Rethinking Educational Malpractice: Are Educators Rock Stars?

Stijepko Tokic

Follow this and additional works at: https://digitalcommons.law.byu.edu/elj

Part of the Educational Assessment, Evaluation, and Research Commons, and the Education Law Commons

Recommended Citation
Available at: https://digitalcommons.law.byu.edu/elj/vol2014/iss1/6

This Article is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Brigham Young University Education and Law Journal by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.
RETHINKING EDUCATIONAL MALPRACTICE: ARE EDUCATORS ROCK STARS?

Stijepko Tokic, J.D., LL.M.*

I. INTRODUCTION

Rock stars sometimes get sued over the quality of their performances on the stage.1 One of the more recent highly publicized lawsuits featured the performance of the rock band Creed at the Allstate Arena in Rosemont, Illinois.2 In that case, the lead singer allegedly mumbled through his lyrics, gave the appearance of intoxication, rolled around on the floor of the stage, and eventually left his band mates for extended periods of time.3 Ultimately, some fans filed a class action suit over the quality of the band’s performance, or lack thereof.4 Unfortunately for the fans, but fortunately for the entertainment industry, the lawsuit was not successful.

The main reason why the lawsuit was not successful is the fact that American jurisprudence does not allow for “causes of action based on the disappointment of subjective consumer expectations within the live performance industry.”5 As explained by one commentator,

* Stijepko Tokic is an Assistant Professor of Business Law at the Northeastern Illinois University in Chicago, Illinois. He acknowledges, with much appreciation, Ilina Lazarova’s research assistance, and the support he received from the Title V Promoting Postbaccalaureate Opportunities for Hispanic Americans Grant. He can be reached at s-tokic@neiu.edu.

1 See e.g., Kass v. Young, 136 Cal. Rptr. 469 (Cal. Ct. App. 1977) (Neil Young concert attendee filed a class action against the performer after Young performed for only an hour because of the oppressive behavior exhibited by security personnel at the venue).


3 Eric Gwinn, Some Creed Fans are Singing a Different Tune After Concert, CHI. TRIB., Apr. 28, 2003, 5 (Tempo), at 2.

4 Id.

Existing case law shows that the purchase of a ticket to a live event is nothing more than the purchase of a license that entitles the purchaser to enter and remain in the venue for the event, and perhaps entitles the purchaser to some form of performance. By no means does the purchase of a ticket entitle the purchaser to any level of quality in an event or performance.6

When it comes to rock shows, this approach seems appropriate. Historically speaking, “spontaneity” and “unpredictability” have been paramount to rock shows, and courts should not “dictate how rock performers must behave.”7 Moreover, it is possible that some fans might actually embrace the experience of an unorganized and chaotic concert. Without a doubt, concert attendees could form entirely different perceptions about the duration and quality of the show based on a mood on any given day, relative familiarity with a particular band, or a music genre. Therefore, it is easy to see why a ticket to a concert cannot guarantee any particular level of quality of performance. However, does the same hold true for the education industry? Should a “ticket” to the classroom guarantee more than a right to enter and remain in the classroom during the scheduled class? Should the purchase of a “ticket” to a classroom entitle the purchaser to any level of quality in the educators’ performance? Unfortunately, the United States “Supreme Court has never provided guidance on what students have [the] right to expect as consumers of an educational product.”8

Quality has long been on the agenda of many education-related discussions, and the relative quality of educational institutions is increasingly measured by the quality of their output—that is, student learning.9 The issue of quality in the

---

6 Id. at 37.
7 See Memorandum and Order from Judge Peter Flynn, Berenz v. Diamond Rd., Inc., No. 03 CH 7106 (Ill. Cir. Ct. Cook County, Ch. Div., July 13, 2004) (Judge Flynn also quipped in his oral opinion regarding plaintiff's first complaint that “rock singers are—at least so [The] Rolling Stones would like us to believe—the unconstrained element in our society. Lawyers are the precise opposite.”). See also Transcript and Proceedings at 40, Judge Peter Flynn, Sept. 10, 2003, Berenz v. Diamond Rd., Inc., No. 03 CH 7106, (Ill. Cir. Ct. Cook County, Ch. Div., July 13, 2004).
9 The controversial large-scale standardized testing, designed to measure students' proficiency in certain key areas, has become prevalent in evaluating the
educational context becomes very interesting in light of many
court decisions that have dealt with the issue of educational
malpractice. Tort lawsuits for educational malpractice have
been brought against all kinds of educational institutions,
including primary and secondary education institutions, institutions of higher education, professional schools, and so on. Moreover, lawsuits for educational malpractice have even been brought against accrediting associations. Notably, courts have repeatedly rejected claims for educational malpractice on the principle that can be summarized as, “the failure to learn does not bespeak a failure to teach.” Although commentators have articulated many theories of educational malpractice, and the courts continue to hear educational malpractice cases, educational malpractice is still merely “a tort theory beloved of


See infra note 24.

See e.g. Lawrence v. Lorain County Community College, 127 Ohio App. 3d 546, 713 N.E.2d 478 (Ohio Ct. App. 1998).

See infra note 16.

See Ambrose v. New Eng. Ass’n of Schs. & Colleges, Inc., 100 F. Supp. 2d 48, 2000 U.S. Dist. LEXIS 7999 (D. Me. 2000). The lawsuit was filed by seven former students against NEACE, the accrediting association for Thomas College, the institution where they obtained associate degrees in “medical assisting.” The plaintiffs enrolled in the medical assisting program expecting it to qualify them for entry-level positions as medical assistants. According to the court, the medical assisting program had no clinical component. Because clinical tasks form a large part of a medical assistant’s job, six of the seven plaintiffs were unable to find employment as medical assistants. The seventh plaintiff obtained a job but lost it due her inadequate knowledge and training. In their suit, the plaintiffs charged NEACE with fraud, misrepresentation, and deceptive business practices based on the association’s accreditation of the college.


See infra notes 78–89.

commentators, but not of courts.” So far, courts have upheld some breach of contract claims against educational institutions, but only in situations where an institution has failed to fulfill some very specific promises to its students, such as a promise to provide tutoring.

