REVIVING AN EDUCATIONAL MALPRACTICE ARGUMENT FOR STUDENT-ATHLETES: WHAT REMEDY EXISTS FOR STUDENT-ATHLETES DENIED AN EDUCATIONAL OPPORTUNITY?

Ann H. Rodriguez, J.D.

I. INTRODUCTION

Athletics have long been an integral part of the university setting. Indeed, since 1869 when Princeton University and Rutgers University competed in the first intercollegiate football competition,[1] the presence of athletics on campus and their seemingly important, yet often ill-defined, role in the functioning of the university has steadily increased. In the 1920's, universities realized they could gain financial benefits by actively embracing athletics.[2] Many commentators agree that the rewards gained by universities through athletics run the gamut from huge financial rewards to increased enrollment, enhanced prestige, and numerous means of support from a school's constituents.[3]

This increase in importance for athletics on campus, primarily fostered through vast commercialization, pressures universities to produce winning teams because such teams often mean millions of dollars in revenue.[4] In turn, the pressure increases the competition between

[1] Timothy Davis, *An Absence of Good Faith: Defining a University's Educational Obligation to Student-Athletes*, 28 HOUS. L. REV. 743, 748 n.35 (1991).
[2] *Id*. at 749.
[3] *Id*. at 749 n.38.
[4] For the purposes of this work, the narrow focus will investigate the so-called "revenue-producing sports," those being men's basketball and football.

universities for the best student-athletes.[5] As competition increases, so too does the opportunity for abuse and exploitation of the student-athlete.

Litigation as a consequence of such exploitation has steadily increased over the past two decades.[6] Cases have ranged in theory, and all have highlighted problems associated with this potentially abusive situation and the confusion that stems from a relationship not clearly defined.

This article examines the root of the conflict between a university and its student-athletes, the potential for abuse and exploitation, and the legal theory that offers a potential solution.

II. DEVELOPMENT OF THE PROBLEM

Presumably, the mission of any university is to educate to the best of its ability all of the students whom it chooses to admit. However, with the commercialization of college athletics and the importance of having winning teams, academic integrity has arguably been compromised. This lead to ethical abuses in recruitment and often overwhelming neglect of the academic needs of the student-athlete as athletic performance takes center stage. This exploitation of the student-athlete and the educational duty of universities appear to conflict with one another; this conflict forms the basis of this work.

Many commentators question the value of athletics on university campuses and express concern about the role athletics assumes in today's university communities.[7] Though these commentators acknowledge that athletics are educational in that they teach the enduring values of challenge and response, teamwork, discipline, and perseverance, commentators continue to question whether it is part of a university's mission to inculcate these admittedly worthy values into its students.[8] The reality is that college athletics today are entrenched on campuses across the country, playing an ever-increasing role in fostering loyalty, raising revenue, increasing enrollment, and maintaining alumni support for these institutions. The important issue is not whether athletics should be a part of this academic community, but how the university is responding to the academic needs of the young adults that it recruits to be not necessarily successful students, but primarily successful athletes. More particularly, what redress, if any, does a student-athlete have when he feels that he has not been offered the educational opportunity promised to him by the university upon his commitment to perform athletically.

In 1982, Dr. Jan Kemp attempted to address very similar issues at the University of Georgia ("UGA").[9] At that time, Dr. Kemp was the English coordinator for UGA's

[5] Davis, *An Absence of Good Faith*, *supra* note 1, at 751.
[6] *See generally*, Hall v. Univ. of Minnesota, 530 F. Supp. 104 (Dist.Minn.1982); Kemp v. Ervin & Trotter, 651 F. Supp. 495 (N.D.Ga.1986); Ross v. Creighton Univ., 740 F. Supp. 1319 (N.D.Ill.1990) *aff'd in part, rev'd in part*, 957 F.2d 410 (7th Cir. 1992); Jackson v. Drake Univ., 778 F. Supp. 1490 (S.D.Iowa1991).
[7] *See, e.g.*, Davis, *An Absence of Good Faith*, *supra* note 1; Craig Neff, *On Trial In Georgia: Academic Integrity*, SPORTS ILLUSTRATED, Jan. 27, 1986, *available at* http://sportsillustrated.cnn.com/vault/article/magazine/MAG1127168/index.htm; Murray Sperber, COLLEGE SPORTS INC.: THE ATHLETIC DEPARTMENT VS. THE UNIVERSITY (1991); Tanyon T. Lynch, *Quid Pro Quo: Restoring Educational Primacy to College Basketball*, 12 MARQ. SPORTS L. REV. 595 (2002); Frank J. Ferraro, *When Athletics Engulfs Academics: Violations Committed by University of Minnesota Basketball*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 13 (2003).
[8] *See, e.g.*, Gregory M. Travalio, *Values and Schizophrenia In Intercollegiate Athletics*, 20 CAP. U. L. REV. 587 (1991).
[9] Neff, *supra* note 7, at 13.

Developmental Studies Program, which was essentially a remedial program characterized as "a warehouse for the school's academically unqualified athletes."[10]

The program was a well-intentioned outgrowth of affirmative action policies designed to make a university education available to students from disadvantaged backgrounds. The courses were designed to teach basic skills such as reading and writing, but they did not count toward a degree. Students ordinarily had four chances to pass each remedial course. If they achieved a "C" or better and could pass a basic skills test, they were allowed to enroll in regular university courses. If they failed after four attempts, they were supposed to be dismissed from the university.[11]

In August, 1982, Dr. Kemp was fired after several philosophical disagreements with her supervisors.[12] In 1986, claiming she was dismissed from her job for speaking out against preferential academic treatment she felt athletes were receiving in the program, Kemp filed suit against the university.[13] She cited that Leroy Ervin, her supervisor, told her to have the grades of six athletes changed from "F" to Incomplete when they were actually scheduled for dismissal from the university. Upon her refusal to do so, Ervin allegedly asked Kemp, "Who do you think is more important to this university, you or a very prominent basketball player?"[14] The conflict then apparently culminated in December 1981, when Virginia Trotter, another supervisor, allowed nine football players to "exit" from the program to the regular university curriculum, despite the fact that they had all failed their fourth and final quarter in English. The players went on to remain eligible for and consequently play in the 1982 Sugar Bowl.[15]

At trial, Trotter defended her actions, saying there had been no wrongdoing. While admitting that athletes did receive preferential treatment, she said that in this particular situation she felt "they deserved an opportunity because of the work they had done."[16] She further testified that she "felt they had made great progress."[17]

Kemp's concern was that the athletes were getting the message that they did not have to work for their promotions. She felt it was important for a student-athlete to realize that if he did not try, then he could not remain at UGA. Kemp realized that with this move the administration had practically announced to the athletes that they would be taken care of and that they did not have to do the work. Particularly troubling for Kemp was that at the same time, a failing non-athlete had been dismissed from the university under the same circumstances.[18]

