DOCUMENT RESUME

ED 375 513 EA 026 222

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TITLE Professional Malpractice: Are Educators at Risk? Policy Bulletin.
INSTITUTION Indiana Univ., Bloomington. Education Policy Center.
REPORT NO PB-B14
PUB DATE Jun 92
NOTE 5p.
PUB TYPE Collected Works - Serials (022) -- Guides - Non-Classroom Use (055) -- Legal/Legislative/Regulatory Materials (090)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Compliance (Legal); *Court Litigation; *Educational Malpractice; Elementary Secondary Education; *Legal Responsibility; Negligence; Public Schools; Torts

ABSTRACT

Although no lawsuits claiming educational malpractice have yet been successful, it is conceivable that educators and school systems will be held legally accountable for correctly diagnosing pupils' needs, placing them in appropriate instructional programs, and reporting their progress to parents or guardians. This bulletin briefly examines litigation in which individuals have sought monetary damages from school districts for various types of alleged instructional negligence and areas of potential liability for educators. Some courts have recognized circumstances under which plaintiffs possibly could recover damages in an instructional tort action. Successful educational malpractice suits, particularly those involving negligence in placement decisions and reporting to parents, may be more likely in the future than they have in the past. The increasing legislative specificity about student proficiency standards and special education placement procedures may strengthen the grounds for such suits. While it is still unlikely that liability will be imposed for discretionary acts involving professional judgment, it is conceivable that educators may soon be held legally liable for breaching their duties to diagnose and place students appropriately and to inform parents or guardians accurately of their children's deficiencies. Educators' best defense against an educational malpractice suit is to give careful attention to their diagnostic, placement, and reporting practices. (LMI)

Indiana Education Policy Center

POLICY BULLETIN

Bloomington Office

June 1992—No. PB-B14

Professional Malpractice: Are Educators at Risk?

by Martha McCarthy

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Although no lawsuits claiming educational malpractice have yet been successful, educators may soon be held legally liable for certain diagnostic, placement, and reporting practices.

A patient harmed by her doctor may sue that doctor for medical malpractice and recover damages. A lawyer who incompetently handles a legal matter may be sued by his client for legal malpractice. Successful malpractice suits have been brought against professionals ranging from architects to veterinarians.

What about professionals in education? Are teachers and other educators vulnerable to malpractice charges for instructional negligence? From litigation to date, one is inclined to say "no." It is highly unlikely that, in the near future, teachers will be held legally responsible for their students' level of achievement. However, it is conceivable that educators and school systems *will* be held legally accountable for correctly diagnosing pupils' needs, placing them in appropriate instructional programs, and reporting their progress to parents or guardians (see O'Hara, 1984). This bulletin briefly examines litigation in which individuals have sought monetary damages from school districts for various types of alleged instructional negligence and areas of potential liability for educators.[1]

Legal Framework

Instructional negligence claims are grounded in tort law, a branch of civil law. A tort involves a private injury or wrong by one person or entity against another. While there are several types of tort actions,[2] negligence claims are by far the most numerous in the school context. To establish negligence, four conditions must be proven:

- The defendant must have a *legal duty* to protect the plaintiff from harm.
- That duty must be *breached* in that the defendant has *not* exhibited a reasonable standard of care, given the circumstances involved.

[1]This bulletin builds in part on an article by McCarthy in *Educational Horizons*, Spring 1992, Vol. 70, No. 3.

[2]Examples of torts include defamation (written or spoken false statements that damage a person's reputation), assault (placing another person in fear of bodily harm), battery (intentionally and offensively touching another person without his or her consent), and false imprisonment (intentional confinement of a person without lawful privilege for any length of time).

- The breach of duty must be the legal, i.e., *proximate*, cause of the injury.

- The plaintiff must have suffered *actual harm*.

The remedy for proven negligence is usually a monetary award to compensate the injured person for the harm suffered.

Educational Malpractice Claims

Although a number of suits have been filed against public school districts, no malpractice claim for instructional negligence has been successful to date. For example, in the first instructional negligence suit to receive substantial attention, *Peter W. v. San Francisco Unified School District*, a California appeals court in 1976 reasoned that the complexities of the teaching/learning process made it impossible to place the entire burden of assuring student literacy on the school. The court found no liability in connection with the allegation that the student had been promoted and graduated from high school without being able to read above the fifth-grade level. The court declared that to hold the school district liable for students' failure to master basic academic skills would expose all educational agencies to countless "real or imagined" tort claims of "disaffected students and parents" (p. 861).

In 1979 the highest court in New York dismissed what had appeared to be the only successful educational malpractice suit. A lower court had awarded a former public school student $500,000 in damages after concluding that the New York City Board of Education had negligently diagnosed his needs and erroneously instructed him in a program for the mentally retarded for twelve years (*Hoffman v. Board*, 1979). Distinguishing this case from previous educational malpractice suits, the lower court concluded that school personnel were negligent when they ignored the psychologist's report recommending reassessment of the child within two years of the original evaluation. The child's placement was not reevaluated, even though he scored in the 90th percentile on reading readiness tests at ages eight and nine. Only when he graduated from high school was it determined that the plaintiff had normal intelligence, which made him ineligible for an occupational training program for the disabled. Despite this evidence, the New York Court of Appeals by a narrow margin reversed the lower court's ruling and held that it was not the role of the judiciary to make such educational policy determinations. The court emphasized that instructional negligence claims should not be entertained by the judiciary but should be handled instead through the state educational system's administrative appeals process.