This Article argues against using an output-based approach in determining quality and legal liability of educational institutions. The Article points out that, unlike in education, the perceived quality of performance and malpractice liability in other service-oriented industries, such as the medical and legal industries, is overwhelmingly input/conduct-based. Naturally, this Article argues in favor of adopting an input/conduct-based approach to educational malpractice, where instructors’ and institutions’ conducts are separately assessed, as is the case in medical malpractice cases. In particular, the Article suggests that liability of educational institutions should be determined solely by assessing whether an institution has and enforces internal quality assurance mechanisms that ought to promote the fulfillment of the institutions’ own stated objectives, mission, and obligations. The Article ultimately seeks to establish that recognizing claims for educational malpractice based on institutional negligence could play a vital role in promoting the quality and accountability of educational institutions, without causing undue hardship for administrators. Without change, educators and their institutions will continue to be treated just like rock stars, which does not foster an environment for enhancing the quality and accountability of educational institutions.

This Article is divided as follows: Part II reviews leading educational malpractice cases, explains the legal and policy grounds for rejecting educational malpractice claims, and underlines why the current framework for analyzing educational malpractice claims is inappropriate and legally unsound. Part III addresses the question of whether a “ticket” to a classroom entitles students to any level of quality of educational services, or merely the right to be in the classroom for a specific period of time as the current law implies. Part III explores predominantly foreign authority about the nature and

---

18 Id. at 1331–32.
19 See infra notes 40–50.
20 See infra notes 104–110.
concept of quality in education, and ultimately argues that “fitness for purpose” is the most appropriate definition of quality in the educational context. Part IV relies on the “fitness for purpose” definition of quality to articulate a cause of action for institutional negligence, and explains why this approach is more legally sound than the current approach to educational malpractice. Part IV also discusses potential criticisms of using a concept of institutional negligence in the education industry, namely the burden on administrators and academic freedom issues.

Additionally, the scope of this article is limited in the following ways: The courts have articulated three broad categories of educational malpractice claims: “(1) the student alleges that the school negligently failed to provide him with adequate skills; (2) the student alleges that the school negligently diagnosed or failed to diagnose his learning or mental disabilities; or (3) the student alleges that the school negligently supervised his training.” This Article is primarily concerned with the first category of educational malpractice claims. Furthermore, the Article only addresses educational malpractice claims based on tort law, as scholars and commentators have already explored numerous grounds for holding educators liable based on causes of action outside of tort law. Finally, while the main thesis of this Article can conceptually be applied to educational institutions of all kinds, it is likely to be most useful in the post-secondary setting.

II. BRIEF OVERVIEW OF EDUCATIONAL MALPRACTICE JURISPRUDENCE

As articulated by one court, “the term ‘educational malpractice’ has a seductive ring to it; after all, if doctors, lawyers, accountants, and other professionals can be held liable for failing to exercise due care, why can’t teachers?” To be
sure, claims for educational malpractice have been raised as early as 1976, and as recently as 2012. While educational malpractice cases can be brought on the basis of various legal theories ranging from breach of contract to intentional torts such as misrepresentation, educational malpractice claims are generally brought under the theory of negligence where a successful plaintiff must establish the following prima facie elements: (1) existence of a legal duty of care owed by the defendant to the plaintiff; (2) a breach of the legal duty by the defendant; (3) causation between the defendant’s acts, or failure to act, and the plaintiff’s injuries suffered; and (4) damages suffered by the plaintiff.

Courts have identified multiple reasons that counsel against allowing claims for educational malpractice under the theory of negligence. First, there is the lack of a satisfactory standard of care by which to evaluate an educator. Theories of education are not uniform, and “different but acceptable scientific methods of academic training [make] it unfeasible to formulate a standard by which to judge the conduct of those delivering the services.” Second, when it comes to causation,

---

28 See W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164–65 (5th ed.1984); 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.”).
educational malpractice cases inherently entail uncertainties when it comes to the cause and nature of damages. "Factors such as the student’s attitude, motivation, temperament, past experience and home environment may all play an essential and immeasurable role in learning." Consequently, it may be a “practical impossibility [to prove] that the alleged malpractice of the teacher proximately caused the learning deficiency of the plaintiff student.”

Besides “practical” reasons, courts have also articulated multiple policy reasons that counsel against allowing claims for educational malpractice under the theory of negligence. The first reason is the fear of a potential flood of litigation against schools. As one district court noted, “education is a service rendered on an immensely greater scale than other professional services.” Consequently, the potential number of claims that could arise if educational malpractice causes of action were allowed might overburden schools. Yet another policy concern courts have cited is the fear that an educational malpractice cause of action could entangle the courts into overseeing the day-to-day operations of schools, which might be particularly inappropriate in the university setting due to considerations of academic freedom and autonomy. Ultimately, in light of the enumerated practical and policy reasons, courts have found that a common-law tort remedy may not be the best way to deal with the problem of inadequate education.

A. The Wrong-Headed Approach?

According to its dictionary meaning, malpractice literally means “bad practice.” In fact, scholars have long recognized

---

33 Id.
36 Id.
38 Moore, 386 N.W.2d at 115.
39 Ross, 740 F. Supp. at 1329.
that “the standard [for malpractice] is one of conduct, rather than consequences.” 41 In the legal industry, a lawyer commits malpractice “by giving an erroneous legal opinion or erroneous advice, by delaying or failing to handle a matter entrusted to the lawyer’s care, or by not using a lawyer’s ordinary care in preparing, managing, and prosecuting a case.” 42 For example, in one case, an attorney who did not specialize in the area of family law represented a woman in a divorce case, and the court found that the attorney’s failure to research the issue of the community property nature of her client’s husband’s military pension constituted malpractice. 43 Other types of behavior that can lead to a legal malpractice claim include

[f]ailure to know the law, inadequate investigation, missed statute of limitations, conflict of interest, errors or omissions that result in a lawsuit being dismissed, billing fraud, improper legal advice, dishonest, breach of fiduciary duty, obstruction of justice, failure to inform a client or get a client’s consent, [and] failure to follow client instructions. 44

Similarly, in the medical industry, a medical professional is liable for malpractice when she/he does not meet the acceptable standard of care, such as in a recent “blockbuster” case where a jury awarded $6.7 million dollars to a widow whose husband died from injuries caused by internal bleeding. 45 The lawsuit was based on allegations that the doctor failed to follow up on the indications of internal bleeding, as he did not issue an order for follow-up X-rays to monitor the internal bleeding. 46 Other negligence incidents that can lead to medical malpractice are “misdiagnosis, failure to diagnose in time, surgical error, failure to follow up with treatment, failure to treat in a timely manner, anesthesia error, [and] . . . prescription error.” 47