Throughout the trial, various University of Georgia officials tried to justify the actions taken in the Developmental Studies Program. Athletic Director and Head Football Coach, Vince Dooley, admitted during the trial that, "Because of the similar approaches by other institutions, we were placed in a position of offering scholarship aid to student-athletes who were very, very

[10] *Id*.
[11] William Nack, *This Case Was One For The Books*, SPORTS ILLUSTRATED, Feb. 24, 1986, at 34, *available at* http://cnnsi.com/vault/article/magazine/MAG1064531/index.htm.
[12] Kemp v. Ervin, 651 F. Supp. 495, 499 (N.D.Ga.1986).
[13] *Id*. at 495.
[14] Nack, *supra* note 11, at 34.
[15] Nack, *supra* note 11, at 34 (The University of Georgia reportedly made $1 million for its 1982 Sugar Bowl appearance.).
[16] Neff, *supra* note 7, at 13.
[17] *Id*.
[18] Nack, *supra* note 11, at 34.

poorly academically prepared. It became obvious that we had to take some numbers that were high risk."[19] UGA President, Fred Davison, tried to justify the school's recruiting practices by saying, "We have to compete [with rival schools] on a level playing field."[20] When asked if the standards were lower for "revenue-producing" athletes[21], Davison responded, "If you want to ask me if they have utilitarian effect to the university, certainly they do."[22]

The jury determined that Kemp's First Amendment right to free speech was violated in UGA's employment actions against her and awarded Kemp a surprising $2.5 million in compensatory and punitive damages.[23] Though the judge reduced the award to $680,000 calling it "shockingly excessive…[and] oppressive,"[24] the parties settled out of court for $1.08 million rather than face a new trial.[25]

Still, commentators note that the enormity of the jury award is significant because it reflected a general disdain for the hypocrisy of programs like UGA's. These programs profess to respond to a national mandate to increase educational opportunities for the disadvantaged and minorities, but in reality they allow athletes to retain athletic eligibility so they can continue to produce revenue for their institutions but receive little educational value for themselves.[26] UGA math education professor Ed Davis deplored the policy of admitting the ill-equipped in the first place: "It's too much to ask. They realize they're not going to make it; it's a very negative experience…a teacher spoke out on academic values, and won against the big administrative figures. It might give some leverage to bring about reforms."[27] Kemp herself, in reaction to the jury award, noted,

> I want to make it clear I didn't do this for the money. If it doesn't cause reforms nationwide, it's all been for nothing. I hope athletic directors will realize they can no longer exploit athletes. Athletes are being harmed; they're not better off. They come in expecting to make the pros and earn a diploma. Most of them do neither.[28]

As perhaps an exclamation point to the pervasive attitude among academic administrators attempting to justify so-called preferential treatment for athletes, Hale Almand, attorney for Ervin and Trotter, stated the following in his opening argument: "We may not make a university student out of [an athlete] but if we can just teach them to read and write then maybe he can work for the post office instead of being a garbage man when he is through with his academic career."[29] The statement drew fire from many, yet the sentiment was echoed in a final statement by President

[19] Neff, *supra* note 7, at 13.
[20] *Id*.
[21] *See generally*, Allen L. Sack & Ellen J. Staurowsky, College Athletes For Hire: The Evolution and Legacy of the NCAA's Amateur Myth (1998) (Sports such as football and men's basketball are referred to as "revenue-producing" because they make money for the school).
[22] Neff, *supra* note 7, at 13.
[23] *Kemp*, 651 F. Supp. at 498.
[24] *Id*. at 508.
[25] Miron Bishop, *For The Record: Mileposts*, SPORTS ILLUSTRATED, May 19, 1986, at 139.
[26] Nack, *supra* note 11, at 34.
[27] *Id*.
[28] *Id*.
[29] Kirk Victor, *Armchair Quarterbacks Tough On Georgia*, LEGAL TIMES, April 21, 1986, at 3.

Davison: "If they leave us able to read, write, and communicate better, we simply have not done them any damage."[30]

Also troubling was that Almand spent most of his opening statement discussing money as a justification for UGA's actions, as well as the claim that "everyone else was doing it and if [UGA] stopped, it would be like unilateral disarmament."[31] The overall tone was an unapologetic one, and indeed the question lingers whether merely not doing a student-athlete "any damage" is consistent with a university's academic mission.

It is questionable whether the disdain reflected in the jury award survives today, particularly as one traces the subsequent legal activity. This case stands as one of the very few where student-athletes' educational opportunities were even considered, let alone addressed to some degree. More common is the glaring lack of any decisions supporting student-athletes who take the initiative to seek compensation from the institutions that arguably did not provide them an adequate educational opportunity, particularly while the student-athletes performed on and off the field or court, generating revenue for that institution. Moreover, since few of these types of cases make it past the summary judgment stage, it is difficult to surmise where today's society stands on such issues, how the various parties are affected, who should ultimately be held accountable, and under what legal theories plaintiffs should proceed.

III. AFFECTED INTERESTS

a. Student-Athletes

The student-athlete is perhaps most affected by this potentially exploitative relationship with his university. However, the problems associated with this relationship arguably begin much earlier in the student-athlete's academic career. Prior to matriculation, the average student-athlete has spent a great deal of the time during his secondary education being lauded for his athletic talent, and many are just "passed on" from one grade to the next without ever having actually earned the requisite passing grades. This often happens because a misguided administrator, teacher, or coach feels that athletics is the student-athlete's "best shot" at going to college; he must progress through his secondary educational path in order to succeed. This assumption presupposes that college is indeed a road to success, where it may well not be for the student-athlete who enters college so ill-equipped to compete academically that he is almost certainly doomed to fail.

Furthermore, while the student-athlete entering college has generally met the minimum National Collegiate Athletic Association ("NCAA")[32] academic requirements for financial aid and athletic eligibility, he most often is admitted to the university through some sort of "special admits" loophole in the admission regulations; were he not an athlete, he would not be qualified academically to attend the university.[33] This often sets up a situation where the student-athlete enters a university curriculum woefully unprepared to meet the academic challenges of college-

[30] *Id*.
[31] *Id*. at 5.
[32] The NCAA is a private, non-profit association of approximately 900 members. All four-year institutions of higher education that meet certain academic requirements are eligible for membership. The NCAA operates pursuant to a constitution and bylaws adopted by the membership at an annual convention. *See also* Chad Baruch, *Technical Foul: The Legality and Wisdom of NCAA Academic Requirements*, 20 LINCOLN L. REV. 71 (1991).
[33] Murray Sperber, *College Sports Inc.: The Athletic Department vs. The University*, 219 (1991).

level studies. Thus, rather than providing an opportunity for the student-athlete who otherwise may not have had such an opportunity, the situation is one that will more likely lead to frustration, academic failure, and the student-athlete's realization that his future successes rely solely on his physical abilities and not on his mental or intellectual skills.

