Everybody Wants to Sue: Legal Implications with Students

Objectives:

• Examine the ever-evolving concept of educational malpractice and other legal issues that are confronting contemporary educators.

• Provide case examples of legal actions taken by students in allegations of legal malpractice.

• Delineate examples of early identification of potential risk, and the importance of transparent communication and thorough documentation.

Educational Malpractice

Why have I never heard of it?

• Although educational malpractice has been the subject of much scholarly commentary it has historically been almost universally rejected by the judiciary.

• BUT THIS HAS BEEN RAPIDLY CHANGING....

• In the past, legal claims against institutions for allegedly not providing enough instruction or preparation for the work force have usually failed.

• Courts have lumped such claims under the heading of "educational malpractice" and then promptly turned them away.

• The law has been reluctant to dictate standards for how colleges deliver their core educational services.

• However, courts have now recognized charges of breach of contract against educational institutions when plaintiffs demonstrate that educational institutions failed to carry out specific promises.
Why the evolution and increase?

- The 4.0 GPA debacle
- The corporatization of education
- The “fee for service” phenomenon
- Finances / Financial aid issues
- Lack of faculty consistency
- Student policies
- Student performance
- Factors related to disability resources
- Job market

What is it?

- Educational malpractice is a tort cause of action.
- Essentially, a claim of educational malpractice asserts that educational institutions and their employees breached their duty to educate plaintiffs adequately.
- Many students (and parents) have taken a “fee for service” consumerist stance.

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What is it?

- Torts are wrongdoings that are done by one party against another.
- As a result of the wrongdoing, the injured person may take civil action against the other party.
- The tortfeasor or defendant, is the alleged negligent party.
- There are three general categories of torts. Regardless of the tort action, three elements must be present:
  - Tortfeasor, or defendant, had a duty to act or behave in a certain way.
  - Plaintiff must prove that the behavior demonstrated by the tortfeasor did not conform to the duty owed to the plaintiff.
  - The plaintiff suffered an injury or loss as a result.

Negligence Torts

- Negligence occurs when a party fails to demonstrate the kind of care a prudent person would take in the same situation and an injury results from the action or inaction.
- There are five elements necessary to prove a negligence case:
  - Defendant owed a duty of reasonable care.
  - Defendant did not behave in a reasonable manner to demonstrate care.
  - Plaintiff suffered an injury as a result of the defendant's actions or inactions.
  - The injury caused actual damages.
  - Proximate cause: defendant's actions or inactions were the cause of injury.

Utilizing the Educational Malpractice Doctrine

- One of the best tools for defending against student lawsuits is the educational malpractice doctrine.
- There are three key lessons for effectively using the doctrine to defend against student claims.

Lesson 1

- Expose educational malpractice claims masquerading as negligence, breach of contract, or other legal theories.
The first key lesson for schools is to expose these impostor claims for what they really are – improper malpractice claims.

Before hitting the panic button when a new complaint alleging wide-ranging legal theories and potential punitive damages lands on your desk, look closely at the nature of the claims to see if they really are sound in malpractice and thus are barred by the widely-recognized educational malpractice doctrine.

Lesson 2

The educational malpractice doctrine covers a wide array of factual assertions – know what allegations to look for!

Lesson 3

Achieve early dismissal by articulating the claim's essence.

Be Consistent

- My last professor never....
- I have a 4.0....
- I have never received anything but an A+ on all my other papers....
- Ask my previous professors....

Be Consistent

- Lack of consistency "sets up" the next teacher
- It sets precedent which can have implications
  - The "Incomplete" student
  - The "Can I do anything for extra credit" cliff
  - The "Can you read a draft of my paper" slippery slope....
  - "In my other classes we only had to make an initial post and one reply to two peers...."
Be Consistent

Parity

Equity

Consistency

The “Un-Learning” Student

• This creates a platform for grievance

• Case example – the student with the 3.9 GPA (who could now not write cogent sentences and had 38 misspelled words in one paper)

• The student with a 3.85 GPA who was granted 15 INCOmpletes and therefore had an average of 6 months to complete each course.

