COMMENTS

AN APPLE A DAY KEEPS EDUCATIONAL MALPRACTICE LAWSUITS AT BAY: APPLYING PRINCIPLES OF MEDICAL MALPRACTICE'S "LOCALITY RULE" TO DECONSTRUCT THE ACADEMIC ABSTENTION DOCTRINE

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Education serves as one of the most impactful and purposeful tools in American society. However, the United States education system suffers from many shortcomings and failures, and as a result, may occasionally lead to student harm from the actions of educators or academic institutions. These claims commonly allege that educators and academic institutions engaged in negligent behavior, and students or parents bringing these claims are often looking for legal relief through the judicial system. These claims are typically labeled as educational malpractice, and historically, courts have almost uniformly rejected these claims as non-cognizable actions.

This Comment argues that this judicial treatment of educational malpractice cases fails to provide students and families with deserved legal relief and posits that

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courts should begin recognizing certain educational malpractice cases as cognizable claims of action. In educational malpractice cases, courts traditionally dismiss or grant summary judgment in favor of academic institutions as courts have yet to determine a workable standard of care for educational professionals. Taking the legal principles and guidelines already established in the medical malpractice field, this Comment contends that educational malpractice claims could be modeled similarly by employing a measurable standard of care. Further, by using the reasoning of the 'locality rule,' heavily relied on in earlier medical malpractice cases, courts can account for the disparities between academic institutions and help achieve more equitable outcomes. Using a modified version of medical malpractice law's locality approach, courts can both employ a measurable standard of care for educational malpractice cases and simultaneously create a path forward to hold academic institutions and educators accountable for grossly negligent misconduct rather than outright dismiss claims of educational malpractice under the academic abstention doctrine. Allowing these claims to be heard, courts can implement further accountability to ensure that students are able to recover in the event of grossly negligent educator misconduct.

TABLE OF CONTENTS

"Education is the most powerful weapon which you can use to change the world."

—Nelson Mandela[1]

"Education is perhaps the most important function of state and local governments."

—Chief Justice Earl Warren[2]

INTRODUCTION

In 1983, the United States National Commission on Excellence in Education published a report on the history, growth, and evolution of education in the United States titled *A Nation at Risk: The Imperative for Educational Reform*.[3] The report shed light on the failures of the American education system and vigorously encouraged the federal government to take immediate steps to implement educational reform.[4] The report candidly stated that "[w]e have even squandered the gains in student achievement[,] . . . dismantled essential support systems which helped make those gains possible[,] . . . [and] have, in effect, been committing an act of unthinking, unilateral educational disarmament."[5] Accordingly, federal, state, and local institutions began implementing various educational reforms, such as creating measurable standards for schools to follow and attempting to combat the issues the report noted.[6]

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1. Nelson Mandela, *Lighting Your Way to a Better Future*, Remarks at the launch of the Mindset Network (July 16, 2003) (transcript available at http://db.nelsonmandela.org/speeches/pub_view.asp?pg=item&ItemID=NMS909 [https://perma.cc/29C7-NCNX]).

2. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

3. NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983). Secretary of Education, Terrel Howard Bell, appointed this commission to respond to widespread concerns that American education was failing. *Id.* at iii.

4. *See id.* (identifying various educational issues and explaining that there is hope for the future of the United States educational system if certain steps are taken).

5. *Id.* at 5. By comparing the decline in students' success to the performance from prior decades, the quote emphasizes the current rankings decline America is experiencing compared to other nations' educational system. *Id.*

6. *See* Anya Kamenetz, *What 'A Nation at Risk' Got Wrong, and Right, About U.S. Schools*, NPR (April 29, 2018, 6:00 AM), https://www.npr.org/sections/ed/2018/04/29/604986823/what-a-nation-at-risk-got-wrong-and-right-about-u-s-schools [https://perma.cc/4ZLU-5L2Y] (stating that the release of the report marked the "beginning of a 'moment of angst' about the state of the nation's schools").

Decades later, schools across the nation remain far from perfect.[7] Academic institutions across the nation face difficulties with understaffing,[8] underfunding,[9] and providing for the health, wellness, and safety of students.[10] These problems create tangible consequences for both students and schools, leading to problems such as the ever-growing, national illiteracy crisis.[11] As a result, distressed parents and

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7. *See infra* notes 8–10 (detailing issues that schools currently face).

8. *See* Emma Garcia & Elaine Weiss, *The Teacher Shortage is Real, Large and Growing, and Worse than We Thought*, ECON. POL'Y INST. (Mar. 26, 2019), https://www.epi.org/publication/the-teacher-shortage-is-real-large-and-growing-and-worse-than-we-thought-the-first-report-in-the-perfect-storm-in-the-teacher-labor-market-series [https://perma.cc/D53S-GSMS] (detailing the teacher shortage in school districts across the country and discussing how the shortage threatens efficient learning and causes high teacher turnover rates).

9. *See TCF Study Finds U.S. Schools Underfunded by Nearly $150 Billion Annually*, CENTURY FOUND. (July 22, 2020) https://tcf.org/content/about-tcf/tcf-study-finds-u-s-schools-underfunded-nearly-150-billion-annually [https://perma.cc/5VFA-V56G] (explaining that K–12 schools are underfunded by about $150 billion annually which severely limits resources for student success and further noting that underfunding primarily affects schools with larger minority populations).

10. *See* Endia Fontanez, *Virtual Learning Poses Unique Challenges for Arizona's 148,000 Students in Special Ed Programs*, CRONKITE NEWS (Oct. 21, 2020) https://cronkitenews.azpbs.org/2020/10/21/virtual-learning-challenges-arizona-students-special-ed-programs [https://perma.cc/LK5U-QDW3] (describing how the switch to virtual learning during the COVID-19 pandemic presented additional challenges for students with special needs); *see also* Sneha Dey, *How Some Districts Are Trying to Get Anxious Families Back into School Buildings*, NPR (July 26, 2021), https://www.npr.org/2021/07/26/1017864066/how-some-districts-are-trying-to-get-anxious-families-back-into-school-buildings [https://perma.cc/U3C7-3SJA] (detailing the struggle schools are facing while trying to return to in-person education while balancing the concerns and worries of parents and students as the pandemic rages on); Cory Turner, *'Children Are Going Hungry': Why Schools Are Struggling to Feed Students*, NPR (Sept. 8, 2020, 5:00 AM), https://www.npr.org/2020/ 09/08/908442609/children-are-going-hungry-why-schools-are-struggling-to-feed-students [https://perma.cc/FBM6-D4SJ] (noting the important role that schools play in addressing food insecurity and discussing how currently only about fifteen percent of students who qualify for reduced-price meals actually receive food).

11. *See* Editorial, *Crisis Point: The State of Literacy in America*, RESILIENT EDUCATOR, https://resilienteducator.com/news/illiteracy-in-america [https://perma.cc/4TXY-YRF2] (exploring the current landscape of the illiteracy crisis in the United States and the impact has on schools nationwide); *see also* Alex Keiper, Comment, *Taking a Broad View to Recognize a Narrow Right: How a Holistic Analysis of Literacy's Role in American Society Demonstrates that It Is a Fundamental Right*, 70 AM. U. L. REV. F. 157 (2021) (addressing the U.S. Supreme Court's historic refusal to recognize a fundamental right to education and suggesting that recent case law may provide a stronger foundation to carve out a path for a constitutional guarantee for literacy). The importance of basic

families alike have resorted to bringing legal claims of misconduct against educators, academic institutions, and school boards in search of legal relief.[12] These claims commonly allege that educators and academic institutions engaged in negligent behavior, causing students harm.[13]

In educational malpractice cases, courts traditionally dismiss or grant summary judgment in favor of academic institutions for a variety of reasons because courts have yet to determine a workable standard of care for educational professionals.[14] This Comment contends that courts can resolve this standard of care issue by looking to the underlying principles of the "locality rule" in medical malpractice law. As opposed to educational malpractice, medical malpractice is a highly regarded area of law that the courts have long recognized and applied.[15] Using a modified version of medical malpractice law's

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education to succeed in the future is self-evident. However, to date, the right to education has not been upheld as a constitutional right by the Supreme Court of the United States. *Id.* The ongoing discussion around whether the Constitution contains a right to an education is outside the scope of this Comment.

12. *See, e.g.*, Johnny C. Parker, *Educational Malpractice: A Tort is Born*, 39 CLEV. ST. L. REV. 301, 302 (1991) (detailing the rise of educational malpractice cases in search of judicial and legal recognition under tort law); Peter W. v. S.F. Unified Sch. Dist., 131 Cal. Rptr. 854, 861 (Ct. App. 1976) (justifying dismissal or summary judgment verdicts in educational malpractice cases and refusing to recognize educational malpractice as a valid claim of action); Hunter v. Bd. of Educ. of Montgomery Cnty., 439 A.2d 582, 585 (Md. 1982) (finding that "an award of money damages, in our view, represents a singularly inappropriate remedy for asserted errors in the educational process" and dismissing the case for failing to state a valid claim).

13. Throughout this Comment, the terms "educators" and "academic institutions" will be interchangeably used unless a certain case or point specifically singles one of the terms out. Educational malpractice claims are brought against both individual educators and teachers, as well as academic institutions, school districts, and school boards. However, for clarity and conciseness, this Comment uses these terms interchangeably, though it may often be in reference to all these groups. *See* Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1354 (N.Y. 1979) (bringing an educational malpractice claim against the school's negligence); Peter W., 131 Cal. Rptr. at 855 (bringing an educational malpractice claim against a school by arguing that the school failed to properly educate the plaintiff-student). *See generally* Kimberly A. Wilkins, Note, *Educational Malpractice: A Cause of Action in Need of a Call for Action*, 22 VAL. U. L. REV. 427, 429 (1988) (explaining the purpose of educational malpractice claims and detailing case law in which students brought educational malpractice seeking legal remedies).

14. *See infra* Section I.A.

15. *See generally* Theodore Silver, *One Hundred Years of Harmful Error: The Historical Jurisprudence of Medical Malpractice*, 1992 WIS. L. REV. 1193 (1992) (exploring the history

locality approach, courts can both employ a measurable standard of care for educational malpractice cases and simultaneously create a path forward to hold academic institutions and educators accountable for grossly negligent misconduct rather than outright dismiss claims of educational malpractice under the academic abstention doctrine.

Part I of this Comment introduces the history of educational malpractice claims and the development of the academic abstention doctrine, provides and examines current leading educational malpractice case law, and explores the development of the "locality rule" in medical malpractice cases. Part II analogizes the underlying principles of medical malpractice to educational malpractice and argues that courts can use the standards from medical malpractice to derive a measurable standard of care for educators, thereby removing one of the main obstacles to successful educational malpractice claims. Part II then argues that constructing a standard of care for educational malpractice creates liability for academic institutions and educators for acts of gross misconduct and provides harmed students with legal relief. Part III addresses a commonly cited criticism of this approach and explains why it is ultimately unfounded. This Comment concludes that the recognition of educational malpractice claims allows courts to grant students deserved legal relief and ensures educators and institutions may be held accountable for harm caused to students.[16]

I. BACKGROUND

This Part presents an overview of the history of educational malpractice claims in the judicial system, explains how courts review these claims, and details the principles of the academic abstention doctrine, which provides academic institutions with substantive

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and expansion of medical malpractice suits over time and the success that the ever-growing area of law has provided plaintiffs seeking legal relief for medical injury).