---

41 KEETON ET AL., supra note 28, at 170.
43 See Smith v. Lewis, 530 P.2d 589 (Cal. 1975), (overruled on other grounds by In re Marriage of Brown, 544 P.2d 561 (Cal. 1976)).
46 Id.
47 Id. See also Medical Malpractice, LAWYERSANDSETTLEMENTS.COM, http://www.lawyersandsettlements.com/lawsuit/medical_malpractice.html#UQsWuoX.
Examples from the legal and medical industry clearly indicate that malpractice liability is not outcome/consequences based. As put by one commentator while addressing educational malpractice issues,

patients die and clients go to jail. The outcome of the rendering of professional services is not always positive. ‘Courts recognize that part of being a professional includes making judgment calls that may not always guarantee a positive result.’ The issue, generally, is whether or not the professional rendered the expected service. Following the examples from medicine and law, the issue would not be whether the student learned, but whether the educator rendered the instruction that would be expected of a professional educator.\textsuperscript{48}

Although malpractice lawsuits should be about “conduct,” many educational malpractice cases have focused on “consequences.”\textsuperscript{49} Such a wrong-headed approach makes it virtually impossible to prove educational malpractice, which makes it overly convenient for courts to dismiss educational malpractice claims without even evaluating “whether the educator rendered the instruction that would be expected of a professional educator.”\textsuperscript{50}

To be sure, courts have had an opportunity to hear certain


\textsuperscript{49} See Waugh v. Morgan Stanley & Co., 966 N.E.2d 540, 2012, Ill. App. LEXIS 133, 359, Ill. Dec. 219, 2012 Ill. App (1st) 102653 (Educational malpractice claim for allegedly receiving inadequate training not cognizable). Glorvigen v. Cirrus Design Corp., 796 N.W.2d 541, 553 (Minn. Ct. App. 2011) (“The bar on educational-malpractice claims recognizes that ‘[a]llowing individuals . . . to assert claims of negligent instruction would avoid the practical reality that, in the end, it is the student who is responsible for his knowledge, including the limits of that knowledge.’”). See also Houston v. Mile High Adventist Academy, 846 F. Supp. 1449, 1455–56 (D. Colo. 1994) (claiming that teachers were “not properly trained,” and that “school failed to provide adequate instruction” were construed as educational malpractice and properly dismissed). Johnson v. Clark, 165 Mich. App. 366, 418 N.W. 2d 466 (Mich. Ct. App. 1987); Dallas AirMotive, Inc. v. FlightSafety Int’l., Inc., 277 S.W.3d 696, 700 (Mo. App. W.D. 2008) Dallas AirMotive, 277 S.W. 3d at 700; Christensen v. S. Normal Sch., 790 So. 2d 252, 255 (Ala. 2001) (claim is barred by educational malpractice doctrine if the claims “require an analysis of the quality of education received”); Gupta v. New Britain General Hospital, 239 Conn. 574, 687 A.2d 111 (Conn. 1996) (claim based on institution’s failure to provide “adequate training” was not cognizable); Lawrence v. Lorain County Community College, 127 Ohio App. 3d 546, 713 N.E.2d 478 (court would not recognize any claim that educational services were “substandard” or “inadequate”).

\textsuperscript{50} See DeMitchell, DeMitchell, & Gagnon, \textit{supra} note 48 at 296.
specific “conduct”-based cases. For example, in Bittle v. Oklahoma City University (OCU), the plaintiff alleged that

his constitutional law professor frequently arrived late for class, discharged class early, or canceled class altogether; that neither the professor nor OCU provided make-up classes or academic counseling to assist students as OCU implicitly agreed; and that the failures of the professor (OCU’s agent), OCU and the Board in these particulars caused his academic dismissal.51

On these facts, the plaintiff “asserted claims for fraud, breach of contract, tortious breach of contract, [and] negligence . . . seeking actual and punitive damages.”52 However, the court declined to recognize the claim based on “inadequate or improper instruction,”53 finding that all of the plaintiff’s claims commonly alleged OCU’s failure to provide him an “adequate legal education.” As such, the court determined the plaintiff’s claims were based upon a theory of “educational malpractice,” which Oklahoma law did not recognize in the absence of a specific, identifiable agreement for the provision of particular services.54

In another similar case, Miller v. Loyola University of New Orleans, a law student sued a university for negligence and breach of contract based on the manner in which a faculty member taught a course.55 The student charged that the instructor failed to order course materials in a timely manner, that she changed the course time without the permission of law school officials, that she had students make class presentations on subjects she was obligated to teach, that she only covered approximately 60% of the material, that she only gave a final examination that consisted partly of materials from the National Conference of Bar Examiners, and that her original

52 Id. at 512.
53 Id. at 515.
54 Id. at 515 (“... absent a specific, identifiable agreement for the provision of particular services, the public policy of this state similarly militates against recognition of a claim by a student against a private educational institution arising from the institution’s alleged improper or inadequate instruction however denominated—either in tort or contract—for “educational malpractice.” Notwithstanding his protestations to the contrary, all of Bittle’s claims for fraud, breach of contract, tortious breach of contract, negligence, and unjust enrichment commonly allege a willful or negligent failure of OCU to provide him an adequate legal education ...”).
questions contained serious errors. After law school officials looked into the allegations, concluding that at least some of them had merit, the student filed suit, seeking to recover the cost of taking the course and reimbursement for the cost of taking the course a second time from a different instructor. Ultimately, without even evaluating the instructor’s conduct, an appellate court affirmed the rejection of all of the student’s claims, declaring flatly, “Louisiana law does not recognize a cause of action for educational malpractice under contract or tort law.” In support of its conclusion, the court simply cited the decision from *Bittle v. Oklahoma City University*, and other general policy concerns for rejecting educational malpractice claims.

These cases seem to indicate that courts tend to view specific conduct-based educational malpractice cases merely as an attempt to mask “allegations of educational malpractice,” and “circumvent the fact that educational malpractice is not a recognized cause of action.” While it might be true that “the nature of education radically differs from other professions,” the standards for liability in educational malpractice cases should not “radically differ” from standards used in other professions. Therefore, courts should refrain from bundling and generalizing claims for educational malpractice, and should move towards adopting an input/conduct-based approach to educational malpractice. The following section addresses the policy concerns for rejecting educational malpractice cases and the “bandwagon” problem.

