes are neither arbitrary nor capricious).

An early statement of the contractual relationship between student and college emphasized that contract law would not be “rigidly” applied to colleges. This case involved the expulsion of a graduate student for academic dishonesty. A U.S. District Court had awarded the former student money damages for breach of contract, but the U.S. Court of Appeals set aside that verdict and ordered judgment for the University.

The complaint was based on a contract theory and that alone, but neither the conclusory allegations of the complaint showed, nor did the proof submitted by the plaintiff establish, a contract between plaintiff and the University in the disciplinary context. The Graduate School Catalogue and the conduct-honor codes were the only evidence as to the “contract.” The trial court's rigid application of commercial contract doctrine advanced by plaintiff was in error, and the submission on that theory alone was error.

It is apparent that some elements of the law of contracts are used and should be used in the analysis of the relationship between plaintiff and the University to provide some framework into which to put the problem of expulsion for disciplinary reasons. This does not mean that “contract law” must be rigidly applied in all its aspects, nor is it so applied even when the contract analogy is extensively adopted. There are other areas of the law which are also used by courts and writers to provide elements of such a framework. These included in times past *parens patriae*, and now include private associations such as church membership, union membership, professional societies; elements drawn from “status” theory, and others. Many sources have been used in this process, and combinations thereof, and in none is it assumed or required that all the elements of a particular doctrine be applied. The student-university relationship is unique, and it should not be and cannot be stuffed into one doctrinal category. It may also be different at different schools. There has been much published by legal writers advocating the adoption of various categories to be applied to the relationship. See 72 Yale L.J. 1387; 48 Indiana L.J. 253; 26 Stanford L.Rev. 95; 38 Notre Dame Lawyer 174. There are also many cases which refer to a contractual relationship existing between the student and the university, especially private schools. See *Carr v. St. John's University*, 17 A.D.2d 632, 231 N.Y.S.2d 410; *University of Miami v. Militana*, 184 So.2d 701 (Fla.App.); *Zumbrun v. University of Southern California*, 25 Cal.App.3d 1, 101 Cal.Rptr. 499; *Drucker v. New York University*, 59 Misc.2d 789, 300 N.Y.S.2d 749. But again, these cases do not adopt all commercial contract law by their use of certain elements. *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 626 (10thCir. 1975), *cert. den.*, 423 U.S. 898 (1975). This holding from *Slaughter*, rejecting so-called “rigid” application of contract law to colleges, has been cited with approval in the following decisions:

- *Lyons v. Salve Regina College*, 565 F.2d 200, 202 (1stCir. 1977), *cert. denied*, 435 U.S. 971 (1978);
- *Marquez v. University of Washington*, 648 P.2d 94, 96 (Wash.App. 1982);
- *Neel v. Indiana University Bd. of Trustees*, 435 N.E.2d 607, 610-611 (Ind.App. 1982);
- *Napolitano v. Trustees of Princeton University*, 453 A.2d 263, 272-273 (N.J.Super.A.D. 1982);
- *Boehm v. University of Pennsylvania School of Veterinary Medicine*, 573 A.2d 575, 581 (Pa.Super. 1990);
- *Soderbloom v. Yale University*, Not Reported in A.2d, 1992 WL 24448 at \*2 (Conn.Super. 1992);
- *University of Mississippi Medical Center v. Hughes*, 765 So.2d 528, 534 (Miss. 2000).

Of course, rejecting “rigid” application of contract law means that mainstream contract law will *not* be applied to colleges in their relationship with students.

student-college contractual relationship  
but not strict contract law

A number of judicial decisions have stated that the student-college relationship is contractual, but some of these decisions have also said that contract law will *not* be applied “rigidly” or “strictly” to colleges. In the following list of cases, I have omitted most of the citations to authority from the quotations, to make the quotation easier to read.