Student-athletes also encounter related problems during the recruitment process. Often a university will use its strong academic reputation as a selling point when it is trying to convince the student-athlete to attend. By promoting itself in this manner, the university is arguably sending a hypocritical message to the student-athlete that although the university has a stellar academic reputation, the student-athlete may perhaps never have genuine access to the faculty and other academic resources that combine to uphold that reputation.[34] Somewhere in this hypocrisy, the student-athlete ought to be able to pinpoint not only what he can expect to give to the university, but also what the university must give him in return for his athletic performance. The university should recognize that as it reassures the student-athlete of his importance to the institution and of the expectation of future success, that part of the student-athlete's expectation of that success may include academic achievements along with athletic successes.

Once admitted to the university, the student-athlete faces a number of obstacles to being able to take advantage of the academics promised to him during recruitment. Indeed, the most basic of academic decisions, one's course selections, is often made for the student-athlete by his "academic advisors" who are oftentimes active members of the athletic department.[35] This sets up a potential conflict of interest because the advisors have a vested interest in maintaining the student-athlete's eligibility. The trend has been to place him in courses that he can easily pass – which often means in courses that will neither challenge him nor help him to progress toward a marketable degree.[36] This arrangement perpetuates the problem of dependency often begun in high school or earlier, where the student-athlete becomes accustomed to other people taking care of his academic needs.

Realistically, given this pattern of dependence, there is no reason to expect a student-athlete to come into a university setting and suddenly be able to take control of his own academic progress or accept responsibility for his own academic needs. He has every reason to believe that someone else will set his academic track, as it has always been before; for a university to assume otherwise is both unrealistic and naïve.

Another obstacle that a student-athlete might face is placement in the "remedial program." Athletic departments are notorious for pigeonholing a student-athlete in such a program and allowing him to continue to retake the same courses, all while maintaining his eligibility. Arguably, the university is exploiting his athletic talents at the expense of his intellectual needs, as *Kemp* so vividly illustrated.[37] NCAA regulations address this problem by requiring the student-athlete to show adequate progress toward a degree,[38] but there are ways around the regulations, such as declaring new major degree programs through physical education departments.[39]

[34] *Id*. at 229-239.
[35] *Id*. at 278-279.
[36] *Id*. at 279.
[37] *See* Kemp, 651 F. Supp. 495
[38] NCAA By-Laws, reprinted in National Collegiate Athletic Association 1992-93 NCAA Manual, art. 14.4.
[39] Sperber, *supra* note 33, at 283.

Coaches and athletic administrators can also add to the difficulty student-athletes face. When a practice or other type of mandatory team event conflicts with a class or lab, the student-athlete must make a choice between athletics and academics. By giving a student-athlete such an ultimatum, the university is sending a clear message that athletic success sometimes comes at the expense of the student-athlete's academic endeavors. Indeed, many believe that the student-athlete himself is not even genuinely interested in obtaining an education, but is solely at the university to train for the professional ranks in his chosen sport.[40] Most damaging about this attitude is the fact that it offers the student-athlete an excuse for low levels of academic success, and worse, it provides no incentive for the student-athlete who truly wants to get a quality college education to even try.

More troubling still is the extent to which this attitude about student-athletes pervades our society. An insightful illustration comes from *Hall v. University of Minnesota*.[41] U.S. District Court Judge Lord, in a rare decision favoring the student-athlete, stated the following:

> "The plaintiff will probably never attain a degree…The plaintiff was a highly recruited basketball player out of high school who was recruited to come to the University of Minnesota to be a basketball player and not a scholar. His academic record reflects that he has lived up to those expectations…The plaintiff and his fellow athletes were never recruited on the basis of scholarship and it was never envisioned that they would be on the Dean's List…This court is not saying that athletes are incapable of scholarship; however they are given little incentive to be scholars and few persons care how the student-athlete performs academically, including many of the athletes themselves. The exceptionally talented student-athlete is led to perceive the…athletic programs as farm teams and proving grounds for professional sports leagues. It may well be true that a good academic program for the athlete is made virtually impossible by the demands of their sport at the college level."[42]

As long as society reinforces this belief of academic incompetence in its student-athletes, they will continue to live up to those low expectations. Perhaps university administrators ought to reconsider the message, choosing instead to challenge the student-athlete to not only take more responsibility for his own educational path, but also to believe that both academic and athletic success can coexist in the university setting. Furthermore, perhaps society should hold universities responsible for offering the same educational opportunities to all students, which is consistent with the university mission.

b. Universities

As a measure of a university's commitment to its academic mission vis-à-vis student-athletes, a great deal of attention has recently been focused on graduation rates for athletes, particularly those from Division I schools.[43] Low graduation rates have attracted so much attention that in 1991, the NCAA revised and expanded its requirements regarding disclosure of

[40] *See, e.g.*, Sperber, *supra* note 33, at 304.
[41] Hall v. Univ. of Minn., 530 F. Supp. 104 (Dist.Minn.1982)(finding that the university arbitrarily denied Hall access to a degree program ordering the university to admit Hall into a degree program and declare him eligible to compete in intercollegiate varsity basketball competition his senior season).
[42] *Id*. at 109.
[43] Division I represents the larger schools in the NCAA. There are various requirements for attendance numbers, number of sports sponsored, competition levels, etc.

admissions and graduation-rate information.[44] Currently, schools must disclose: (1) the total number of entering student-athletes who will receive athletically-related financial aid; (2) the total number of full-time, degree-seeking undergraduate students at the institution; (3) the average grade point average ("GPA") used to admit athletes; (4) the average standardized test scores; (5) the number of athletes admitted to each specific college or department; (6) extensive graduation rates for all students and separately for student-athletes; and (7) information about the specific baccalaureate degree programs of study pursued by the student-athletes included in the graduation rate information, who graduated, and the number who obtained a degree in each of these programs.[45]

Many commentators believe that the value of student-athlete graduation-rate information is that it provides revealing evidence as to the compromise of academic integrity on university campuses.[46] A 1991 Chronicle of Higher Education survey examined the graduation rates of student-athletes and non-athletes at 262 of 295 NCAA Division I universities.[47] Although the survey revealed overall higher graduation rates for student-athletes, it confirmed that student-athletes who compete in revenue-producing sports at the Division I level lag behind graduation rates for both other student-athletes and non-athletes.[48] The relatively low graduation rates among student-athletes should not be astounding, especially when one considers that universities routinely admit student-athletes with low academic predictors, and then fail to provide the proper support services necessary for these student-athletes to obtain an adequate education over their collegiate careers.[49] A 1988 NCAA report revealed that basketball and football players spend approximately thirty hours per week on preparation/competition for their sports, but only twenty-five hours per week on academic work.[50] James Delaney, then Commissioner of the Big Ten Conference, stated in 1989: "[T]oo often we're taking students who are unprepared vis-à-vis the rest of the student body, and we're putting them on T.V., we're putting them on the road, and when they fail, we act like [we're surprised]."[51]