16. This Comment was written during the ongoing COVID-19 pandemic. COVID-19 has created an immense burden on students—and the educational system as a whole—at all levels of schooling. Although COVID-19 will affect cases dealing with academic and educational matters in the judicial system in previously unforeseen ways, this Comment focuses on the legal principles and concerns surrounding educational malpractice without addressing the further impact COVID-19 may have. For more information on the impact the pandemic had on students, see Emma Dorn et al., COVID-19 and Education: The Lingering Effects of Unfinished Learning, MCKINSEY & CO. (July 27, 2021), https://www.mckinsey.com/industries/education/our-insights/covid-19-and-education-the-lingering-effects-of-unfinished-learning [https://perma.cc/APH3-UNFH].

deference to handle claims that arise from academic issues. With these considerations in mind, this Part then provides insight into leading case law on educational malpractice. Lastly, this Part briefly touches on the history of medical malpractice, the growth of the area over time, and explains the locality rule that exists within medical malpractice case law.

A. Educational Malpractice: A General History

Educational malpractice does not have one set definition.[17] Broadly, educational malpractice claims refer to complaints against educators for misconduct,[18] failure to educate,[19] or failure to provide students with certain levels of competency and knowledge.[20] Courts historically treat educational malpractice actions as non-cognizable claims, which regularly result in summary judgment against the plaintiffs alleging these claims.[21] Plaintiffs attempt to establish educational malpractice claims by analogizing their claims to legal or medical malpractice

17. *Black's Law Dictionary* defines "malpractice" as "[a]n instance of negligence or incompetence on the part of a professional." *Malpractice*, BLACK'S LAW DICTIONARY (11th ed. 2019). The theory behind educational malpractice rests on the idea that as educational professionals, educators and academic institutions must adhere to a professional standard of care similar to other professions. *See* Wilkins, *supra* note 13, at 437–38 (explaining how courts have struggled with defining an educational standard of care); Richard Funston, *Educational Malpractice: A Cause of Action in Search of a Theory*, 18 SAN DIEGO L. REV. 743, 746–48 (1981) (demonstrating how courts and practitioners define educational malpractice in everyday use).

18. *See* Hunter v. Bd. of Educ. Mont. Co., 439 A.2d 582, 585 (Md. 1982) (dismissing case that alleged an educational malpractice claim against a school board and administration for misconduct by inappropriately evaluating a student's learning ability).

19. *See* Peter W. v. S.F. Unified Sch. Dist., 131 Cal. Rptr. 854, 856 (Ct. App. 1976) (alleging that a school failed to properly educate plaintiff-student, thereby threatening his ability to gain employment and resulting in a loss of earning capacity).

20. *See* Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1353 (N.Y. 1979) (arguing the school failed to evaluate plaintiff-student's mental capacity to understand the school subjects); *see also* Wilkins, *supra* note 13 (detailing cases that students have brought under educational malpractice claims searching for legal remedies); Timothy Davis, *Examining Educational Malpractice Jurisprudence: Should a Cause of Action Be Created for Student-Athletes?*, 69 DENV. U. L. REV. 57, 59 (1992) (examining the potential to use educational malpractice to state a valid claim in relation to student-athletes and their relationship with an educational institution).

21. *See* Funston, *supra* note 17, at 746–47 (expressing support for recognizing educational malpractice as an actionable claim based on the success of causes of action for victims of malpractice in other professions).

claims, arguing that educators and academic institutions should be held to similar standards as those in the legal or medical professions.[22]

Occasionally, judges have awarded some degree of deference to various institutions or organizations, deferring to the ability of the institution, or individuals within those organizations, to self-govern, rather than decide on the appropriateness of the disputed conduct themselves.[23] Since judges are not always specialists in a particular field or area of inquiry, they have deferred to the expertise of the institution that is expected to have the knowledge to make an informed decision.[24]

However, for educators and academic institutions, judicial deference is the norm rather than the exception.[25] This is a result of the academic abstention doctrine, which relies on the principle that educational institutions serve as the appropriate recourse for students' claims against misconduct.[26] Consequently, aggrieved students have little ability to bring their claims before a judge, leaving students and families to work internally within academic institutions to resolve their alleged complaints.[27] Thus, educational malpractice claims against educators and institutions largely fail and leave those institutions practically untouched legally.[28]

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22. *See* Davis, *supra* note 20, at 61 (detailing that "educational malpractice refers to complaints against academics and academic institutions alleging professional misconduct analogous to medical and legal malpractice").

23. Judges often afford deference to administrative agencies and corporations according to well-established doctrines. Courts often utilize the "*Chevron* standard" when dealing with cases involving administrative agencies and will defer to the appropriate agency's reasonable interpretation of statute ambiguities. *See* Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc., 467 U.S. 837, 865–66 (1984) (holding that courts may not impose their own interpretation of statutes and should defer to the knowledge and interpretation of the respective agency). When dealing with businesses, courts will invoke the "business judgment rule," a doctrine that presumes that a business is the best actor to evaluate the appropriateness of corporate decisions and that the corporation will act in good faith. *See, e.g.*, Shlensky v. Wrigley, 237 N.E.2d 776 (Ill. App. Ct. 1968) (ruling that the courts could not overrule pure business decisions and must respect the business judgment rule).

24. *See supra* note 23 (detailing other areas of law where courts afford deference).

25. *See infra* Section I.B. (explaining the academic abstention doctrine).

26. *See infra* Section I.B. (explaining the academic abstention doctrine).

27. *See infra* Sections I.C.1, I.C.2 (reviewing leading educational malpractice cases discussing why courts defer to school authorities to address complaints).

28. *See* Funston, *supra* note 17, at 745, 750.

B. The Academic Abstention Doctrine

Educational malpractice claims historically have not granted much, if any, relief to students because of the lack of legal recourse within the field. This is largely in part due to the academic abstention doctrine. The academic abstention doctrine grants near absolute deference to educational institutions to make the most appropriate decisions for their students in each situation.[29] Rather than hearing claims dealing with academic matters and educator conduct in front of a judge, the judicial system grants deference to academic institutions to hear and control a students' and their families' claims.[30]

Historically, the academic abstention doctrine stems from medieval law where claims arising from universities and students were not heard in civil courts, but rather in ecclesiastical courts.[31] This separation between judicial and academic spheres continued into the modern age where "courts have traditionally refused to interfere in the basic academic process of the university, particularly in the evaluation of students or faculty."[32] Although students could seek legal redress in ecclesiastical courts, this avenue is no longer available in the modern judicial system.[33] Furthermore, modern courts are reluctant to expand or entertain educational claims or become more involved in the

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29. Professor Virginia Davis Nordin is credited with first coining the term "academic abstention doctrine." Nordin's research and publications detail the history of the doctrine and the significant impact it has on the autonomy of academic institutions. *See* Virginia Davis Nordin, *The Contract to Educate: Toward a More Workable Theory of the Student-University Relationship*, 8 J.C. & U.L. 141, 141–42 (1981) (exploring the legal rights of students in higher education and the potential success of students who bring their education claims under contract law).

30. *See generally id.* (detailing the academic abstention doctrine's history and background and how it continues to play a significant role in education law today); Harry T. Edwards & Virginia Davis Nordin, HIGHER EDUCATION AND THE LAW (1979) (studying the case law and legal principles that regulate higher education institutions).

31. *See id.* at 52 (explaining how academic abstention came from medieval law, making it reasonable to subject universities and scholars to the jurisdiction of ecclesiastical courts because universities were operated by the church and their priests were the professors); *see also* Nordin, *supra* note 29, at 147–48 (describing the history of educational cases in early American legal history).

32. Edwards & Nordin, *supra* note 30, at 14.

33. *See* RONALD B. STANDLER, ACADEMIC ABSTENTION IN THE USA 52 (2011), http://www.rbs2.com/AcadAbst.pdf [https://perma.cc/F9M5-GZVQ] (noting that the academic abstention doctrine is "an anachronism in the USA because ecclesiastical courts have never been recognized by the government in the USA").

educational realm.[34] While courts have gradually involved themselves in student disciplinary matters, they continue to use the academic abstention doctrine to justify their lack of intervention in all other types of student cases that focus on purely academic matters.[35]

Accordingly, due to the courts' reliance on the academic abstention doctrine, and subsequent failure to get involved in student cases, students are left with few options for legal remedies.[36] Without the fear of liability for acts of gross misconduct, teachers and institutions are not worried about potential educational malpractice claims.[37] Further, the judiciary's reluctance to get involved in educational malpractice claims discourages students, parents, and other interested parties from bringing claims for valid injuries that students have suffered, particularly considering the high likelihood for academic institutions to win or obtain dismissal.[38] Consequently, because academic institutions are likely to be successful in getting educational malpractice cases dismissed, many parties feel that bringing these claims would be a waste of time, money, or resources, even if the student has a valid claim.[39]

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34. *See* Bd. of Curators v. Horowitz, 435 U.S. 78, 90 (1978) (holding that the U.S. Supreme Court "decline[s] to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship"); *see also* Hoffman v. Bd. of Educ., 400 N.E.2d 317, 320 (N.Y. App. 1979) ("Our decision in *Donohue* was grounded upon the principle that courts ought not interfere with the professional judgment of those charged by the Constitution and by statute with the responsibility for the administration of the schools of this State.").

35. *See* Nordin, *supra* note 29, at 146 (stating that courts will rely on the academic abstention doctrine whenever possible to "leave untouched the sanctity of the academic process"). *But see Bd. of Curators*, 435 U.S. at 87 (holding that courts have more ability to participate and take judicial action in social infractions involving students and education than purely academic claims).

36. *See* STANDLER, *supra* note 33, at 62 (detailing the implications of the courts' refusal to recognize educational malpractice claims on students and families seeking legal relief).

37. *See* Terri D. DeMitchell & Todd A. DeMitchell, *A Crack in the Educational Malpractice Wall*, AM. ASS'N SCH. ADM'RS, https://www.aasa.org/SchoolAdministratorArticle.aspx?id=6516 [https://perma.cc/TXZ3-7DF5] (noting that educators are aware that educational malpractice claims are "empty threats").

38. *See id.* (illustrating how educational malpractice jurisprudence operates like a wall that protects educators from litigation).

39. *See id.* (stating that public policy also supports dismissing educational malpractice claims because society is ultimately burdened if schools and their limited budgets are not protected).

Courts further justify their reliance on the academic abstention doctrine using various legal principles, including the *in loco parentis* doctrine.[40] The *in loco parentis* doctrine, which translates from Latin to "in place of a parent," is a historic principle that allows a person or entity to stand in the place of a parent where appropriate.[41] In *Mahanoy Area School District v. B.L.*,[42] the Supreme Court stated that the *in loco parentis* doctrine "treats school administrators as standing in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them."[43] This doctrine empowers academic institutions to act as a guardian for students in academic matters; thus, allowing schools to take action and make decisions on behalf of a student.[44]

Additionally, courts cite the autonomy of academic institutions as further rationale for the academic abstention doctrine.[45] Courts acknowledge that academic institutions—especially colleges and universities where students are adults seeking higher education degrees—have curriculum plans and requirements for graduation eligibility.[46] As a result, courts are hesitant to overstep and disrupt an institution's operating procedures and policies, fearing this would be

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40. *See* STANDLER, *supra* note 33, at 53 (explaining that because *in loco parentis* assumes parents and teachers are always benevolent and acting in the best interests of the child, the doctrine extends tort immunity to teachers and professors).