- *Carr v. St. John's University*, 231 N.Y.S.2d 410, 413 (N.Y.A.D. 1962) (“When a student is duly admitted by a private university, secular or religious, there is an implied contract between the student and the university that, if he complies with the terms prescribed by the university, he will obtain the degree which he sought. The university cannot take the student's money, allow him to remain and waste his time in whole or in part (because the student might regard it as a waste of time if he does not obtain the degree), and then arbitrarily expel him or arbitrarily refuse, when he has completed the required courses, to confer on him that which it promised, namely, the degree. [citing two cases]”), *affirmed without opinion*, 187 N.E.2d 18 (N.Y. 1962);
- *Slaughter v. Brigham Young University*, 514 F.2d 622, 626 (10thCir. 1975) (“It is apparent that some elements of the law of contracts are used and should be used in the analysis of the relationship between plaintiff and the University to provide some framework into which to put the problem of expulsion for disciplinary reasons. This does not mean that ‘contract law’ must be rigidly applied in all its aspects, nor is it so applied even when the contract analogy is extensively adopted.”), *certiorari denied*, 423 U.S. 898 (1975);
- *Mahavongsanan v. Hall*, 529 F.2d 448, 450 (5thCir. 1976) (“Implicit in the student's contract with the university upon matriculation is the student's agreement to comply with the university's rules and regulations, which the university clearly is entitled to modify so as to properly exercise its educational responsibility. [citation to one case] The appellee's claim of a binding, absolute unchangeable contract is particularly anomalous in the context of training professional teachers in post graduate level work.”);
- *Abbariao v. Hamline University School of Law*, 258 N.W.2d 108, 113 (Minn. 1977) (“Elements of the law of contracts have been applied to the student-university relationship, but rigid importation of contractual doctrine has been rejected. [citing two cases]”);
- *Jansen v. Emory University*, 440 F.Supp. 1060, 1062 (D.Ga. 1977) (“This Court's decision need not and should not be controlled by a mechanistic application of the law of contract.”), *aff'd without opinion*, 579 F.2d 45 (5thCir. 1978);
- *Olsson v. Board of Higher Ed.*, 402 N.E.2d 1150, 1152 (N.Y. 1980) (“While it is true that in the ordinary case, a principal must answer for the misstatements of his agent when the latter is clothed with a mantle of apparent authority [citation omitted], such hornbook rules cannot be applied mechanically where the ‘principal’ is an educational institution and the result would be to override a determination concerning a student's academic qualifications.”);

- *Neel v. Indiana University Bd. of Trustees*, 435 N.E.2d 607, 612 (Ind.App. 1982) (“In *Sofair v. State Univ. of New York*, 388 N.Y.S.2d [453] at 456 [(N.Y.A.D. 1976)<sup>26</sup>], the court stated: ‘(L)iteral adherence to internal rules will not be required when the dismissal rests upon expert judgments as to academic or professional standards and such judgments are fairly and nonarbitrarily arrived at.’ ”). Quoted with approval in *Sung Park v. Indiana University School of Dentistry*, 692 F.3d 828, 831 (7thCir. 2012);
- *Corso v. Creighton University*, 731 F.2d 529, 531 (8thCir. 1984) (“The relationship between a university and a student is contractual in nature.”);
- *Ewing v. Board of Regents of Univ. of Mich.*, 742 F.2d 913, 915 (6thCir. 1984) (“Other circuit courts have also agreed in the contractual nature of the relationship between a student and his university. [citing two cases]”), *reversed on other grounds*, 474 U.S. 214 (1985);
- *Beukas v. Board of Trustees of Fairleigh Dickinson University*, 605 A.2d 776, 782 (N.J.Super.L. 1991) (“I believe that in the absence of a showing of bad faith, arbitrariness or lack of prompt notice by defendants of their intention to close the dental college there is no purpose in forcing a contract analysis upon the relationship only to have the court reject whatever classic contract principle the court, in its discretion, thinks should not apply. See, *Peretti [v. Montana]*, 464 F.Supp. 784] at 786 [ n.1 (D.Mont. 1979), *reversed on other grounds*, 661 F.2d 756 (9thCir. 1981)].”);
- *Ross v. Creighton University*, 957 F.2d 410, 416 (7thCir. 1992) (“It is held generally in the United States that the ‘basic legal relation between a student and a private university or college is contractual in nature. The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract.’ *Zumbrun v. University of Southern California*, 25 Cal.App.3d 1, 101 Cal.Rptr. 499, 504 (1972) (collecting cases from numerous states).” The U.S. Court of Appeals in *Ross* reversed summary judgment for defendant on breach of contract claims.);
- *Mangla v. Brown University*, 135 F.3d 80, 83 (1stCir. 1998) (“The student-college relationship is essentially contractual in nature.”);
- *Dinu v. President and Fellows of Harvard College*, 56 F.Supp.2d 129, 130 (D.Mass. 1999) (“That the relationship between a university and its students has a strong, albeit flexible, contractual flavor is an idea pretty well accepted in modern case law.”);
- *Stern v. Board of Regents, University System of Maryland*, 846 A.2d 996, 999 (Md. 2004) (Trial court said: “Other jurisdictions have held that under ‘quasi-contract’ analysis, a university may make unilateral changes if such changes are within the reasonable expectations of reasonable students in light of all of the circumstances and in light of all the materials that establish the framework of the relationship.”);

