



THE COMMONWEALTH EDUCATIONAL POLICY INSTITUTE

CENTER FOR PUBLIC POLICY - L. DOUGLAS WILDER SCHOOL OF GOVERNMENT AND PUBLIC AFFAIRS

CEPI Education Law Newsletter

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APRIL 2004: Vol. 2-8

STUDENT FAILURE TO LEARN/ACADEMIC DAMAGES ACTIONS

Overview

The current literature in public school law contains several articles dealing with the possibility of a new wave of educational malpractice emerging in the future. DeMitchell and DeMitchell (2003) Is this prediction an accurate one? The purpose of this month's commentary is to explore the possibility of parents, on behalf of their children, bringing a *failure to learn/academic damages tort action* against public school officials. In the today's environment of student academic testing and professional accountability, on what foundation would they build such a claim? What are the implications for educational policy?

Step one of this month's commentary briefly summarizes, extends, and connects two of last year's commentaries (*educational malpractice* and *teacher evaluation*). Next, the discussion looks at the impact of: (1) Debra P. v Turlington (1984), (2) educational finance litigation post-Rodriguez (1973), and (3) *No Child Left Behind Act (NCLB) 2001* which, when linked together with issues of educational malpractice and teacher evaluation and performance assessment, may indicate a foundation upon which future parents might build a *failure to learn/academic damages claim*.

Educational Malpractice. In November of 2003, my commentary focused on a discussion of educational malpractice. "*Educational Malpractice and Academic Damages*" (November, 2003) The central purpose of the piece was threefold. First, to show that the current boundaries of administrator/teacher liability are broader than ever before, as promotion from grade to grade and receipt of a high school diploma are contingent on a student passing a statewide academic competency test. Second, to demonstrate how *accountability* for student academic progress, performance, and achievement now functions as a major criterion in evaluating the professional productivity of administrators and classroom teachers (see, e.g., the Code of Virginia 22.1-292 [2003]). Third, to propose that future administrators and classroom teachers might be subject to court action if students fail to learn what the state requires them to learn, as evidenced by poor performance on statewide academic tests and/or the entire school loses its accreditation. Based on my research I concluded that while plaintiff parents in 1970's malpractice cases (e.g., Peter W. [1976], Donohue [1979]) failed because of the absence of a legally cognizable and enforceable "right of general education students to an appropriate education," a new brand of educational malpractice claim (argued on a *failure to learn/academic damages negligent tort theory*), might be possible.

Teacher Evaluation. In December of 2003, a related commentary entitled “*Teacher Evaluation 2004*” concluded that today’s public school students must be exposed only to classroom teachers who are both *highly qualified* (i.e., academically prepared, fully certified, and endorsed in their subject field), and *competent* (i.e., demonstrate a sustained record of effective classroom performance). As such, the need to *retain quality classroom teachers* and to *remove those who are not* is of utmost importance to every public school system in this nation. To be successful in this endeavor, I stated, local school boards must have in place and consistently implement a continuous process of teacher evaluation (i.e., *performance assessment*). In my opinion, if this goal is not accomplished it adds one more opportunity for parents of students who have failed statewide academic competency tests and/or have failed end of course examinations to successfully argue a *failure to learn/academic damages tort action*.

Debra P. and Procedural Due Process. It is well established that public school students possess both liberty and property interests in their education; and, that these interests fall under the protection of the Fourteenth Amendment’s due process guarantee. Goss v Lopez (1975) In Debra P. v Turlington (1984), the United States Court of Appeals for the Eleventh Circuit applied procedural due process to students required to take and pass statewide competency tests. To treat all students fairly and successfully avoid legal difficulties, the following elements of due process must be present: (1) *adequate and timely notice* of [a] what students are required to learn (some courts have specified 2 to 5 years as adequate notice), [b] the fact that they will be tested on that material, and [c] when they will be tested on the material; (2) *opportunities* to remediate deficiencies; and (3) *opportunities* for parents on behalf of their kids and students themselves to *discuss test results*.

Public School Finance Post-Rodriguez (1973). In the 1980’s and 1990’s state courts were busy hearing challenges to state public school finance systems. Scott v Commonwealth (1994) In these cases judges applied the following standard: a determination was made as to: (1) whether or not a student has a “right to education” under the state’s constitution, (2) the meaning of the specific language of the state constitution’s education clause (e.g., “thorough and efficient education,” “an efficient system to achieve a general diffusion of knowledge,” “a sound basic education,” “a high quality education,” etc.), (3) the magnitude of a state’s constitutional duty to implement and support education of all children of school age, and (4) whether or not the state is meeting its obligation. Dayton (1992) This triggered an overall shift in state legislative policy toward establishing minimal standards to achieve “adequacy of educational opportunity for all children,” and to measure “outputs and not inputs.” It was during this period that state legislatures worked to set in place statewide student academic standards, and to mandate statewide testing programs to measure the effectiveness of these standards. The overall intent in the states was to guarantee that all students of school age throughout the state receive some “benefit for their educational opportunities.” Vacca and Boshier (2003)

