Educational Malpractice?

Higher Ed May Be Courting Trouble with Overpaid Execs and Restless Consumers

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The number and complexity of state and federal regulations governing U.S. colleges and universities is on the rise. Consumerism, soaring tuition costs, burgeoning student loan debt and the high expectations of helicopter parents are all converging to put higher education under increased scrutiny. Colleges and universities beware! Higher education's "consumers" are growing angry and restless. That anger is likely to boil over on two related issues in higher education: students feeling like they don't get their money's worth and dismay over excessive executive pay.

U.S. Secretary of Education Margaret Spellings recently suggested that colleges account for their "escalating sticker price" by tracking student performance and aligning with standards similar to those imposed on K-12 by the No Child Left Behind law. "If you want to buy a new car," she noted further "you go online and compare a full range of models, makes, and pricing options. And when you're done you'll know everything from how well each car holds its value down to wheel size and number of cup-holders. The same transparency and ease should be the case when students and families *shop* for colleges, especially when one year of college can cost a lot more than a car!"

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While Spellings has been criticized for her college-car analogy, her call for increased accountability is already being answered by 78 public college and university administrators developing recommendations for a "Voluntary System of Accountability" (VSA) which would apply to all state colleges. In August 2006, the National Association of State Universities and Land-Grant Colleges and the American Association of State Colleges and Universities prepared a "discussion draft" in which they recognized multiple constituencies to which schools should be held accountable and recommended that schools begin compiling data about "student campus engagement" and "value-added core educational outcomes" to create a "bundle of accountability measures" that could then be made available to the public.

Such standards could open the educational malpractice floodgates. To date, courts have refused to hear educational malpractice claims on the grounds that judges and juries are not qualified to decide what constitutes a "reasonable" standard of care in higher education. But if the government were to establish—and state schools were to follow—some "reasonable standard of care" for colleges and universities, courts could enforce that standard without the problems associated with crafting one of their own. Nothing would do more to validate educational malpractice lawsuits than the implementation of universal standards written by experts in higher education and approved by policymakers at the Education Department.

When other businesses establish industry-wide standards, deviation from those standards can be used as evidence of negligence. If higher education adopts universal standards, deviation from those standards, can (and probably will) be used against colleges and universities in court. Universal standards are particularly problematic considering the broad diversity of academic programming that exists today. How will "Big 10" schools, the Ivy League, and small, single-sex, religious colleges all live by the same code?

Even in the absence of such standards, courts, which historically showed great deference to academic decision-making, are now using quasi-contractual analysis to ask (and answer) the question, "Are colleges and universities delivering the 'goods' they promise to students?"

Proprietary institutions are particularly vulnerable to these kinds of lawsuits because these for-profit professional schools often promise students that they will acquire specific skills, licenses or other forms of certification.

For example in the 1999 case of *Alsides v. Brown Institute, Ltd.*, a Minnesota Appeals Court refused to hold a trade school liable for educational malpractice on the grounds that such a ruling would be against public policy. But in the same opinion, the court held the school liable for failing to provide "specifically promised educational services," which included an array of issues impacting the *general* quality of education such as instructors' attendance and attentiveness; lack of hands-on training and of specific technology in the classroom; and a shortage in the number of hours of instruction provided to students. The 40 plaintiff-students in that case could have been entitled to money damages on their contract-based claims.

Educational malpractice claims cloaked in terms of breach of contract (as opposed to tort) are still largely confined to trade schools—but that may not be the case for long. A Florida court concluded that a fourth-year medical student was entitled to lost future earnings and

tuition reimbursement after the school dismissed him for failing one of his required courses. In the jury's estimation, the school's decision was "arbitrary and capricious."

When we start comparing colleges to car dealerships, we invite courts to expand the theory of contract-based malpractice to traditional liberal arts settings. While you cannot sue a car dealer for malpractice, you can sue him for breach of contract, breach of warranty, and for a host of lemon law violations, which all amount to a kind of "reasonable standard of care" for car dealers. If you think of educators as professionals (like doctors and lawyers) it is easy to imagine how they might be sued for malpractice on a routine basis. Although the principles of academic freedom and independent intellectual discourse should prevent us from outsourcing educational decisions to judges and juries, the realities of educating students in a highly commercialized environment ensures that at least some of these battles will end up in court.

