

EDUCATIONAL MALPRACTICE: IS IT A TORT WHOSE TIME HAS COME? AN EXPLORATORY MIXED METHODS STUDY

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I.	INTRODUCTION	254
II.	THE IMPORTANCE OF AN EDUCATION: A PUBLIC GOOD AND/OR A PRIVATE BENEFIT	256
	A. <i>Education as a Public Good</i>	256
	B. <i>Education as a Private Benefit</i>	259
III.	THE PRACTICE OF THE PROFESSIONAL TEACHER	260
	A. <i>Malpractice</i>	262
IV.	EDUCATIONAL MALPRACTICE CASE LAW ON INSTRUCTIONAL NEGLIGENCE	264
	A. <i>A Tort of Negligence</i>	264
	B. <i>Malpractice in the Professions</i>	268
	C. <i>The Professional Educator and Malpractice</i>	270
V.	THE PERCEPTIONS OF EDUCATION LAW EXPERTS	275
	A. <i>Quantitative Analysis</i>	276
	1. <i>Demographics</i>	276
	2. <i>Analysis of Survey Questions</i>	277
	a. <i>Viability of a Tort for Educational Malpractice</i>	277
	b. <i>Factors Impacting Educational Malpractice</i>	278
	c. <i>Who Should be Liable for Malpractice?</i>	280

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B. *Open Answer Responses*.....282

1. No Prima Facie Case: Theme.....283

2. Defense Themes: Public Policy Concerns,
Distributed Education Responsibilities,
Causation: Non-Teacher Controlled Variables,
and Standards for Assessment.....284

VI. CONCLUSION: ARE CRACKS IN THE EDUCATIONAL
MALPRACTICE WALL FORMING?.....290

“The novel—and troublesome—question on this appeal is whether a person who claims to have been inadequately educated, while a student in a public school system, may state a cause of action in tort against the public authorities who operate and administer the system. We hold that he may not.”¹

“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.”²

I. INTRODUCTION

Peter Doe, a high school student with an average IQ and an average attendance record, graduated from high school in 1972.³ His reading ability at the time of graduation was approximately at the fifth-grade level.⁴ Peter Doe brought suit against the school district and its employees for negligence resulting in his inability to read and write.⁵ He sought damages of \$500,000.⁶ The plaintiff claimed that these actions resulted in depriving him of basic academic skills thus limiting his lifetime stream of earnings.⁷ In other words, he asserted that he was injured because the school district and its “teachers negligently or intentionally failed to conform to minimum standards of professional competence.”⁸ Peter Doe lost his suit,⁹ setting a rejection standard for virtually all such suits. “While professionals, such as physicians and attorneys, are held

1. Peter W. v. S.F. Unified Sch. Dist., 181 Cal. Rptr. 854, 855 (Cal. Ct. App. 1976).
 2. Donohue v. Copiague Union Free Sch. Dist., 391 N.E. 2d 1352, 1353 (N.Y. 1979).
 3. Belle Lind Gordon, *Schools and School Districts—Doe v. San Francisco Unified Sch. District, Tort Liability for Failure to Educate*, 6 LOY. U. CHI. L.J. 462, 463 (1975).
 4. *Id.*
 5. *Id.* at 464.
 6. *Id.* at 467.
 7. *Id.* at 464–65, 467.
 8. *Educational Malpractice*, 124 U. PENN. L.R. 755, 756 (1976).
 9. Peter W. v. S.F. Unified Sch. Dist., 131 Cal. Rptr. 854, 854 (Cal. Ct. App. 1976).

individually accountable through malpractice suits when their professional actions fail to conform to accepted practices and an injury results, to date malpractice in education has failed as a theory of recovery.”¹⁰ Have times changed in the intervening almost half-century since *Peter W.* that may bring about a change—is educational malpractice a tort whose time has come?

This study uses a mixed method to review the legal concept of educational malpractice and the perceptions of education law experts on educational malpractice. Stefkovich and Torres noted that a mixed methods approach is “strongly supported by the education law community.”¹¹ Furthermore, Schimmel reinforced their assertion, writing that these complimentary methods add depth and texture to legal research.¹²

This research design has five parts. The first part is the introduction of the study. The study focuses on instructional practices delivered by teachers in traditional classroom settings.¹³ Part II lays the foundation by discussing the importance of education to the individual and to society. Part III explores the role of teachers in student outcomes. The issue of what constitutes teacher effectiveness “has significant implications for decision making regarding preparation, recruitment, compensation, in-service professional development, and evaluation of teachers.”¹⁴ It is also a critical component of any suit for educational malpractice. For the quantitative portion, Part IV, the study uses a judgment sample, sometimes called an expert sample. Because the study explores the viability of educational malpractice as a tort in today’s current

10. Terri A. DeMitchell, *Educational Malpractice*, in TODD A. DEMITCHELL, *NEGLIGENCE: WHAT PRINCIPALS NEED TO KNOW ABOUT AVOIDING LIABILITY* 67 (2007) (citations omitted).

11. Jacqueline A. Stefkovich & Mario S. Torres Jr., *The Demographics of Justice: Student Searches, Student Rights, and Administrative Practices*, 39 *EDUC. ADMIN. Q.* 259, 263 (2003).

12. *RESEARCH THAT MAKES A DIFFERENCE: COMPLEMENTARY METHODS FOR EXPANDING LEGAL ISSUES IN EDUCATION 1–2* (David Schimmel ed., 1996). For an additional discussion of mixed methods research including legal analysis, see Khadijah Mohamed, *Combining Methods in Legal Research*, 11 *SOC. SCIS.* 5191, 5197 (2016) (“Nevertheless, it is argued that since there are a wide variety of issues still to be explored within legal research and the growing interest in empirical legal research means that the importance of combination of methods in legal research has been recognized and will therefore be essential in the future.”).

13. Education law scholars, Martha M. McCarthy, Nelda H. Cambron-McCabe, & Suzanne E. Eckes, use the term instructional negligence and distinguishes it from negligent evaluation and treatment of students with disabilities. MCCARTHY ET AL., *PUBLIC SCHOOL LAW: TEACHERS AND STUDENTS’ RIGHTS* 83–84 (7th ed. 2014). Professor John Collis used the term “pure” to differentiate “hybrid” educational malpractices in which “officials allegedly misdiagnosed or failed to diagnose the student’s learning disabilities” resulting in an injury to the student. JOHN COLLIS, *EDUCATIONAL MALPRACTICE: LIABILITY OF EDUCATORS, SCHOOL ADMINISTRATORS, AND SCHOOL OFFICIALS* 137 (1990).

14. James H. Stronge et al., *What Makes Good Teachers Good? A Cross-Case Analysis of the Connection Between Teacher Effectiveness and Student Achievement*, 62 *J. TCHR. EDUC.* 339, 339 (2011).

educational and judicial environment, it only surveys experts in education law. They are the first line for bringing or defending the suit. Consequently, all members of the sample are selected because they either teach education law and/or have a practice in education law. This sampling technique provides expert views on the topic. The last part is a wrap-up of the research. It is not an advocacy piece for either side of the topic; it seeks to be an exploration of it by adding an expert voice to the case law analysis.

II. THE IMPORTANCE OF AN EDUCATION: A PUBLIC GOOD AND/OR A PRIVATE BENEFIT

“[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society.”¹⁵

Education is not only a public good for the community; it is also a private benefit for the individual. Noted education historian, Lawrence Cremin, asserted that the important questions education addresses go “to the heart of the kind of society we want to live in and the kind of society we want our children to live in.”¹⁶ Public education has great consequences for every individual as well as for the nation.

A. *Education as a Public Good*

The importance of supporting an educated citizenry through government action started with the Massachusetts Bay School Law of 1642, which sought to maintain the authority of the government and the dominant religion stating, “education is important to the Commonwealth.”¹⁷ By 1787, the newly emerging United States of America acknowledged the importance of a formal state-supported education system through the passage of the Northwest Ordinance of 1787, section 3, which declared, “[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”¹⁸

The transition of education as a family matter continued through the Common School Movement of the early 19th century to the rise of compulsory education in the latter part of the century in which states used

15. Plyler v. Doe, 457 U.S. 202, 221 (1982).

16. LAWRENCE A. CREMIN, PUBLIC EDUCATION 74–75 (1976).

17. Todd A. DeMitchell & Joseph J. Onosko, *A Parent's Child and the State's Future Citizen: Judicial and Legislative Responses to the Tension Over the Right to Direct an Education*, 22 S. CAL. INTERDISC. L.J. 591, 596 (2013).

18. ORDINANCE OF 1787: THE NORTHWEST TERRITORIAL GOVERNMENT, art III, reprinted in 1 U.S.C. at LV, LVII (2006).

government-funded systems of education to respond to compelling social problems that America confronted after the War of 1812.¹⁹ “The justification for compulsory education laws lies in the recognition of the parents’ duty to educate his child for the child’s sake, and the parent’s duty to have his child educated for the benefit of the state.”²⁰

Public education became an instrument of government policies and initiatives. For example, the Indiana Supreme Court upheld the state’s compulsory education law holding that parents have a natural obligation to educate their child; however, “this duty he owes not to the child only, but to the commonwealth”²¹ Thus, education became a public good in which government invested in a system of public education that moved from decentralized loosely structured village schools to a more standardized, centralized, and professional bureaucracy.²²

From humble beginnings in New England’s grammar and Dame schools the education of the Nation’s children grew into a major undertaking with approximately 49.4 million public school students (4.7 million private school students) and 3.2 million public school teachers (0.5 million private school teachers) attending school in the 2019–20 school year) with expenditures of 667 billion for 2018–19.²³ Public education is a federal interest, a state responsibility, and a local function.

Over sixty years ago the U.S. Supreme Court underscored the importance of the State’s responsibility for providing a public education writing:

Today, education is perhaps the most important function of state and local governments. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he [or she] is denied the opportunity of an education.

. . . Such an opportunity, where the state has undertaken to provide it, is a right, which must be made available to all on equal terms.²⁴

19. Joan Blackburn, *Educational Malpractice: When Can Johnny Sue?*, 7 *FORDHAM URB. L.J.* 117, 121 (1979).

20. *Id.* See also *Fogg v. Bd. of Educ.*, 82 A. 173, 174–75 (N.H. 1912) (holding that the primary purpose of maintaining a public school system is “the promotion of the general intelligence of the people constituting the body politic.”).

21. *State v. Bailey*, 61 N.E. 730, 732 (Ind. 1901) (“The welfare of the child and the best interests of society require that the state shall exert its sovereign authority to secure to the child the opportunity to acquire an education.”).

22. See DAVID B. TYACK, *THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION* 28–29 (1974).

23. *Fast Facts: Back to School*, NAT’L CTR. FOR EDUC. STATS., <https://nces.ed.gov/fastfacts/display.asp?id=372#PK12> [<https://perma.cc/6PFN-DMAX>] (last visited May 4, 2022).

24. *Brown v. Bd. of Educ.*, 347 U.S. 484, 493 (1954).