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<sup>26</sup> *Sofair* was reversed on other grounds, 377 N.E.2d 730 (N.Y. 1978).

- *Gorman v. St. Raphael Academy*, 853 A.2d 28, 34 (R.I. 2004) (“Numerous jurisdictions have held that a student and private university relationship is essentially contractual in nature, but recognize that the relationship has unique qualities, and thus does not require strict adherence to contract law. [citing eight cases]”);
- *Manago v. District of Columbia*, 934 A.2d 925, 927 (D.C. 2007) (“Although we recognize the general rule ‘that the relationship between a university and its students is contractual in nature,’ *Basch v. George Washington University*, 370 A.2d 1364, 1366 (D.C. 1977), [plaintiff’s] breach of contract claim fails for two independent reasons [failure to allege sufficient facts, failure to serve “proper defendant” with the complaint].”).

To conclude, the student-college relationship is contractual, but the student will likely *not* receive all of the protections of contract law. This means that contract law is an illusion in the context of the student-college relationship.

#### tort/contract claims rejected

When a pupil or student attempts to sue a school or college for a tort (e.g., misrepresentation, fraud, infliction of emotional distress) or for breach of contract, since the mid-1990s judges often grant the defendant’s motion for summary judgment on grounds that plaintiff is attempting to make a forbidden educational malpractice claim. In the following list, I have omitted most of the citations to authority from the quotations, to make the quotation easier to read.

- *Sitomer v. Half Hollow Hills Cent. School Dist.*, 520 N.Y.S.2d 37, 38 (N.Y.A.D. 1987) (“Although the plaintiffs argue that they have pleaded a cause of action sounding in negligent infliction of emotional distress, the gravamen of the complaint is .... As such, it sounds in ‘educational malpractice’ and is not cognizable in the courts of this State, notwithstanding the manner in which the plaintiffs characterize their claims.”);
- *Houston v. Mile High Adventist Academy*, 846 F.Supp. 1449, 1459 (D.Colo. 1994) (Dismissing “claims based on ... educational malpractice”, including “negligence, willful and wanton negligence, negligent misrepresentation, negligent supervision, negligent entrustment, negligent hiring and retention, negligent infliction of emotional distress, outrageous conduct, breach of contract, deceit, deceit based on concealment[,] and breach of fiduciary duty.”).
- *Gupta v. New Britain General Hosp.*, 687 A.2d 111, 119 (Conn. 1996) (“Because these tort principles are difficult, if not impossible, to apply in the academic environment, courts have almost universally held that claims of ‘educational malpractice’ are not cognizable.”);