When attacked about low academic achievement by their student-athletes, universities often respond that it is not their job to teach students to read and to write, and that high schools

[44] NCAA By-laws, *supra* note 37, art.13.3.1.1.
[45] *See generally*, Nat'l Collegiate Athletic Ass'n, 1992-93 NCAA Division 1 Manual (1992).
[46] Davis, *An Absence of Good Faith*, *supra* note 1, at 753.
[47] Douglas Lederman, *College Athletes Graduate at Higher Rates than Other Students, but Men's Basketball Players Lag Far Behind*, CHRON. HIGHER EDUC. Mar. 27, 1991, at A1, col. 2.
[48] *Id*. at col. 4; A38, col. 2(The results of the survey also suggest that graduation rates for student-athletes are significantly affected by the nature of the student-athlete's sport, the type of institution a student-athlete attends, a student-athlete's gender, and the level of competition. For instance, graduation rates may be significantly higher for student-athletes who are female, attend an Ivy League school (where athletes must meet the same entrance requirements as the regular student body population), and participate in a sport that involves minimal travel (resulting in fewer academic absences). The fact that a student-athlete attends an Ivy League school versus a school in a more competitive athletic conference will also impact graduation rates because the student-athlete will, on average, be required to spend less time and energy on his athletic endeavors and consequently will have more time to devote to his academic pursuits.).
[49] Davis, *supra* note 1, at 756.
[50] Douglas Lederman, *Many College Athletes Favor Limits on the Time They Spend on Sports*, CHRON. HIGHER EDUC., Sept. 20, 1989, at A44, col. 1.
[51] Douglas Lederman, *New Commissioner of the Big Ten Defies the Stereotypes as He Criticizes and Defends Intercollegiate Sports*, CHRON. HIGHER EDUC., June 28, 1989, at A25, col. 1.

and junior high schools are not providing these students with a proper academic base.[52] While this may be a legitimate argument, it is hard to sympathize with a university that argues the above on the one hand, yet continues to recruit and admit functionally illiterate student-athletes for its own gain, paying little attention to the academic problems or progress of the student-athlete himself.

Universities are also routinely criticized for allowing, even encouraging, their student-athletes to take academically easier courses to maintain their academic eligibility to compete in athletics.[53] Such encouragement leads the student-athlete toward no meaningful academic end and leaves him unprepared for a career in today's competitive marketplace.[54]

It is apparent that various interests are affected by this often abusive and exploitative relationship between a university and its student-athletes. However, the student-athletes themselves, coupled with the universities, appear to be not only the primary groups affected by the negative impact of such a relationship, but they also appear to be the entities in the best position to effectuate change within that relationship. This change could take place in any number of ways. One such way is through litigation based on an educational malpractice theory.

IV. EDUCATIONAL MALPRACTICE THEORY

The judiciary has expressed concern about getting involved in the educational process.[55] The degree to which the courts should be involved in the regulation of education has been one of the primary public policy reasons recited when courts refuse to hear student-athletes' claims.[56]

In *Donohue v. Copiague Union Free School District*,[57] a leading case for educational malpractice claims, the New York Supreme Court concluded that the judicial system was an inappropriate forum in which to test the efficacy of educational programs and pedagogical methods.[58] On appeal, the New York Court of Appeals, , affirmed the decision, holding that by recognizing the cause of action, the trial court would have blatantly interfered with the state school administrative agencies' responsibilities.[59] Subsequent courts have concurred with the *Donohue* decision that it is not within the judicial function to evaluate conflicting educational theories. In *Hoffman v. Board of Education of New York*,[60] the New York Court of Appeals "reasoned that it should not evaluate educational policies, and thereby substitute its judgment or a jury's judgment, for that of professional educators."[61]

[52] Thomas M. Dixon, Note, *Achieving Educational Opportunity Through Freshman Ineligibility and Coaching Selection: Key Elements in the NCAA Battle for Academic Integrity of Intercollegiate Athletics*, 14 J. C. & U. L. 383 (1987).
[53] Sperber, *supra* note 33, at 278-80.
[54] Davis, *supra* note 1, at 757 n.81.
[55] Laurie S. Jamieson, *Educational Malpractice: A Lesson In Professional Accountability*, 32 B.C. L. Rev. 899, 934 (1991)
[56] *Id.* at 935; *see also Hall*, 530 F. Supp. at 108.
[57] 64 A.D.2d 29, 407 N.Y.S.2d 874 (App. Div. 1978), *aff'd*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).
[58] Jamieson, *supra* note 55, at 935.
[59] *Id*.
[60] 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979).
[61] Jamieson, *supra* note 55, at 935.

However, professional malpractice claims have been routinely recognized when a professional demonstrates misconduct or an unreasonable lack of skill.[62] A malpractice claim requires that the professional owe the plaintiff a legal duty of care, that the professional breach that duty, and that the breach be the proximate cause of an injury to the plaintiff.[63] Although most of the decided cases of professional malpractice have dealt with medical personnel, courts have applied that theory to other professionals including lawyers, architects, engineers, and clergy.[64] Therefore, those individuals who hold themselves out to the public as possessing skill or knowledge beyond that of an ordinary person are considered to be professionals. As professionals, they are held to a higher standard of care in their activities than the ordinary person. Consequently, if they commit acts that a trier of fact could characterize as negligent or in conflict with common practice, courts can find them liable for malpractice.[65]

Educational malpractice refers to complaints against academics and academic institutions alleging professional misconduct analogous to medical and legal malpractice.[66] Educational malpractice is premised on the notion that academic institutions have a legal obligation to instruct students in such a manner as to import a minimum level of competence in basic subjects.[67] Lawsuits by student-athletes are premised on a similar theory, as they attempt to show the alleged failure of universities to provide an adequate education for its student-athletes.[68] In such lawsuits, student-athletes argue that institutional conduct, both passive and affirmative, interferes with their ability to make academic progress and acquire useful skills.[69]

The seminal case in the area of educational malpractice is *Peter W. v. San Francisco Unified School District*.[70] In *Peter W.*, the plaintiff, a functionally illiterate high school graduate, alleged that the defendant's negligent performance of its duty to provide him with adequate instruction and counseling led to the deprivation of such basic academic skills as reading and writing.[71] The plaintiff also claimed that a duty of care arose from the defendant's role as instructor and the recognized special relationship between students and their teachers.[72] The court focused on the existence of a legally recognizable duty of care, and based on broad issues of public policy, the court determined that the defendant did not owe such a duty.[73]

The *Peter W.* court then identified the relevant public policy concerns that it had balanced in determining not to recognize a legal duty of care and thus a new tort claim for educational malpractice.[74] Among these considerations were education's social utility, a court's inability to