Reflective of this important state function, the Sixth Circuit Court of Appeals, focusing on providing a foundation of literacy, found that education was a fundamental interest.²⁵ The Appellate Court in *Gary B. v. Whitmer*²⁶ asserted,

the role of basic literacy education within our broader constitutional framework suggests it is essential to the exercise of other fundamental rights. Most significantly, every meaningful interaction between a citizen and the state is predicated on a minimum level of literacy, meaning that access to literacy is necessary to access our political process.²⁷

A settlement was reached between the parties involving payments to the plaintiffs which was \$280,000, \$2.7 million to the Detroit school district, and a promise to propose legislation (approximately \$95 million) for literacy programs in Detroit.²⁸ Consequently, in an *en banc* poll, a majority of the judges granted a rehearing thus vacating the opinion and judgment of the court.²⁹ While the finding of a fundamental right to literacy was vacated, the concept of the importance of literacy was confirmed through the settlement.³⁰

Education is a public good.

25. *Gary B. v. Whitmer*, 957 F.3d 616, 662 (6th Cir. 2020).

26. *Id.* at 616.

27. *Id.* at 649; see also James Madison's letter to W.T. Barry (Aug. 4, 1822) about the importance of education:

Learned Institutions ought to be favorite objects with every free people. They throw that light over the public mind which is the best security against crafty & dangerous encroachments on the public liberty. They are the nurseries of skilful [sic] Teachers for the schools distributed throughout the Community. They are themselves Schools for the particular talents required for some of the public Trusts, on the able execution of which the welfare of the people depends.

James Madison, *From James Madison to W.T. Barry, August 4, 1822, Manuscript/Mixed Materials*, LIBR. OF CONGRESS, https://www.loc.gov/resource/mjm.20_0155_0159/?sp=2&st=text [<https://perma.cc/9GKY-YP5K>].

28. Mark Walsh, *Full Federal Appeals Court to Reconsider Ruling on Right of Access to Literacy*, EDUC. WEEK (May 19, 2020), <https://hlerk.com/wp-content/uploads/2020/07/en-banc.pdf> [<https://perma.cc/8LY2-HUTA>].

29. *Gary B. v. Whitmer*, 958 F.3d 1216, 1216 (6th Cir. 2020).

30. For a discussion of Whitmer and the concerns about finding education as a fundamental interest, see Bruce Meredith & Mark Paige, *Reversing Rodriguez: A Siren Call to a Dangerous Shoal*, 58 HOUS. L. REV. 355, 376 (2020) (“Attempts to find a meaningful fundamental federal right to education are also dangerous.”).

B. *Education as a Private Benefit*

An education is also a private benefit in that the educated individual not only does have an increased ability to achieve economic security, but he or she also tends to live longer and “portray greater satisfaction in life than those with lower levels of educational attainment.”³¹ The research on the economic benefits of an education is quite clear and sustained over time.³² The U.S. Bureau of Labor Statistics succinctly states the relationship between earning and education, writing, “the more you learn, the more you earn.”³³ For example, those individuals who earned a doctoral or professional degree had median weekly earnings triple those who obtained less than a high school diploma (\$553 for those who obtained less than a high school diploma, \$1,825 for those who earned a doctoral degree, and \$1,884 for those who earned a professional degree).³⁴ On the flip side of earnings is the unemployment rate by educational attainment. The unemployment rate was the inverse of the weekly earning chart; the 2018 unemployment rate was 1.6% for those with doctoral degrees, 2.1% for those with a master’s degree, 4.1% for those with a high school diploma but no college, and 5.6% for those with less than a high school diploma.³⁵ These data demonstrate the potential personal outcomes of an education.

The more you learn, the more you earn—educational attainment makes a difference in a person’s life. Consequently, the quality of an individual’s learning experiences, which may lead to further education, has consequences for the future of that individual. Mark Dynarski connects learning, earning, and malpractice writing, “[m]alpractice suits serve a dual purpose of providing remedies to persons that have been harmed and deterring the harm itself. If more education malpractice cases were to be judged in favor of plaintiffs (students), the remedy presumably

31. *Education Indicators in Focus*, ORGANISATION FOR ECON. CO-OPERATION & DEV. (Jan. 1, 2013), <https://www.oecd-ilibrary.org/docserver/5k4ddxn139vk-en.pdf?expires=1649537312&id=id&accname=guest&checksum=96547FB0018BE3AD0EA979AD93CD0997> [https://perma.cc/WK76-L8LS].

32. A quarter of a century ago, Mike Schmoker wrote, “A report on education and the economy indicates that educational attainment is the single most important determinant of a person’s success in the labor market. The 50 years it has been tracked, the payoff to schooling has never been higher.” MIKE SCHMOKER, RESULTS: THE KEY TO CONTINUOUS SCHOOL IMPROVEMENT 8 (1996).

33. Elka Torpey, *Education Pays, Career Outlook*, U.S. BUREAU LAB. STAT. (Feb. 2019), https://www.bls.gov/careeroutlook/2019/data-on-display/education_pays.htm [https://perma.cc/T2BZ-TXES].

34. *Id.* The median weekly income for a bachelor’s degree was \$1,198 while the weekly income for a high school diploma was \$730. *Id.*

35. *Id.*

would be the value of lost earnings arising from weaker academic skills.”³⁶

Similar to the 2020 court in *Gary B. v. Whitmer*, thirty-five earlier literacy researchers connected the importance of reading with the individual’s life prospects, asserting, “[r]eading is a basic life skill. It is a cornerstone for a child’s success in school and, indeed, throughout life. Without the ability to read well, opportunities for personal fulfillment and job success inevitably will be lost.”³⁷ The report not only identified the private benefit of learning to read; the authors also stated, “[r]eading is important for the society as well as the individual.”³⁸

The United States Supreme Court in *San Antonio Independent School District v. Rodriguez*³⁹ echoed this statement, opining, “the grave significance of education both to the individual and to our society cannot be doubted.”⁴⁰ A publicly supported education is both a public good and a private benefit.

III. THE PRACTICE OF THE PROFESSIONAL TEACHER

“The quality of teachers and teaching is undoubtedly among the most important factors shaping the learning and growth of students.”⁴¹

Whether pursuing a public good or a private benefit, teachers make the difference in the education of a student.⁴² That difference cuts both

36. Mark Dynarski, *Can Schools Commit Malpractice? It Depends*, BROOKINGS (July 26, 2018), <https://www.brookings.edu/research/can-schools-commit-malpractice-it-depends/> [<https://perma.cc/DZ9K-X9YS>].

37. RICHARD C. ANDERSON ET AL., *BECOMING A NATION OF READERS: THE REPORT OF THE COMMISSION ON READING 1* (1985).

38. *Id.*

39. 411 U.S. 1 (1973).

40. *Id.* at 30.

41. Richard M. Ingersoll, *Power, Accountability, and the Teacher Quality Problems*, in *ASSESSING TEACHER QUALITY: UNDERSTANDING TEACHER EFFECTS ON INSTRUCTION AND ACHIEVEMENT 97–109* (Sean Kelly ed., 2011).

42. For example, Hiram Orcutt, in 1859, wrote of the importance of teachers by relating the following fable:

When Jupiter offered the prize of immortality to him who was the most useful to mankind, the court of Olympus was crowded with competitors. The warrior boasted of his patriotism, but Jupiter thundered; the rich man boasted of his munificence, and Jupiter showed him the widow’s mite; the pontiff held up the keys to heaven, and Jupiter the doors wide open; the painter boasted of his power to give life to inanimate canvas, and Jupiter breathed aloud in derision; the Sculptor boasted of making the gods that contended with the immortals for human homage, Jupiter frowned; the orator boasted of his power to sway the nation with his voice, and Jupiter marshaled the obedient host of heaven with a word; the poet spoke of his power to move in the gods by praise, Jupiter blushed; the musician claimed to practice the only human science that had been

ways; an effective teacher makes a positive difference in a student's learning and an ineffective teacher also makes a difference, just the wrong difference. As Harvard professor Susan Moore Johnson wrote almost three decades ago, but with the same salience today, "[w]ho teaches matters."⁴³

Teachers occupy the central position in the school providing the instruction, structuring the learning activities, and assessing the work of students. Succinctly stated, "[t]eacher quality matters. In fact, it is the most important school-related factor influencing student achievement."⁴⁴ It is particularly well established that no other measured aspect of schools is nearly as important in determining student achievement than the effectiveness of the classroom teacher; teacher quality makes a difference in student learning.⁴⁵ Consequently, some researchers and policymakers assert that the endpoint of accountability is holding individual teachers (not just schools) accountable for results.⁴⁶

The focus on the teacher as the hinge in a student's educational attainment has coincided with the other policy streams⁴⁷ that may reopen the question of whether teachers/school districts can be held liable for educational malpractice. Malpractice is often distinguished from other types of negligence committed by professionals in that it deals with the quality of the services rendered.⁴⁸

transplanted to heaven, Jupiter hesitated; when seeing a venerable man looking with intense interest upon the group of competitors but presenting no claims, 'What art thou?' Said the benignant monarch. 'Only a spectator,' replied the gray headed sage; 'all these were my pupils.' 'Crown him, crown him,' said Jupiter; 'crown the *faithful Teacher* with immortality, and make room for him at my right hand!'

HIRAM ORCUTT, HINTS TO COMMON SCHOOL TEACHERS, PARENTS AND PUPILS; OR GLEANINGS FROM SCHOOL-LIFE EXPERIENCE 16–17 (rev. ed., Rutland, G.A. Tuttle & Co. 1859).

43. SUSAN MOORE JOHNSON, *TEACHERS AT WORK: ACHIEVING SUCCESS IN OUR SCHOOLS* xii (1990).

44. JENNIFER K. RICE, *TEACHER QUALITY: UNDERSTANDING THE EFFECTIVENESS OF TEACHER ATTRIBUTES* v (2003).

45. See Eric Hanushek, *The Economic Value of Higher Teacher Quality*, 30 *ECON. EDUC. REV.* 466, 467 (2010) ("First, teachers are very important; no other measured aspect of schools is nearly as important in determining student achievement.").

46. Dan Goldhaber & Michael Hansen, *Assessing the Potential of Using Value-Added Estimates of Teacher Job Performance for Making Tenure Decisions* 1 (Nat'l Ctr. for Analysis of Longitudinal Data in Educ. Rsch., Working Paper No. 31).

47. See generally JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (Leo A. Wiegman et al. eds., HarperCollins College Publishers 2d ed. 1995) (1984) (discussing how public problems get on the public's policy agenda).

48. Like professionals, the central act of teaching is speaking. Claudia E. Haupt, an Associate-in-Law at Columbia Law School, raises an interesting issue regarding the free speech of professionals and malpractice. Claudia E. Haupt, *Professional Speech*, 125 *YALE L.J.* 1238, 1289 (2016). She writes, "Professionals speak not only for themselves but also as members of a learned profession: "they 'assist[] individuals making personal choices based on the cumulative

While several legal theories have been asserted as a basis for educational malpractice,⁴⁹ Thomas G. Eschweiler discusses several theories of recovery, including constitutional, contract, and misrepresentation. Eschweiler asserts, “perhaps the most popular theory used in the educational malpractice arena has been traditional negligence.”⁵⁰ We will focus on this theory of recovery.

A. Malpractice

Malpractice is a tort, which is a civil wrong based on reasonableness and fault. Under tort law, an individual who has suffered because of the improper conduct of another may sue that person for money damages. The purpose of tort law is to balance a plaintiff’s claim to protection from damages against a defendant’s freedom of action. Malpractice focuses on the duty that is owed to the recipient of the professional service and whether that duty has been breached, causing injury—education in the case of educational malpractice.