B. *Fiat Justitia, Ruat Coelum*

Perhaps the biggest problem with educational malpractice lawsuits is the lack of independent analysis by the courts. The courts tend to dismiss any claim that “smells” like a claim for

---

56 Miller, 6 P.3d at 1058.
57 Id. at 1059.
58 Id. at 1061.
59 Id. at 1060.
60 Lawrence v. Lorain County Community College, 127 Ohio App. 3d 546, 549 (Ohio Ct. App. 1998) (“The trial court characterized Lawrence’s claims as masking allegations of educational malpractice, which is barred as a cause of action in this state.”).
61 Id. at 548.
Educational malpractice simply by citing to other courts that have done the same. For example, in a very recent educational malpractice case from Illinois, the court stated, “[w]hile Illinois has not addressed whether educational malpractice claims are cognizable, most jurisdictions that have considered the issue have found that educational malpractice claims are not cognizable.” The bandwagon mentality has created a snowball effect that has resulted in a smothering of educational malpractice claims. Of course, the United States is a common-law jurisdiction and courts ought to respect stare decisis and the value of legal precedents (even from other jurisdictions), but the courts need to recognize that not all educational malpractice claims are factually the same, and that the articulated policy concerns for rejecting educational malpractice claims are fairly arcane.

In fact, the key policy concerns that courts keep citing were articulated in two early educational malpractice cases from the 1970s.

The main policy concerns for rejecting educational malpractice (the fear of a “flood of litigation,” overburdening the schools and the alleged difficulty in framing an appropriate measure of damages) were objected to in the first case in the United States that used the phrase “educational malpractice.”

Initially, it must be emphasized that the policy considerations enunciated in Peter W., supra, do not mandate a dismissal of the complaint. Whether the failure of the plaintiff to achieve a basic level of literacy was caused by the negligence of the

63 Waugh v. Morgan Stanley & Co., 966 N.E.2d 540, 551, 2012 Ill. App. LEXIS 133, 359 Ill. Dec. 219, 2012 IL App (1st) 102653 (2012). (“While Illinois has not addressed whether educational malpractice claims are cognizable, most jurisdictions that have considered the issue have found that educational malpractice claims are not cognizable.”) (citing nine cases); Paladino v. Adelphi Univ., 454 N.Y.S.2d 868, 870 (1982) (“The courts have uniformly refused, based on public policy considerations, to enter the classroom to determine claims based upon educational malpractice.”) (citing seven cases); Swidryk v. St. Michael’s Medical Center, 493 A.2d 641, 642 (citing nine cases); Moore v. Vanderloos, 386 N.W.2d 108, 113 (citing thirteen cases); Ross, 957 F.2d at 414 (citing fourteen cases in eleven states); Moss Rehab v. White, 692 A.2d 902, 906 (Del. 1997) (citing fifteen cases); Doe v. Yale University, 1997 WL 766845, *1 (Conn. Super. 1997) (citing twelve cases).

64 Waugh, 966 N.E.2d at 551.


66 Id.

school system, as the plaintiff alleges, or was the product of forces outside the teaching process, is really a question of proof to be resolved at a trial. The fear of a flood of litigation, perhaps much of it without merit, and the possible difficulty in framing an appropriate measure of damages, are similarly unpersuasive grounds for dismissing the instant cause of action. Fear of excessive litigation caused by the creation of a new zone of liability was effectively refuted by the abolition of sovereign immunity many years ago, and numerous environmental actions fill our courts where damages are difficult to assess. Under the circumstances, there is no reason to differentiate between educational malpractice on the one hand, and other forms of negligence and malpractice litigation which currently congest our courts.68

In the period following the early educational malpractice cases, scholars immediately began arguing against the flat-out rejection of educational malpractice claims.69 Interestingly enough, the House of Lords in England has rejected the public policy arguments advanced against educational malpractice in the United States. It stated,

I am not persuaded by these fears. I do not think they provide sufficient reason for treating work in the classroom as territory which the courts must never enter . . .

I am not persuaded that there are sufficient grounds to exclude these claims even on grounds of public policy alone. It does not seem to me that there is any wider interest of the law which would require that no remedy in damages be available. I am not persuaded that the recognition of a liability upon employees of the education authority for damages for negligence in education would lead to a flood of claims, or even vexatious claims, which would overwhelm the school authorities, nor that it would add burdens and distractions to the already intensive life of teachers. Nor should it inspire some peculiarly defensive attitude in the performance of their professional responsibilities. On the contrary, it may have the healthy effect of securing that high

68 Id.
standards are sought and secured.\textsuperscript{70}

It is worth mentioning that the public policy reasons for shielding educators from malpractice liability have been raised and rejected before in various contexts. For example, the fear of opening the floodgates of litigation has been used to deny claims for mental distress, which are now generally allowed.\textsuperscript{71}

While addressing the issue of “floodgates of litigation,” two respected scholars have opined:

> It is the business of the law to remedy wrongs that deserve it, even at the expense of a “flood of litigation,” and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds. That a multiplicity of actions may follow is not a persuasive objection; if injuries are multiplied, actions should be multiplied, so injured parties may have recompense. So far as distinguishing true claims from false ones is concerned, what is required is rather a careful scrutiny of the evidence supporting the claim; and the elimination of trivialities calls for nothing more than the same common sense which has distinguished serious from trifling injuries in other fields of the law.\textsuperscript{72}

These remarks have been cited in many court decisions,\textsuperscript{73} and some courts have used similar reasoning to recognize tort claims for emotional distress.\textsuperscript{74}

In addition to claims for emotional distress, it is worth
menting that the public policy reasons that currently shield educators from malpractice liability were also rejected as a justification for the immunity of state and local governments from tort liability.\textsuperscript{75} The reasoning for ending immunity of state and local governments from tort liability was substantially similar to the reasoning for allowing claims for mental distress.\textsuperscript{76}

Therefore, instead of reciting and relying on the same stale public policy arguments that have been rejected in various other contexts, the courts hearing educational malpractice cases should acknowledge arguments against these arcane public policy reasons and, ultimately, follow the old legal principle: "\textit{Fiat justitia, ruat coelum.} (Let justice be done, though the heavens fall)."\textsuperscript{77} The following section explores the grounds for holding educators liable for educational malpractice.

\section*{III. HOLDING EDUCATORS LIABLE}

In addition to numerous theories of educational malpractice based on negligence,\textsuperscript{78} scholars and commentators have

\textsuperscript{75}Jones v. Knight, 373 So. 2d 254, 264 (Miss. 1979) ("We must also reject the fear of excessive litigation as a justification for the immunity doctrine. Empirically, there is little support for the concern that the courts will be flooded with litigation if the doctrine is abandoned. . . . More compelling than an academic debate over the apparent or real increases in the amount of litigation, is the fundamental concept of our judicial system that any such increase should not be determinative or relevant to the availability of a judicial forum for the adjudication of impartial individual rights."); Muskopf v. Corning Hosp. Dist., 359 P.2d 457 (Calif. 1961); Ayala v. Philadelphia Board Educ., 305 A.2d 877 (Pa. 1973); Mayle v. Penn. Dept. Highways, 388 A.2d 709 (Pa. 1978).