At present, there is no clear alternative to litigation, which leaves schools in a very difficult position. When a student spends hundreds of thousands of dollars and years (sometimes *many* years) of his or her life at an institution, but fails to acquire the skills necessary to graduate or enter their chosen field, whose fault is it? On the one hand, the school has an obligation to afford the student some number of second chances before expelling him from the program. On the other, there may come a point (in the seventh or eighth year of someone's college career) when the school has a responsibility to turn the student away and encourage him to pursue other endeavors. Where and how schools should draw this line is a difficult question for educators, let alone jurors.

Excessive Compensation

In June 2004, the U.S. Senate Finance Committee held a hearing on fraud and mismanagement in America's nonprofit organizations. At the close of the hearing, Chairman Charles Grassley (R-Iowa) said it was "sad that in a hearing about charities, we have to hear about million-dollar insider contracts; middlemen who purposely cheat charities to make an extra buck; and the fact that over half of all new tax shelters used a tax-exempt party."

The intense scrutiny of executive compensation that started in the corporate world is now focused on nonprofits. With rising tuition costs and unprecedented levels of student debt, all eyes are on colleges and universities. Where presidents, provosts and coaches command high six-figure or even seven-figure salaries and enjoy a range of extravagant perks, Congress, the Internal Revenue Service (IRS) and the public can be expected to pressure schools to justify their pay scales.

The problem came into full relief in fall 2005 when American University President Benjamin Ladner was forced out of office after an anonymous tip revealed he received $800,000 for travel and personal expenses in 2004 alone, in addition to his $886,750 base salary. A trip to Paris with a personal chef and $40,000 for wine, liquor and parties, all went on the school's tab.

American University is not alone. The president of Mercer Community College left his post in Trenton, N.J., after serving $60-per-pound Kobe beef at special school dinners even as tuition headed upward. Meanwhile, an internal audit revealed that University of Tennessee President John W. Shumaker was using the university's aircraft for personal travel to the tune of at least $25,000 in outstanding travel reimbursement fees.

The cynics among us expect high level officials to get caught with their hands in the cookie jar every once in a while. What's so shocking about these scandals is that no one seemed to be watching the cookie jar in the first place. The trustees should have been aware of these problems from the start, but because they grossly misjudged or ignored their fiduciary duties, the excesses of a few executives were allowed to grow and fester until they exploded onto the front page. Predictably, the response has been to place round-the-clock surveillance on that jar.

The IRS is helping to drive these reforms with its "Tax Exempt Compensation Enforcement Project," launched in August 2004. The stated goals of the project are to: 1) address the compensation of specific individuals including high level administrators and highly compensated coaches and faculty members and identify questionable compensation practices; 2) increase awareness about tax issues to help institutions set appropriate levels of compensation on the theory that colleges will play by the rules if they know them; and 3) ensure that compensation practices are reported to the IRS and the public on annual Form 990 returns. Note that these reforms are not intended to set a cap on compensation, but rather to shed light on questionable spending practices that might otherwise go unnoticed.

In response, and in the interest of self-preservation, many colleges are adding layers of oversight to their executive compensation systems by using independent compensation committees, outside auditors and consulting firms. Meanwhile, Sarbanes-Oxley, the federal law designed to reform corporate America by enhancing "transparency" and accuracy in the accounting industry, casts a long shadow over the future of executive compensation in all fields.

These two trends—educational malpractice and executive compensation—are interlocked. As students continue to pour money into their educations and take on mountains of debt, they increasingly feel as though they are not getting their money's worth. This discontent is fueled by stories about overpaid administrators who live the high life while students barely scrape by. The challenge for schools today is to find a way to break this cycle and avoid the litigation that will inevitably flow from it.

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