The courts have historically been loath to extend the malpractice tort of negligence to the public schools.⁵¹ Professor Tokic identified several legal arguments against a finding of negligence based on educational malpractice.⁵² The first was the failure to articulate a standard of practice to which all educators are expected to adhere.⁵³ Second, there were uncertainties when it comes to establishing causation.⁵⁴ Third, courts

knowledge of the profession.” *Id.* at 1242. “It is thus the knowledge community that determines the standard of care.” *Id.* at 1286. Consequently, if education does not constitute a knowledge community, a shared knowledge of teaching research and resulting practices, it may not have a standard of care as the *Peter W.* case asserted.

49. A duty can also be imposed by statute. A statute often establishes a standard of care that is owed by the professional while rendering services and therefore impliedly creates a duty of due care. Depending upon the jurisdiction, a violation of a statute specifying a standard of care may be considered negligence “per se” or merely evidence of negligence. In a jurisdiction that recognizes a violation of a statute as negligence “per se,” once the breach of a statute is established, negligence is conclusive. RESTATEMENT (SECOND) OF TORTS § 288B (AM. L. INST. 1965). However, compliance with a statute does not necessarily prove due care. While compliance may be used as evidence that the defendant used due care, it may also be alleged that the defendant was negligent because he or she did not do more than what was required by the statute. *Christou v. Arlington Park-Washington Park Race Tracks Corp.*, 432 N.E.2d 920, 924 (Ill. App. Ct. 1982).

50. Thomas G. Eschweiler, *Educational Malpractice in Sex Education*, 49 SMU L. REV. 101, 107 (1996).

51. The lone exception is the Montana special education case *B.M. v. State*, 649 P.2d 425 (Mont. 1982).

52. Stijepko Tokic, *Rethinking Educational Malpractice: Are Educators Rock Stars?*, 2014 BYU EDUC. & L.J. 105, 107 (2014).

53. *Id.* at 110.

54. *Id.* at 110–11.

questioned whether a lack of educational attainment is proximately caused by the plaintiff teacher.⁵⁵

A fourth issue arises in tort litigation. It is possible that, even if it is appropriate to provide compensation to a specific plaintiff, the plaintiff will be denied compensation if it is determined that there may be negative social consequences for the public associated with such a decision. These social consequences are sometimes referred to as public policy concerns.⁵⁶ Public policy concerns play a significant role in malpractice litigation.⁵⁷ For example, a Missouri Court of Appeals wrote, “universities must be allowed the flexibility to manage themselves and correct their own mistakes.”⁵⁸

However, despite these judicial concerns, a crack in the educational malpractice wall may be emerging.⁵⁹ Law professors Ethan L. Hutt and Aaron Tang argue that common law torts such as negligence and malpractice are sensitive to changing times and that advances in

55. *Id.* at 111.

56. *See* McGovern v. Nassau Cnty. Dep’t. of Soc. Servs., 876 N.Y.S.2d 141, 142 (N.Y. App. Div. 2009) (“These allegations sound in educational malpractice, which has not been recognized as a cause of action in [New York] because public policy precludes judicial interference with the professional judgment of educators and with educational policies and practices.”); Melanie Natasha Henry, *No Child Left Behind? Educational Malpractice Litigation for the 21st Century*, 92 CAL. L. REV. 1117, 1119 (2004) (asserting that No Child Left Behind can form the basis for educational malpractice); Todd A. DeMitchell & Terri A. DeMitchell, *Statutes and Standards: Has the Door to Educational Malpractice Been Opened?*, 2003 BYU EDUC. & L.J. 485, 509 (2003) (exploring whether a California law, “English Language in Public Schools” (Cal. Educ. Code Ann. § 300, et seq. (West 2002)), which allows students who have been denied the option of an English language curriculum, may sue the teacher or administrator who could be personally liable for actual damages). They ask, “has the door to educational malpractice, which has been shut for decades, been opened a crack by the passage of Proposition 227 and its right to sue.” *Id.* at 509–10.

57. *Klingsberg v. Council of Sch. Supervisors*, 122 N.Y.S.3d 335, 337 (N.Y. App. Div. 2020) (underscoring the impact of public policy as codified in law, specifically at the intersection of education and the law). A New York principal charged with multiple financial improprieties brought a suit for legal malpractice against the union attorney representing her in accordance with the collective bargaining agreement. *Id.* at 336. During the pendency of the hearing, the union attorney was seeking a position with the school district. *Id.* The plaintiff lost her malpractice suit. *Id.* at 337. The court held that section 301 of the Federal Labor Management Relations Act preempts the principal’s complaint, and attorneys who “perform services for and on behalf of a union may not be held liable in malpractice to individual grievants such as the plaintiff where the services performed constitute part of the bargaining process.” *Id.*

58. *Lucero v. Curators of Univ. of Mo.*, 400 S.W.3d 1, 8 (Mo. Ct. App. 2013).

59. *See* DeMitchell & DeMitchell, *supra* note 56, 2003 BYU EDUC. & L.J. 485 (2003); Terri A. DeMitchell & Todd A. DeMitchell, *A Crack in the Educational Malpractice Wall*, 64 SCH. ADMIN. 34 (Oct. 2007); Todd A. DeMitchell et al., *Teacher Effectiveness and Value-Added Modeling: Building a Pathway to Educational Malpractice*, 2012 BYU EDUC. & L.J. 257 (2012).

educational teaching standards may provide the rationale for overcoming the judicial aversion to allowing educational malpractice suits.⁶⁰

IV. EDUCATIONAL MALPRACTICE CASE LAW ON INSTRUCTIONAL NEGLIGENCE⁶¹

“Educational malpractice is a tort theory beloved of commentators, but not of courts.”⁶²

A. *A Tort of Negligence*

A tort is a civil wrong for which the courts will provide a remedy for the injury suffered, usually in the form of damages assessed against the defendant. “The purpose of the law of torts is to adjust these losses, and to afford compensation for injuries sustained by one person as the result of the conduct of another.”⁶³ Tort liability embraces the concept that all persons have a duty “to exercise due care in [their] own actions so as not to create an unreasonable risk of injury to others.”⁶⁴

As stated above, a tort is a civil wrong based on reasonableness and fault. Examples of tort lawsuits include backing into another person’s car, leaving roller skates on a sidewalk for another to trip over, or building a wall that falls on a person.

Public policy concerns play a significant and sometimes conflicting role in malpractice litigation.⁶⁵ With the pervasiveness of the courts’ influence on public policy, education is no stranger to the effects of court cases on education policy. Law Professor David L. Horowitz captured

60. Ethan L. Hutt & Aaron Tang, *The New Education Malpractice Litigation*, 99 VA. L. REV. 419 (2013). The authors assert:

We argue in this Article that there may well be recourse in court for children assigned to chronically ineffective teachers under basic principles of tort law familiar to most first-year law students. Such children should be able to state a claim for negligence against school officials who, with full knowledge that certain teachers are chronically ineffective, nevertheless assign students to a year’s worth of academic injuries in those teachers’ classrooms.

Id. at 425.

61. Deborah D. Dye defines educational malpractice as “the failure to adequately educate a student and includes the improper or inadequate instruction, testing, placement or counseling of a child.” Deborah D. Dye, *Educational Malpractice: A Cause of Action that Failed to Pass the Test*, 90 W. VA. L. REV. 499, 502 (1988).

62. *Ross v. Creighton Univ.*, 740 F. Supp. 1319, 1327 (N.D. Ill. 1990).

63. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 6 (5th ed. 1984).

64. 57 AM. JUR. 2d *Negligence* § 75 (2021).

65. See *McGovern v. Nassau Cnty. Dep’t. of Soc. Servs.*, 876 N.Y.S.2d 141, 142 (N.Y. App. Div. 2009) (“These allegations sound in educational malpractice, which has not been recognized as a cause of action in [New York] because public policy precludes judicial interference with the professional judgment of educators and with educational policies and practices”).

this connection when he wrote, “[t]he American proclivity to think of social problems in legal terms and to judicialize everything from wage claims to community conflicts and the allocation of airline routes makes it only natural to accord judges a major share of social policy.”⁶⁶

The most common tort is negligence. This tort is characterized by conduct that falls below an acceptable standard of care and results in unintentional harm or injury. As individuals, we can be held legally accountable for our actions, or failures to act, under certain circumstances. The same is true for school districts.⁶⁷ For example, school districts and educators have been held liable for torts of negligence for such things as failure to adequately supervise students on the school grounds,⁶⁸ failure to warn and instruct students about the use of methanol around a flame,⁶⁹ and failure to instruct a field hockey player to wear a required mouth protector.⁷⁰ However, not all injuries to students result in a finding of liability. School districts are not insurers of safety for school children.⁷¹ Sometimes, injuries to students occur which do not result in legal liability for a school district. For example, a student playing dodgeball stepped backwards and tripped over another student’s foot resulting in an injury.⁷² The “incident occurred so quickly that even the most intense supervision would not have averted the accident.”⁷³

To successfully bring an action under the theory of negligence, including malpractice,⁷⁴ the following elements must be established:⁷⁵

1. DUTY OWED⁷⁶: A duty, or obligation, recognized by the law,

66. DAVID L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 7 (1988).

67. *See* C.B. v. Rahway Bd. of Educ., 209 A.3d 222, 226 (N.J. Super. Ct. App. Div. 2018) (“School officials have a duty to supervise the children in their care.”).

68. *E.g.*, Walley v. Bivins, 917 N.Y.S.2d 461 (N.Y. App. Div. 2011); Vonungren v. Morris Cent. Sch. Dist., 658 N.Y.S.2d 760 (N.Y. App. Div. 1997). *But see, e.g.*, Moffat v. North Colonie Cent. Sch. Dist., 917 N.Y.S.2d 754 (N.Y. App. Div. 2011).

69. *E.g.*, Bush v. Oscoda Area Sch., 250 N.W.2d 759 (Mich. 1976).

70. *E.g.*, Baker v. Briarcliff Sch. Dist., 613 N.Y.S.2d 660 (N.Y. App. Div. 1994).

71. Maldonado v. Tuckahoe Union Free Sch. Dist., 817 N.Y.S.2d 376, 377 (N.Y. App. Div. 2006).

72. Knightner v. William Floyd Union Free Sch. Dist., 857 N.Y.S.2d 726, 727 (N.Y. App. Div. 2008).

73. *Id.*

74. *See* Michael J. Polelle, *Who’s on First, and What’s a Professional*, 33 U.S.F. L. REV. 205, 206 (1999) (“Judicial intervention in the specific professions of medicine and law has largely molded the malpractice law applied to all professionals.”).

75. For an application of the elements of a tort to educational malpractice, see DeMitchell & DeMitchell, *supra* note 59, at 492–505.