\textsuperscript{76}See Jones, 373 So. 2d at 264.


frequently explored other grounds for holding educators liable. For example, some commentators have argued that courts should be willing to adopt a contractual framework for administering litigation involving educational liability issues, and the courts can look to three theories of contract law for administering suits against schools: express contract, promissory estoppel, and third-party beneficiary. It was suggested that express contract law can be applied to nearly all aspects of the student-school relationship at nearly all levels, but, if courts are unwilling to adopt a rigid contract approach, the more flexible theories of promissory estoppel and third-party beneficiary should be applied. The focus of promissory estoppel in an educational liability action is on the reasonable reliance by the parents and students of an educational institution’s “promises,” while a third-party beneficiary claim could enable the plaintiff to argue that she was the beneficiary of the contract between educational institutions and the teachers.


See McJessy, supra note 22.

Id. at 1815–1816.

Id. at 1804–1807 (describing in detail promissory estoppel claims).

Id. at 1807–1810 (describing in detail third-party beneficiary claims).
Other commentators have previously proposed other creative approaches. One commentator has compared the nature of decision-making engaged in by educators in the educational malpractice context to decision-making by corporate management. She suggested that the two are comparable, as the judiciary hesitates to intervene in both contexts because “it does not want to infringe upon the policy-making domain of corporate directors and educators.”

However, unlike corporate directors that enjoy qualified immunity for poor decision-making under the “business judgment rule,” educators currently enjoy complete immunity. This commentator also suggested that the principle for liability of corporate directors could be used in the education setting, which would end the absolute immunity of educators and, ultimately, make educators accountable for conduct that amounts to gross negligence.

There have been other very “unique” approaches to educational liability. For example, one commentator has proposed a conceptualization of educational liability based on the correlation between property values and school performance. Under this approach, it was suggested that the proper plaintiff in a suit for educational liability should be a class composed of property owners, not necessarily students or parents and that, ultimately, courts should embrace the liability of educational institutions to local property owners, instead of contemplating the liability of educational institutions to students. The property-ownership approach is mainly concerned with “big decisions” of the administrators, and is based on the assumption that poor performance of students in the school to which residents of a property are assigned under the local school district’s residential assignment scheme reduces the value of their property.

In spite of the various creative theories for holding
educators liable, the issue of educational malpractice is still in status quo. In fact, the issue is likely to remain in status quo until it is resolved as to whether a “ticket” to a classroom entitles a “purchaser” to more than a right to enter and remain in the classroom during the scheduled class, or in other words, whether a “ticket” to a classroom entitles a “purchaser” to any level of quality of educational services. Consequently, in order to determine what kind and level of quality a purchaser of a “ticket” to a classroom might be entitled to, it is necessary to define “quality” in the educational context.

A. “What the Hell is Quality?”

As noted by one commentator, “we all have an intuitive understanding of what quality means but it is often hard to articulate. Quality, like ‘liberty’, ‘equality’, ‘freedom’ or ‘justice’, is a slippery concept.” Recognizing that the concept of quality has not been adequately explored, at least in the context of education, some commentators have sought to define the nature and the concept of quality. In a widely cited article, “Defining Quality,” Harvey and Green have identified five categories or ways to define quality. As cited in another article, the definition of quality can be summarized as follows:

| Exception | “The exceptional notion of quality takes as axiomatic that quality is something special. There are three variations of this. First, the traditional notion of quality as distinctive, second, a view of quality as embodied in excellence (that is, exceeding very high standards) and third, a weaker notion of exceptional quality, as passing a set of required (minimum) standards.” |
| Perfection | This approach sees quality in terms of consistency. “It focuses on process and sets |

---

90 CHRISTOPHER BALL, “FITNESS FOR PURPOSE: ESSAYS IN HIGHER EDUCATION 96–102 (Dorma Urwin ed., SRHE & NFER/Nelson 1985) (“What the Hell is Quality?”).
91 See Lee Harvey & Diana Green, Defining Quality, ASSESSMENT AND EVALUATION IN HIGHER EDUCATION, Apr.1993, at 9–34.
92 Id.
93 Id. See also Kim Watty, When will Academics Learn about Quality?, QUALITY IN HIGHER ED., 2003, at 213–221.
specifications that it aims to meet perfectly. This is encapsulated in two interrelated dictums: zero defects and getting things right first time.”

<table>
<thead>
<tr>
<th><strong>Fitness for Purpose</strong></th>
<th>This approach “relates quality to the purpose of a product or service.” It suggests that “quality only has meaning in relation to the purpose of the product or service. Quality is thus judged in terms of the extent to which the product or service fits its purpose. This notion is quite remote from the idea of quality as something special, distinctive, elitist, conferring status or difficult to attain.”</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Value for Money</strong></td>
<td>This approach focuses on “efficiency and effectiveness,” measuring outputs against inputs, and it is a populist notion of quality (government).</td>
</tr>
<tr>
<td><strong>Transformation</strong></td>
<td>“A qualitative change; education is about doing something to the student as opposed to something for the consumer. Includes concepts of enhancing and empowering: democratization of the process, not just outcomes.”</td>
</tr>
</tbody>
</table>

It has been suggested that “fitness for purpose” and “transformation” are the two most appropriate definitions of quality in the context of education. As noted above, “fitness for purpose” relates quality to the purpose of a product or service and, therefore, “quality only has meaning in relation to the purpose of the product or service.” However, some commentators have pointed out that although straightforward in theory, “fitness for purpose” is deceptive because it raises the questions of: “whose purpose?” and “how is fitness assessed?”

---


95 See Harvey and Green, *supra* note 91.

96 GRAEME C. MOODIE, *STANDARDS AND CRITERIA IN HIGHER EDUCATION*, 1–8
To address these issues, the “fitness for purpose” approach “offers two alternative priorities for specifying the purpose.” The first priority focuses on customers, while the second one focuses on the provider. It has been suggested that, “the tricky issue of determining who are the customers of education and what their requirements are can be circumscribed by returning the emphasis to the institution.” Under this approach, instead of focusing on meeting customer requirements, quality can be defined in terms of the institution fulfilling its own stated objectives, or mission. Although focusing on the institution can help with defining quality in the context of “fitness for purpose,” the provider-centered approach has its limitations because it is not easy to determine whether an institution is achieving its enumerated purposes, which brings into question the role of quality assurance. It has been proffered that, as an alternative to the subjective assessment of achievement of purpose, “quality assurance is about ensuring that there are mechanisms, procedures and processes in place to ensure that the desired quality, however defined and measured, is delivered.” Obviously, the critical assumption is that “if mechanisms exist, quality can be assured,” so the main emphasis is on having quality control mechanisms in place.

