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EDUCATIONAL MALPRACTICE—DOES THE CAUSE OF ACTION EXIST?

Michael A. Magone

I. INTRODUCTION

The Montana Constitution provides the basic goals and objectives of the Montana educational system: “(1) It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of education is guaranteed to each person of the state.”¹ From this provision and similar provisions within various state constitutions, teachers, parents, school boards and students may ask, in terms of the quality of education, whether an individual may hold a public school district liable in tort for failing to educate a student. Not surprisingly, courts throughout the United States have confronted this issue.² With the exception of one Montana case, however, courts have consistently refused to recognize a cause of action based on educational malpractice.³ This comment reviews both those decisions refusing to recognize a teacher malpractice cause of action and *B.M. v. State*,⁴ the lone exception to all other teacher malpractice holdings in the United States.

II. WHAT IS MEANT BY A “FAILURE TO EDUCATE”?

Before reviewing why courts have refused to recognize an educational malpractice cause of action, one needs to clarify how courts define “educational malpractice.” Most cases dealing with educational malpractice seem to fall into three basic categories.⁵ The first category entails a failure to educate a student in basic academic skills.⁶ The second category includes the improper placement or removal of a student in a special education program.⁷ The final category encompasses improper or inadequate supervision of “trainees” which may lead to a malpractice suit against the supervisor-teacher.⁸ This article concentrates primarily on the first of

1. MONT. CONST. art. X, § 1 (1972).

2. *Is There a Case for Failure to Educate?*, TRIAL 81 (Feb. 1987) [hereinafter *Failure to Educate*].

3. *Moore v. Vanderloo*, 386 N.W.2d 108, 114 (Iowa 1986) (holding that a school could not be held liable on a theory of educational malpractice).

4. 200 Mont. 58, 649 P.2d 425 (1982).

5. *Moore*, 386 N.W.2d at 113.

6. *Id.*

7. *Id.*

8. *Id.*

those categories—the failure to educate a student in basic academic skills.

III. THE ELEMENTS OF PROOF

Like most negligence causes of action, a failure to educate cause of action requires the plaintiff's proof of (1) a duty of care, (2) a failure to conform to that duty, (3) a failure to conform which is the legal cause of the injury, and (4) a compensable injury.⁹ The decisions analyzed in this comment, however, make it clear that it is a plaintiff's continual inability to meet these standards, among other reasons, which currently defeats the educational malpractice cause of action.

A. *Lack of a Standard of Care*

The initial justification for refusing to recognize the educational malpractice cause of action is the inability of the courts to find a set standard of care. *Peter W. v. San Francisco Unified School District*,¹⁰ the earliest reported educational malpractice case,¹¹ set a precedent for denying educational malpractice causes of action. There the court denied the cause of action primarily for its lack of a standard of care.

In *Peter W.*, a high school graduate sued his former school district for damages allegedly resulting from his inability to read past a fifth grade level.¹² In particular, the former student claimed the school district and its agents failed to recognize his reading deficiencies.¹³ This, he contended, led to the school's assigning him to inappropriate reading classes and promoting him to grade levels and courses beyond his reading ability, which culminated in his high school graduation without the required reading skills.¹⁴

In holding there was no workable standard of care measuring an educator's teaching methods, the court in *Peter W.* noted that the science of pedagogy promotes a multitude of conflicting views in determining the correct approach to educating students.¹⁵ In addition, the court pointed out numerous factors, both inside and outside the classroom, which subjectively affect a student's education. These factors included physiological, neurological, emotional,

9. *Failure to Educate*, *supra* note 2, at 81.

10. 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).

11. *Failure to Educate*, *supra* note 2, at 81.

12. *Peter W.*, 60 Cal. App. 3d at 818, 131 Cal. Rptr. 856.

13. *Id.*

14. *Id.*

15. *Id.* at 824, 131 Cal. Rptr. at 860-61.

cultural and environmental influences. Subsequent educational malpractice cases have similarly found the same lack of a workable duty of care.¹⁶

B. *Lack of Identification of Cause of Damage or Nature of Damage*

Proponents of an educational malpractice cause of action have also had difficulty in pinpointing a cause of damage or the nature of damage itself in educational malpractice cases.¹⁷ In *Donohue v. Copiague Union Free School District*,¹⁸ a case factually similar to *Peter W.*, a high school graduate sued his former school district for its alleged failure to provide the student with sufficient reading and comprehension skills.¹⁹ In denying the cause of action, primarily for public policy reasons,²⁰ the court reasoned that due to numerous factors affecting one's education,²¹ proving causation would be a difficult, if not an impossible, burden on plaintiffs.²² The court did, however, stop short of saying that causation could never be proven.²³ The court acknowledged that one could not deny a high school graduate who failed to comprehend simple English was indeed injured in some way; yet, at the same time, the court did not attempt to identify the measure of damages.²⁴ Other courts agree with the near impossibility of proving the cause and identifying the exact damages.²⁵

C. *Potentially Heavy Burden on Schools and Interference of Courts in Educational Institution Operation*

Further justification for denying the educational malpractice cause of action lies in the insurmountable burden that would be placed on school officials. Schools are currently beset with funding

16. *Hunter v. Board of Educ.*, 292 Md. 481, 484-85, 439 A.2d 582, 584 (1982).