76. TODD A. DEMITCHELL, *NEGLIGENCE: WHAT PRINCIPALS NEED TO KNOW ABOUT AVOIDING LIABILITY* 27 (2006) (stating that the duty that educators owe students is often phrased as “obligations,” including: (1) providing adequate supervision; (2) providing proper instructions; (3) providing properly maintained buildings, grounds, and equipment; and (4) providing warnings regarding known or reasonably foreseeable hazards).

requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable and foreseeable risks of harm that the defendant knew or should have known. This is often referred to as a duty to provide ordinary care.⁷⁷ “Educators owe students a duty to anticipate foreseeable dangers and take necessary precautions to protect students entrusted in their care from such dangers.”⁷⁸ The duty may be heightened as the gravity of possible harm increases.⁷⁹

2. BREACH OF DUTY: A failure on the person’s part to conform to the standard of care owed to the plaintiff.⁸⁰ Did the educator’s action or failure to act create an unnecessary risk of harm? At its core, breach of duty asks whether the educator acted as a reasonable and prudent teacher would under the same or similar circumstances.

3. CAUSATION: A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as “legal cause” or “proximate cause,” and which includes the notion of cause in fact (but for). Law professor Vincent R. Johnson, writing on legal malpractice, but applicably to educational malpractice, states, “[i]t is therefore important to think carefully about causation issues. Just as it would be unfair to deny a plaintiff compensation for harm the defendant’s negligence in fact caused, so too it would be unfair to hold a defendant liable for harm the defendant did not cause.”⁸¹ However, an Ohio Court

77. See *N.L. v. Bethel Sch. Dist.*, 378 P.3d 162, 430 (Wash. 2016) (quoting *Briscoe v. Sch. Dist. Bo.* 123, Grays Harbor Cnty., 201 P.2d 697, 701 (Wash. 1949)) (holding that “[s]chool districts have the duty ‘to exercise such care as an ordinarily responsible and prudent person would exercise under the same or similar circumstances.’”).

78. *DEMITCHELL*, *supra* note 76, at 129. For a case in which the defendant school district took necessary precautions to protect students, see *Jones v. Icahn Assocs. Corp.*, 102 N.Y.S.3d 586, 587 (N.Y. App. Div. 2019), in which a student fell down the stairs of her school following a rainstorm. The New York Appellate Court held that the school was “not required to cover all of the school floors with mats nor were they required to continuously mop up the moisture resulting from the tracked-in rain.” *Id.* (citation omitted).

79. See *Munn v. Hotchkiss Sch.*, 24 F. Supp. 3d 155, 163 (D. Conn. 2014) (finding that the school was liable for permanently disabling injuries (encephalitis) contracted from a bite by a diseased tick while on a field trip to rural China). The jury found that the school failed to warn Cara Munn and the other students about the risks and failed to use protective measures (such as spraying on DEET and wearing long sleeves) as recommended by the Center for Disease Control. *Id.* at 165. The duty owed to Cara was heightened because of the gravity of harm. *Id.* at 180. However, a tort may be dismissed as a matter of law if the defective condition is “trivial.” *K.A. v. City of New York*, 134 N.Y.S.3d 423, 425 (N.Y. App. Div. 2020). For example, a suit brought by a public-school student who tripped over a crack while running was dismissed on summary judgment as “nonactionable.” *Id.*

80. The Appellate Division cautioned in *Donohue* that the burden of demonstrating that a breach of the duty owed “was the proximate cause of [a] failure to learn. The failure to learn does not bespeak a failure to teach.” *Donohue v. Copiague Union Free Sch. Dist.*, 407 N.Y.S.2d 874, 881 (N.Y. App. Div. 1978).

81. Vincent R. Johnson, *Causation and “Legal Certainty” in Legal Malpractice Law*, 8 ST. MARY’S J. LEGAL MALPRACTICE & ETHICS 374, 381 (2018).

of Appeals identified the challenge of demonstrating proximate cause because of such variables as student motivation, past educational experience, and home environment (supportive or otherwise).⁸²

4. SUFFICIENT INJURY: Injury is not presumed even when the standards of duty owed, breach of duty, and causation have been established. “Injury is not presumed, the plaintiff must show actual injury or harm.”⁸³

The courts have long and consistently recognized a school’s duty to protect students in their care from physical injury on school grounds and under school supervision.⁸⁴ For example, a Texas Court of Appeals held that “a school has the duty to reasonably care for the well-being and safety of its students.”⁸⁵ While school districts have a duty to take reasonable steps to protect students from a foreseeable physical harm,⁸⁶ the absence of an educational malpractice cause of action implies that there is no corresponding duty to educate students.

Although it is expected that educators will provide a professional teaching service for their students, students cannot sue if their education is inferior, thus harming their chances for future success. Administrative action can be taken resulting in an educator being disciplined, even dismissed, for incompetence. However, a student who is injured due to inadequate instruction has no legal recourse in a suit for damages under a theory of malpractice.

In other professions, there is legal recourse for malpractice. When a complaint is filed against a physician for allegedly rendering incompetent service to a patient that causes an injury, the physician’s actions are scrutinized, and the patient is generally compensated for damages suffered due to proven professional malpractice. Attorneys are also subject to malpractice. The general rule is that a lawyer is liable for the failure to possess the requisite skill or for the failure to exercise the standard of care necessary for his or her client’s cause.⁸⁷ Liability can also result if a lawyer takes a case that is beyond his or her capabilities or for the failure to know or to learn the law applicable to his or her client’s

82. *Poe v. Hamilton*, 565 N.E.2d 887, 888–89 (Ohio Ct. App. 1990) (per curiam).

83. DEMITCHELL, *supra* note 76, at 39.

84. Judith H. Berliner Cohen, *The ABC’s of Duty: Educational Malpractice and the Functionally Illiterate Student*, 8 GOLDEN GATE U. L. REV. 293, 299 (1978). *See also* *Dunn v. Unified Sch. Dist. No. 367*, 40 P.3d 315, 328 (Kan. Ct. App. 2002) (“There is no question that a school has a duty to provide a suitable environment conducive to the general health, safety, and welfare of each student.”).

85. *Univ. Preparatory Sch. v. Huitt*, 941 S.W.2d 177, 180 (Tex. App. 1996).

86. *See id.*

87. *Campbell v. Magana*, 8 Cal. Rptr. 2d 32, 34 (Cal. Ct. App. 2d 1961).

case.⁸⁸ As discussed in the following section, courts have consistently refused to recognize educational malpractice as a cause of action.⁸⁹

B. *Malpractice in the Professions*

Since most harmful acts by professionals are unintentional, the most common theory for malpractice asserted against a professional is negligence. This is true whether the professional is a physician,⁹⁰ an attorney,⁹¹ or an educator. Malpractice is often distinguished from other wrongs committed by professionals in that it deals with the quality of the services rendered.⁹² Professionals are expected to exercise a standard of

88. For example, in *Smith v. Lewis*, 530 P.2d 589, 591–92 (1975), an attorney who did not specialize in the area of family law represented a woman in a divorce case. Before advising her of her rights, the defendant failed to research the issue of the community property nature of her husband's military pension. *Id.* at 595. The courts found this omission to be malpractice. *Id.*

89. See *McGovern v. Nassau Dep't of Soc. Servs.*, 876 N.Y.S.2d 141, 142 (N.Y. App. Div. 2009) (“These allegations sound in educational malpractice, which has not been recognized as a cause of action in this State because public policy precludes judicial interference with the professional judgment of educators and with educational policies and practices.”); *Bell v. Bd. of Educ. of West Haven*, 739 A.2d 321, 325 (Conn. App. Ct. 1999) (holding that duty, standard of care, and reasonable conduct “are difficult, if not impossible, to apply in the academic environment.”); *Brown v. Compton Unif. Sch. Dist.*, 80 Cal. Rptr. 2d 171, 172 (Cal. Ct. App. 1998) (quoting *Peter W. v. S.F. Unif. Sch. Dist.*, 131 Cal. Rptr. 854, 861 (Cal. Ct. App. 1976)) (“Policy considerations preclude ‘an actionable ‘duty of care’ in persons and agencies who administer the academic phases of the public educational process. . . .”). See also Karen H. Calavenna, Comment, *Educational Malpractice*, 64 U. DET. L. REV. 717, 719–21 (1987); Frank Aquila, *Educational Malpractice: A Tort En Ventre*, 38 CLEVELAND STATE L. REV. 323, 355 (1991) (“As such, educational malpractice today remains an ‘unborn tort.’”); Patricia Abbott, Note, *Sain v. Cedar Rapids Community School District: Providing Special Protection for Student-Athletes*, 2002 BYU EDUC. & L.J. 291, 291 (2002) (“Long ago, legal scholars held a funeral service for the tort of educational malpractice.”); Hope Gray, *New Life for Educational Malpractice: Decades of Policy Revisited*, LOY. U. CHI. EDUC. L. & POL'Y INST. 25 (2010), https://www.luc.edu/media/lucedu/law/centers/childlaw/childled/pdfs/2010studentpapers/Hope_Gray.pdf [<https://perma.cc/5FKX-R6MD>] (concluding that “it is unlikely that state courts will soon see an end to educational malpractice cases.”).

90. “In 1794, the United States saw its first medical malpractice case. The plaintiff claimed a doctor promised to do an operation skillfully, but instead did the opposite. The plaintiff’s wife died as a result of the operation. He won the case. . . .” Naomi Anderson, *A Brief History of Medical Malpractice*, PHYSICIANS NEWS DIG. (May 10, 2017), <https://physiciansnews.com/2017/05/10/brief-history-medical-malpractice/> [<https://perma.cc/NDU5-69NP>].

91. See, e.g., HERBERT M. KRITZER & NEIL VIDMAR, *WHEN LAWYERS SCREW UP: IMPROVING ACCESS TO JUSTICE FOR LEGAL MALPRACTICE VICTIMS* (2018).

92. B. Sonny Bal, *An Introduction to Medical Malpractice in the United States*, 467 CLINICAL ORTHOPAEDICS & RELATED RSCH. 467, 468 (2009) (“The concept that every person who enters into a learned profession undertakes to bring to the exercise of a reasonable degree of care and skill dates back to the laws of ancient Rome and England.”), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2628513/> [<https://perma.cc/2BWU-MVHJ>]; Ronald E. Mallen, *Recognizing and Defining Legal Malpractice*, 30 S.C. L. REV. 203, 204–05 (1979). See also Dynarski, *supra* note 36 (“Malpractice is a failure to deliver what a reasonable professional would consider an appropriate service.”).

care recognized by their profession as appropriate, based on the training received and the commonly held set of practices associated with the service rendered.⁹³ Failure to exercise the accepted standard of care may form the basis for malpractice if the negligent delivery of the service is the legal cause for an injury suffered.⁹⁴ Professionals who engage in alleged professional misconduct or who allegedly lack appropriate skill resulting in injury may be liable for malpractice. The practitioners are held accountable through malpractice “for failure to perform in accordance with skills that define their jobs.”⁹⁵ For example, the duty owed by a physician to his or her patients applies to all aspects of the relationship, from diagnosis to treatment.

In medicine, a surgeon may operate on a patient and follow all commonly accepted procedures for the operation, yet the patient may die. The death of the patient is not the measure of malpractice; the delivery of the standard of care concerning the operation is instead dispositive. In other words, a malpractice suit will not prevail if a patient dies in spite of the surgeon doing everything expected in the delivery of the professional service. The service rendered may be competent, but the outcome may be negative.