[62] *Id*. at 903.
[63] W. Keeton, *Prosser & Keeton on the Law of Torts*, 832 (5th Ed. 1984).
[64] Jamieson, *supra* note 55, at 904.
[65] *Id*.
[66] Kimberly A. Wilkins, Note, *Educational Malpractice: A Cause of Action in Need of a Call For Action*, 22 VAL. L. REV. 427, 429 (1988).
[67] Richard Funston, *Educational Malpractice: A Cause of Action in Search of a Theory*, 18 SAN DIEGO L. REV. 743, 746-47 (1981)
[68] Timothy Davis, *Examining Educational Malpractice Jurisprudence: Should a Cause of Action Be Created For Student-Athletes?*, 69 DENV. L. REV. 57 (1992).
[69] *Id*.
[70] 131 Cal.Rptr. 854 (Cal.Ct.App. 1976).
[71] *Id*. at 856.
[72] *Id*.
[73] *Id*. at 861.
[74] *Id*. at 857.

discern a workable rule of care for educators or to prove causation and injury, administrative considerations of feigned claims, and the prospect of limitless liability.[75]

Three years after *Peter W.*, the New York Court of Appeals considered the *Donohue* case.[76] Ultimately reasoning that the public policy concern over judicial interference in state educational policy-making was dispositive of the issue, the *Donohue* court established that New York would not recognize a cause of action for educational malpractice.[77] The court focused on the existence of a duty of care in the defendant and a corresponding right in the plaintiff.[78] Reasoning, as in *Peter W.*, that judicial recognition of a duty of care depended on public policy principles, the *Donohue* court identified four categories of relevant public policy concerns:[79] (1) a concern about the foreseeability of harm to the students; (2) the degree to which the courts should be involved in the regulation of education; (3) defendants' ability to pay damages; and (4) courts' ability to handle the possible flood of litigation, especially from potentially feigned complaints.[80] The *Donohue* court ultimately decided that no legal duty of care existed between educators to their students.[81]

As mentioned earlier, the *Hoffman* case also illustrates a court's unwillingness to hear an educational malpractice case. However, in *Hoffman*, , the court did not need to consider an educational policy because at issue was a failure to retest a child previously determined to be mentally retarded and placed in special classes.[82] Once retested years after the recommended date, the plaintiff was found to not be mentally retarded. He filed suit alleging negligence in the original testing, in the failure to retest, and damage to his intellectual and emotional well-being, in addition to reducing his ability to find future employment.[83]

Hoffman won at the trial level and the appellate division affirmed based on the school district's failure to retest him.[84] The New York Court of Appeals, however, overturned the judgment, stating that a cause of action for educational malpractice "should not, as a matter of public policy, be entertained by the courts of this state."[85] Three justices dissented, agreeing with the appellate division that the case involved affirmative negligence that was the proximate cause of Hoffman's injuries and that his recovery should stand.[86]

Hoffman exemplifies the rigidity of the courts' refusal to allow claims of educational negligence. In *Hoffman*, the issue was not one of educational policy; no difficult choices or borderline interpretation of educational judgment had to be made. The school district simply

[75] Peter W. v. San Francisco Unified School Dist., 131 Cal.Rptr. at 860.
[76] Jamieson, *supra* note 55, at 908.
[77] *Donohue*, 47 N.Y.2d 440, 444-45, 391 N.E.2d 1352, 1353-54, 418 N.Y.S.2d 375, 377 (1979), *aff'g* 64 A.D.2d 29, 407 N.Y.S.2d 874 (App.Div. 1978).
[78] Jamieson, *supra* note 55, at 909.
[79] *Id*.
[80] *Donohue*, 64 A.D.2d at 33-34, 407 N.Y.S.2d at 877-78.
[81] *Donohue*, 64 A.D.2d at 31, 407 N.Y.S.2d at 876.
[82] *Hoffman*, 49 N.Y.2d at 124, 400 N.E.2d at 319, 424 N.Y.S.2d at 378.
[83] *Id*. at 125, 400 N.E.2d at 319, 424 N.Y.S.2d at 378.
[84] *Id*.
[85] *Id*.
[86] *Id*. at 127, 400 N.E.2d at 321, 424 N.Y.S.2d at 380.

failed to follow through on the recommendation of a testing specialist who was hired specifically for the function of assessing educational needs.[87]

Though the above illustrations demonstrate typical situations constituting educational malpractice claims, over the past few decades, university student-athletes and others affiliated with intercollegiate athletics have also filed a variety of lawsuits alleging educational malpractice.[88]

In *Echols v. Board of Trustees of the California State University and Colleges*,[89] seven former student-athletes at California State University at Los Angeles sued in tort for educational malpractice.[90] The lawsuit did not define the harm in terms of the student-athletes' academic achievement, but rather in terms of a denial of access to university educational services.[91] The student-athletes alleged that they were instructed to receive academic counseling solely from the athletic department coaches and were specifically prohibited from receiving counseling from the usual academic counselors.[92]

The student-athletes also alleged that they were counseled by their coaches to take primarily physical education courses in order to avoid losing their athletic eligibility. Further, the student-athletes alleged that they were instructed to repeat courses they had already passed and to accept passing grades in courses they never attended.[93] The lawsuit was eventually settled before trial with the student-athletes receiving compensation for educational expenses personally incurred, repayment of student loans that they were fraudulently induced to take, a trust fund for future educational expenses, and over $10,000 each in punitive damages.[94]

Another case brought in the 1980s illustrates how athletic exploitation may begin well before the college level.[95] In *Jones v. Williams*,[96] the mother of a Detroit public school student claimed that after the school had diagnosed her son as having learning disabilities and placed him in a special school, the district removed him and enrolled him in a regular junior high and high school to take advantage of his basketball talent.[97] Jones never made it to college because he suffered a mental breakdown while attending junior college, which he attributed to his being teased about his illiteracy.[98] The court denied the suit based on sovereign immunity; therefore, Jones received no compensation for his claims.[99]

Courts presented with educational malpractice claims against colleges and universities have followed the approach taken by courts confronted with this same issue at the primary and secondary levels. In so doing, these courts have not made an independent assessment of whether

[87] Edmund J. Sherman, *Good Sports, Bad Sports: The District Court Abandons College Athletes In Ross v. Creighton University*, 11 LOY. ENT. L. J. 657, 669 (1991).
[88] *Id*. at 670.
[89] No. C-266, 777 (Cal.Super.Ct., L.A.County, June 7, 1984) (discussed in Derek Quinn Johnson, *Educating Misguided Student Athletes: An Application of Contract Theory*, 85 COLUM. L. REV. 96 (1985)).
[90] Johnson, *supra* note 89, at 110.
[91] *Id*.
[92] *Id*.
[93] *Id*.
[94] Johnson, *supra* note 89, at 100 n.88.
[95] Sherman, *supra* note 87, at 671.
[96] 172 Mich.App. 167, 431 N.W.2d 419 (Mich. Ct. App. 1988).
[97] *Id*. at 170, 431 N.W.2d at 422.
[98] *Id*.
[99] *Id*. at 172, 431 N.W.2d at 422.