- *Lawrence v. Lorain County Community College*, 713 N.E.2d 478, 479 (Ohio App. 1998) (“The trial court granted the motion by journal entry dated March 20, 1998, finding that the entire complaint alleged educational malpractice and served as ‘an attempt to circumvent the fact that educational malpractice is not a recognized cause of action in Ohio or anywhere else in the United States.’ ” Affirmed trial court.);
- *Tankoos v. Mead School for Human Development*, Not Reported in A.2d, 1999 WL 391350 at \*9 (Conn.Super. 1999) (“Under the reasoning of the Supreme Court in *Gupta* [ v. *New Britain Hospital*, 687 A.2d 111 (Conn. 1996)], actions that necessitate such an inquiry cannot be maintained whether they are brought as negligence, breach of contract or, as here, unjust enrichment claims. The plaintiffs cannot disguise their impermissible claims sounding in negligence and breach of contract as an unjust enrichment claim.”);
- *Livolsi v. Hicksville Union-Free School Dist.*, 693 N.Y.S.2d 617 (N.Y.A.D. 1999) (“Moreover, the plaintiffs’ cause of action sounding in ‘negligence’ is clearly based upon alleged ‘educational malpractice’. As a matter of public policy, such a cause of action cannot be entertained by the courts of this State [citing three cases].”);
- *Christensen v. Southern Normal School*, 790 So.2d 252, 256 (Ala. 2001) (“Again, a claim cannot be couched as a fraud claim merely to avoid the doctrine that precludes an educational-malpractice claim.”);
- *Alligood v. County of Erie*, 749 N.Y.S.2d 349, 350 (N.Y.A.D. 2002) (“The essence of both the breach of contract and breach of fiduciary duty causes of action is that plaintiffs are entitled to money damages because of defendants’ educational malpractice. There is, however, no cognizable cause of action in New York for educational malpractice.”);
- *Hendricks v. Clemson University*, 578 S.E.2d 711, 717 (S.C. 2003) (“As such, allowing Hendricks’s claim [for breach of contract] to proceed would invite courts to engage in just the type of subjective analysis that courts prohibiting educational malpractice claims in tort and contract have avoided.”);
- *Bass ex rel. Bass v. Miss Porter’s School*, 738 F.Supp.2d 307, 327 (D.Conn. 2010) (“Most importantly, while her claim is that Porter’s personnel were *negligent* in their handling of Plaintiff, including after being informed that she was suffering from distress, the *Gupta* exceptions [to forbidding *all* educational malpractice claims], which permit claims against educational institutions that ‘act arbitrarily, capriciously, or in bad faith,’ [citation omitted] necessarily exclude negligence theories of liability.”);

- *Introna v. Huntington Learning Centers, Inc.*, 911 N.Y.S.2d 442, 445 (N.Y.A.D. 2010) (“However, the third cause of action seeking to recover damages for ‘negligent infliction of mental distress’ is in actuality a cause of action sounding in educational malpractice, which is not cognizable in this State.”);
- *Papelino v. Albany College of Pharmacy of Union University*, 633 F.3d 81, 93 (2dCir. 2011) (“... New York law does not recognize a claim for ‘educational malpractice,’ [citation omitted] and a student may not seek to avoid this rule by couching such a claim as a breach of contract claim.”);
- *Zinter v. University of Minnesota*, 799 N.W.2d 243, 245 (Minn.App. 2011) (“The district court found that her breach-of-contract and promissory-estoppel claims were really claims for educational malpractice and dismissed them, on the ground that this cause of action is not recognized in Minnesota law.” Affirmed District Court.).

The above list of citations shows that the rejection of educational malpractice had been interpreted by judges to also include the broad rejection of tort and contract claims against schools and colleges.