Mere dissatisfaction with the services rendered, however, is not enough for a successful claim against a professional even if a duty is established. There must be a breach of the expected duty of care, which requires the establishment of the degree of care owed and proof that the defendant did not meet that standard.⁹⁶ Therefore, while the courts have enabled patients to bring grievances into court by liberally finding that a duty between a physician and a patient exists, they have not required professionals to be insurers of results.

Malpractice suits depend on several factors. The gravamen for professional malpractice cases rests on whether the professional performed in accordance with the standard of care observed by members of the profession⁹⁷—the standard of care used to measure the expected competence of the professional practice. Malpractice is defined as:

93. For example, a physician owes a patient (1) the duty to possess the requisite knowledge and skill such as is possessed by the average member of the medical profession, (2) the duty to exercise ordinary and reasonable care in the application of such knowledge and skill, and (3) the duty to use best judgment in such application. 61 AM. JUR. 2d *Physicians and Surgeons* § 311 (1981). Haupt, *supra* note 48, at 1285 (“It is correctly understood that “[m]alpractice law protects the vulnerability of clients by requiring professionals to maintain strict standards of expert knowledge.”).

94. DeMitchell & DeMitchell, *supra* note 59, at 489.

95. John G. Culhane, *Reinvigorating Educational Malpractice Claims: A Representational Focus*, 67 WASH. L. REV. 349, 371 (1992).

96. See Bal, *supra* note 92, at 342.

97. See generally Hall v. Hilbun, 466 So.2d 856 (Miss. 1985) (discussing the parameters of the medical standard of care).

Professional misconduct or unreasonable lack of skill. The term is usually applied to such conduct by doctors, lawyers, and accountants. [It is the] failure of one rendering professional services to exercise the degree of skill and learning commonly applied under all the circumstances of the community by the average prudent reputable member of the profession with the result of injury, loss or damage to the recipient of those services or to those entitled to rely upon them. It is any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct.⁹⁸

One of the most concise statements regarding the requisite standard of care for physicians was established by a Kentucky Court of Appeals in *Blair v. Eblen*, which held, “[A physician is] under a duty to use that degree of care and skill which is expected of a reasonably competent practitioner in the same class to which he belongs, acting in the same or similar circumstances.”⁹⁹

Establishing causation is difficult in any professional malpractice case. However, a physician or an attorney can only be held liable for an injury he or she actually caused. Many factors must be considered in complex situations and the courts grapple with these complexities. For example, a physician can be held liable if he or she hastened the death of a terminally ill patient.¹⁰⁰ However, like establishing that a standard of care exists in education, establishing causation is a major stumbling block. The rendering of professional services does not always result in a positive outcome—unfortunately, patients die, and clients go to jail. The issue is whether professionals’ decisions and actions are consistent with the type of service expected of the profession.

C. *The Professional Educator and Malpractice*

Educational malpractice was first adjudicated in the 1976 seminal case, *Peter W. v. San Francisco Unified School District*.¹⁰¹ This case set the stage for all subsequent educational malpractice actions by clearly denying recovery. In this case, a high school graduate brought suit against the San Francisco Unified School District, the superintendent, and governing board to recover for alleged negligence in instruction and intentional misrepresentation of the student’s progress.¹⁰² The plaintiff claimed that these actions resulted in depriving him of basic academic

98. *Malpractice*, BLACK’S LAW DICTIONARY (5th ed. 1979).

99. 461 S.W.2d 370, 373 (Ky. 1970).

100. *E.g.*, *James v. United States*, 483 F. Supp. 581, 586 (N.D. Cal. 1980).

101. 131 Cal. Rptr. 854 (Cal. Ct. App. 1976).

102. *Id.* at 817.

skills.¹⁰³ In other words, he asserted that he was injured because he had not been adequately educated.¹⁰⁴

The plaintiff in this action was an eighteen-year-old man who had recently graduated from the San Francisco Unified School District after having been enrolled in the school system for a period of approximately twelve years.¹⁰⁵ He claimed that although he had graduated from high school, he possessed only a fifth-grade reading ability.¹⁰⁶ The plaintiff alleged in part that the four requisite elements (duty owed, breach of duty, causation, and sufficient injury) for bringing an action in tort were present in his case.¹⁰⁷ In his complaint, the plaintiff alleged that the defendant school district, its agents, and its employees had a duty to provide plaintiff with an adequate education and that the defendant breached that duty.¹⁰⁸ In addition, the plaintiff alleged that this breach of duty was in fact the proximate cause of plaintiff's inability to read at grade level and that the plaintiff had been injured because of this inability.¹⁰⁹

The court found that the plaintiff was not owed a duty of due care.¹¹⁰ The court ruled that finding a cause of action could expose school districts to tort claims in "countless numbers" which would burden the school systems.¹¹¹ The court further reasoned that there is no singular standard of care in education and that it would be difficult to determine the reasons

103. *Id.* at 818.

104. *Id.*

105. *Id.* at 817.

106. *Id.* at 818.

107. *Peter W.*, 131 Cal. Rptr. 3d at 854.

108. Specifically, *Peter W.* alleged that the defendants negligently failed to exercise that degree of professional skill required of an ordinarily prudent educator with the following acts:

- (1) failed to apprehend his reading disabilities,
- (2) assigned him to classes in which he could not read "the books and materials,"
- (3) allowed him "to pass and advance from a course or grade level" with knowledge that he had not achieved either its completion or the skills "necessary for him to succeed or benefit from subsequent courses,"
- (4) assigned him to classes in which the instructors were unqualified or which were not "geared" to his reading level, and
- (5) permitted him to graduate from high school although he was "unable to read above the eighth grade level, as required by [California] Education Code section 8573, . . . thereby depriving him of additional instruction in reading and other academic skills."

Id. at 818.

109. *Id.*

110. *Id.* at 825.

111. *Id.*

why a student had failed to learn basic academic skills.¹¹² Since it would be difficult to establish the elements of a legal cause of action in tort, such as breach of duty, causation, and damages and because of the policy concern of overburdening school districts, the court found no duty of due care.

The court admitted that the facts impose upon the defendant a duty of care within the “common meaning of the term.”¹¹³ However, the court dismissed each of the theories raised by the plaintiff for want of relevant authority establishing that the enrollment of the plaintiff in defendants’ schools creates a legal duty, which will sustain liability for negligence of its breach.¹¹⁴ The most pertinent principle for purposes of this issue expounded by the court was that “judicial recognition of such duty in the defendant, with the consequence of his liability in negligence for its breach, is initially to be dictated or precluded by considerations of public policy.”¹¹⁵

Despite the constraints placed on expanding the concept of duty, the California Supreme Court has in the past opened or sanctioned new areas of tort liability when the wrongs and the injuries involved were both comprehensible and assessable within the existing legal framework.¹¹⁶ However, the court in *Peter W.* was unwilling to extend the concept of a duty of due care to the facts presented in that case because there was no recognizable standard of care, cause, or injury in education:

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 the 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, and environmental; they may be present but not perceived, recognized but not identified.¹¹⁷

112. *Id.*

113. *Peter W.*, 131 Cal. Rptr. at 854.

114. *Id.*

115. *Id.* at 822.

116. *Id.*

117. *Id.* at 824

The court found that a duty of due care should not exist because of the multiple factors involved in education and because of an assumption on the part of the court that there is no recognized methodology regarding education.¹¹⁸ The court expressed other concerns that help explain its reluctance to allow a cause of action for educational malpractice that extended beyond the four elements required for a negligence case.¹¹⁹ In closing its opinion, the court explained:

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. They are already beset by social and financial problems which have gone to major litigation, but for which no permanent solution has yet appeared. The ultimate consequences, in terms of public time and money, would burden them—and society—beyond calculation.

Upon consideration of the role imposed upon the public schools by law and the limitations imposed upon them by their publicly-supported budgets and of the just cited ‘consequences to the community of imposing (upon them) a duty to exercise care with resulting liability for breach’ we find no such ‘duty’ in . . . plaintiff’s complaint.¹²⁰

Thus, the plaintiff’s action failed because the court refused to find that a California school district owed a duty of care while instructing students.¹²¹ According to California law, educators must adequately supervise students,¹²² but according to *Peter W.*, they do not have a legal duty to adequately educate them.¹²³

Three years after the case of *Peter W.* was heard in California, a high school student in New York brought a similar action. In *Donohue v. Copiague Union Free School District*,¹²⁴ the plaintiff alleged that he had attended Copiague Senior High School from 1972 to 1976 when he graduated without the rudimentary ability to read and write.¹²⁵ The plaintiff in this case sought five million dollars in damages.¹²⁶

The plaintiff asserted two causes of action: (1) educational malpractice and (2) negligent breach of a constitutionally imposed duty

118. *Id.* at 826.

119. *Peter W.*, 131 Cal. Rptr. at 854.

120. *Id.* at 825.

121. *Id.*

122. CAL. EDUC. CODE § 44807 (West 2002).

123. *Peter W.*, 131 Cal. Rptr. at 854.

124. 391 N.E.2d 1352 (N.Y. 1979).

125. *Id.* at 1353.

126. *Id.*

to educate under New York law.¹²⁷ The court rejected the second claim with very little discussion.¹²⁸ However, the first cause of action, alleging educational malpractice, was analyzed in depth.¹²⁹ The court found that such a cause of action was indeed plausible and stated that “the imagination need not be overly taxed to envision allegations of a legal duty of care flowing from educators”¹³⁰

However, after determining that a cause of action in educational malpractice was indeed possible, the court opined that such claims should not be entertained for public policy reasons.¹³¹ The court found that the control and management of educational affairs in the state of New York was vested in the Board of Regents and the Commissioner of Education and that the courts should not interfere with the decision making of that entity absent a gross violation of public policy.¹³² The court did not, however, elaborate on what type of violation might be considered gross,¹³³ but clearly a lack of due care while instructing students was not considered a gross violation of public policy. Specifically, the court held that:

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 unfalteringly 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.¹³⁴

The court in *Peter W.* found that no duty of care exists in the educational setting,¹³⁵ and therefore an action in malpractice is not possible. However, the *Donohue* court found that the four elements of a tort do exist in educational malpractice cases.¹³⁶ Still, the court in

127. *Id.*

128. *Id.*

129. *Id.*

130. *Donohue*, 391 N.E.2d at 1353.

131. *Id.* at 1354.

132. *Id.*

133. *Id.*

134. *Id.* (citations omitted).

135. *Peter W. v. S.F. Unified Sch. Dist.*, 131 Cal. Rptr. 854, 854 (Cal. Ct. App. 1976) (quoting *Raymond v. Paradise Unified Sch. Dist. of Butte Cnty.*, 31 Cal. Rptr. 847, 847 (Cal. Dist. Ct. App.)) (“We find in this situation no conceivable ‘workability of a rule of care’ against which defendants’ alleged conduct may be measured”).

136. *Donohue*, 391 N.E.2d at 1354 (“[A] complaint alleging ‘educational malpractice’ might on the pleadings state a cause of action within traditional notions of tort law”).

Donohue chose to insulate educators from liability as a matter of public policy by deferring to the judgment of the professionals and not substituting their judgment as to what constitutes a reasonable educational program.¹³⁷ In other words, the court erected a public policy obstacle alongside the *Peter W.* obstacles of duty owed and causation.