17. *Id.* at 487, 439 A.2d at 584-85.

18. 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).

19. *Id.* at 442-43, 391 N.E.2d at 1353, 418 N.Y.S.2d at 376-77.

20. The court reasoned that (1) control and management of educational affairs is vested in the Board of Regents and the Commissioner of Education; (2) courts are reluctant to make judgments as to the validity of broad educational policies and do not like to sit in review of day to day implementations of school policies; and (3) that statutory administrative processes already provide remedies for such problems and conflicts. *Id.* at 444-46, 391 N.E.2d at 1354-55, 418 N.Y.S.2d at 377-79.

21. The court did not elaborate on these factors.

22. 44 N.Y.2d at 443, 391 N.E.2d at 1354, 418 N.Y.S.2d at 377.

23. *Id.*

24. *Id.*

25. *Moore*, 386 N.W.2d at 114.

difficulties due to social, financial and political problems.²⁶ Another cause of action would open the door to potential tort claims by any disaffected student or parent.²⁷ Time, money, and energy previously focused on educating students would be strangled by the burden of increased court problems, legitimate or not.²⁸

Tied in with this burden is the public policy concept that allowing an educational malpractice cause of action would presuppose the duties and responsibilities of educational administrators.²⁹ Management of state and individual school affairs in Montana is generally vested in the state board of public education, superintendent and office of public instruction, county superintendents, local school boards, and school administrators.³⁰ Recognizing an educational malpractice cause of action would force courts to "sit in review of the day-to-day implementation of [school] policies," a role courts strongly oppose.³¹ A more favorable alternative to ensure a proper education for students would be to seek help through the state's school administrative agencies.³²

For example, the Administrative Rules of Montana stipulate the procedure for conducting hearings and appeals on all school controversies.³³ Generally, a person may direct complaints to the local school board of trustees which reviews the complaint and issues a decision.³⁴ A person receiving an unfavorable decision then may appeal the issue to the county superintendent.³⁵ The county superintendent, in turn, holds a formal hearing where the parties present their issues in a manner very similar to a judicial hearing.³⁶ Following the hearing, the county superintendent issues a final order including findings of fact and conclusions of law.³⁷ The parties then may appeal the county superintendent's order to the state superintendent of public instruction.³⁸ The superintendent of public instruction issues a final order based upon the record established at the previous hearing and upon review of the county superinten-

26. *Hunter*, 292 Md. at 486, 439 A.2d at 584 (citing *Peter W.*, 60 Cal. App. 3d at 825, 131 Cal. Rptr. at 861).

27. *Id.*

28. *Id.*

29. *Donohue*, 47 N.Y.2d at 445, 391 N.E.2d at 1354, 418 N.Y.S.2d at 378.

30. See MONT. CODE ANN. § 20-2-101 to -131 (1987).

31. *Donohue*, 47 N.Y.2d at 445, 391 N.E.2d at 1354, 418 N.Y.S.2d at 378.

32. *Hunter*, 292 Md. at 488, 439 A.2d at 585.

33. MONT. ADMIN. R. 10.6.101 (1987).

34. MONT. ADMIN. R. 10.6.103 (1987).

35. *Id.* See also MONT. CODE ANN. § 20-3-210 (1987).

36. MONT. ADMIN. R. 10.6.116 (1987).

37. MONT. ADMIN. R. 10.6.119 (1987). See also MONT. CODE ANN. 20-3-107 (1987).

38. MONT. ADMIN. R. 10.6.121 (1987).

dent's findings of facts and conclusions of law.³⁹ The superintendent of public instruction's final order is then subject to the legal remedies available in the district and federal courts.⁴⁰

D. *Legislatively Defined Competency Standards*

A final contributing justification for denying an educational malpractice cause of action may rest in the notion that the legislature, not courts, controls teacher competency standards.⁴¹ Before one can teach in a Montana public school, an individual must satisfy certain requirements. These include, but are not limited to, earning a bachelor's degree from an accredited school,⁴² taking and passing education/teacher training courses,⁴³ and completing student teaching.⁴⁴ Additionally, to secure quality educators, the Montana Public Board of Education recently enacted the requirement that individuals not currently certified to teach in Montana must pass a national teacher core battery examination before acquiring a Montana teaching certification.⁴⁵ Thus, to ensure that quality teachers are providing a quality education to students, an individual might look to the legislature for improvements in teacher competency standards.

The preceding discussion reveals a judicial reluctance to recognize an educational malpractice cause of action for several reasons. First, courts find it nearly impossible to define any standard of care to which educators may conform. This is primarily because there are too many factors outside the school environment contributing to a student's learning abilities and education. In addition, courts recognize there are multitudes of conflicting theories on how best to educate a student. Second, courts find it difficult to identify and measure the extent of any damages sustained by the student. Third, courts are unwilling to interfere with the operations of educational institutions, most of which already provide procedures for individuals to present their concerns and complaints about the education process. Fourth, courts are reluctant to recognize the educational malpractice cause of action for fear of placing increased burdens upon schools. Finally, courts hesitate to interfere with legislatively controlled teacher competency standards.