41. *In Loco Parentis*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining in loco parentis as "[o]f, relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent"). *See generally* Susan Stuart, In Loco Parentis *in the Public Schools: Abused, Confused, and in Need of Change*, 78 U. CIN. L. REV. 969 (2010) (delving into the historical reasoning behind the *in loco parentis* doctrine and its application to students).

42. 141 S. Ct. 2038 (2021).

43. *Id.* at 2046 (explaining the in loco parentis doctrine in relation to a case arising from a student's First Amendment rights in a public high school).

44. *See* Stuart, *supra* note 41, at 970. The significance of the in loco parentis doctrine and its impact on student life, while briefly defined here to explain one of the justifications for the academic abstention doctrine, does have limitations. However, any legal arguments for or against the doctrine, as well as any acknowledged criticism of the doctrine, exist outside the scope of this Comment.

45. *See* Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1354 (N.Y. 1979) (arguing that entertaining educational malpractice would be overstepping into the independence of academic institutions).

46. *See* Nordin, *supra* note 29, at 163–64 (noting an interest to grant maximum flexibility to higher education institutions to protect academic autonomy).

an interference with the institution's independent responsibilities.[47] Furthermore, the independent autonomy of educational institutions falls under the larger ideal of academic freedom, where institutions fear that expanding the potential for liability to non-academic matters threatens the general idea of academic freedom from judicial intervention.[48]

Furthermore, some courts have found that select claims brought under educational malpractice may be successful if brought instead under breach of contract or contractual misrepresentation.[49] However, the type of claim that plaintiff-students could bring under breach of contract or misrepresentation is not applicable for all instances of harm that a student may suffer.[50] For college or university students, courts have recognized that a contractual relationship may exist that could provide legal options for students to bring select causes of action

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47. *See id.* The majority opinion states that recognizing educational malpractice claims would be an overstep into the independent nature of schools because

> [t]o entertain a cause of action for "educational malpractice" would require the courts not merely to make judgments as to the validity of broad educational policies—a course we have unalteringly eschewed in the past—but, more importantly, to sit in review of the day-to-day implementation of these policies. Recognition in the courts of this cause of action would constitute blatant interference with the responsibility for the administration of the public school system lodged by Constitution and statute in school administrative agencies.

Id.

48. *See* Nordin, *supra* note 29, at 149 (stating that "such autonomy is a variant or component of the larger idea of academic freedom which is vital to a free society"). For example, in *Soueidan v. St. Louis University*, a plaintiff-Ph.D. candidate alleged that he was incorrectly advised on his academic program requirements, which resulted in additional time and financial expenditures to complete his degree. *See* 926 F.3d 1029, 1032–33 (9th Cir. 2019). The court dismissed the claim, stating that educational malpractice cases are generally not cognizable, in tort or contract, because "[u]niversities must be allowed the flexibility to manage themselves and correct their own mistakes." *Id.* at 1034.

49. *See Ross*, 957 F.2d at 416–17 (explaining that claims of educational malpractice by the plaintiff-student may be successful if brought under other areas of law, like breach of contract, since "[the plaintiff] point[s] to an identifiable contractual promise that the defendant failed to honor").

50. In leading educational malpractice cases, such as *Peter W. v. San Francisco Unified School District*, 131 Cal. Rptr. 854 (Cal. Ct. App. 1976), or *Donohue v. Copiague Union Free School District*, 391 N.E.2d 1352 (N.Y. 1979), the plaintiff-student's claims would not appropriately fall under either a breach of contract or misrepresentation claim. While these areas of law may be applicable to certain other cases that students bring, reliance on these areas of law as valid legal options fails to address student harm in other situations involving gross misconduct.

under breach of contract of misrepresentation.[51] Nevertheless, the same legal options are unavailable to students in primary and secondary schools whose claims do not arise from the same type of contractual relationship or to higher education students whose actions do not fall under these select areas of law.[52]

When looking at case law regarding educational malpractice, courts rely on a multitude of reasons to justify dismissing educational malpractice claims and deferring to decisions arising out of an educational setting to academic institutions, with a specific focus on the lack of a standard of care to justify their reasoning for continuing to dismiss.[53] Using the justifications that were initially set out in leading educational malpractice case law,[54] courts continue to rely on these considerations to dismiss claims without much, if any, actual consideration of the cases' merits.[55] These reasons include the lack of a measurable standard of care for educators and institutions; the difficulty in assessing accurate causation and damages; the financial impact on courts, educators, and institutions; and the fear of an overabundance of new litigation flooding the courts.[56] Together, these reasons comprise the rationale behind the academic abstention doctrine.[57]

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51. *See Ross*, 957 F.2d at 413 (stating "[w]ith regard to the contract claims, the court recognized that the relationship between a student and a university is at least partly contractual").

52. Contractual claims between students and universities are different classes of claims that some students may be able to pursue, but what claims may or may not appropriately fall under those areas is outside the scope of this Comment.

53. *See infra* notes 93–99 and accompanying text.

54. *See infra* Section I.C (detailing significant educational malpractice case law and the focus on a lack of a standard of care).

55. *See, e.g.*, Hunter v. Bd. of Educ., 439 A.2d 582, 583, 586 (Md. 1982) (dismissing an educational malpractice claim against a school board and its administration for misconduct when they inappropriately evaluated a student's learning abilities); Ross v. Creighton Univ., 957 F.2d 410, 415 (7th Cir. 1992) (holding that Illinois does not recognize educational malpractice as a valid claim after a plaintiff-student alleged a school's failure to educate).

56. *See* STANDLER, *supra* note 33, at 6, 35–36, 59 (detailing the academic abstention doctrine, the reasoning behind it, and the significant role it plays in educational lawsuits); *see also infra* Part III (explaining and addressing concerns and criticisms of allowing educational malpractice suits).

57. *See* STANDLER, *supra* note 33, at 4 (analyzing how cases nationwide developed the doctrine of academic abstention which, as the most important doctrine in American education law, allows schools to win any dispute about purely academic matters, no matter how grave the injustice to the student).

C. Influential Educational Malpractice Caselaw

Historically, courts have dismissed cases that allege educational malpractice as failing to contain a cognizable claim.[58] A leading reason why courts consistently dismiss educational malpractice claims is rooted in the lack of a measurable standard of care to hold instructors and educators accountable.[59] Without a measurable standard of care, judges continue to find that educational malpractice is not a cognizable claim that they can entertain under tort law, specifically under a malpractice argument.[60]

Courts primarily rely on two particularly influential cases when discussing educational malpractice: *Peter W. v. San Francisco Unified School District*,[61] and *Donohue v. Copiague Union Free School District*.[62]

1. Peter W. v. San Francisco Unified School District

In *Peter W.*, a student alleged that his high school "negligently and carelessly" provided inadequate education and allowed him to graduate without the required skillset of a typical graduating high school student.[63] The plaintiff-student made five claims, arguing that

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58. See, for example, Peter W. v. San Francisco Unified School District, 131 Cal. Rptr. 854, 855 (Ct. App. 1976), and Donohue v. Copiague Union Free School District, 391 N.E.2d 1352, 1354 (N.Y. 1979), for discussions of why courts refuse to recognize educational malpractice as a valid cause of action.

59. *See* Peter W. v. S.F. United Sch. Dist., 131 Cal. Rptr. 854, 860–61 (Ct. App. 1976).

60. *See id.* (expressing concern that creating an actionable duty of care would expose public schools and educators to countless tort claims by "disaffected students and parents"); *see also* Ross v. Creighton Univ., 957 F.2d 410, 415 (7th Cir. 1992) (holding that Illinois does not recognize educational malpractice as a valid claim when a plaintiff alleges a failure to educate); Lindner v. Occidental Coll., No. CV 20-8481-JFW(RAOx), 2020 WL 7350212, at *6 (C.D. Cal. Dec. 11, 2020) (providing that the lack of a measurable standard of care prevents claims of educational malpractice from succeeding).

61. 131 Cal. Rptr. 854 (Ct. App. 1976). *Peter W.* is often referred to as the seminal educational malpractice case, and subsequent case law relies and expands upon the *Peter W.* court's reasoning to justify dismissing educational malpractice claims.

62. 391 N.E.2d 1352 (N.Y. 1979).

63. *Peter W.*, 131 Calp. Rptr. at 856. Plaintiff's specific claims included allegations that the institution and educators

> (1) failed to apprehend his reading disabilities, (2) assigned him to classes in which he could not read "the books and other materials," (3) allowed him "to pass and advance from a course or grade level" with knowledge that he had not achieved either its completion or the skills "necessary for him to succeed or benefit from subsequent courses," (4) assigned him to classes in which the instructors were unqualified or which were not "geared" to his reading level,

the school district, the school, and its employees were negligent and careless in their instruction and further claimed that the institution's actions proximately caused his "loss of learning capacity," leaving him with limited qualifications for employment.[64]

The plaintiff-student presented three theories as to why courts should recognize a duty of care for schools and argued that the school's misconduct could fit within the traditional framework of a negligence formula.[65] First, the plaintiff argued that teachers and administrators assume a "duty to exercise reasonable care" while instructing students.[66] The court dismissed this theory, finding the plaintiff's case law was inapplicable to establish educator liability.[67] Notably, the court only addressed the validity of the claims presented by the plaintiff, but it never actually resolved the underlying argument that teachers owe students a "duty of reasonable care."[68] The second theory the plaintiff-student argued was that the relationship between educators and students constitutes a "special relationship" that comprises a "duty to exercise reasonable care."[69] The third theory iterated upon the second argument, asserting that educators and students form a special relationship that gives rise to a duty to use reasonable care based on California precedent that recognizes a duty by educators to "exercise reasonable care for the [p]hysical safety of students under their supervision."[70] The court also rejected these two theories, again finding that the case law failed to support to support the plaintiff's assertions.[71] The court clarified that although California case law establishes a duty to "exercise reasonable care for the [p]hysical safety of students under their supervision," the duty does not extend to creating a standard of care for students' academic performance or for the adequacy of their education.[72]

> and (5) permitted him to graduate from high school although he was "unable to read above the eighth grade level . . . thereby depriving him of additional instruction in reading and other academic skills."

Id.

64. *Id.*

65. *See id.* at 857–59 (laying out the plaintiff-student's arguments).

66. *Id.* at 858.

67. *See id.*; *see also infra* note 73 and accompanying text (explaining why the court found the case law presented to be inapplicable).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

Subsequently, the California Court of Appeals dismissed *Peter W.* for failing to state a valid cause of action, ruling the plaintiff failed to successfully plead all the elements required to prove negligence.[73] The court emphasized and held that the school district and educators did not have an affirmative duty to prove an adequate education for students.[74] As such, the court could not interpret a measurable standard of care.[75] Rather, the court stated that "classroom methodology affords no readily acceptable standards of care, or cause, or injury" that courts could use to hold educators and institutions to a measurable standard.[76]

The California Court of Appeals argued that holding educators or academic institutions liable under traditional elements of a negligence suit "would expose them to the tort claims—real or imagined—of disaffected students and parents in countless numbers."[77] The court enunciated multiple reasons—which are still widely utilized by courts today—to justify its ruling.[78] First, the court discussed the lack of a measurable standard of care for academic institutions and educators.[79] Second, the court cited difficulty in determining actual and proximate cause.[80] Third, the court explained that the existence of possible outside factors may influence students outside of a teacher's control,

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73. Peter W. v. S.F. Unified Sch. Dist., 131 Cal. Rptr. 854, 863 (Ct. App. 1976). To successfully bring a negligence suit, a plaintiff must prove all the required elements: "duty, breach of duty, causation, and damages." *Negligence*, BLACK'S LAW DICTIONARY (11th ed. 2019).