These two seminal cases provided a rationale for future cases: there are a lack of agreed upon teaching standards, public policy concerns about trusting the professional judgment of the educators, and “fear of crushing liability.”¹³⁸ Thus, these two cases laid the foundation that educators should not be held accountable for the services they render for both legal and policy reasons.

V. THE PERCEPTIONS OF EDUCATION LAW EXPERTS

Two respondents to the qualitative portion of the open response section held opposite views of educational malpractice:

“Stop protecting bad teachers and provide more support to students in need.”¹³⁹

“It will be a free-for-all.”¹⁴⁰

“An educational malpractice tort will drive more people out of the profession.”¹⁴¹

This portion of the study includes an exploratory quantitative and qualitative method of knowledgeable educational malpractice stakeholders. The Educational Malpractice Viability Survey was designed to consider recurrent themes in malpractice defenses, drawn from the researchers’ examination of educational malpractice cases and current research in the field of education law. Participants were selected from a group of individuals (judgmental sampling technique) who have expertise on the impact of the law on the schools. Judgmental or expert sampling is a non-probability sampling technique in which the researchers select potential respondents based on their knowledge and

137. *Id.* (“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.”).

138. See Hutt & Tang, *supra* note 60, at 464–66. Justice Suozzi, in a dissenting opinion, asserted, “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.” *Donohue v. Copiague Union Free Sch. Dist.*, 407 N.Y.S.2d 874, 882–83 (N.Y. App. Div. 1978) (Suozzi, J., dissenting).

139. This is a quote from an attorney participant.

140. This is a quote from a former teacher and current education law professor participant.

141. This is a quote from a former teacher and current attorney participant.

professional judgment—not a random sample of participants.¹⁴² The judgmental sample consisted of education law attorneys and education law professors.

A survey instrument was developed that explored how selected educational stakeholders understand and may respond to educational malpractice as a potential emerging lawsuit. Three nationally recognized education law professors with experience as education law attorneys, who hold law degrees as well as either a Ph.D. or Ed.D. from R1 research intensive universities, juried the instrument. The instrument was finalized based on their analyses.

The survey contained eight Likert-style questions, two open-answer questions, and six demographic questions, which seek to collect information on the participant's professional position (law professor or practicing attorney), education, and prior experience in Pre-K–12 education and prior malpractice suits.

Participants were identified from a select group of individuals (judgmental sampling technique) who have expertise on the impact of the law on schools. These individuals were identified from the attendance list from the November 2018 Education Law Association's annual law conference in November at Cleveland and a review of authors in educational law reviews as well as web-based search for attorneys with educational malpractice listed as an area of practice.

A. *Quantitative Analysis*

1. Demographics

The Educational Malpractice Viability Survey was sent to 200 identified education law professionals. A total of 43 education law experts out of 200 responded from twenty different states; the response rate was 21.5%. The sample included 7 (16.3%) practicing education law attorneys, 34 (79.1%) education law professors, and 2 (4.6%) respondents who were both; all respondents held either a JD or PhD/EdD while 17 (39.5%) of the respondents held both terminal degrees. Eleven (25.6%) respondents were involved in professional malpractice suits (medical, legal, etc.). Seventy-two percent of the participants served as teachers and 44% served as administrators. The average amount of experience in education/education law was 24 years (with a standard deviation of 12 years). Additionally, 26% stated that they have been involved with malpractice suits.

142. Tom Turner & John Tredennick, *Smart Sampling in E-Discovery*, 47 TENN. BAR J. 16, 18 (2011).

2. Analysis of Survey Questions

a. Viability of a Tort for Educational Malpractice

Two of the eight survey questions focus on the perceived viability of torts for educational malpractice. The following two tables sort the responses.

Table 1: **At this point in time**, I believe that instructional educational malpractice suits are viable causes of action (emphasis added).

	Frequency	Percentage
Strongly Disagree	12	27.9%
Disagree	21	48.8%
Agree	0	0.0%
Strongly Agree	8	18.6%
Not Sure	2	4.7%

N= 43

Table 2: In the **near future**, instructional educational malpractice is likely to become to be a viable cause of action (emphasis added).

	Frequency	Percentage
Strongly Disagree	5	11.6%
Disagree	18	41.9%
Agree	2	4.7%
Strongly Agree	8	18.6%
Not Sure	10	23.3%

N=43

Just over three-quarters (76.7%) of the respondents responded that they disagree or strongly disagree that educational malpractice is currently a viable tort, as seen in Table 1. When the two “not sure” responses are removed from the calculation resulting in a forced choice of disagree or agree, 80% of the education law respondents believe that the educational malpractice is not a current viable cause of action.

Shifting to an analysis of Table 2 on the near future of successful educational malpractice suits, the responding professors/attorneys moderate their disagree positions. The strongly disagree/disagree positions shifted from disagree “now” (76.7%) to disagree “near future” (53.5%). This is a large swing. Of the twelve education law respondents who moved from current viability to near future viability, ten moved to “unsure” and two to agree. Overall, there was a migration of ten respondents (23.3%) from strongly disagree/disagree. The majority

moved to “unsure,” possibly indicating that the factors that may have militated against the viability of this tort may change. Given the ambiguity of “in the near future,” we cannot make any conclusions about how respondents interpreted this window of time. However, nearly a quarter of the respondents foresee a possible shift.

b. Factors Impacting Educational Malpractice

The following four survey questions focused on factors that may have an impact on the viability of educational malpractice suits. The three factors reflect the legal arguments advanced for denying this tort—research that defines instructional practices, establishing causation for student outcomes of instruction, and public policy. The survey directions for these three questions stated, “For the next three questions, please rate how much impact each underlined piece of information has on the viability of instructional educational malpractice as a tort.” The fourth question asks the question posed by the *Peter W.* court, “are there established teaching standards?” This question is similar and reinforces the question posed in Table 3. We start with the impact questions.

Table 3: Educational research has been identifying instructional practices that are effective. This research has the following impact on the viability of instructional educational malpractice suits.

	Frequency	Percentage
No Impact	2	4.6%
Slight Impact	16	37.2%
Moderate Impact	18	41.9%
Significant Impact	7	16.3%
Not Sure	0	0.0%

N=43

Table 4: Value-added modeling, which purports to measure student achievement and then attribute expected gain or lack of gain to a specific teacher, is currently being used in teacher evaluations. This practice has the following impact on the viability of instructional educational malpractice suits.

	Frequency	Percentage
No Impact	6	14.0%
Slight Impact	16	37.2%
Moderate Impact	11	25.6%
Significant Impact	8	18.6%
Not Sure	2	4.6%

N=43

Table 5: Public policy has been moving toward greater accountability for student learning. This emerging policy has the following impact on the viability of instructional educational malpractice suits.

	Frequency	Percentage
No Impact	2	4.6%
Slight Impact	9	20.9%
Moderate Impact	11	25.6%
Significant Impact	19	44.2%
Not Sure	2	4.6%

N=43

A clear majority of the respondents believe that these three factors impact the viability of malpractice. To gauge the degree of impact, we collapsed No Impact and Slight impact into one group and Moderate Impact and Significant Impact into another group and calculated the percentage for each group.

Table 6: Comparative Impact of Factors

Factors	No Impact /Slight Impact	Moderate/Significant Impact
Table 3 Research	41.9% (N=18)	58.1% (N=25)
Table 4 Value-Added Modeling	53.7% (N=22)	46.3% (N=19)
Table 5 Public Policy	26.8% (N=11)	73.2% (N=30)

The respondents perceive that public policy has the largest impact (73.2%) on the viability of a tort of educational malpractice. Public policy has been the consistent basis for the courts' denial of suits for malpractice. It also had the largest number of significant impact responses supporting the conclusion that is perceived by school experts as the most important factor. Research focused on identifying effective instructional practices is the second most important factor. A lack of teaching standards is also one of the reasons for the failure of educational malpractice suits.¹⁴³ Just over half (53.7%) of the respondents for Table 4 selected no impact/slight impact of value-added modeling. Their responses may reflect the controversy regarding the use of value-added modeling on high stakes employment decisions.¹⁴⁴ This position of

143. See *infra* tbl. 7 for a discussion of perceptions of teaching standards.

144. For a discussion of the impact of value-added modeling (VAM) on teacher evaluation, a potential core issue on proving causation of teacher instructional deficits for purposes of malpractice, see Mark A. Paige et al., *Tennessee's National Impact on Teacher Evaluation Law & Policy: An Assessment of Value-Added Litigation*, 13 TENN. J. L. & POL'Y 523, 527 (2019) ("Despite their widespread adoption, the use of these statistical models in improving public schools is a source of considerable debate in law and policy."). Additionally, for a discussion of

no/slight impact does not provide a definitive argument for demonstrating causation for malpractice.

Table 7: I believe there are established standards for teaching that all teachers must adhere to in order to be considered as providing a professional service to their students.

	Frequency	Percentage
Strongly Disagree	3	7.0%
Disagree	10	23.3%
Agree	4	9.3%
Strongly Agree	5	11.6%
Not Sure	21	48.8%

N=43

The issue of establishing standards of instruction appears to remain unresolved according to the responses in Table 7 with nearly one-half of the respondents not sure whether there are recognized teaching standards and only 20.9% agreeing/strongly agreeing that there are existing teaching standards that teachers are expected to adhere to. Taken together, the respondents in Table 3 and Table 7 think that research is making progress on developing standards of practice but that they are not yet in place to support educational malpractice as a cause of action.

c. Who Should be Liable for Malpractice?

A persistent thorny issue for supporters of educational malpractice is who is liable if there is a showing of malpractice. Does the plaintiff student select a specific defendant teacher or teachers as causing harm or does the plaintiff select the school district as liable for the educational injury? Either possibility presents challenges for the plaintiff student. The data for the two questions are displayed below.

VAM and educational malpractice, see DeMitchell et al., *supra* note 59, at 259 (“A new public policy favoring accountability and the advent of a statistical model that purports to identify ineffective—possibly incompetent—instruction may combine to build a path to recognizing educational malpractice as a viable remedy for students who allegedly suffered an academic injury.”).

Table 8: A school district should be held liable when their teachers' professional practice (teaching) falls below expected standards and a student is harmed by not learning at an acceptable level.

	Frequency	Percentage
Strongly Disagree	6	14.0%
Disagree	15	34.9%
Agree	3	7.0%
Strongly Agree	6	14.0%
Not Sure	13	30.1%

N=43

Approximately 50% of the respondents agree/strongly agree that school districts should not be liable for student instructional harm, while 21% agree that the school district should be held liable. When the Not Sure respondents are removed, the disagree responses accounts for 70%. The responding attorneys and professors, by over two-to-one do not believe that school districts should be held liable.

Table 9: Educators should be held personally liable when their professional practice (teaching) falls below expected standards and a student is harmed by not learning at an acceptable level.

	Frequency	Percentage
Strongly Disagree	13	30.1%
Disagree	18	41.9%
Agree	2	4.7%
Strongly Agree	4	9.3%
Not Sure	6	14.0%

N=43

The respondents clearly tip toward not holding teachers liable for malpractice type actions. Seventy-two percent disagree or strongly disagree that teachers should be held liable for their professional practice. Half (N=6) of the remaining attorneys/professors believe that teachers should be held liable, but the other half do not know. When Not Sure responses are removed, 84% of the remaining respondents strongly disagree or disagree that educators should be held personally liable when their professional practice falls below expected standards resulting in harm to a student.