the differences in the factual circumstances warrant reaching a different result.[100] Moreover, courts have not undertaken a critical analysis of the soundness of the policies on which educational malpractice claims have been denied.[101]

A federal district court's decision in *Ross v. Creighton University*[102] is perhaps the most important example of the judiciary's refusal to create a tort precedent for educational malpractice, despite evidence plainly showing that a student-athlete attended school and played intercollegiate basketball for four years, regardless of the fact that he had academic scores that would not have allowed him to be admitted as a regular student.[103] Kevin Ross was an outstanding high school basketball player who in 1978 was recruited by and received a scholarship from Creighton University.[104] Although his ACT scores were extraordinarily below Creighton's average that year and despite his reading skills being well below the junior high level, Ross attended Creighton for four years until his basketball eligibility expired.[105]

Not only did Ross not graduate, he finished with a "D" average in courses such as "ceramics, marksmanship, and the respective theories of basketball, track & field, and football."[106] After his eligibility expired, in order to get Ross remedial education, Creighton placed him in the renowned Westside Preparatory School in Chicago, where he attended classes with children reading at elementary levels.[107] While Creighton paid for Ross to get the help necessary for him to graduate from Westside Prep and achieve a high school education, it terminated its commitment to Ross's further education at that point.[108] Ross experienced psychological problems after a failed attempt at gaining a college education at another institution, stopping just short of suicide.[109]

As a result, Ross sued Creighton University for "negligent admission," a hybrid of negligent infliction of emotional distress and educational malpractice, "intertwin[ing] to form the novel tort of 'negligence in recruiting and repeatedly re-enrolling an athlete utterly incapable – without substantial tutoring and other support – of performing the academic work required to make educational progress,' exacerbated by the enrollment of plaintiff in a school with children half his age and size."[110] Finding against Ross, the district court held that he had failed to prove any duty existed under Illinois law requiring a university to "non-negligently admit, counsel and educate students who may require special attention," and it gave great weight to its conclusion that creating such a duty would be bad policy.[111]

In denying Ross' educational malpractice claim, the court focused on the duty and proximate cause elements of the negligence analysis. The court stated that imposing a duty of care to educate would put too much strain on educators; it was practically impossible to prove a teacher's alleged malpractice, especially with the various factors involved in education at the

[100] Davis, *Examining Educational Malpractice*, *supra* note 68, at 59.
[101] *Id*.
[102] 740 F.Supp. 1319 (N.D. Ill. 1990).
[103] *Id*. at 1322.
[104] *Id*.
[105] *Ross*, 740 F.Supp. at 1319, 1322 (N.D. Ill. 1990).
[106] *Id*.
[107] Curry, *Suing For a Second Chance to Start Over*, N.Y.TIMES, Jan. 30, 1990, Sect. B, at 9, col. 2.
[108] Menaker, *Casualty of a Failed System*, N.Y.TIMES, Oct. 3, 1982, Sect. 5, at 1, col. 1.
[109] Robbins, *Education: The Saga of Kevin Ross Puts the School's Role in Teaching Under Legal Scrutiny*, L.A.TIMES, Apr. 12, 1992, Sect. C, at 3, col. 1.
[110] *Ross*, 740 F.Supp. at 1322-23.
[111] *Id*. at 1328, 1331 (*quoting in part* Plaintiff's Response at 11).

college level.[112] Ultimately, the *Ross* court found that both elements failed to meet the foreseeability test of tort analysis, that the potential deluge of litigation proved the disutility of the proposed remedy, and that no new and unique tort action for Ross should be crafted.[113] Ross had argued that because his case was "so unique and egregious" the court should allow a new cause of action created specifically for student-athletes whose academic performance would not have qualified them to be students had they not been athletes.[114] In Ross's view, "The present case does not question classroom methodology or the competence of instruction. Rather the issue is whether plaintiff should ever have been admitted to Creighton and whether, once admitted, Creighton had a duty to truly educate plaintiff and not simply to maintain his eligibility for basketball…."[115]

One final case of importance is *Jackson v. Drake University*.[116] Terrell Jackson was recruited to play basketball at Drake University, and during the recruiting process, head basketball coach Tom Abatemarco emphasized the high quality of education at the university.[117] Though Drake provided Jackson with a tutor, Jackson's coaches scheduled basketball practices which interfered with Jackson's allotted study time and tutoring schedule, forcing him to make a choice between the two.[118] Jackson chose to attend practices under the threat of pulling his scholarship if he didn't.[119] The coaching staff also prepared term papers for Jackson, which he refused to turn in, and recommended that Jackson take certain "easy" courses in order to maintain his athletic eligibility, which he also refused to do.[120]

Jackson ultimately quit the team and sued the university because he felt that by recruiting him to attend Drake, the university "undertook a duty to [Jackson] to provide an atmosphere conducive to academic achievement."[121] Jackson further argued that Drake breached this duty by requiring him to enroll in easy courses in order to remain academically eligible, but without regard for the courses' academic worth or his progress toward an undergraduate degree.[122] Jackson contended that the scheduling of practices that interfered with his study and tutorial time and threats to take away his scholarship if he did not attend such practices also constituted a breach of Drake's duty to Jackson.[123] Drake's only argument in response was that Jackson's claims amounted to educational malpractice, which was not recognized under Iowa law.[124] In finding for Drake, the court cited *Ross*[125] and stated that the policy considerations articulated therein were important considerations here as well.[126] The court also noted that "[t]hough Jackson's claim does not specifically challenge the 'academic' freedom of Drake, in effect, it

[112] *Id*. at 1328.
[113] *Id*. at 1329-30.
[114] *Id*. at 1330.
[115] *Ross*, 740 F.Supp. at 1330 (*quoting* Plaintiff's Response to Defendant's Motion to Dismiss at 10).
[116] 778 F.Supp. 1490 (S.D. Iowa 1992).
[117] *Id*. at 1492.
[118] *Id*.
[119] *Id*.
[120] *Id*.
[121] *Id*. at 1493.
[122] *Jackson*, 778 F.Supp. at 1493 (S.D. Iowa 1992).
[123] *Id*. at 1493.
[124] *Id*.
[125] *Ross v. Creighton University*, 740 F.Supp. 1319 (1990).
[126] *Jackson*, 778 F.Supp. at 1494.

does ask the court to pass judgment on the manner in which Drake runs its men's basketball program, a program which does have an academic component."[127]

The *Jackson* court did, however, initially decide that the negligent misrepresentation and fraud claims should at least survive a summary judgment motion because Jackson had designated specific facts that tended to show a genuine issue for trial on these counts, and because the court found that the public policy considerations discussed above did not weigh as heavily in favor of precluding these claims.[128] The court did ultimately find for Drake as to these issues as well.[129] Nevertheless, with the initial decision, the court slightly opened the door for yet another possible avenue of recovery for student-athletes' claims of educational malpractice against their universities.