### **My opinion of what the law should be**

**this section is my opinion and is *not* law**

The tort of educational malpractice may be appropriate for particularly outrageous failures of the educational system. It is helpful to divide allowed educational malpractice claims into two groups: (1) institutional malpractice, where a school or college is blamed, and (2) instructor malpractice, where a specific named individual is blamed. I generally favor suing institutions, *not* individual instructors, because (1) the institutional administration was — or should have been — aware of the problem, (2) under the doctrine of *respondet superior*, recognizing that the institution selected and supervised the instructors, and (3) a pupil’s failure to learn is generally the result of a succession of different teachers.

The use of “educational malpractice” — departure from a standard of conduct observed by reasonable, competent instructors — gives more flexibility than either traditional torts (e.g., misrepresentation, fraud, infliction of emotional distress, etc.) or breach of contract claims.

#### A. institutional malpractice

I favor allowing a pupil or student to sue an institution if:

- the pupil or student graduates with a gross deficiency of knowledge, such as a functionally illiterate person graduating from high school. Alternatively, a pupil completes 12 years of

school with mostly A, B, or C grades, but then repeatedly fails the state examination for a high school diploma. See Nr. 2 in my taxonomy at page 5, above.

- the institution “failed to perform on specific promises” to the pupil or student. *Alsides*, 592 N.W.2d 468, 473 (Minn.App. 1999) (allowing claims for breach of contract, fraud, or misrepresentation).
- the pupil or student was physically injured by the negligence of the institution or instructor while on campus or under direct supervision of the instructor. Continuing existing law, a tort should be allowed if a negligent instructor was flying with a student pilot when an airplane crash occurred.
- the school or college chose an instructor who is incompetent in the subject material to teach<sup>27</sup>.
- the school or college fails to investigate cheating, plagiarism, or other misconduct that disadvantages honest students. See Nr. 7 in my taxonomy at page 7, above.

#### B. instructor malpractice

I am concerned that the threat of suing an individual instructor for educational malpractice may:

- discourage different styles in teaching;
- discourage experimentation in education;
- discourage high academic standards and tough grading; or
- make all instructors into some bland, homogeneous product that either stifles individual creativity in teaching or denies differences in personality amongst instructors.

I favor allowing a student to sue an instructor for educational malpractice, or some other tort, when the instructor’s conduct shocks the conscience of reasonable people:

- the pupil or student was harmed by either intentional conduct, malicious conduct, or grossly negligent conduct by an instructor. Examples of malicious conduct are given in *Bovino v. Board of School Directors of Indiana Area School Dist.*, 377 A.2d 1284 (Pa.Cmwlt. 1977) (teacher terminated for calling 14 y old girl a “slut”); *Smith v. Atkins*, 622 So.2d 795 (La.App. 1993) (law professor called female student a “slut” in the classroom, held defamatory per se.).
- the instructor fails to report cheating, plagiarism, or other misconduct that disadvantages honest students. See Nr. 7 in my taxonomy at page 7, above.

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<sup>27</sup> The example that comes to my mind is a high school that assigns its football coach to teach physics, because the coach is free when the physics class is scheduled. If the coach is ignorant of physics, algebra, analytic geometry, etc. then the school commits educational malpractice by assigning the coach to teach physics.

- 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 the pupil's or student's original work. Such allegations may be more appropriately argued under another legal theory (e.g., fraud, copyright infringement, conversion), but the possibility of educational malpractice should be kept open for negligent conduct or intentional misconduct that does not fit an established legal theory.
- Wrongful acts by graduate student's advisor or dissertation committee, e.g.: (1) imposing requirement(s) on the wronged student that are not customarily imposed on similarly situated students; (2) malicious, arbitrary, or capricious evaluation of the student's work.

### C. types of educational malpractice that should be rejected

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

#### C.1. *after graduation* a former student should be responsible for their own decisions and acts

I am critical of educational malpractice claims against a school or college after the pupil or student has graduated, for an injury that occurs *after* graduation (e.g., medical malpractice).