B. Articulating Educational Malpractice Based on a “Fitness for Purpose” Definition of Quality: What Should Courts Look for?

The long line of failed educational malpractice cases that were based on “failure to learn” clearly establishes that students are not entitled to a “quality” education. While some notable experts have long used the term *instructional negligence* in order to more accurately characterize this area of education law, some decisions indicate that students are also not entitled to a “quality” instructor. However, what about

---

97 See Harvey and Green, supra note 91.
98 Id.
99 Id.
100 Id.
101 See supra notes 63–64.
103 See Bittle v. Oklahoma City University, 2000 OK CIV APP 66, 6 P.3d 509, 511–515. See also Miller v. Loyola University of New Orleans, 829 So. 2d 1057, 1060–
“fitness for purpose” as a definition of quality in educational context? Are students at least entitled to an institution that has and enforces quality assurance mechanisms, procedures, and processes designed to fulfill its own stated objectives, mission, and obligations? One would certainly hope so. The following section articulates the possible tort cause of action against educational institutions based on the “fitness for purpose” definition of quality.

1. Educational malpractice based on institutional negligence

The reason for unsuccessful lawsuits against educational institutions just might be the fact that a cause of action against educators is known as “educational malpractice,” which inherently places “education,” and consequently the conduct of a teacher, at the center of analysis. However, exploring an alternative cause of action known as institutional negligence can alleviate this problem. The cause of action for institutional negligence originated in medical malpractice litigation, where courts reasoned that “hospitals have an independent duty to assume responsibility for the care of their patients.”

For example, in a fairly recent case, Oscar Salinas v. Advocate Health and Hospital Corp., the plaintiff filed a medical malpractice lawsuit against both Dr. Ramillo and the Advocate Christ Hospital for improper treatment of his knee injury. Shortly after filing the lawsuit, the plaintiff dismissed Advocate Christ Hospital from the medical malpractice lawsuit, but then brought an institutional negligence lawsuit against Advocate Christ Hospital the following year. The medical malpractice lawsuit against the doctor focused on the doctor’s negligence, while the institutional negligence lawsuit dealt with allegations that the hospital should have had policies and procedures in place to prevent certain errors from occurring.

Notably, in addition to hospitals, health maintenance


106 Id.

107 Id.
organizations ("HMOs") have also been held liable under the doctrine of institutional negligence, based on their procedures for scheduling medical treatments and their practices for assigning patients to a particular doctor.\textsuperscript{108}

While the notion of institutional negligence has been challenged in some contexts, such as in the context of tort liability of religious institutions,\textsuperscript{109} the concept of institutional negligence could be very useful in the educational context. Using the concept of institutional negligence in the education industry would put the “processes” at the center of attention, instead of the most direct input (instructors’ conduct) or output (students’ learning). Switching focus to internal rules, policies, and quality assurance mechanisms inherently eliminates the most-often mentioned obstacles in educational malpractice cases, which include the inability to prove breach of duty due to the lack of a uniform standard of care when it comes to evaluating teaching methodology, and the “practical impossibility [to] prove that the alleged malpractice of the teacher proximately caused the learning deficiency of the plaintiff student.”\textsuperscript{110} The following section will address issues related to proving institutional negligence in the education industry.

C. Proving Institutional Negligence in the Educational Context

Educational institutions, especially universities, usually provide significant informational materials about themselves, available either in print form or online. These materials can be

\textsuperscript{108} See Jones, 730 N.E.2d, at 1123–24 (Count I of the plaintiff’s second amended complaint alleged that Chicago HMO was institutionally negligent for “assigning Dr. Jordan as Shawndale’s primary care physician while he was serving an overloaded patient population [and for] adopting procedures that required Jones to call first for an appointment before visiting the doctor’s office or obtaining emergency care.”). See also Shannon v. McNulty, 718 A.2d 828, 836 (Pa. Super. Ct. 1998) (“When a benefits provider, be it an insurer or managed care organization, interjects itself into the rendering of medical decisions affecting a subscriber’s care it must do so in a medically reasonable manner.”). For more information on this issue, see Karen M. Coulson, Institutional Negligence and the HMO: The Expanding Realm of HMO Liability in Illinois: Jones v. Chicago HMO Ltd. of Illinois, 730 N.E.2d 1119 (Ill. 2000), 26 S. Ill. U. L. J. 597 (2002).


\textsuperscript{110} Donohue v. Copiague Union Free Sch. Dist., 47 N.Y.2d 440, 446, 391 N.E.2d 1352, 1355 (1979).
course catalogs with course descriptions, faculty handbooks that specify faculty obligations and expectations, and so on. While it may be unreasonable to hold educational institutions liable for general claims of “failure to learn,” educational institutions should not escape liability if they fail to implement and enforce policies and procedures that ought to assure “fitness for purpose” quality. For example, faculty handbooks can obligate faculty members to attend all classes, to begin and end classes at the scheduled times, to meet for the full duration of the academic term, to provide reasonable choices for classes to be “made-up,” to distribute and follow the course syllabus, to follow administrative procedures with respect to exams, to make themselves available to students, and other similar items.111

It is true that rules and policies like these primarily define the contractual relationship between an educational institution and an instructor, but nonetheless, they can be viewed as a quality assurance mechanism. Consequently, if rules and policies like the ones mentioned above exist, reasonable steps should be taken to ensure that they are honored and enforced. If such policies do not exist, this unlikely omission alone could be a basis for institutional negligence. Ultimately, if an instructor does not follow internal policies and, as a result, a particular course ends up not matching relevant syllabi and/or a course description, the fault should fall not only on the instructor, but also on the institution due to the lack of enforcement of internal policies that ought to preclude such a scenario. The principle from the medical industry, where a malpractice lawsuit against an individual most directly responsible for wrongdoing can be completely different from a negligence lawsuit against an institution that allowed certain wrongdoings to happen,112 can and should be applied in the

111 See Professional Policies & Faculty Responsibilities—Basic Expectations of the Faculty Position, UNIV. OF IOWA, http://clas.uiowa.edu/faculty/professional-policies-faculty-responsibilities-basic-expectations-faculty-position (last visited May 21, 2013); See also Faculty Performance Expectations, SETON HALL UNIVERSITY, www.shu.edu/academics/business/upload/ASCEXPT_RPT.pdf (last visited May 21, 2013); See also Brownsville Middle School Faculty Handbook, http://brownsville.dadeschools.net (last visited May 21, 2013); see also Faculty Employment Obligations and Expectations, NORTHEASTERN ILL. UNIV., http://www.neiu.edu/DOCUMENTS/Faculty_Staff/Faculty_Resources/Policies/FEOE.pdf (last visited May 21, 2013).

education industry.