74. *Peter W.*, 131 Cal. Rptr. at 861. The court stated, "[t]hese recognized policy considerations alone negate an actionable 'duty of care' in persons and agencies who administer the academic phases of the public educational process." *Id.*

75. *See Duty of Care*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining duty of care as "[a] legal relationship arising from a standard of care").

76. *Peter W.*, 131 Cal. Rptr. at 860–61. The court went on to further state that

> We find in this situation no conceivable "workability of a rule of care" against which defendants' alleged conduct may be measured . . . no reasonable "degree of certainty that . . . plaintiff suffered injury" within the meaning of the law of negligence . . . and no such perceptible "connection between the defendant's conduct and the injury suffered," as alleged, which would establish a causal link between them within the same meaning.

Id. at 861 (first quoting Raymond v. Paradise Sch. Dist., 218 Cal. App. 2d 1, 8 (1963); then quoting Rowland v. Christian, 69 Cal. 2d 108, 113 (1968)).

77. *Id.*

78. *Id.*

79. *Id.*

80. *See id.*

thus potentially confounding a successful negligence claim.[81] Finally, the court feared an overwhelming increase in new litigation and held that academic institutions should decide issues of negligence arising from academic misconduct.[82]

2. Donohue v. Copiague Union Free School District

In *Donohue*, a student claimed that his high school continuously allowed him to advance to higher grade levels and granted him a diploma even though he lacked the ability to comprehend and understand English at minimal competency levels.[83] Citing the lack of a "rudimentary ability" to understand and perform basic educational skills, the plaintiff-student claimed that he was unable to complete job applications or obtain employment as a result of the school's deficient ability to educate him.[84]

In *Donohue*, the court dismissed the student's claim, ruling that courts cannot entertain educational malpractice cases.[85] The *Donohue* court noted that "the fact that a complaint alleging 'educational malpractice' might on the pleadings state a cause of action within traditional notions of tort law does not, however, require that it be sustained."[86] The court refused to acknowledge under what circumstances a plaintiff could successfully bring an educational malpractice claim against an administrator or faculty member.[87]

The court held that the plaintiff's claim failed to state a valid cause of action.[88] However, the dissenting opinion argued that the harm the school's misconduct caused to the student constituted an actionable claim.[89] The dissent further stated that educational malpractice claims arising from the negligent behavior of educators are no different than

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81. *See id.* (noting that "physical, neurological, emotional, cultural, [and] environmental" factors affect students and are out of teacher control).

82. *Id.*

83. Donohue v. Copiague Union Free School Dist., 391 N.E.2d 1352, 1353 (N.Y. 1979).

84. *Id.* at 1352.

85. *See id.*

86. *Id.* at 1354.

87. *Id.* The *Donohue* court conceded that educational malpractice claims could potentially fit under a traditional negligence framework, thus breaking from the *Peter W.* court that found that educational malpractice could not meet the necessary requirements for a negligence claim. *See Peter W.*, 131 Cal. Rptr. at 857–58.

88. *See* Donohue v. Copiague Union Free Sch. Dist., 407 N.Y.S.2d 874, 876 (N.Y. App. Div. 1978).

89. *Id.* at 882 (Suozzi, J., dissenting).

medical malpractice actions where medical providers fail to provide appropriate care despite being aware of a patient's condition.[90] In his dissenting opinion, Judge Suozzi stated,

> In my view, the negligence alleged in the case at bar is not unlike that of a doctor who, although confronted with a patient with a cancerous condition, fails to pursue medically accepted procedures to (1) diagnose the specific condition and (2) treat the condition, and instead allows the patient to suffer the inevitable consequences of the disease. Such medical malpractice would never be tolerated. At the very least, a complaint alleging same would not be dismissed upon motion . . . . Under [this case's] circumstances, the cause of action at bar is no different from the analogous cause of action for medical malpractice and, like the latter, is sufficient to withstand a motion to dismiss.[91]

While both the trial and appellate courts relied on the reasons established in *Peter W.* as justification for the dismissal of the case, the trial court dissent further added that the "considerations enunciated in *Peter W.* . . . do not mandate a dismissal of the complaint," and a jury should determine whether the student's lack of education was in fact due to the educator's conduct or rather was a result of outside factors and behaviors of a student.[92] Disregarding the trial court dissent's concern that the court relied too heavily on *Peter W.*, the court dismissed the case.[93]

Many courts today continue to rely on *Peter W.* and *Donohue* when hearing educational malpractice claims, with courts citing to these two cases as precedent to justify dismissal or summary judgment for failing to state a cognizable claim due to a lack of a duty of care.[94] The long-standing impact of the courts' reasoning has continued for upwards of

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90. *Id.* at 884.

91. *Id.* at 884–85. Judge Suozzi stated that the school failed to take appropriate measures to support the student, and "[i]nstead, the plaintiff was just pushed through the educational system without any attempt made to help him." *Id.* at 885.

92. *Id.* at 883; *see also* Florez III v. Ginsberg, 449 P.3d 770, 776 (Kan. Ct. App. 2019) ("[W]e must be careful not to reject all claims that arise out of a school environment under the umbrella of educational malpractice. Instead, the specific facts of each case must be considered in light of the relevant policy concerns that drive the rejection of educational malpractice actions.").

93. *Donohue*, 407 N.Y.S.2d at 882 (Suozzi, J., dissenting).

94. *See, e.g.*, Hunter v. Bd. of Educ., 439 A.2d 582, 583, 585 (Md. 1982) (finding that "an award of money damages . . . represents a singularly inappropriate remedy for asserted errors in the educational process" and that the case can be dismissed for failing to state a valid claim); Ross v. Creighton Univ., 957 F.2d 410, 415 (7th Cir. 1992) (holding that Illinois does not recognize educational malpractice as a valid claim).

forty years and continues to be a source of support for the dismissal of cases falling under the educational malpractice umbrella.[95]

3. B.M. by Burger v. Montana

There is one sole exception to the widespread tendency of courts to dismiss educational malpractice cases: *B.M. by Burger v. Montana*.[96] This case represents the singular successful instance of a plaintiff bringing an educational malpractice claim[97] The plaintiff-student alleged that her school incorrectly placed her in a special education program at a young age.[98] The court expressly found that educators and academic institutions owe a duty of care to children in special education programs.[99] The court ruled that the school owed a duty to this student to use reasonable care to adequately test and place her in an appropriate special education program if she displayed an academic need.[100] This individual case, while based on specific facts, showcases the ability of a court to recognize situations where a judicially recognized standard of care for educators and academic institutions may be needed.

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95. *See* Lindner v. Occidental Coll., No. CV 20-8481-JFW(RAOx), 2020 WL 7350212, at *7 (C.D. Cal. Dec. 11, 2020) (relying on *Peter W.* to justify dismissing an educational malpractice claim).

96. 649 P.2d 425 (Mont. 1982).

97. *Id.* at 427.

98. *Id.* at 425–46.

99. The court in *B.M. by Burger v. Montana* stated that it

> ha[d] no difficulty in finding a duty of care owed to special education students. The general tenor of education for all citizens in Montana is stated in Art. X, § 1, 1972 Mont. Const.: "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 educational opportunity is guaranteed to each person of the state."

Id.

Although the Montana court found a specific duty of care owed to students in special education programs rooted in its state constitution, the guidelines, principles, and requirements for students in special education curricula are outside the scope of this Comment. One could theoretically argue that students who are not in special education programs should be afforded equal educational opportunities, which includes acknowledging their educational malpractice claims as cognizable; however, this argument rests on principles of state constitutional law and is also outside the scope of this Comment.

100. *See id.* at 427. (holding that "[t]he school authorities owed the child a duty of reasonable care in testing her and placing her in an appropriate special education program").

D. Medical Malpractice and the Locality Rule

Medical malpractice lawsuits began as general negligence suits rather than as a distinct area of law.[101] *Stratton v. Swanlond*,[102] the first case to recognize damage caused by a physician's negligent error, occurred in England in 1374, though it was brought under the more traditional common law notion of trespass.[103] In the United States, the first recognized medical malpractice case occurred in 1794.[104] Over time, medical malpractice evolved into its own area of tort law, holding physicians accountable against a professional standard of care that they must comply with during their course of practice.[105]

Similar to arguments that academic institutions are more suitable to hear academic matters as judges are not educators, judges likewise often are not doctors or medical providers.[106] However, despite often lacking medical degrees, judges and courts began hearing an increasing number of medical malpractice cases.[107] The emergence of medical malpractice litigation signaled a recognition that the law could adequately hold doctors and hospitals accountable against a tangible standard of care.[108]

Negligence can be subdivided into various distinctions, including ordinary and gross negligence.[109] Ordinary negligence is a failure to perform a reasonable standard of care, or a failure to act or perform

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101. *See* Silver, *supra* note 15, at 1196 (explaining the history of medical malpractice).

102. Y.B. 48 Edw. 3, plea 11, folio 6 (1374) (Eng.).

103. *See* Silver, *supra* note 15, at 1196 n.13 (finding that in the 1374 case, Stratton v. Swanlond, the court would have held a surgeon liable for failing to treat the plaintiff's hand in a competent manner, but was barred because the suit was pled under trespass); *see also* Allan H. McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 550 (1959) (describing the historical jurisprudence of medical malpractice cases and the first reported medical malpractice cases).

104. *See* Cross v. Guthrey, 2 Root 90 (Conn. 1794) (explaining details of the first recorded medical malpractice case in the United States, where a doctor performed an operation that led to the death of a patient and still billed the spouse for the procedure).

105. *See* Silver, *supra* note 15, at 1193–94 (noting that most legal scholars now identify medical malpractice as a discrete body of law with its own set of procedural rules, doctrines, and principles).

106. *See supra* notes 23–24.

107. *See* Section I.C (noting how, since the first case in 1794, medical malpractice has evolved into its own area of tort law in the United States).

108. *See id.* (explaining how medical malpractice holds physicians accountable against a professional standard of care to which compliance is required).

109. *See Negligence*, BLACK'S LAW DICTIONARY (11th ed. 2019).

in the way a reasonable person in the same circumstances would.[110] On the other hand, gross negligence is a more severe breach of duty, found by a "lack of even slight diligence or care" or behavior that is in "conscious disregard" of harm to others.[111] Black's Law Dictionary clarifies that the "difference between gross negligence and ordinary negligence is one of degree and not of quality."[112]

Differentiating between the two types of negligence in practice is not always easy, as there is no set list of what constitutes either gross or ordinary negligence. Gross negligence in medical malpractice is the "equivalent to [a] failure to exercise even a slight degree of care," or "lack of the diligence that even careless men are accustomed to exercise."[113] For medical malpractice, examples of gross negligence recognized by courts includes negligently misdiagnosing conditions that lead to death or serious bodily injury,[114] recklessly missing signs of serious diseases or diagnosis,[115] or failing to provide enough nurses, which can result in patient complications.[116]

In comparison, examples of medical malpractice that fail to meet the level of gross misconduct that induces liability, or that only meets ordinary negligence, include a doctor's failure to notice a fracture on scans that the otherwise properly reviewed a peer physician,[117] or

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110. *Id.*

111. *Id. Gross Negligence* (noting that gross negligence can alternately be termed "reckless negligence; wanton negligence; willful negligence; willful and wanton negligence; willful and wanton misconduct; [or] hazardous negligence").