One should not go through life blaming one's ignorance on the lack of education, or on a particularly poor instructor. Can you imagine hiring an attorney who botches litigation and then excuses his mistakes by saying he had Prof. A\_\_\_ for evidence class in law school, who was an incredibly poor teacher? Can you imagine a surgeon who slashes into an artery and then excuses his mistake by saying he had Prof. B\_\_\_ for anatomy class in medical school, who was an incredibly poor teacher? It's time to wake up and realize that each of us are not only responsible for our own education, but also we should continue learning *after* our final graduation from school or college. If we had bad instructor(s), our task of learning was made more difficult, and we need to be more self-reliant than if we had a good instructor(s). But the ultimate responsibility for education is always on ourselves, *neither* on teachers, professors, *nor* the educational system. In 2000, the Michigan Supreme Court wrote:

... to assert claims of negligent instruction would avoid the practical reality that, in the end, it is the student who is responsible for his knowledge, including the limits of that knowledge. *Page v. Klein Tools, Inc.*, 610 N.W.2d 900, 906 (Mich. 2000). This is consistent with the ethical principle that a professional (e.g., physician, attorney, engineer, airplane pilot, etc.) should *not* attempt work that the professional is *not* competent to do, unless the client is informed that the professional is working outside his/her education and experience.

No college would make a warranty that its students will be taught *everything* they need to know during their lifetime. Even if it were possible to teach *everything* that a person will need to know, it can not be accomplished in a four-year curriculum. It is *unreasonable* for a student to expect to be taught *everything* he/she needs to know. I argue that graduates of colleges — as individuals — should be responsible for their own knowledge or ignorance. Therefore, I favor the current law of refusing to hear educational malpractice claims made by pupils or students for an injury that occurred *after* graduation, such as:

- Physician (or other health care provider) who allegedly committed medical malpractice sues university for *inadequate* instruction. See Nr. 5 in my taxonomy at page 6, above.
- Victim harmed by negligence of D<sub>1</sub>, sues the school or college that educated D<sub>1</sub>. This is a third-party educational malpractice claim, in which the victim was allegedly a third-party beneficiary of the education of D<sub>1</sub>. See Nr. 6 in my taxonomy at page 7, above.

I am ambivalent about survivors — or next-of-kin in a wrongful death case — suing the flight school that trained the pilot in an airplane crash that occurred *after* the pilot's successful completion of training. In cases involving pilots learning to fly an airplane that is equipped with deicing boots, one would expect the flying lessons to specifically cover flying during rime icing conditions. Because of the catastrophic consequences of icing, the flight school should be held to a high level of competence.<sup>28</sup> For these reasons, I think educational malpractice torts against flying schools might be allowed for injuries that occur *after* the pilot has completed the instruction. This may be one exception to the general rule of barring educational malpractice claims for injury that occurs *after* graduation. On the other hand, it may be better to have no exceptions, because of the slippery slope problem: for example, improperly trained physicians can kill people just as easily as improperly trained airplane pilots.

One might allow third-party educational malpractice when 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). See Nr. 6 in my taxonomy at page 7, above.

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<sup>28</sup> Tort law has a higher standard of care when there is a greater risk of harm. See Restatement Second of Torts §§ 293, 298 (1965).

### C.2. bad grades are adequate warning

I believe it is *not* educational malpractice when a pupil or student receives no diploma, or is expelled for academic reasons, after 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 *unsatisfactory* performance, and an expected consequence of such poor performance is expulsion for academic reasons or denial of a diploma.

### C.3. reject claim(s) that a pedagogical method was *ineffective*

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 *unreasonable*, 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.

### C.4. reject claims of *inadequate* education at college level

Above, I suggested that elementary schools and high schools should be held accountable under the tort of educational malpractice for failing to provide an adequate education. However, I believe 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 contained in academic abstention, which was mentioned at page 48, above.

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.

#### C.5. reject disputes about grade in a class, unless ....

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.

*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 of an examination, negligent 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.

#### C.6. reject disputes about acceptability of a thesis or dissertation, unless ....

If disputes about the acceptability of a thesis or dissertation 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).