Taken together, the responses to the eight questions indicate that, in the judgment of a small exploratory sample of education law attorneys and professors, that educational malpractice is not currently a viable tort and that it is unlikely that it will be viable in the near future. The

responses to the two questions about who would be liable supports this conclusion that educational malpractice is not a viable tort in that more respondents chose disagree or strongly disagree with liability for both school districts and individual teachers. However, the Not Sure response for school liability was quite high.

The respondents are unsure whether there currently exists a standard of practice to which teachers must adhere. However, research on instructional practices impacts the development of educational malpractice. Professions define and redefine their standards of practice based on research.¹⁴⁵ Educators, as noted by the *Peter W.* decision, have not yet clearly articulated the standards of the profession upon which individual practice can be judged. It is a work in progress, and until it is fully established this obstacle to viability will likely not be overcome. The relationship between standards and practices and resulting policy positions is worthy of and essential to the issue partisans who seek to implement educational malpractice.

B. *Open Answer Responses*

A short-answer section was included in the survey instrument. Two prompts explore strategies and responses to the viability of a tort of malpractice. This method is a hybrid. Its purpose was derived from the quantitative portion of the survey instrument, but the data were not amenable to typical quantitative statistical treatments (case study, grounded theory, interviewing, and so on). Furthermore, the short answers, even though the data appear to be like qualitative data, do not fit into the typical qualitative analyses associated with nonnumerical data. Furthermore, professor and qualitative scholar, Thomas Schram states that responses to these types of questions “can be helpful in terms of enhancing, illustrating, deepening, and/or extending the other survey responses.”¹⁴⁶ Therefore, we used an analysis from previous research that allows us to uncover themes from the data using coding techniques often associated with grounded theory.¹⁴⁷

First, we had to contend with the limitations of the data. For example, we were unable to “probe” or ask, “What is happening here?”¹⁴⁸ Analysis of open-answer responses is problematic for conducting member checks

145. An example of how research informs practice is the evolving response to the COVID-19 pandemic of 2020–21 in which emerging research shaped the medical procedures and protocols as well as the guidance issued to the public.

146. Email from Thomas Schram to author (May 4, 2022 4:43 PM) (on file with author) (concerning the method for analyzing open answer data).

147. Todd A. DeMitchell et al., *To Test or Not to Test? Drug Testing Teachers: The View of the Superintendent*, 110 TCHRS. COLL. REC. 1207, 1228 (2008).

148. See BARNEY G. GLASER, *THEORETICAL SENSITIVITY: ADVANCES IN THE METHODOLOGY OF GROUNDED THEORY* 57 (1978).

to support validity or to do theoretical sampling. Furthermore, the one-shot aspect of the short-answer data precluded the “unfolding” of data from in-depth interviewing or multiple sequential interviews.¹⁴⁹

Two of the researchers independently coded the qualitative responses from the two open-item questions on the survey thematically. The results were examined for inter-rater reliability. Discrepancies were discussed and a mutual resolution was arrived at. Both prompts are explored below.

1. If a plaintiff student prevailed in establishing a prima facie case for educational malpractice, what arguments would you explore for the defendant’s defense?

This question essentially posits that the plaintiff student has met the burden of establishing a prima facie case demonstrating that there was a duty owed, that duty was breached, the breach was caused by the defendant’s conduct or failure to act, and that the student plaintiff suffered a sufficient injury. The respondents were asked to discuss how they would respond in their defense.

Thirty-six (84%) attorney/professors responded to this prompt. One respondent (attorney/teacher) wrote, “This question does not apply as I only handle Plaintiff cases.” This response is removed from the analysis as a non-response leaving thirty-five (81%) responses. One of the respondents checked both attorney and professor, three of the respondents are attorneys, three are attorneys and former teachers, six are professors, and twenty-seven are professors and former teachers. Five themes emerged from the iterative analysis of the comments. Multiple respondents’ comments were placed in more than one theme; thus, the total is larger than thirty-five responses.

1. No Prima Facie Case: Theme

The first theme identified by thirteen respondents asserted, “[n]o Prima Facie” case can be established with the logic of ‘if they can’t prove the case, I don’t have to defend it.’” Ten attorneys/plaintiffs cited “causation” as a specific failure of making the case. For example, a professor/teacher wrote, “It seems to me the toughest part of a claim would be to demonstrate that the Defendant’s actions caused the injury.” A professor/attorney concluded, “I don’t believe there is any way to prove proximate cause.” A professor/teacher offered the following rationale, “Cannot establish that a single instructor or at a particular grade level, was wholly accountable for inadequate academic progress.” This response seems to reflect the quantitative questions above about who is liable for malpractice.

149. DeMitchell et al., *supra* note 147, at 1228.

A sub-theme countered the assertion of the prompt that all four elements were proved.¹⁵⁰ One of the three respondents answered, “it would be difficult for a plaintiff to prevail in proving all elements for ed malpractice” (Professor/Teacher).

2. Defense Themes: Public Policy Concerns, Distributed Education Responsibilities, Causation: Non-Teacher Controlled Variables, and Standards for Assessment

The first defense theme is “public policy concerns,” which has ten responses from nine respondents. Four listed governmental immunity as a response to the prima facie case. Policy concerns include the “open floodgate” of litigation¹⁵¹ and interference with the administration of the schools. For example, a Connecticut court rejected an educational malpractice case asserting that “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. . . . This is a project the judiciary is ill equipped to undertake.”¹⁵²

A professor/teacher stated, “Depending on the jurisdiction, the first argument should be sovereign immunity. While I don’t like the doctrine personally, it would shut down the lawsuit immediately in many states, at least in public schools.” Six responses specifically identified policy as a viable response to educational malpractice suits. An attorney/teacher offered the following analysis about the policy impact of educational malpractice, “There is a public policy argument against educational malpractice in that the money that goes to an individual student who claims harm directly takes away from the education of other students.” This respondent concluded, “The availability of such a cause of action

150. An attorney/teacher offered the following analysis of the likely success of a prima facie case:

Presumably, the issue of duty would need to be addressed to get to the point of a prima facie case. The element of causation will be difficult for plaintiffs to establish because of the difficulty of tying specific classroom practices (or the absence of certain practices) was the proximate cause of a student's poor performance. The element of damages will pose similar problems as plaintiffs attempt to show that specific practices (or the absence thereof) resulted in economic harm to a student.

151. *See, e.g.*, *Hunter v. Bd. of Educ.*, 439 A.2d 582, 585 (Md. 1982) (writing that “an award of damages . . . represents a singularly inappropriate remedy for asserted errors in the educational process.”); *D.S.W. v. Fairbanks N. Star Borough Sch. Dist.*, 628 P.2d 554, 556 (Alaska 1981) (“In particular, we think that the remedy of money damages is inappropriate as a remedy for one who has been a victim of errors made during his or her education.”).

152. *Gupta v. New Britain Gen. Hosp.*, 687 A.2d 111, 119 (Conn. 1996) (quoting *Ross v. Creighton Univ.*, 957 F.2d 410, 416 (7th Cir. 1992)).

would result in increased litigation because it would foster litigation by parents with minor claims thereby increasing legal costs for the district and further reducing the money available to educate students.” And, a professor/teacher noted, that settled law precludes a finding of educational malpractice. The respondent summed, “As a matter of policy, if it was found to be a viable claim, it would throw the public education system into chaos.”

These respondents selected public policy as a defense that could be used after the prima facie case was established. This is a major obstacle identified by the *Donohue v. Copiague Union Free School District* court and cited by subsequent cases.¹⁵³

The “distributed education responsibilities” theme focuses on the distribution of responsibilities for student learning for the major participants, students, teachers, and parents. Thirteen respondents identified students with several identifying contributory/comparative negligence and two cited the role of parents in the education of their children. The *Restatement (Second) of Torts* defines contributory negligence as:

[C]onduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff’s harm.¹⁵⁴

In other words, the plaintiff has violated the duty of his/her “own care and prudence.”¹⁵⁵ If the defendant’s defense of contributory negligence prevails, damages will not be awarded or will be reduced. The plaintiff must come to the court with “clean hands” in order to prevail. While the person who owes a duty must act as a reasonable and prudent person would act, so must the plaintiff. A professor and former teacher captured this concept, writing, “Education is a two way street, student must put forth effort.” Another respondent (Professor/Teacher) recommended that parent-teacher communications are an “interactive process” and if parents

153. See *McGovern v. Nassau Cnty. Dep’t. of Soc. Servs.*, 876 N.Y.S.2d 141, 142 (N.Y. App. Div. 2009) (“These allegations sound in educational malpractice, which has not been recognized as a cause of action in [New York] because public policy precludes judicial interference with the professional judgment of educators and with educational policies and practices.”); *Harris v. Dutchess Cnty. Bd of Coop. Educ. Servs.*, 25 N.Y.S.3d 527 532–33 (N.Y. Sup. Ct. 2015) (holding against the plaintiff because the plaintiff’s claim required the court to make judgments regarding the viability of broad educational policies); *Gupta*, 687 A.2d at 119 (rejecting the prospect that courts sit in review of the daily implementation of educational policies) (citing *Donohue v. Copiague Union Free Sch. Dist.*, 391 N.E.2d 1352, 1354 (N.Y. 1979)).

154. RESTATEMENT (SECOND) OF TORTS § 463 (AM. L. INST. 1965).

155. KEETON ET AL., *supra* note 63, at 452.

did not engage in the process, “then the liability should not fall solely to the teacher.”

A number of respondents explicitly used the legal terms of contributory or comparative negligence. Contributory negligence occurs when the plaintiff’s actions or omissions are negligent and contribute to his or her own injury—the plaintiff has a duty to act as reasonable person. One professor cited lack of effort and a professor and former teacher stated that “whether the student had been keeping up with the work and participating in class” should be explored as part of the defense. A defense of contributory negligence in educational malpractice could be raised, as the respondent above notes for failure to pay attention to class and complete assignments. “Therefore, a student would arguably be required to take reasonable responsibility for his or her own learning.”¹⁵⁶

The third theme is “Causation: Non-Teacher Controlled Variables.” It is similar to the second theme of distributed education responsibilities in that it also deals with factors/actions that typically are not part of the purview or control of the teacher but impact student learning. Twenty-one responses are logged for this theme. The statements cover external factors such as “home life,” “socioeconomic status,” and “adequate funding.” There exist internal educational factors as well, which influence the classroom, such as the required curriculum and the training provided by the school district.

A responding attorney and former teacher captured the impact of these factors, writing, “[t]here are multiple factors that affect student performance that the teacher has no control over and for which the teacher should not be held liable.” A professor and former teacher echoed this statement: “[t]oo many external factors (e.g., at-risk factors, lack of level playing field for students in public schools, lack of student effort, poor state and local resourcing, poor parental support) that could account for the inadequate academic progress.” One respondent summed this theme, writing, “[t]here are many factors both in and out of school that impact student learning, so how can it be proved that the teacher/district caused the harm rather than one or more of the other factors?”

The last theme is “standards used for assessment.” This theme questions the use of standards for assessment of malpractice. This theme has seven responses aimed at student¹⁵⁷ and teacher assessment and standards. They question the vagueness, reliability, and validity of assessments that may have been used to define the duty owed, breach of duty, and causation. For example, a professor/teacher wrote,

156. DeMitchell & DeMitchell, *supra* note 59, at 505.

157. A Professor/teacher stated, “I would also explore the lack of a clearly established expectation for a minimum level of achievement for each individual student under the law.”