V. POLICY CONSIDERATIONS

Courts considering educational malpractice claims point to a variety of public policy considerations as they consistently rule against former student plaintiffs. One such policy is the inability to create a standard of care. The judiciary's concern over this difficulty may be somewhat justified because the nature of the educational process is amorphous and complex; there is no general consensus as to pedagogical approaches or philosophical arguments as to the appropriate content of educational instruction.[130] However, notwithstanding the merits of such judicial concern, courts deciding educational malpractice claims have not yet attempted to make an in-depth analysis of what they have come to consider the inherently impossible task of deciding upon a standard of care by which to measure an educator's breach of duty.[131]

Additionally, some dissenters have asserted that plaintiffs could prove an educational standard of care at trial in the same manner as other professional standards of conduct are proven.[132] Dissenters suggest that education is no different from medicine or law in that each profession encompasses differing theories of conduct, and requires professional judgment.[133] They have concluded that educators, as professionals, owe a duty of care to their students, and that a standard of care is possible to establish in light of currently available empirical evidence on pedagogical methods.[134] As an alternative, some have suggested that courts can find a duty and standard of care for educators in state constitutional or legislative language.[135] *B.M. v. State*[136] provides one example by concluding that Article X, which mandates an educational system that would develop equally the full potential of the state's students, thereby creating a mandatory standard of care for public educators, combined with state legislation requiring mandatory school attendance and sufficient guidance on how to administer special education programs, sufficiently defines a duty of care that educators owed to special education students.[137] While an extremely

[127] *Id*.
[128] *Id*. at 1495.
[129] *Id*. at 1496.
[130] Funston, *supra* note 67, at 780.
[131] William F. Foster, *Educational Malpractice: A Tort For the Untaught?*, 19 U. BRIT. COLUM. L. REV. 161, 190 (1985).
[132] *See* Hunter v. Board of Educ. Of Montgomery County, 439 A.2d 582, 589 (Md. 1982) (Davidson, J., concurring in part and dissenting in part).
[133] *Id*. at 588-589.
[134] *See* Ratner, *A New Legal Duty For Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 800-09 (1985).
[135] *See, e.g.*, Rubino v. Carlsbad Mun. School Dist., 106 N.M. 446, 448-449, 744 P.2d 919, 921 (1987).
[136] 200 Mont. 58, 649 P.2d 425 (1982).
[137] *Id*. at 63, 649 P.2d at 427.

narrow holding, it suggests that such a duty can be articulated and therefore stand as the basis for educational malpractice suits.

In sum, at least two viable arguments appear to be available to courts struggling to determine if a workable standard of care for educators can be defined when considering educational malpractice claims. Therefore, the prevailing public policy argument that it is impossible to define such a standard of care may be weakening may exist solely for the misguided desire of the judiciary to protect educators from unreasonable demands and expectations from their students.

As mentioned earlier, another important policy concern that the judiciary consistently cites in educational malpractice cases is the perceived difficulty in establishing causation. Proof of causation in educational malpractice claims may be extremely difficult in all but the most egregious cases, but that does not necessarily mean that causation can never be proven; therefore it should not support a presumption of impossibility. Rather, as one commentator has noted, the difficulty in proving causation will curb the floodgates of litigation because the proximate cause requirement serves to help distinguish between legitimate and illegitimate claims and consequently, restrain the latter.[138]

Additionally, some courts have concluded that causation is not impossible to prove and should be submitted to the trier of fact for decision at trial. For example, in *Donohue*, the New York Court of Appeals stated that although causation in the educational context may be difficult to prove, it assumes too much to conclude that it can never be established.[139] Furthermore, in *B.M. v. State*, Montana's highest court concluded that the questions of breach of a duty of care and resulting causation were material questions of fact for trial.[140] And, in support of the above conclusions, one commentator notes that medical malpractice actions raise troublesome causation questions, but that controversy does not shield physicians from liability arising from their misconduct.[141]

In sum, attempts to prove causation in educational malpractice actions do pose certain difficulties that could bar recovery. However, these difficulties should not be allowed to masquerade as a rationale for adopting a broad rule of non-liability because that in turn allows courts to conveniently dispose of such actions without assessing the interests of the alleged victims.[142] This rationale that courts have latched on to effectively precludes a case-by-case analysis of educational malpractice claims and consequently may bar recovery by a student who could otherwise establish the requisite causation. However, the judiciary may view this rationale as an important protection for educators as well as a convenient blockade to increased litigation and the time, administrative, and financial demands that would necessarily accompany more lawsuits.

The potential imposition of unlimited liability on school systems has also been an oft cited policy consideration in educational malpractice actions.[143] Courts have stated that recognition of such a cause of action would expose both courts and defendants to disaffected

[138] Johnny C. Parker, *Educational Malpractice: A Tort Is Born*, 39 CLEV. ST. L. REV. 319 (1991).
[139] *Donohue*, 47 N.Y.2d 440, 443, 391 N.E.2d 1352, 1353-54, 418 N.Y.S.2d 375, 377 (1979).
[140] 200 Mont. 58, 60, 649 P.2d 425, 426 (1982).
[141] Robert H. Jerry, *Recovery In Tort For Educational Malpractice: Problems of Theory and Policy*, 29 KAN. L. REV. 195, 203 (1981).
[142] Foster, *supra* note 131, at 191.
[143] Funston, *supra* note 67, at 793.

students' innumerable real or feigned tort claims,[144] and some courts have concluded that recognition would ultimately burden society as a whole in terms of time and money.[145] However, critics have successfully argued that such fears are unwarranted for a variety of reasons, such as justice should not be denied and wrongs should not go uncorrected simply because of a potential increase in litigation,[146] and that the difficulty in establishing a standard of care, proximate cause and resulting legal injuries would itself act as a built-in check on this potential flood of litigation.[147]

Also cited as public policy considerations, though to a lesser extent, is the difficulty in determining the alleged educational injury, presumed judicial incompetence, and the question as to whether professional malpractice can even exist if education is not classified as a profession[148]. As for the alleged injury, courts have been divided on this issue. Some have noted, though largely in dissent, that courts have historically recognized mental and emotional distress injuries as well as lost earning potential despite the difficulties in assessing such damage. The difficulty in measuring injuries from educational malpractice negligence should not prevent recovery and a viable cause of action should lie for such a tort claim.[149]

Regarding presumed judicial incompetence, courts often point to a longstanding policy of non-interference in matters of education.[150] Courts have consistently mentioned that they feel that it is not within the judicial function to evaluate the conflicting educational theories that necessarily arise in such tort actions, and they feel uncomfortable substituting their judgment, or a jury's, for that of professional educators.[151] One commentator has suggested that "[t]his policy is premised on the belief that courts lack the expertise to formulate workable standards for teaching and learning or to address the types of complex educational issues inevitably involved in educational malpractice suits.[152] However, many counter such judicial arguments by reminding courts that there is routine judicial involvement in the areas of medicine, law, accounting, psychiatry and other professional fields, that courts are routinely willing to intercede in matters requiring assessment of the quality of educational programs and substantive educational issues such as those in desegregation and educational financing, and that such total deference afforded educational practitioners is not afforded any other professional occupation without the availability of a remedy in tort for those injured by such professionals.[153]