#### D. suggested remedies

For claims of an *inadequate* education by elementary schools or high schools, damages should be limited to free remedial education (even past age 21 y, if necessary), to avoid creating windfalls. 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.

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

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.

#### E. suggested statute of limitations

I suggest that institutional educational malpractice torts be confined to what occurred during the education, with a short statute of limitations (e.g., not more than 18 months) that begins to run when the pupil/student leaves the defendant school/college.

One might suggest that individual educational malpractice torts also have a short statute of limitations (e.g., not more than 12 months) that begins to run at the end of academic term during which the last tort occurred. However, such a short statute of limitations will be unfair to the student for two reasons. First, after filing litigation against a colleague, the student will probably be *persona non grata* amongst other faculty, so it would be better to wait until after graduation to file litigation. Second, a student may not be able to afford hiring a litigator. For these reasons, I suggest that individual educational malpractice torts have the usual tort statute of limitations (e.g., two or three years) that begins to run when the student leaves the school or college where the defendant is employed.



#### F. duty of pupils

It is *unreasonable* to expect all young children to voluntarily do extra work, because they are not learning enough in school. (An exception might be a child who was fortunate enough to have a devoted parent who instilled a sense that “learning is fun” in the child from an early age, and who encouraged the child to be curious.)

Pupils are, therefore, dependent on guidance from their parents and teachers. These parents and teachers must sometimes firmly require pupils to study, to read, to do homework, ..., despite the pupil’s unwillingness or the pupil’s preference for recreational activities. Part of the proper role of parents and teachers is to find ways to motivate each child to study and to read.

Because pupils (and their parents) justifiably rely on teachers and schools, the schools should be liable for failing to educate pupils to their potential.

#### G. duty of students

However, students in college *should* be able to recognize:

1. when they select a major subject because it is *not* academically demanding,
2. when they select a class because it is easy, instead of an intellectually challenging class, or
3. when they do not understand the subject matter that is being taught, even if they received a good grade in the class.

Instead of blaming the professor, students should ask questions, students should read books beyond the assigned textbook, students should assign themselves intellectual “finger exercises” to develop their ability to solve problems. Further, students are generally free to transfer to a college with a more challenging academic program, particularly after their first year at a college.

A student who has complacently sculpted a high grade average by selecting only easy classes, has taken the easy route to obtaining a bachelor’s degree, and simultaneously wasted his/her opportunity in college to prepare for the remainder of their life. I have an essay on the topic of *Why Attend College?* at <http://www.rbs0.com/edu.htm>, in which I list my criteria for an educated person. I suggest that the real goals of education are:

1. learn how to think critically,
2. learn more than one way to solve problems,
3. learn how to teach themselves,
4. practice a drive to excel intellectually as preparation for life after completion of their formal education; and
5. learn knowledge that will give them a satisfying life: not just a job with a high income, but also an understanding of civilization, culture, and technology.

## Conclusion

The tort of educational malpractice is consistent with traditional principles of torts. However, judges across the USA have nearly unanimously refused to consider any educational malpractice tort (see pages 39-43, above), for reasons that I believe are specious, as explained on pages 43-58, above. Because of the judicial consensus that educational malpractice is *not* a viable tort, state legislatures will need to enact a statute that authorizes the new tort of educational malpractice.

Beginning at page 58 above, I have stated my opinion of the kinds of educational malpractice torts that should be allowed, and others that should be forbidden.

Finally, 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.

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### **About the Author**

The author earned a B.Sc. in physics in 1971 from the University of Denver and a Ph.D. in physics in 1977 from the New Mexico Institute of Mining and Technology. Dr. Standler was a professor of electrical engineering for ten years. Following the annihilation of financial support for scholarly research in all of his areas of science and engineering, he changed careers to law. He earned a J.D. in 1998 from Franklin Pierce Law Center, now called the University of New Hampshire School of Law. Since 1998, Dr. Standler has been an attorney in Massachusetts, where he specializes in academic issues in higher-education law and copyright law, and consults nationwide with litigators on scientific evidence in torts.

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