“[s]tandardized tests and the related value-added measures¹⁵⁸ lack reliability and validity when applied to students and are of even less value as applied to teachers.”

Similarly, a professor/teacher questioned the reliability of value-added assessments used to ascertain teacher quality. Another professor/teacher pointed out that the evidence on value-added modeling was not “strong enough to support causation.”¹⁵⁹ These statements tend to be supported by Table 4 data that shows that the majority believed that value-added modeling has no to slight impact on the viability of educational malpractice.

This theme also identifies the lack of articulated standards of practice for teaching. For example, a professor/teacher asserted that there is “insufficient Law/regulations governing teacher performance too vague to define teacher/school culpability.” Another professor/teacher stated, “[l]ack of certainty of, and appropriate evidence about the standards of similarly situated professionals. Lack of uniformity of acceptable inputs, and lack of direct clear evidence of what inputs work on what types of students.”¹⁶⁰

The next open response question focuses on the preventative measures that school districts can take to reduce their exposure to findings of malpractice.

2. If educational malpractice is found to be a viable tort, what kinds of advice would you give to school districts to protect themselves from a lawsuit?¹⁶¹

Thirty-three professors/attorneys provided suggestions to this open response question on proactive actions that can/should be taken. Two were removed from the analysis because they did not offer suggestions.

158. For a discussion of value-added modeling and educational malpractice, see DeMitchell et al., *supra* note 59; Dynarski, *supra* note 36.

159. See Derek Black, *The Constitutional Challenge to Teacher Tenure*, 104 CAL. L. REV. 75, 97–98 (2016) (questioning the use of value-added modeling in teacher evaluations and writing, “Those states that do not fully account for student demographics in their models are measuring students’ preexisting knowledge, aptitude, and familial advantages not teaching effectiveness. . . . In short, value-added models and student growth percentile models, as currently implemented, are more a measure of student demographics and out-of-school factors than teaching effectiveness.”).

160. This respondent offered the following example of the statement, “Knowing what is best practice in the use of high to mid forceps in a neonatal scenario is very different from knowing what should be done with all types of students.”

161. For an early discussion of responses to potential educational malpractice suits, see Nathan L. Essex, *The Teacher and Malpractice: Ten Ways to Invite a Lawsuit*, 60 CLEARING HOUSE 212, 213–15 (Jan. 1987). Law school professor Essex concluded 34 years ago, “The time is ripe for teachers to respond to these challenges. Otherwise, it may be a matter of whether teachers pay now or pay more later. The choice is ours.” *Id.* at 215.

“Document everything” is the consistent refrain. One respondent wrote, “Document, document, document” (Professor/Teacher). The word document is found twenty-three times in the responses. Clearly, proper documentation¹⁶² is an overarching theme covering all participants and nearly all activities. Examples of what to document include, “student academic data,” “learning interventions,” “rigorously review student progress through multiple measures,” “attendance,” “parental involvement,” “teaching efforts,” “limited resources,” “limited instructional time,” and “professional development.” An attorney and former teacher captured this overarching theme, writing, “require teachers to document everything they do in a classroom with every student.”

Two specific themes emerged from the data—“using human resource functions” and “establishing expectations.” Fifteen respondents recommended one or more activities associated with typical human relations functions. Four functions emerged from the data as the major actions to take to prudently respond to potential malpractice suits—hiring, professional development, evaluation/supervision, and remediation/dismissal.¹⁶³ Hiring qualified teachers (and principals) was identified as an important strategy.¹⁶⁴ The importance of professional development to hone and develop new instructional practices was identified by a number of respondents.

The most cited strategy was evaluation¹⁶⁵ followed by remediation and, failing success, dismissal. A remediation plan is central to the progression from evaluation to dismissal. One professor captured these functions, writing, “effective teacher evaluation system/individual improvement plans, termination of demonstratively ineffective teachers.”¹⁶⁶ Professional development is the last factor in this theme. An

162. For a discussion of documentation systems for teacher evaluations, see TODD A. DEMITCHELL & MARK A. PAIGE, *THREADING THE EVALUATION NEEDLE: THE DOCUMENTATION OF TEACHER UNPROFESSIONAL CONDUCT* (2020); KELLY FRELS ET AL., *A SYSTEM FOR TEACHER IMPROVEMENT OR TERMINATION* (7th ed. 2014); LAWRENCE ROSSOW & LAUREL LOGAN-FAIN, *THE LAW OF TEACHER EVALUATION* (3d ed. 2013).

163. An attorney wrote in stark terms, “Terminate the employment of every questionable teacher; do not risk attempting to help those who need additional assistance.”

164. “Put more effort into hiring competent teachers” (Professor/Teacher); “Adopt tested screening tools before hiring a teacher (to avoid negligent hiring)” (Professor/Teacher).

165. A professor and former teacher explicitly stated, “I would also allow for unannounced visits into the classes of all teachers, regardless of their years of experience.” While unions were not explicitly stated in any of the open responses, this comment may be an oblique reference to collective bargaining contracts.

166. A professor/teacher expanded on the remediation function, writing, “A teacher who is performing poorly would be put on an improvement plan, which would include professional development focused on instructional strategies, training to identify best practices for optimal learning in classroom, culturally relevant practices to engage learners, and other practices known (from research) to impact student learning and engagement in the classroom.”

attorney and former teacher offered the following advice to education leaders, “engage in extensive training on best practices.”

The next theme, “establishing expectations,” had six responses. The call for explicit expectations focused on teachers. One respondent called for the establishment of parental expectations, writing, “establish parental expectations, provide parent training on ed support for children, monitor parent compliance” (Professor). And one response appears to suggest developing “a statement of outcomes from [parents]” (Professor/Teacher). The other four responses focused on expectations for teachers. “Following standards set by the profession as well as ensuring that each teacher has the appropriate credential.” For setting the expectations locally, a professor/teacher suggests the following:

boards devise set criteria for all instructional staff ranging from ability to control/supervise classes adequately, professionalism in addressing/dealing with students, to ensuring content knowledge and require teachers to demonstrate ongoing knowledge within their fields much in the way attorneys compete CLE units.

Just over three-quarters of the attorneys and professors responded to the two prompts. For the first prompt identifying defenses to a tort of educational malpractice, the respondents first focused on documenting teacher practices and student learning. Next, their responses basically tracked tort concepts of contributory negligence and causation, including elements of confounding variables that also may account for the student’s educational outcomes and the reliability/validity of the assessments used to establish causation. The last theme was consistent with the defenses to educational malpractice: public policy concerns.

The second prompt follows the first prompt on defenses by positing that a viable tort for educational malpractice was established and inquiring how a school district should respond to the liability. The major takeaway of their advice to school leaders was to step up the documentation of the factors related to the prima facie cases and the potential defenses to a malpractice claim. First, “use existing human resource functions so that only qualified and competent educators are placed in their schools’ classrooms.” Second, “articulate expectations for behavior.” The responses from the experts provide much for school leaders to consider in the advent of educational malpractice, but also, and possibly more importantly, in the current daily operations of our nation’s schools.

VI. CONCLUSION: ARE CRACKS IN THE EDUCATIONAL MALPRACTICE WALL FORMING?

“It does not lie with the power of judicial systems to remedy all human wrongs.”¹⁶⁷

Government cannot address all the issues individuals want solved. Consequently, the agenda-setting process narrows the conceivable public issues to the set that become the focus of the attention of government officials. John W. Kingdon developed a concept on how ideas get on this small public agenda for potential resolution.¹⁶⁸ He starts his work with the question, “how does the public know that an idea’s time has come?”¹⁶⁹

Kingdon asserts that three policy streams constantly flow—the problem stream that advocates for the identification of specific problems that need to be addressed; the proposal stream that asserts a preferred solution; and the politics stream, in which actors who gain power judge the political factors, climate, and mood as well as the voices of advocacy and opposition. When these streams merge, a window of opportunity opens. When windows open, solutions can be grafted onto problems and a new policy can be developed. These windows do not stay open long and advocates rush to take advantage of them. While the courts have been a voice of opposition to educational malpractice, education law experts foresee the potential convergence of the policy streams in which educational malpractice may emerge as a viable tort.

Public policy shifts, while often slow, are not uncommon. It is the purpose of policy to make fair adjustments to conflicting claims in the best interest of society. Education has known its share of changes in policy, such as desegregating public schools, the shift to high stakes accountability measures, Title IX to address discrimination in education, and the rise of special education. These, and more policies, were made in the best interests of society and its children.

Professors McCarthy and Deignan, capturing the intersection of litigation and policy, assert that most changes in education are a direct or indirect result of judicial activity.¹⁷⁰ “Perhaps more than any other branch of the law, the law of torts is a battleground of social theory. Its primary purpose, of course, is to make fair adjustments of the conflicting claims of the litigating policies.”¹⁷¹ Is a change to allow cases for educational

167. KEETON ET AL., *supra* note 63, at 23.

168. Kingdon, *supra* note 47.

169. *Id.* at 1–20.

170. MARTHA M. MCCARTHY & PAUL T. DEIGNAN, WHAT LEGALLY CONSTITUTES AN ADEQUATE PUBLIC EDUCATION? A REVIEW OF CONSTITUTIONAL, LEGISLATIVE, AND JUDICIAL MANDATES 6 (1982).

171. KEETON, ET AL., *supra* note 63, at 15.

malpractice a fair adjustment of current policy made in the best interest of society?

As educators, we need to be aware that, as we professionalize our practice through establishing standards of instructional practice, we may provide a lever to move claims of malpractice forward. As Myrna Cooper states: “[w]e will know that teaching is a profession when a malpractice suit becomes plausible.”¹⁷² It is not farfetched to believe that policy may one day dictate that educators be held accountable for the professional services they render, particularly as the profession establishes standards for practice and public policy holds them accountable for providing that practice.

If educational malpractice emerges as a tort of negligence, it will have an impact on how education is delivered in the public schools. The reform movement tying teacher effectiveness to specific student outcomes measured by VAM type instruments, hovered just above the argument for educational malpractice. Malpractice is a policy mechanism for holding professionals; such as physicians, surgeons, and attorneys; responsible for a breach of the duty they owe their patients and clients. Malpractice may well be the next step in holding educators and schools accountable for student outcomes.

In 1928, B.H. Bode, in a note on the role of textbooks in instruction, concluded, “[t]eachers are held even less responsible than physicians in the practice of their profession, but the time may come, as Dewey once suggested, when it will be possible to bring suit for educational malpractice.”¹⁷³ Ninety-three years later, has that time arrived? If so, knowledge about the possible intended and unintended implications of a transfer of professional malpractice to educators and/or their school districts is prudent and necessary. The responses from our judgmental sample of education law attorneys and professors may provide a good beginning point.

172. Myrna Cooper, *Whose Culture Is It, Anyway?*, in ANN LIEBERMAN, BUILDING A PROFESSIONAL CULTURE IN SCHOOLS 52 (1988).

173. B.H. Bode, *On the Use of Textbooks*, 7 EDUC. RSCH. BULL. 10, 11 (1928).