And finally, regarding whether education is a profession, Prosser & Keeton define a "professional" as a person who holds himself out to society as having knowledge above and beyond that of ordinary citizens.[154] Some critics of educational malpractice have expressed the sentiment that educators are not professionals because education is not a learned profession, and

[144] *See, e.g., Peter W.*, 60 Cal.App.3d at 825, 131 Cal.Rptr. at 861.
[145] *See, e.g.*, Smith v. Alameda County Social Servs. Agency, 90 Cal.App.3d 929, 941, 153 Cal.Rptr. 712, 719 (Ct.App. 1979).
[146] Terence P. Collingsworth, *Applying Negligence Doctrine to the Teaching Profession*, 11 J. L. & EDUC. 479, 504 (1982).
[147] Jamieson, *supra* note 55, at 919.
[148] *See, e.g.*, Sperber, *supra* note 33, at 304.
[149] *See, e.g., Hunter*, 439 A.2d 582, 589 (Davidson, J., concurring in part and dissenting in part).
[150] *See, e.g., Donohue*, 64 A.D.2d 29, 407 N.Y.S.2d 874 (App.Div.1978), *aff'd*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).
[151] R. Lapchick, *The Rules of The Game: Ethics in College Sport* 22 (1989).
[152] Davis, *Examining Educational Malpractice*, *supra* note 68, at 61.
[153] Alice J. Klein, Note, *Educational Malpractice: Can the Judiciary Remedy the Growing Problem of Functional Illiteracy?*, 13 SUFFOLK U. L. REV. 27, 40 (1979).
[154] Keeton, *supra* note 63, at 164, 186-87.

it does not require trust and confidence in the same manner that the work of a physician or lawyer requires.[155] One commentator even went so far as to assert that teachers are unqualified to be labeled professionals, and yet, so skilled as to be beyond judicial review.[156]

Nevertheless, many argue that educators are professionals and should be recognized by the courts as such. For example, Judge Davidson in his *Hunter* dissent argued that public educators, like lawyers and medical personnel, are certified, specially trained individuals who hold themselves out as possessing certain skills and knowledge that ordinary persons do not share.[157] Indeed, one commentator has astutely noted that "courts themselves in considering educational malpractice claims have refused to substitute their judgment for what they call that of professional educators."[158]

In sum, though courts are routinely unwilling to recognize an action for educational malpractice, they are just as often willing to defer to the expertise of so-called professional educators. Therefore, it seems that courts are engaging in a contradiction because they refuse to hold educators to a professional standard of conduct, well-recognized in other professions and arguably definable in the educational realm as well. However, they rationalize such a decision with the explanation that educators are professionals and therefore are much better equipped to decide issues of educational policy and implementation than are the courts.

The various public policy considerations that courts have consistently cited when refusing to recognize the legitimacy of educational malpractice claims do not necessarily make a strong enough rationale to allow dismissal before the plaintiffs are able to at least attempt to overcome the difficult hurdles that proving such a negligence claim creates. This commentator believes that courts hide behind the cloak of educational malpractice because *stare decisis* then allows them to deny the cause of action without further inquiry into the possible merits of an individual case. For judicial economy reasons, and through a misguided desire to shield the educational community from a presumed flood of meritless litigation, courts have decided that they will not hold educators responsible for educational injuries students receive through professional misconduct.

If this trend continues, it will suggest that society has decided that the ultimate price tag of inadequate education is not high enough to force the judiciary to wade through the difficulties inherent in any educational malpractice claim and to assign accountability. Given the current educational climate, one commentator estimated that four out of five young adults cannot summarize the main point of a newspaper article, read a bus schedule, or calculate their change from a restaurant bill.[159] This commentator believes that public pressure to improve the educational system in this country, coupled with the concrete arguments for recognition, will at least call into question the dispositive use of these public policy arguments that courts have relied on in denying educational malpractice claims, potentially allowing the educationally injured plaintiff to have his day in court.

---

[155] Parker, *supra* note 138, at n.86 (*quoting* Halligan, *The Function of Schools, the Status of Teachers, and the Claims of the Handicapped: An Inquiry into Special Education Malpractice*, 45 MO. L. REV. 667-77 (1980)).
[156] Funston, *supra* note 67, at 774, 795.
[157] *Hunter*, 439 A.2d 582, 588-89 (Davidson, J., concurring in part and dissenting in part).
[158] *Jamieson*, *supra* note 55, at 948 (*citing Hoffman*, 49 N.Y.2d 121, 126-27, 400 N.E.2d 317, 320, 424 N.Y.S.2d 376, 379 (1979)).
[159] D. Kearns & D. Doyle, *Winning the Brain Race: A Bold Plan to Make Our Schools Competitive* 1 (1988).

VI. CONCLUSION

A number of cases suggest that student-athletes should not be allowed to bring the unique cause of action against a university for the tort of education malpractice based on an inadequate educational opportunity. However, a closer look at the public policy considerations indicates that the door should at least be open for such a cause of action.

Primarily, a university is in the business of educating its students to the best of its abilities, and though the students must necessarily share in that responsibility, they cannot do so unless the opportunity is made available to them. When universities recruit student-athletes who are obviously and significantly ill-equipped to compete academically at the university level, they are acting in a self-serving manner, exploiting the athletically talented student-athlete, and refusing to honor the duty of care arguably owed the student-athlete by failing to provide adequate access to the educational opportunities available to the student body at large. And, while the tort theory of recovery for these aggrieved student-athletes has not yet succeeded in the courts, it does show some promise as the judiciary continues its public policy debate on both sides of the issue.

The current state of the law strikes no real balance between competing interests because the judiciary has been unwilling to seriously consider the merits of such cases and has been too quick to cite pre-packaged public policy rationales for dismissal. However, the turning point may come when the courts decide how to define what "access to an educational opportunity" really means. At that point, the ability to more objectively determine the duty of care owed suggests that such a claim could be considered without having to second-guess professional judgment or educational policies. Currently, courts do have the discretion to imply a duty of care owed to these student-athletes, thereby allowing them to recover under a tort theory. Arguably, exercising this discretion would involve little review of subjective educational matters, just a consideration of a breach of the predetermined duty of care.

However, until courts hand down such decisions, the student-athlete will remain trapped in a potentially abusive and exploitative relationship with his university. The student may be eager to perform and grow both athletically and academically, but is often counseled that he must concentrate on one to the detriment of the other. Courts must force universities to honor their academic missions and be accountable not only to the student-athletes to which they owe a duty of care, but also to society as a whole, for whom they profess to develop the leaders of tomorrow.