112. *Id.*

113. *See* Johnson v. Omondi, 751 S.E.2d 288, 291 (Ga. 2013) (describing how the doctor felt the child was not a common example of someone with the condition that caused the child's death following treatment. The child's parents sued, alleging that the doctor was grossly negligent as laid out in Georgia's medical standards and statutes).

114. *See id.* The court additionally defines "gross negligence" as "the absence of even slight diligence, and slight diligence is defined in [Georgia law] as 'that degree of care which every man of common sense, however inattentive he may be, exercises under the same or similar circumstances.'"

115. *See* Trowell v. Providence Hosp. and Med. Ctrs., Inc., 918 N.W.2d 645, 651–52 (Mich. 2018) (per curiam) (detailing the difference between gross malpractice and ordinary negligence from multiple incidents that resulted from a lack of an "adequate number of nurses" to fully assist all patients).

116. *See id.* at 647.

117. *See* Pottinger v. Smith, 293 Ga. App. 626, 660–61 (Ga. App. 2008) (explaining that doctors are not grossly negligent if they take the appropriate steps and procedures).

conduct such as the negligent misplacement of medical documents.[118] Ordinary negligence may cause harm or inconvenience; however, the injury or harm does not typically rise to the same level that acts of gross negligence can, and is therefore not afforded the same legal remedy.[119]

Successful medical malpractice claims that arise from the negligent behavior of medical professionals require four separate elements: (1) a duty of care that the health care professional owes to the patient; (2) a breach of this duty by the professional's conduct; (3) causation showing the relationship between the breach of the duty that was owed leading to the injury that occurred; and (4) damages that resulted from the injury or harm that the patient suffered.[120]

The medical standard of care is "derived from the collective training, and experience of physicians over time, as well as from medical literature."[121] A leading doctrine within the area of medical malpractice is the "locality rule," which is a principle holding medical professionals to different standards of care depending on where they are located geographically and their available resources.[122] In effect, the locality rule holds medical professionals to the same standard of care that similarly positioned medical professionals would reasonably exercise in the same community or circumstance.[123]

Case law details the history and advancement of the locality rule as it adapted to changing medical education and technology. Historical jurisprudence explains that the locality rule was created to bridge the gap between medical professionals who had more resources and

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118. Battocchi v. Washington Hosp. Ctr., 581 A.2d 759, 761–62 (D.C. 1990) (alleging negligence on the part of the hospital for misplacing a note from medical files). A patient's incorrect description of their symptoms, pain, or extent of their prior medical history that results in a doctor's failure to properly diagnose is outside the scope of this Comment.

119. *See supra* notes 109–14 and accompanying text (detailing cases in which courts have considered medical malpractice to rise to gross negligence).

120. *See, e.g.*, Hemsley v. Langdon, 909 N.W.2d 59, 66 (Neb. 2018) (per curiam) (defining the elements of medical malpractice); Richards v. KRMC, 410 P.3d 954, 954 (Mont. 2018) (same).

121. Marc D. Ginsberg, *The Locality Rule Lives! Why? Using Modern Medicine to Eradicate an Unhealthy Law*, 61 DRAKE L. REV. 321, 323 (2013).

122. *Locality Rule*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The doctrine that, in a professional-malpractice suit, the standard of care applicable to the professional's conduct is the reasonable care exercised by similar professionals in the same vicinity and professional community.").

123. *See* Ginsberg, *supra* note 121, at 321–25 (detailing the history of the locality rule and arguing that today's modern technology has made having varying standards of care obsolete); Silver, *supra* note 15, at 1194.

availability—typically those located in larger suburban or urban communities and those professionals in more rural areas who did not have access to as much education, newer technology, or updated procedural norms.[124] The locality rule is based on the theory that "a doctor in a small community d[oes not] not have the same opportunities and resources as did a doctor practicing in a large city . . . hence, he should not be held to the same standard of care and skill as that employed by doctors . . . in larger cities."[125]

This theory rings true as courts recognized that doctors did not all have the same access to medical equipment to provide the exact same standard of care, and the actions a reasonable doctor would take may differ based on their geographic location.[126] The courts acknowledged that doctors with less experience or outdated technology should not be held to the same standard as medical professionals with access to state-of-the-art facilities and newer medical treatments.[127]

However, as technology and education became more equitably available to physicians across the nation,[128] courts began to note that

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124. *See* Pederson v. Dumouchel, 431 P.2d 973, 977 (Wash. 1967) (en banc) (explaining the historical reasoning behind creating the locality rule as medical malpractice cases gained recognition in courts across the country).

125. *See id.* (stating that "[w]hen there was little intercommunity travel, courts required experts who testified to the standard of care that should have been used to have a personal knowledge of the practice of physicians in that particular community where the patient was treated").

126. *See* Morrison v. MacNamara, 407 A.2d 555, 562 (D.C. 1979) (discussing how jurisdictions that can adhere to national medical professional standards, such as urban D.C. in the late seventies, do not fall under the justifications for the locality rule); *see also* Small v. Howard, 128 Mass. 131, 136 (1880) (*overruled by* Brune v. Belinkoff, 235 N.E.2d 793, 798 (Mass. 1968)) (holding that a small-town doctor with limited skills could not be held to the same standard as more experienced doctors). The court in *Small* provided that:

> [t]he defendant . . . being the practitioner in a small village . . . was bound to possess that skill only which physicians and surgeons of ordinary ability and skill, practi[c]ing in similar localities, with opportunities for no larger experience, ordinarily possess; and he was not bound to possess that high degree of art and skill possessed by eminent surgeons practi[c]ing in large cities .

Id. at 136.

127. *See Morrison*, 407 A.2d at 561 (stating "[t]he rule was designed to protect doctors in rural areas who, because of inadequate training and experience, and the lack of effective means of transportation and communication, could not be expected to exhibit the skill and care of urban doctors").

128. *See The History of Healthcare Technology and the Evolution of EHR*, VERTITECHIT, https://www.vertitechit.com/history-healthcare-technology

the locality rule may no longer be as applicable for jurisdictions that now have access to newer medicine and treatments.[129] With modern technology, there is no longer the same widespread gap between urban and rural areas that previously justified the extreme differences in creating varying standards of care for physicians, though healthcare disparities do still exist.[130] However, even today, there remains a lack of available resources for professionals in smaller rural areas than those in larger, more well-funded areas, which justifies using the locality rule to account for the disparities that persist.[131]

Courts approach the locality rule in three different ways: (1) the national approach; (2) the locality approach; and (3) the strict locality approach.[132] The national approach posits that there should be a singular set national standard of care to hold medical professionals against across the country.[133] This approach creates a uniform standard

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[https://perma.cc/88VH-6DZK] (detailing the emergence of medical technology over the last hundred years).

129. *See* Shilkret v. Annapolis Emergency Hosp. Ass'n, 349 A.2d 245, 249 (1975) ("Whatever may have justified the strict locality rule fifty or a hundred years ago, it cannot be reconciled with the realities of medical practice today. 'New techniques and discoveries are available to all doctors within a short period of time through medical journals, closed circuit television presentations, special radio networks for doctors, tape recorded digests of medical literature, and current correspondence courses.' More importantly, the quality of medical school training itself has improved dramatically in the last century." (internal citations omitted)).

130. *See* Robin Warshaw, *Health Disparities Affect Millions in Rural U.S. Communities*, ASS'N AM. MED. COLL. (Oct. 31, 2017), https://www.aamc.org/news-insights/health-disparities-affect-millions-rural-us-communities [https://perma.cc/4GK9-32X3] (describing the health disparities that continue to affect primarily rural areas, even as there has been some advancement in accessibility to modern healthcare technology across the nation).

131. This Comment acknowledges that healthcare disparities continue to be a widespread problem across the United States, especially considering the ongoing pandemic. The significance of the locality rule in the current healthcare climate is outside the scope of this Comment, though it acknowledges opposing sides of whether the locality rule is still applicable today. *Compare* Ginsberg, *supra* note 121, at 324 (detailing the history behind the locality rule and arguing that having various standards of care is obsolete), *with* Casey Caroline Hyman, Comment, *Setting the "Bar" in North Carolina Medical Malpractice Litigation: Working with the Standard of Care that Everyone Loves to Hate*, 89 N.C.L. REV. 234, 238 (2010) (arguing that a national standard of care is not appropriate when considering the realities of the healthcare system in response to North Carolinian legal discourse over the standard of care a doctor must perform).

132. *See* Ginsberg, *supra* note 121, at 323–24.

133. *See, e.g.*, *id.* (introducing the three approaches to the locality rule); *see also* Hill v. Medlantic Health Care Grp., 933 A.2d 314, 325 (D.C. 2007) (evaluating the origin

of care that does not differ based on locality, and instead, it holds physicians to the exact same standard regardless of their environment.[134] Alternatively, the locality approach places a "geographical dimension" on the standard of care that doctors and healthcare providers must adhere to, holding that a professional should be held to the same standard of care that a reasonably qualified physician in a similar locality under similar circumstances would exercise.[135] The courts adopted this approach to provide flexibility for doctors in more rural areas where modern techniques, procedures, and medicine were not yet widely available.[136] Finally, the strict locality approach adopts a firm geographic lens that is even narrower than the broader locality approach, holding that the standard a doctor or medical professional should be held to is what a doctor in the same state or community would do.[137]

II. ANALYSIS

Although courts have noted that educational claims may be successful if brought under other areas of law, such as misrepresentation or contract law, students and families are still regularly barred from bringing such claims due to the reluctance of courts to adopt legal avenues for wholesale educational malpractice relief.[138] Looking to other areas of malpractice, specifically medical malpractice, the similarities of the acts of misconduct present an opportunity to analogize the areas to establish similar legal standards.

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of the locality rule in the medical field, acknowledging the problems the rule solved and arguing that the rule is outdated in today's modern world).

134. *Hill*, 933 A.2d at 325.

135. *See* Ginsberg, *supra* note 121, at 331 (defining the locality approach); *see also* Small v. Howard, 128 Mass. 131, 136 (1880) (overruled by Brune v. Belinkoff, 235 N.E.2d 793, 798 (Mass. 1968)) (holding that a doctor in a rural town with less access to medical technology and education should not be held to the same standard as doctors in urban areas with better access to advanced medicine).

136. *See* Ginsberg, *supra* note 121, at 331 (explaining the justification for the "geographic" approach to the locality rule).

137. *See id.*; Dunham v. Elder, 306 A.2d 568, 571 (Md. Ct. Spec. App. 1973) (discussing the strict locality approach and holding a doctor accountable to a strict locality standard based off the doctor's geographic location).

138. *See* Sain v. Cedar Rapids Cmty. Sch. Dist., 626 N.W.2d 115, 128 (Iowa 2001) (en banc) (dismissing a claim brought by a plaintiff-student who argued that educational malpractice resulted in their loss of scholarship); Ross v. Creighton Univ., 957 F.2d 410, 415 (7th Cir. 1992) (holding that Illinois does not recognize educational malpractice as a valid claim after a plaintiff-student alleges failure to educate).