Cases like Miller v. Loyola University of New Orleans and Bittle v. Oklahoma City University, for instance, are good examples of cases that are about not only instructors’ malpractice, but also institutional negligence.\(^{113}\) In these cases students alleged that, among other things, the instructors changed the course time without the permission of law school officials, covered approximately only 60% of the material that ought to be covered,\(^{114}\) frequently arrived late for class, discharged class early, canceled class altogether, and failed to provide make-up classes.\(^ {115}\) Interestingly enough, the faculty handbook for Loyola University, for example, provides that “each faculty member shall observe duly promulgated regulations concerning such matters as the cancellation of scheduled classes, examinations, . . . [and] current syllabi.”\(^ {116}\)

The relevant legal analysis in these types of scenarios should focus on institutions’ mechanisms, or the lack of mechanisms, for preventing the educational missteps mentioned above. Failure to separate claims for instructional malpractice/negligence from claims for institutional negligence, and the tendency to label both claims as regular educational malpractice claims (based on a “failure to learn”) is, legally and logically speaking, unsound. Treating these two claims the same is akin to mixing apples and oranges on the principle that both are fruit.

Clearly, the discussion above is more applicable to post-secondary educational institutions, but the underlying principle of institutional negligence can be applied to primary and secondary education, albeit on different grounds. In fact, two distinguished commentators have very recently introduced some new ideas regarding educators’ liability in primary and secondary education that are conceptually based on


\(^{114}\) Miller, 829 So. 2d at 1057.

\(^{115}\) Bittle, 6 P.3d at 511.

\(^{116}\) (“Each faculty member shall observe duly promulgated regulations concerning such matters as the cancellation of scheduled classes, examinations, grades, current syllabi, teaching assignments, contact hours, full-time employment, and assessment and development of the curriculum.”). See http://academicaffairs.loyno.edu/faculty-handbook, p7–2.
institutional negligence. In particular, Hutt and Tang argue that educators today operate with access to unparalleled amounts of data concerning teacher effectiveness and teacher impacts on student learning. Consequently, instead of seeking to hold educators liable for negligence claims based on instructional negligence and failure to learn, a plaintiff should seek to hold a school district liable for its negligence one step earlier, that is, assignment to a classroom taught by a teacher whom school officials know to be ineffective based on extensive statistical data concerning the teacher’s performance. This approach is clearly based on institutional negligence.

IV. POSSIBLE CRITICISMS OF INSTITUTIONAL NEGLIGENCE IN THE EDUCATION INDUSTRY

A. Academic Freedom and “Burger King” Issues

One could argue that administrators’ fear of liability for institutional negligence has the ability to trigger far too much overseeing, which could interfere with the academic freedom rights of the faculty. Nothing could be more distant from the truth and the law. Academic freedom in the United States has long been deemed a “special concern of the First Amendment.” As such, academic freedom rights essentially provide that faculty members be entitled to freedom in discussing their curriculum subject, freedom in research and publication, and freedom to speak or write as citizens. To be


118 Id.

119 Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (“Our Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment . . . ”). See also Regents of Univ. of California v. Bakke, 438 U.S. 265, 312 (1978) (“Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.”).

120 See AM. ASS’N OF UNIV. PROFESSORS & ASS’N OF AM. COLLS., 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE 3 (1940), http://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure (last visited May 23, 2013). Even though the 1940 Statement is merely a restatement of principles and, as such, it serves as a guideline, and not binding law, the AAUP does “enforce” the Statement in a way by listing colleges and universities that it finds to be in violation of the 1940 Statement. See generally AM. ASS’N OF UNIV. PROFESSORS, CENSURE LIST, AAUP, http://www.aaup.org/AAUP/about/censuredadministr/ (last visited May 23, 2013).
sure, it is worth noting that the exact legal basis and implications of academic freedom rights are subject to much debate, and courts have distinguished the importance of academic freedom in tertiary, as opposed to in primary and secondary education. Nonetheless, it is hard to imagine that academic freedom could ever be invoked in situations where a central issue is whether a faculty member is doing what he or she is supposed to do based on rules and policies that define employment-related expectations and obligations. If academic freedom could be applied in such situations, then faculty members could decide to teach only when it is not raining. Interestingly enough, one professor has noted, “[s]orry kids, you are not the authority in the classroom. Me Teacher. You student. Me Teach, you learn. End of discussion . . . Education is not a business. You are not my customer. My classroom is not Burger King. You do not get to ‘have it your way.’” Although powerful and rather insightful, the problem with this statement is the emphasis on “my classroom.” Since classrooms where classes are held actually belong to the educational institution, the faculty members should also realize that a classroom is not Burger King and, just like students, they do

121 See David M. Rabban, Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment, 53 SUM LAW & CONTEMP. PROBS. 227, 237 (1990) (“Fitting academic freedom within the rubric of the first amendment is in many respects an extremely difficult challenge. The term ‘academic freedom,’ in obvious contrast to ‘freedom of the press,’ is nowhere mentioned in the text of the first amendment.”). See also Peter Byrne, Academic Freedom: A “Special Concern of the First Amendment”, 99 YALE L.J. 251, 252–53 (1989). The author states, The First Amendment protects academic freedom. This simple proposition stands explicit or implicit in numerous judicial opinions, often proclaimed in fervid rhetoric. Attempts to understand the scope and foundation of a constitutional guarantee of academic freedom, however, generally result in paradox or confusion. The cases, shorn of panegyrics, are inconclusive, the promise of rhetoric reproached by the ambiguous realities of academic life. The problems are fundamental: There has been no adequate analysis of what academic freedom the Constitution protects or of why it protects it. Lacking definition or guiding principle, the doctrine floats in law, picking up decisions as a hull does barnacles.