SYLLABUS

• One method used is preventing students from moving forward with the course (Adaptive Release) until they check off a box saying “I have read and understood the syllabus for this course, including assignments, due dates, objectives and expectations”.

• Later, if a student claims he/she “did not know” it lends strength to any legal action that the student was apprised.

SYLLABUS

• This is your contractual agreement with the students

• This is often your most powerful protection from legal action (*followed by Documentation which will be discussed shortly).

SYLLABUS

• “Bullet Proof” – Syllabi are “living documents” and must be modified regularly.

• They must contain specificity – “Discussion Board example

• Scoring Matrices (the more detailed the better; using matrix weighted items at Level 1 headers).

• Dates/deadlines (specific date versus “Week 8”).

• Enforce consistently across all students.
The Trouble with Plagiarism Software

The Trouble with Plagiarism

- Significant rise in self-plagiarism
- Used to go to Student Conduct Committees…
- Not necessary
- These are only "recommending" bodies.

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Friendly versus Friendship

- Several university lawyers have stressed that although it is important to be "friendly," it is not a faculty member's role to be the student's friend
- Transference
- Countertransference
- Favors and favoritism
- Either create subsequent risks

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Be FERPA-ware

- The Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g, 34 CFR Part 99) is a federal law that protects the privacy of student education records. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education.

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This past semester I had a rather distressing issue with a student that I had never experienced before. The long and short of it is that the student was extremely unhappy with the grade I had given them, and wasn't content to accept said grade even after much discussion, explanation, and pointing to the pertinent assignment guidelines on the course website (which they had neglected to follow). Unfortunately, the situation became extremely complex, and eventually escalated up to the office of the President.

One of the many issues in play was the disclosure of the student's records. One of the student's parents called me requesting information about the student's performance in the class. I repeatedly refused to give the requested information, saying that under FERPA (the Family Educational Rights and Privacy Act), I was prohibited from disclosing student educational records (even to a parent) unless the student had given explicit and official consent. In many ways, I was really using this as a way to stop the parent from calling me as things got dealt with by people in the university with a far higher pay grade. The kicker is that I wasn't 100% sure I was right in this regard.

So, what is the solution? Find out who reigns supreme over FERPA matters at your university, and give them a call. In my case, as mentioned already, it was the Associate Registrar. She was able to answer my question immediately.

At the end of the day, I've managed to answer my question. Unless the student has officially given consent, I have no legal obligation to disclose their academic records to their parents. The problem is that I haven't really answered the question for anyone who isn't at my institution. Because the implementation will be different for different institutions, it behooves you, dear readers, to go find the information out for yourself. Because, in all honestly, you can't afford not to.
"The last piece of advice I would give if you are unsure as to where you stand when someone requests the educational records of one of your students? Pass the buck. Seriously. Refer the parent (or guardian) to your department Chair or relevant associate or assistant Dean. After all, that’s one of the reasons they get paid the big bucks".

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ODR-Accommodations

- Know your ODR policies
  - Typically, a letter of accommodation cannot be submitted after an assignment has already been completed.
  - Ensure that instructions and guidelines are in your syllabus.
  - Refer students to ODR who are notably struggling.
  - Call ODR to clarify any accommodations (the week 1 quiz scenario and paper assignment scenario).

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Have your legal counsel come to a faculty retreat or faculty meeting

- Most legal counsel are very pleased to be invited.
- Legal counsel can provide very helpful guidance for "target hardening" faculty and "bullet proofing" courses/syllabi.
- After all, they are glad when faculty are well-prepared if a student does intend to take legal action.

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References


Paul Thomas Clements, PhD, MSN, RN, DF-IAFN
Associate Clinical Professor
Coordinator – Contemporary Trends and Issues in Forensic Healthcare Online Certificate
Drexel University
College of Nursing and Health Professions
Philadelphia, Pa
paul.thomas.clements@du.edu