The medical and educational realms share comparable aspects, including specified levels of higher education, a general duty to care for others, the disparity of accessibility to resources and opportunities, and the consequences of failing to adhere to their general duty. To allow an opportunity for students to obtain deserved legal relief because of the harm they suffered from educators or academic institutions, courts must first recognize that educational malpractice cases can actually be evaluated similarly to the underlying principles in the medical malpractice field.

A. Why Comparing Medicine and Education Is Appropriate

Educational and medical malpractice's underlying principles share similarities that create an appropriate analogy between the two areas. These similarities justify courts using the already recognized area of medical malpractice law to establish similar legal standards for educational malpractice claims.

Both the medical and academic fields require specific higher education degrees for careers within the profession.[139] For the medical field, most healthcare professionals are required to attend medical school, or complete some form of medical-specific training, in order to obtain certification and licensing.[140] Likewise, teachers and educators typically must attend higher education to qualify for teaching positions or advanced administrative positions.[141]

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139. For the purposes of this Comment, and specifically for the comparison between the medical and education fields, I will generally refer to professionals in their respective areas who attended higher education in order to perform their job, such as doctors, who are required to complete medical school, and teachers or professors, who have obtained a bachelor's, master's, or PhD degrees. There are actors and agents in both fields who do not require higher education to complete their job functions, such as receptionists, secretaries, etc., but the specific credentials for the purpose of analogizing the two professions and fields are outside the scope of this Comment.

140. *See The Road to Becoming a Doctor*, ASS'N AM. MED. COLL. (2020), https://www.aamc.org/system/files/2020-11/aamc-road-to-becoming-doctor-2020.pdf [https://perma.cc/W9WR-HXXJ] (detailing the schooling, credentials, and qualifications required to become a doctor).

141. *See Teacher Certification Requirements by State*, TEACH.COM https://teach.com/careers/become-a-teacher/teaching-credential/state-requirements [https://perma.cc/U3KZ-F43M] (breaking down, by state, the requirements to be a teacher, and the licensing and credentials teachers must obtain). While school administrators typically teach the material to students, these positions often require specialized master's degrees, in addition to years of educational experience in other roles. *See How to Become a School Administrator*, TEACHINGDEGREE.ORG https://www.teachingdegree.org/careers/how-to-become-a-school-administrator

Accordingly, both medical professionals and educators must receive specialized training in their fields to be eligible to treat patients or teach students.[142]

Furthermore, medical professionals and healthcare providers share a similar duty, as they both provide services and specialized care to traditionally vulnerable parties who cannot receive the benefit of the services on their own.[143] Doctors or healthcare providers have a duty to care for those who are sick, injured, or suffering from a disability or illness.[144] Often, individuals suffering from these various medical conditions do not have the education or resources to be able to treat themselves or receive proper care.[145] Similarly, to be credited and certified for teaching, educators and academic institutions are tasked with instructing students and teaching them skills they cannot learn themselves.[146] Additionally, as medical professionals care for patients who need medical care, families entrust teachers and administrators to take care of students who cannot yet take care of themselves.[147]

The difference in educational outcomes and opportunities may further justify implementing a standard of care for educational malpractice claims. Students in more affluent schools and

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[https://perma.cc/HXB2-LVRU] (delineating the educational requirements to become a candidate for a school administrative role, such as school principal).

142. In addition to medical or educational professionals who obtain general higher educational degrees, some members of each respective profession may obtain further degrees or concentrations for specializations, such as special education teachers or doctors who perform specialized surgery (i.e., neurosurgery, radiology, etc.). *See How to Become a Special Education Teacher*, TEACHER.ORG, https://www.teacher.org/career/special-education-teacher [https://perma.cc/6RQT-A2TG] (noting the degree and testing requirements to obtain special education licensing); *Specialty Profiles*, ASS'N AM. MED. COLLS., https://www.aamc.org/cim/explore-options/specialty-profiles [https://perma.cc/4HK8-9C29] (listing various medical specialties and the training and job opportunities for each specialty).

143. *See Role of the Doctor*, WORLD FED'N MED. EDUC., https://wfme.org/home/projects/role-of-the-doctor [https://perma.cc/42LB-4ZPN] (explaining, generally, the need for doctors and the role they play in society).

144. *See generally* McCoid, *supra* note 103, at 553–55 (explaining a doctor's duty and standard of care they owe to their patients).

145. *See Role of the Doctor*, *supra* note 144 (noting that the role of a doctor is to be a communicator, educator, researcher, and manager of health care).

146. *See* Judith Taack Lanier, *Redefining the Role of the Teacher: It's a Multifaceted Profession*, EDUTOPIA (July 1, 1997), https://www.edutopia.org/redefining-role-teacher [https://perma.cc/2HTL-2NUG] (explaining the role of teachers in educating their students).

147. *See id.* (noting that teachers play a custodial role in caring for the students in their class).

communities may receive higher levels of education and more educational opportunities than students in poor, inner-city, or rural schools.[148] This reflects similarities to the locality rule in the medical malpractice context that acknowledges that doctors in rural areas have less access to educational and professional opportunities that can improve their medical skills than doctors in urban cities. This disparity further supports the analogy between the two areas of malpractice and the resulting benefit from modelling educational malpractice claims off of medical malpractice principles.

The long-term consequences of not providing adequate care is evident in both fields as well. Both healthcare providers and educational institutions that act negligently can directly cause long-term consequences for the individual harmed by their misconduct and negligent actions.[149] For medical professionals, failing to properly treat or diagnose a condition can have life or death consequences, especially if the condition is one that a layperson would not be able to diagnose or treat on their own.[150] Educators and academic institutions can affect

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148. *See* Jill Barshay, *A Decade of Research on the Rich-Poor Divide in Education*, HECHINGER REPORT (June 29, 2020), https://hechingerreport.org/a-decade-of-research-on-the-rich-poor-divide-in-education [https://perma.cc/4QVF-SVRB] (detailing the growing disparities between affluent schools and poor schools). The research reported that over a ten-year period, between the 2001–2002 school year and the 2011–2012 school year, the educational funding gap grew forty-four percent; meaning that, on average, affluent schools spent $1,500 more per student on average than poorer schools. *See id.* More affluent, private schools also typically have higher rates of graduating students attending top-ranked or Ivy League universities. *See* James S. Murphy, *The Real College Admissions Scandal*, GUARDIAN (June 14, 2021), https://slate.com/news-and-politics/2021/06/private-schools-competitive-college-advantage-problems.html [https://perma.cc/QB3R-7WEK] (noting that the United States Census Bureau reports about seven percent of high school students attend private schools, while Ivy League institutions, such as Harvard University, report that about forty percent of their incoming class attended private, affluent high schools).

149. *See* Wilkins, *supra* note 13, at 430–31 (noting that a failure to educate "represents a prime example of blatant, unreasonable, and socially harmful conduct").

150. *See* Andrew Suszek, *Medical Malpractice: Misdiagnosis and Failure to Diagnose*, ALLLAW, https://www.alllaw.com/articles/nolo/medical-malpractice/misdiagnosis-failure-diagnose.html [https://perma.cc/JM4S-YKX9] (noting that various forms of harm caused by a physician's misdiagnosis or failure to diagnose result in pain and suffering, medical bills, loss of earning capacity, and loss of enjoyment of life); John G. Culhane, *Reinvigorating Educational Malpractice Claims: A Representational Focus*, 67 WASH. L. REV. 349, 352 (1992) (arguing that the uniform approach to dismissing educational malpractice is unjustified).

factors such as a student's future employment,[151] mental health,[152] or further academic performance[153] in several ways. For example, advancing students who are struggling with learning disabilities or meeting certain learning benchmarks, may negatively impact any of those factors, or lead to other consequences.[154] These long-term consequences are observable in both professions and justify the creation of a measurable standard of care that courts can utilize to grant relief for acts of gross misconduct.

B. Establishing an Educational Locality Rule

Modeling educational malpractice on the medical malpractice principles could create a similar standard of care for educators, allowing legal relief for students harmed by educators who fail to adhere to that standard. For courts to begin to recognize educational malpractice actions as cognizable claims that justify legal action, they must first recognize a measurable standard of care to hold educators and academic institutions accountable.

Already established regulated standards and expectations could help courts recognize a measurable standard of care, as these benchmarks represent tangible guidelines that courts could utilize to measure educator conduct and construct a standard of care. When considering the rise of national[155] and state[156] educational guidelines and benchmarks, the existing claim that there is an inability to form

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151. *See* Wilkins, *supra* note 13, at 429 (explaining that these students lack maturity and judgment skills which prevents them from obtaining employment).

152. *See How Does Academic Stress Affect Mental Health in the Age of Digital Learning*, KVC KANSAS (Nov. 10, 2020), https://kansas.kvc.org/2020/11/10/how-does-academic-stress-affect-mental-health-in-the-age-of-digital-learning [https://perma.cc/E7XK-RVJ6] (noting that improved academic settings can provide students with better mental health and reduce academic stress).

153. *See* Wilkins, *supra* note 13, at 429 n.11 (collecting cases in which students could not proficiently read or write despite school administrators advancing them to higher grades in school).

154. *See* STANDLER, *supra* note 33, at 5–8 (introducing various consequences of educational malpractice that had negative impacts on students); *see also* Wilkins, *supra* note 13, at 429.

155. No Child Left Behind Act, 20 U.S.C. § 6319 (2012).

156. *See, e.g.*, *Standards in Your State*, COMMON CORE STATE STANDARDS INITIATIVE, http://www.corestandards.org/standards-in-your-state [https://perma.cc/4ARW-KWGM] (listing varying educational standards by state).

measurable standards of care falters.[157] In the last few decades, a majority of states have incorporated detailed and regulated national curriculum and performance standards, creating benchmarks that educators and institutions must produce and meet.[158] National standards, such as the No Child Left Behind Act[159] and the Common Core curriculum,[160] "[are] seen by some in the field [of education] as setting out the parameters of a national standard of care for education."[161] These national initiatives lay out measurable criterion for different grade levels and school subjects "by articulating core knowledge and skills, while grade-specific standards provide additional specificity."[162] For example, the Common Core requires fifth graders to have proficiency in analyzing the structure of texts and how certain portions relate to other sections.[163]

By utilizing state or nationally created guidelines that educators must adhere to—or risk being liable—courts can begin recognizing claims of educational malpractice as cognizable claims of action. Similar to the national medical guidelines that medical professionals must meet,[164] establishing and upholding state or national regulations for educators and academic institutions will provide measurable

157. *See generally supra* notes 132–36 and accompanying text. (discussing courts' general lack of ability to recognize a workable standard of care).

158. *See Standards in Your State*, *supra* note 156 (detailing varying state standards for educators to meet). *See generally* Jennifer C. Parker, *Beyond Medical Malpractice: Applying the Lost Chance Doctrine to Cure Causation and Damages Concerns with Educational Malpractice Claims*, 36 U. MEM. L. REV. 373, 404 (2006) (arguing that national standards, like No Child Left Behind, and other state expectations, create measurable standards against which a court could evaluate educational professionals' conduct).

159. No Child Left Behind Act, 20 U.S.C. § 6319 (2008).

160. *Standards in Your State*, *supra* note 156.

161. *See* Parker, *supra* note 158, at 404 (noting that when a national standard for education is recognized in the field, courts may be more likely to entertain educational malpractice claims).