39. *Id.*

40. MONT. ADMIN. R. 10.6.128 (1987).

41. *Id.*

42. MONT. CODE ANN. § 20-4-104 (1987). *See also* MONT. ADMIN. R. 10.57.211 (1987).

43. *Id.*

44. MONT. ADMIN. R. 10.57.104 (1987).

45. MONT. ADMIN. R. 10.57.211 (1987).

IV. MONTANA CASE LAW PERSPECTIVE

As mentioned in the introduction, there has been but one case in the United States where a court recognized an educational malpractice cause of action. In the Montana case of *B.M. v. State*,⁴⁶ a foster mother brought suit against the state for what she alleged was a misplacement of her nine-year-old daughter into a special education program. A psychologist tested the child, with the father's permission, after the child showed learning difficulties in kindergarten. Based on this test, the psychologist recommended the child either repeat kindergarten or receive special education assistance.⁴⁷ Selecting the latter, school officials initially placed the child in a regular first grade classroom, where the child received extra help through a team teaching approach. However, after finding the child and three other similarly situated children easily distracted, school officials moved the children to a resource room for their special assistance without informing the parents.⁴⁸ Upon discovering the relocation of her child, the plaintiff removed the nine-year-old from the program and filed suit.⁴⁹

The Montana Supreme Court, in a four-to-three decision, found the school owed a "duty of reasonable care in testing and placing the child in an appropriate special education program."⁵⁰ The court's basis rested in the Montana Constitution,⁵¹ statutes,⁵² and a Montana Office of Public Instruction handbook outlining procedures and guidelines for implementing and administering special education programs.⁵³ The court did not, however, decide whether the state breached its newly defined duty in this matter, but remanded the issue to District Court.⁵⁴

In an attempt to differentiate the majority's holding from those in other educational malpractice cases, Chief Justice Haswell, in his concurring opinion, noted that *B.M.* was not in the same category of cases as *Peter W.* or *Donohue*.⁵⁵ Instead, *B.M.*

46. 200 Mont. 58, 649 P.2d 425 (1982).

47. *Id.* at 60-62, 649 P.2d at 426-27.

48. *Id.*

49. *Id.*

50. *Id.* at 63, 649 P.2d at 427.

51. *Id.* MONT. CONST. art. X, § 1.

52. MONT. CODE ANN. §§ 20-5-102, 20-7-401 to 402 (1987).

53. SPECIAL EDUCATION HANDBOOK, PROGRAM PROCEDURES AND GUIDELINES FOR CHILDREN AND YOUTH WITH LEARNING HANDICAPS, § III, B (February 1973).

54. On remand, the district court granted summary judgment based on the plaintiff's failure to show damages. On second appeal to the Montana Supreme Court (___ Mont. ___, 698 P.2d 399 (1985)), the supreme court affirmed the lower court's summary judgment.

55. *B.M.*, 200 Mont. at 65, 649 P.2d at 428.

involved a "violation of mandatory statutes alleged to constitute negligence."⁵⁶ For public policy reasons, Haswell concluded, there is no recognizable cause of action for failing to instruct a student in basic academic skills.⁵⁷

In his dissent, Justice Sheehy reiterated public policy reasoning similar to that of Chief Justice Haswell.⁵⁸ Citing those cases traditionally denying the cause of action and using justifications akin to those previously reviewed in this comment, Justice Sheehy went one step further than Chief Justice Haswell by concluding that the cause of action should be denied.⁵⁹

V. CONCLUSION

Courts throughout the nation appear unanimous in denying a cause of action for failure to educate a student in basic academic skills. On the surface, *B.M. v. State* appears to recognize such a cause of action. Yet, a careful reading reveals that the Montana Supreme Court recognizes and adheres to the several justifications supporting the denial of such cause of action. The court's recognition of the cause of action in *B.M. v. State* concerned the misplacement of a student in special education, not the failure to educate a student in basic academic skills. Furthermore, the court based its acknowledgment of the cause of action on statutory and office of public instruction requirements alone.

It would thus seem that unless parents or students are able to find an alternative to the negligence theory approach, the courts will be reluctant to recognize an educational malpractice cause of action. As this comment suggests, persons concerned about educational standards and procedures should use the pre-existing administrative grievance procedures, beginning with contacting local school boards of trustees. Further remedies may be pursued through contacting legislative representatives in an effort to improve the legislatively controlled competency standards by which all Montana public educators must abide. In the meantime, educators may concentrate on educating their students instead of educating themselves on malpractice liability.

56. *Id.*

57. *Id.*

58. *Id.* at 66-69, 649 P.2d at 429, 430.

59. *Id.* at 68-69, 649 P.2d at 430.