122 The majority opinion in Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist., 624 F.3d 332, 345–44 (6th Cir. 2010). The court stated, As a cultural and a legal principle, academic freedom ‘was conceived and implemented in the university’ out of concern for ‘teachers who are also researchers or scholars—work not generally expected of elementary and secondary school teachers.’ . . . ‘[U]niversities occupy a special niche in our constitutional tradition’ and the constitutional rules applicable in higher education do not necessarily apply in primary and secondary schools, where students generally do not choose whether or where they will attend school.

not get to ‘have it your way.’” The faculty can “have it” only in accordance with internal rules and policies of the institution they work for. Academic freedom is not a route to avoid employment expectations and obligations.

B. Burden on School Administrators

The standard for legal liability based on negligence is “knew, or should have known.” One could feasibly argue that the legal standard for negligence would put an undue burden on administrators, as it is almost impossible for administrators to keep up with each and every instructor within an institution on a daily basis, especially in large institutions. These concerns would perhaps be legitimate if institutional negligence lawsuits in the educational context were based on traditional “failure to learn,” as administrators would regularly have to monitor students’ learning. However, unlike educational malpractice, institutional negligence is primarily concerned with implementing and enforcing internal rules and policies that ought to ensure that an instructor is doing what he or she is supposed to do. Consequently, any major disturbance for administrators is unlikely, because it is highly probable that administrators will know about instructors’ (mis)conduct prior to a potential lawsuit. That is so because students and/or parents are likely to report to administrators any serious misconduct on the part of an instructor, such as frequent absences, unreasonable tardiness, improper behavior, not following the syllabus, and so on. Moreover, the administrators have access to student evaluations that could point out violations of relevant rules and policies. Therefore, it is more likely than not that administrators will learn about instructors’ (mis)conduct without a daily run-around, and prior to a lawsuit for institutional negligence.

In reality, the added pressure to implement and enforce internal mechanisms for preventing errors would likely affect student evaluations, which are one of the heartiest issues in the education industry. For teachers, unfavorable

---

124 The “knew or should have known” standard has long been used in a great number of negligence-based cases. See e.g. Svacek v. Shelley, 359 P.2d 127 (Alaska 1961); Mallory v. O’Neil, 69 So. 2d 313 (Fla. 1954); Stricklin v. Parsons Stockyard Co., 192 Kan. 360, 388 P.2d 824 (1964); Bradley v. Stevens, 329 Mich. 556, 46 N.W.2d 382 (1951).

125 See Fish, supra note 123. See also Jonah E. Rockoff, Subjective and Objective
evaluations “can destroy a career that took a decade to train for.” On the other hand, the nature of some student evaluations can cause administrators to refrain from even criticizing teachers for unsatisfactory evaluations because that could “potentially result in years (if not decades) of bitterness between those involved.” Without question, poor student evaluations can cause tensions between teachers and students, teachers and administrators, and students and administrators. Arguably, the best way to reduce the negative impact of student evaluations is to make them more objective, and the best way to make them more objective is to ensure that student evaluations predominantly address the issue of whether a teacher is doing what he or she is supposed to do. In all fairness, students might not always be well positioned to judge whether a teacher possesses mastery of his or her subject area, whether a teacher is clear, well prepared, or generally caring. However, students are exceptionally well positioned to answer questions related to teachers’ absences, tardiness, following the syllabus, making-up classes, holding office hours, and so on. Consequently, the added pressure to enforce internal rules and policies would likely prompt educational institutions to seek direct input from those on the “ground.” Such a scenario would inherently add more objectivity to student evaluations, which would be a desirable trend, as many studies point to the overly subjective nature of student evaluations.

Evaluations of Teacher Effectiveness, AM. ECON. REV., May 2010, at 261–266.

126 Fish, supra note 123.

127 Nicholas Dagostino, Giving the School Bully a Timeout: Protecting Urban Students from Teachers’ Unions, 201163 ALA. L. REV. 177, 195 (2011). The author states,

Principals cannot fire ineffective teachers, and apparently they are afraid even to criticize them, which would potentially result in years (if not decades) of bitterness between those involved. Farcically, in schools that rate teachers as either satisfactory or unsatisfactory, “about 99 percent of all teachers in the United States are rated ‘satisfactory.’” Even when evaluations utilize a broader rating scale than just satisfactory and unsatisfactory, one study showed that ninety-four percent of teachers received one of the top-two ratings while less than one percent of teachers were deemed to have performed unsatisfactorily. As a result, exceptional teachers do not get recognized (or rewarded), average teachers are not given feedback on what specifically they should improve, and poor teachers are generally retained regardless of whether they make improvements.

128 See e.g. Samer Kherfi, Whose opinion is it anyway? Determinants of Participation in Student Evaluation of Teaching, J. OF ECON. EDUC., Aug. 2011, at 19–30; See also Ingrid Farreras & Robert Boyle, The Effect of Faculty Self-Promotion on Student Evaluations of Teaching, COLL. STUD. J., June 2012, at 314–322; See also Scott Freng & David Webber, Turning up the heat on online teaching evaluations: Does “hotness” matter? TECHN. OF PSYCHOL., 2009, at 189–192; See also John Adams, Student
V. CONCLUSION

William Bennett, the former United States Secretary of Education, stated more than 25 years ago, “[t]here are greater, more certain, and more immediate penalties in this country for serving up a single rotten hamburger than for furnishing a thousand schoolchildren with a rotten education.” Since then, scholars have actively sought to articulate various legal theories of educational malpractice, but the courts have consistently been reluctant to recognize claims for educational malpractice, on both legal and policy grounds. Consequently, a “ticket” to a classroom still does not entitle a student to more than a right to be there for a certain period of time, and it is practically impossible to hold educators accountable for the quality of their performance. Educators are indeed treated like rock stars under the current approach to educational malpractice.

This Article has argued in favor of adopting the concept of institutional negligence in the educational context as a way of enhancing the accountability and effectiveness of educational institutions. Using the concept of institutional negligence in the education industry would put institutions’ “processes” for assuring the desired “fitness for purpose” quality at the center of attention, instead of the most direct input (instructors’ conduct) or output (students’ learning). Switching focus to quality assurance mechanisms inherently eliminates the most-often mentioned obstacle in educational malpractice cases, namely, the inability to prove breach of duty due to the lack of a uniform standard of care when it comes to evaluating teaching methodology. Consequently, the courts would finally have a chance to adequately address damages in the context of educational malpractice, which could ultimately clarify the parameters of educators’ obligations towards students.

Evaluations: The Ratings Game, INQUIRY, Fall 1997, at 10–16.