162. *English Language Arts Standards*, COMMON CORE STATE STANDARD INITIATIVE, http://www.corestandards.org/ELA-Literacy [https://perma.cc/Z4ST-UTCR].

163. *English Language Arts Standards* >> *Anchor Standards* >> *College and Career Readiness Anchor Standards for Reading*, COMMON CORE STATE STANDARDS INITIATIVES, http://www.corestandards.org/ELA-Literacy/CCRA/R [https://perma.cc/9E5W-NJ5R] (outlining the specific common core standards in the area of K-12 Reading).

164. *See Code of Medical Ethics Overview*, AM. MED. ASS'N, https://www.ama-assn.org/delivering-care/ethics/code-medical-ethics-overview [https://perma.cc/J57G-X688] (explaining general medical ethical guidelines and expectations).

benchmarks that can guide institutions while holding them accountable to students.[165]

While regulations such as the Common Core Initiative may provide a good start to creating tangible guidelines, they do not currently provide a legal avenue for students who may be harmed by grossly negligent misconduct.[166] A judicially recognized and regulated standard of care—like the ones in place for medical professionals and healthcare providers—that mandates that educators and academic institutions must act reasonably and refrain from grossly negligent misconduct can provide courts with measurable standards to utilize when educators or institutions adversely affect students through grossly negligent conduct.[167]

C. Interpreting Educational Locality Rules

When utilizing this measurable standard of care, the principles of the locality rule seen in the medical malpractice realm could play a beneficial role in enforcing and interpreting educational malpractice standards.[168] Smaller or less well-funded schools may not, and often do not, have the same resources as wealthier or more affluent schools.[169]

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165. Establishing guidelines for the duty and standards of care that an educator owes to students in varying situations provides educators with knowledge of what duties are required of them within their profession. Guidelines that create tangible standards of what an educator must adhere to, in addition to the standard of care required, would reflect medical malpractice's clear standard of care of reasonableness. *See supra* notes 105, 108 and accompanying text (introducing the standard of care required for medical professionals).

166. *See Standards in Your State*, *supra* 156. The Common Core standards create benchmarks for English and mathematics but fall short of creating standards for other subjects that students learn in school. Thomas Armstrong, 12 Reasons the Common Core is Bad for America's Schools, AMERICAN INST. FOR LEARNING AND HUMAN DEV. (Apr. 26, 2018) https://www.institute4learning.com/2018/04/26/12-reasons-the-common-core-is-bad-for-americas-schools [https://perma.cc/D3WJ-2H9E]. Further, the standards fail to hold educators legally liable for failing to meet the standards and thus do not prevent acts of gross misconduct in relation to academic matters and student success. *Id.*

167. *See supra* notes 164, 166 (explaining that the medical profession is guided by medical ethical guidelines and that the education profession can be similarly guided by the Common Core standards or similar guidelines).

168. *See supra* notes 132–36 and accompanying text (detailing the origin and definition of the locality rule).

169. *See* Alana Semuels, *Good School, Rich School; Bad School, Poor School*, ATLANTIC (Aug. 25, 2016), https://www.theatlantic.com/business/archive/2016/08/property-

Courts should take this disparity into account when recognizing a standard of care for educators by using a locality approach to educational malpractice claims, which can mirror the varying standards of care established by the locality rule in the medical malpractice field.[170]

Courts could use a modified version of the medical malpractice locality rule, when applied to educational malpractice, to account for the disparities between schools and the resources available to them. For example, schools with fewer resources may not be able to provide strong college or post-secondary education preparation classes and thus should not be held to the same standard of care as more affluent or college preparatory high schools who may have the ability to provide more opportunities.[171] A locality approach, modified from its existing use in medical malpractice and adjusted to fit the needs of educational malpractice, could allow courts to take into account the disparities between academic institutions while still holding educators and institutions accountable.[172]

With this modified locality rule, judges could interpret a measurable standard of care to apply to educational malpractice actions and provide relief for students. Creating a measurable standard of care will help eliminate one of, if not the most significant, hurdles in the way the courts fail to evaluate acts of gross negligence committed by educators or academic institutions. With a measurable standard of care, courts may entertain claims of gross educator or institution misconduct and allow students and families to gain legal relief for harm and injury caused.

D. Gross Negligence in Education

When creating and recognizing a standard of care for educational malpractice cases, it is important to note that not all acts of misconduct may meet the standard required of the professional, similar to medical malpractice cases.[173] In medical malpractice cases, courts only

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taxes-and-unequal-schools/497333 [https://perma.cc/5B8Q-TLC2] (examining the significance of the disparities that exist between affluent schools in wealthy areas versus poorer schools in higher-poverty cities).

170. *See supra* notes 132–36 and accompanying text.

171. *See supra* notes 148, 169 (explaining the differences between school systems with different types of resources).

172. *See supra* notes 131–32 and accompanying text (discussing the consideration of rural and remote physicians as one of the goals of the locality rule).

173. *See supra* notes 105, 108 (providing the medical malpractice standard of care).

recognize claims arising from acts of gross negligence.[174] Modeling a standard of care for educational malpractice off of medical malpractice would similarly result in only the most egregious cases of gross negligence being brought against educators.[175]

Thus, courts can evaluate misconduct that occurs in an educational setting where the actions clearly constitute gross negligence and establish a valid claim, while conduct that only constitutes ordinary negligence should continue to fail to meet a standard justifying legal relief.[176] Acts of educational misconduct that constitute gross negligence, and are thus reasonable for courts to entertain, need not be part of a set list of certain behaviors or conduct. Conduct that would likely be considered gross negligence includes negligent advancement of students, recklessly providing information that students rely on, negligent failure to prevent serious injury or harm to students, or gross deviation from state or national guidelines of required curriculum.[177]

Negligent advancement of a student occurs when a school allows the student to advance to the next grade or to graduate, despite clear evidence that the student does not comprehend the material by receiving poor grades, demonstrating confusion, lacking basic academic skills, or clearly displaying that the student is not comfortable with the material that is required to advance.[178] This disregard for the student's future success and ability to perform basic skills, such as reading and writing, can cause long-lasting harm for the student.[179]

Another action that likely constitutes grossly negligent misconduct is one in which a teacher or professor recklessly provides incorrect or inadequate information that students rely on, particularly for fundamental general education courses, or key classes in highly

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174. *See supra* note 109 and accompanying text (explaining that ordinary negligence does not result in a legal remedy).

175. *See supra* text accompanying notes 109–14.

176. *See supra* Section I.C. (discussing the wide breadth of educational malpractice claims and the potential application of medical malpractice standards to these claims).

177. *See supra* Section I.D (introducing the elements of medical malpractice and how gross and ordinary negligence is distinguished in medical malpractice suits).

178. *See* Donohue v. Copiague Union Free Sch. Distr., 391 N.E.2d 1352, 1353 (N.Y. 1979). This also is not an exhaustive list of what may constitute negligent advancement and is but a few examples of when student behavior or performance could indicate to an educator that a student requires additional assistance or guidance.

179. *See, e.g.*, *id.* at 1352–53 (listing what may constitute negligent advancement); *see also* Peter W. v. San Francisco United Sch. Dist., 131 Cal. Rptr. 854 (Ct. App. 1976), and other case law where students claimed that the misconduct of an educator or institution resulted in long-term consequences, such as job prospects and success.

specialized concentrations.[180] For foundational classes, inadequately teaching subjects such as basic mathematics or English may have a lasting impact on students who rely on that information for future classes or future employment.[181] For specialized concentrations, this conduct is especially concerning in trade schools, such as flight school or driver's education, or in higher education concentrations in the medical or legal fields.[182] Courts hold medical and legal professionals to ethical and professional standards when they reach their career and are actively practicing.[183] Likewise, educators of those professions should similarly be held to a standard of care where legal action may be justifiable as a result of misconduct which results in a student's reliance on incorrectly taught information. In trade schools, relying on incorrect information could have deathly consequences for students learning to operate powerful vehicles or machinery.[184] As other people are put in harm's way in situations such as these, negligent educators that teach students incorrect information that could potentially cause harm to the student and other individuals should constitute grossly negligent misconduct.[185]

Gross deviation from state or national guidelines may also suffice as grossly negligent misconduct when teachers stray far from the regulated curriculum and fail to provide students with the knowledge

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180. *See Donohue*, 391 N.E.2d at 1352 (alleging failure to educate basic skills that would allow a student to gain post-graduate employment).

181. *See id.* (citing the lack of adequate education of basic skills and subjects to successfully find employment); *see also* Keiper, *supra* note 11, at 200 (stressing the importance of basic literacy education for students to become successful members of society).

182. *See* Dallas Airmotive, Inc. v. FlightSafety Int'l, Inc., 277 S.W.3d 696, 698 (Mo. App. W.D. 2008); Page v. Klein Tools, Inc., 610 N.W.2d 900, 905–06 (Mich. 2000). *Dallas Airmotive* arose from a plane crash where surviving family members sued the flight school. 277 S.W.3d at 698. The *Dallas Airmotive* court found that while "[i]t is the duty of an educator or supervisor to use reasonable care so as not to cause physical injury to a trainee during the course of instruction or supervision," this duty cannot be extended to claims arising after instruction finished. *Id.* at 701. *Page* arose from a plaintiff's injury falling from a utility pole after he took a course provided by a trade school that taught students how to climb utility poles. 610 N.W.2d at 900. The *Page* court ruled that it cannot determine the "precise scope" of what the trade school is required to teach and cannot find a duty that would exist in this situation. *Id.* at 906.

183. *See generally* MODEL RULES OF PRO. CONDUCT (A.B.A.); *Code of Medical Ethics Overview*, *supra* note 164.

184. *See Dallas Airmotive*, 277 S.W.3d at 698 (alleging negligent instruction in flight school resulting in the death of a pilot and passengers).

185. *See supra* 111 (gross negligence is "[a] lack of even slight diligence or care").

that the state, institution, or profession requires.[186] Subjects such as English, mathematics, and health education, among other classes, have a significant impact on a student's life beyond the classroom. An educator's failure to provide the required information and to equip the students with the same information to succeed as all other students at their level may, in turn, constitute gross misconduct.[187]

These areas of educational misconduct could likely meet a gross negligence standard, as they arise from an educator's reckless disregard of their duty and can have long-lasting impacts.[188] Students cannot teach themselves the information, as they attend school to learn and rely on their instructors to provide the proper material.[189] Accordingly, the long-lasting consequences that could result from an educator's or institution's gross misconduct can have more than just an immediate impact.[190] Failing to properly educate a student in accordance with national guidelines or ensure that the student is actually understanding concepts can affect a student's job prospects, future academic performance, mental health, ability to participate in

186. *See supra* notes 149–53 (introducing national and state guidelines that regulate the required curriculum).

187. Wilkins, *supra* note 13, at 429–31.

188. *Id.*

189. *See id.* at 427; *Role of the Doctor*, *supra* note 143 (explaining the need for doctors).

190. *See* Parker, *supra* note 12, at 319–20. The author noted the significant impact of an inadequate education:

> No better statement of the harm that results from miseducation can be found than that made by the Select Committee on Equal Education Opportunity in 1974. The committee noted: The costs of inadequate education are, for the most part, immeasurable. For the individual, educational failure means a lifetime of lost opportunities. But the effects are visited on the Nation as well, for society as a whole also pays for the under-education of a significant segment of the population. Unemployment and underemployment due to low levels of educational attainment and underachievement reduce many citizens' earning power. . . . Finally, the costs of poor education are not just limited to the present generation. The children of persons with inadequate education are themselves more likely to suffer the same educational and social consequences as their parents.