Courts have generally been reluctant to intervene in educational policy decisions.

Other courts also have been reluctant to intervene in such educational policy decisions. For example, a California appellate court dismissed a negligence suit in which parents sought damages for the school district's alleged breach of its duty under state and federal statutes to evaluate and develop an individualized education plan for their emotionally and mentally disabled child (*Keech v. Berkeley*, 1984). Similarly, the Supreme Court of Alaska refused to allow damages against a school district for the alleged misclassification of a student with dyslexia (*D. S. W. v. Fairbanks*, 1981), and a New Jersey superior court ruled that a school district's failure to provide remedial instruction for a student was not actionable in a tort suit for damages (*Myers v. Medford*, 1985).

Potential Liability

Although no educational malpractice claim has yet been successful, some courts have recognized circumstances under which plaintiffs possibly could recover damages in an instructional tort action. In a Maryland case, plaintiffs did not prevail in establishing educational malpractice for *unintentional* negligent acts in evaluating a child's learning disabilities and inappropriately instructing the child; however, the state high court held that parents might prevail if they could prove that the defendants *intentionally* engaged in acts that injured a child placed in their educational care (*Hunter v. Board*, 1982). Distinguishing intentional from unintentional acts, the court noted that administrative remedies are available to settle the latter.

The Supreme Court of Montana went further, ruling that *unintentional* acts might result in liability where school authorities have violated mandatory statutes pertaining to special education placements (*B. M. v. State*, 1985). Declaring that school districts have a duty to exercise reasonable care in testing and placing exceptional students in appropriate programs, the court concluded that damages could be assessed for injuries

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resulting from a breach of that duty. On remand, however, the trial court held that the plaintiff failed to present evidence proving that the child in question was erroneously placed in a segregated special education class, and the state high court later affirmed this ruling.

Some courts have recognized circumstances under which plaintiffs possibly could recover damages in an instructional tort action.

In 1984 the New York high court unanimously allowed damages in a medical malpractice suit, even though the injuries were educational, but it barred damages in an instructional negligence suit by a one-vote margin. In the latter case, which the Supreme Court declined to review, the New York high court ruled that a student was not entitled to damages from a child care agency for its alleged failure to diagnose his reading disabilities and obtain suitable instruction to enable him to learn to read (*Torres v. Little*, 1984). The plaintiff attempted to distinguish his claim from prior malpractice suits against schools in that his charges were against the child care agency responsible for his upbringing after his mother abandoned him at age seven. Rejecting this contention, the court determined that the issue involved educational policy matters regarding instructional program decisions and was not actionable in a negligence suit.

In the other case, the same court awarded damages to an individual who was admitted to a state school at age two, diagnosed as retarded when he was actually deaf, and instructed in classes for the retarded for the next nine years (*Snow v. State*, 1984). The failure to reassess the student upon learning that he was deaf was considered a "discernible act of medical malpractice on the part of the state" rather than a mere mistake in judgment about the student's educational program (p. 964).[3] Concluding that the state school resembled a hospital and the students' records resembled medical records, the court held that damages for medical malpractice were appropriate. The New York high court distinguished these two cases based on the age of the students when institutionalized, the nature of the institutions, and the types of care administered. These distinctions have been questioned by some legal commentators, however (see Zirkel, 1985).

In December 1991 the Supreme Court of Nevada reversed a lower court's dismissal of an instructional negligence case against a private school, remanding the case for a trial (*Squires v. Sierra*). However, the court did not address the merits of the malpractice claim, reasoning that the relief requested could be granted for the allegations of breach of contract and negligent misrepresentation. The court held that the parents had a valid claim that the school breached its promise to provide adequate diagnostic services and individualized reading instruction in return for the tuition they paid. Also, the school did not present evidence refuting the claim that the school breached its duty to inform the parents of their child's academic difficulties. Although this case involved a private school, the court's holding could have implications for claims of negligence in connection with reports to parents in public education.

[3]The dissenting justices in *Torres* asserted that both cases involved "custodial malpractice" for failure to provide appropriate care for children placed in the institutions' custody (*Torres v. Little*, 1984).

Conclusion

Successful educational malpractice suits, particularly those involving negligence in *placement decisions* and *reporting to parents*, may be more likely in the future than they have been in the past. The increasing legislative specificity about student proficiency standards and special education placement procedures may strengthen the grounds for such suits. While it is still unlikely that liability will be imposed for discretionary acts involving professional judgment, it is conceivable that educators may soon be held legally liable for breaching their duties to diagnose and place students appropriately and to inform parents or guardians accurately of their children's deficiencies.[4] Thus, educators' best defense against an educational malpractice suit is to give careful attention to their diagnostic, placement, and reporting practices.

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[4]McBride (1990) argues that if courts properly balanced policy interests with the interests of students seeking judicial relief, the courts would recognize a limited right to sue for students misdiagnosed or misplaced in special education programs who have exhausted any relief provided within the educational system.

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POLICY BULLETIN NO. PB-B14
June 1992

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The Indiana Education Policy Center is funded by the Lilly Endowment, Inc., and Indiana University to provide nonpartisan research on education issues to Indiana policymakers and other education stakeholders to improve public education.