Implementation of NCLB. A very comprehensive (700 pages) and time-consuming federal education statute, *NCLB* has had a major impact on professional accountability both at the state level and in local public school systems. Briefly summarized and generally stated the results of *NCLB* implementation likely to have an impact on producing future failure to learn/academic damages claims are:

- Consistent reliance on statewide student and local student academic progress and achievement data to make day-to-day administrative decisions and long-range budgetary and policy decisions.
- Sustained use of student test data-driven decision-making, especially at individual school building and classroom levels.
- Emphasis on narrowing achievement gaps in specified student groups.
- Required use of student test data (separated into identified subgroups) to demonstrate and track “adequate yearly progress.”

- Use of individual school and classroom level student test data to evaluate what each student knows (including a determination of when, where, and how a student has learned) in an effort to conclude whether or not each student has actually received “an educational benefit.”
- Use of test data to eliminate the practice of “social promotion” of students where it still exists.
- Use of disaggregated student data to change classroom-teaching methodologies and to require the sole use of effective and proven teaching methodologies.
- Use of student test data to individualize student learning (i.e., teach students at his/her learning level and conducive to their learning style) to improve the academic achievement of every student.
- Use of student test data to refocus training and retraining of teachers to be “more effective and efficient” with each student.
- Use of student progress and achievement data to create “optimal teaching conditions” in every classroom.
- Reassignment of more qualified, experienced, effective, administrators, classroom teachers, and other staff members to “failing schools” in an effort to improve the educational opportunities of students in those schools and to raise levels of achievement.
- Use of student test data as a major criterion in removing administrators, classroom teachers, and other staff members whose performance is consistently substandard.
- Training and assignment of “school turn around specialists” to school buildings where student academic progress and achievement are judged as consistently substandard.
- Use of student test data to create and implement individualized student enrichment programs.
- Use of student test data to create and implement individualized student remedial programs.
- Holding school administrators, classroom teachers, and other staff members directly accountable for student progress and achievement.
- Elimination of tenure status and the implementation of performance contracts (3 to 5 years in duration) for all administrators and teachers.
- Rewarding school administrators, classroom teachers, and other staff members for student progress and achievement.
- Use of school system and individual school report cards to keep parents and the community fully informed regarding student test data, number of qualified administrators and teachers, student disciplinary statistics, and other such data.
- Reexamination of state funding levels and local school system budgetary priorities in an effort to provide educational benefits to all children of school age (including homeless children).

Policy Implications

In my professional opinion, the information presented above demonstrates that the potential does exist for parents and students to build a foundation for a *failure to learn/academic damages claim*. The elements to build such a claim seem to be in place. At the same time, however, state law and policy-makers and local school officials have been and are moving forward on a very positive path toward: (1) providing equal access to meaningful and measurable educational opportunities and benefits for all children of school age, and (2) establishing and enforcing accountability (with enforceable consequences) of local school boards, superintendents, principals, classroom teachers, and other staff members for student academic achievement. As the recently published results of the [Commonwealth Education Poll](#) here in Virginia showed, popular support for the statewide *Standards of Learning (SOL's)* test program has continued to increase.

Thus, to demonstrate a resolve to “stay the course,” the following suggestions are made for consideration of possible inclusion in clearly worded local school system policy:

- As an integral part of the school system's curriculum, all students will be taught what the state requires students to learn (i.e., the material upon which all students ultimately will be tested.)
- Classroom teachers are expected to use student test data to construct, plan, and implement lesson plans.
- Administrators, teachers, and other staff members are expected to strive to accommodate the diverse social and educational needs of each student.
- All administrators, classroom teachers, and other staff members are subject to a formal, consistently applied, and data-driven system of professional evaluation, performance appraisal, and employee productivity.
- Student test data will function as a major criterion for evaluating the productivity of all administrators and classroom teachers.
- All students will be held directly accountable for their academic progress as shown by individual test results.
- Remediation and enrichment programs will be implemented and open to all students.
- All administrators, classroom teachers, and other staff members will be held directly accountable for student academic progress and achievement.
- Student academic test data (both progress and achievement) will be factored into all employment decisions.
- The school board intends to hire, place, retain, and reward administrators, classroom teachers, and other staff members who are both highly qualified and competent in their professional specialties.
- The school board reserves the right to assign and reassign all administrators, classroom teachers, and other staff members to schools and positions in individual schools for which they are qualified and where their particular skills and abilities are needed.
- All parents (as well as the community at large) will be kept fully informed of student academic progress and achievement.

One final thought is in order. The threat of possible future litigation is not a reason to change course from a direction that is improving educational opportunities for all children.

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Note: The views expressed in this commentary are those of the author.