Id. at 319–20. (citing S. SELECT COMM. ON EQUAL EDUCATIONAL OPPORTUNITY, 92ND CONG., TOWARD EQUAL EDUCATIONAL OPPORTUNITY 171 (1972) (commonly referred to as "The Coleman Report," the first government-funded study to associate family background as the largest predictor of student learning outcomes and document an achievement gap)).

extracurricular activities,[191] and may only add to the growing illiteracy crisis.[192]

III. CONCERN AND CRITICISM: OPENING THE FLOODGATES

In addition to the legal challenges that courts cite for their justification of failing to recognize educational malpractice claims, courts are often concerned by the prospect that such litigation could create a burden on the judicial system.[193] This fear would be valid if every claim brought under educational malpractice had to be heard. However, this Comment does not argue that all cases brought under the educational malpractice umbrella are claims that courts should entertain, but rather argues that courts should only hear those cases that result from gross misconduct and dismiss those claims that do not reach that standard.[194]

A major reason that courts consistently dismiss educational malpractice claims is because of the potential increase in the amount of litigation brought against educators and schools, as well as the financial impact that would result.[195] Courts fear that opening the floodgates for plaintiffs to bring educational malpractice claims would encourage students and interested parties to bring frivolous actions

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191. *See* Coleman Report, *supra* note 190, at 171.

192. *See* Keiper, *supra* note 11, at 193 (discussing how socially privileged groups used disparate access to education (and literacy) to oppressive power dynamics).

193. *See* Peter W. v. S.F. Unified Sch. Dist., 131 Cal. Rptr. 854 (Ct. App. 1976) (discussing the potential burdens that would result from holding educational institutions to an actionable duty of care and the lack of a judicial framework to apply to educational malpractice claims); *see also* Parker, *supra* note 158 (relaying courts concerns over the results of the establishment of an actionable duty of care in educational malpractice claims).

194. This Comment is not arguing that the ability to bring legal action against educators or institutions should exponentially increase and allow all claims of negligence to constitute legal actions. Rather, this Comment argues that acts of severe and gross educational misconduct should not be automatically dismissed by courts and left to academic institutions to control. The acts that would constitute a successful educational malpractice suit would likely be rare and only in serious acts of misconduct. However, by allowing educational malpractice suits alleging gross negligence to succeed, the interests and welfare of students who are seriously harmed by misconduct are further served with the ability to grant and recognize legal relief.

195. *See* Richard Funston, *supra* note 21, at 793–95 (exploring concerns that recognizing educational malpractice as a valid claim would lead to a flood of litigation and could result in many frivolous claims).

over any inconvenience or action a student disagrees with, thus congesting the courts.[196]

However, if this concern is continuously used as a decisive factor to dismiss well-pleaded claims, this belief would mean that this area of the law is "incapable of growth and adaptation."[197] If the legal system's goal is to provide relief for those who suffer harm due to others' gross misconduct, refusing to entertain new claims for fear of an influx of litigation is contrary to the purpose of the legal justice system.[198] While this concern would be valid if all plaintiffs could successfully bring claims, this Comment is not arguing that courts should strike down all precedent that dismisses educational malpractice. Instead, courts should only consider cases where acts of gross misconduct justify legal relief.

Courts also often repeatedly cite to the difficulty in establishing accurate causation and damages for educational malpractice claims, arguing that various external factors can play a role in the harm that a student suffered.[199] Struggling to pinpoint the "but for" causation of what caused the student's injury or claim, courts are cautious to

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196. *See* Ross v. Creighton Univ., 957 F.2d 410, 414 (7th Cir. 1992). While explaining reasons why Illinois refuses to recognize educational malpractice as a cognizable claim, the majority opinion expressed a fear about the burdensome amounts of litigation that could result from creating the new claim:

> A third reason for denying this cause of action is the potential it presents for a flood of litigation against schools . . . As the district court noted, "education is a service rendered on an immensely greater scale than other professional services." . . . The sheer number of claims that could arise if this cause of action were allowed might overburden schools.

(citations omitted).

197. *See* Funston, *supra* note 17 (arguing that an increase of litigation comes up when new litigation is introduced, which prevents new claims). The article further states

> [that] the claim that a flood of litigation will result is one that can be (and has been) raised against the recognition of any new cause of action. Were such a consideration to be decisive, the law would be incapable of growth and adaptation. It is the business of the law to remedy wrongs that deserve it, even at the expense of a "flood of litigation" and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds.

Id. at 795 (quoting W. PROSSER, THE LAW OF TORTS 51 (4th ed. 1971)).

198. *Id.*

199. *See* Donohue v. Copiague Union Free Sch. Distr., 391 N.E.2d 1352, 1353–54 (N.Y. 1979) (noting that there are varying independent factors for each individual student, meaning that causation and damages can be difficult to attribute to an educator's or institution's actions).

recognize potentially valid claims without confirmation that external factors played no role in the harm suffered.[200] As both causation and damages are necessary to bring a successful negligence claim under tort law, judges cite to the difficulty of establishing causation and damages to prevent parties from successfully bringing a claim under educational malpractice.[201]

To further address this concern of overflooding the judicial system, this Comment is not arguing that all cases brought under educational malpractice will satisfy the standard for grossly negligent misconduct. Thus, there are cases that will likely continue to be dismissed for failing to state a cognizable claim, similar to the dismissal of medical malpractice cases that do not meet the level of negligence needed for a successful claim.[202] For example, cases that allege schools commit misconduct by actions such as using unpreferred methods of instruction, cases that argue a student should not have been eligible to enroll in a class, cases that appeal suspensions, or cases that fight grades or expectations of course material are examples of claims that courts should continue to dismiss.[203]

Currently, there is a plethora of cases stemming from the COVID-19 pandemic that raise educational malpractice claims against schools from the failure to deliver in-person instruction.[204] However, these cases fail to allege that the decision to move to virtual instruction was grossly negligent as the students argued they received "subpar"

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200. *Id.*

201. *Negligence*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A tort grounded in this failure . . . expressed in terms of the following elements: duty, breach of duty, causation, and damages.").

202. *See supra* notes 194–97 (describing different litigation that does not rise to a cause of action).

203. *See infra* notes 207–10 and accompanying text (detailing cases in which courts found claims of malpractice to not rise to the level of gross negligence).

204. *See, e.g.*, Oyoque v. DePaul Univ., No. 20 C 3431, 2021 WL 679231, at *1–6 (N.D. Ill. Feb. 21, 2021) (alleging that DePaul University's decision to move online due to COVID-19 resulted in subpar instruction and experience); Lindner v. Occidental Coll., No. CV 20-8481-JFW(RAOx), 2020 WL 7350212, at *1–10 (C.D. Cal. Dec. 11, 2020) Lindner: (claiming tuition paying students are entitled to a partial refund from the semesters conducted online as they were promised an in-person experience); *see also* Metzner v. Quinnipiac Univ., No. 3:20-cv-00784 (KAD), 2020 WL 7232551, at *1–6 (D. Conn. Nov. 12, 2020) (alleging breach of contract, unjust enrichment, and conversion arising from Quinnipiac University's failure to reimburse students for tuition and fees after moving remote). Courts dismissed all three cases as non-cognizable claims under any of the alleged areas of law. *Oyoque*, 2021 WL 679231, at *6; *Lindner*, 2020 WL 7350212, at *10; *Metzner*, 2020 WL 7232551, at *6.

education as a result of the switch to online learning.[205] Because the pandemic forced almost all schools to move to virtual learning, these claims fail to allege behavior that grossly deviates from what was appropriate or utilized by most other schools in the nation. Thus, courts will likely continue to dismiss these educational malpractice cases for failing to meet the standard of care required of educators.[206]

Further, courts should dismiss cases where students claim they did not have the specific knowledge to be successful in a course or did not feel prepared to handle and master the material yet were eligible to enroll.[207] While a student may be inconvenienced or set back by an action like this, this action is not due to a gross deviation from an educator's standard of care. Thus, it cannot raise to the level of gross misconduct that justifies legal action and remedy.

Claims based on grades a student receives, or decisions from the school itself about the student's conduct, such as expulsions or suspensions, would likely also be dismissed for failing to allege gross misconduct.[208] These claims are purely academic matters that do not fall upon the grossly negligent conduct of the educators or institution, but rather arise from the student's disagreement or disappointment with a decision made regarding their behavior.[209] Cases like these in the medical malpractice field have also been dismissed, where courts dismissed actions from patients who disagreed with the care they

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205. *See* Lindner v. Occidental Coll., 2020 WL 7350212, at *4 (quoting that education in the virtual format was subpar). Gross negligence means in "conscious disregard" of the harm caused to others. *See* BLACK'S LAW DICTIONARY, *supra* note 111.

206. *See supra* Section II.B (discussing the established national standards courts could use to determine whether an educational institution was grossly negligent).

207. *See generally* Andre v. Pace Univ., 655 N.Y.S. 777 (N.Y. App. Div. 1996) (alleging that student-plaintiffs were not prepared for the class they enrolled in and should not have been allowed to enroll).

208. *See generally* Washington v. City of New York, 83 A.D.2d 866 (N.Y. App. Div. 1981) (demonstrating a claim where a student appealed a suspension, claiming it was an improper suspension without cause and brought an educational malpractice claim seeking relief).

209. This Comment acknowledges that decisions regarding student disciplinary matters may result from grossly negligent decisions by institutions. However, this argument refers to claims derived from appealing school suspension, expulsion, or other disciplinary matters seeking legal relief or reversal from the courts. *See, e.g.*, *id.* at 867 (dismissing a student's case appealing his suspension from school to collect monetary damages).

received despite being treated accorded the appropriate medical standard of care.[210]

CONCLUSION

Education remains one of the most impactful and long-term influences in many students' lives. The education system in the United States, from pre-kindergarten through higher education, contains many defects that will be challenging to overcome. However, for educational malpractice claims, courts possess the ability to recognize a measurable standard of care and hold educators and academic institutions accountable for acts of gross miscount, allowing legal relief for students who have suffered harm and contributing to the ever-growing call for educational reform.[211]

Despite the call by the United States National Commission on Excellence in Education for education reform in 1983, forty years later, the system is still in need of substantial reform.[212] By creating a standard of care for educational malpractice cases that allege acts of gross misconduct, courts could provide additional reform to allow for further development of the United States' academic institutions. Continuing to refuse to evaluate claims brought under educational malpractice leaves students and families with little to no recourse for relief for the harm and damages suffered due to the educator's or institution's grossly negligent behavior—a problem that could be solved by adopting a measurable standard of care.

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210. *See* Alvarez v. Prospect Hosp., 501 N.E.2d 572 (N.Y. 1986) (finding that a doctor was not grossly negligent when a plaintiff was not personally satisfied with the doctor's care and outcomes).

211. *See What's Happening in Education Policy in Washington and Beyond*, CTR. FOR EDUC. REFORM, https://edreform.com/education2021 [https://perma.cc/GRB2-HM9H] (providing an overview of current education improvements and news at both the national and state levels aimed at creating impactful educational reform).

212. *See supra* note 210 (containing news and updates on education reform); *see also supra* note 211 (discussing the shortcomings of the United States education system and their implications in 1983).