Brigham Young University Education and Law Journal

Volume 2002 | Number 2 Article 6

Fall 3-2-2002

Sain v. Cedar Rapids Community School District: Providing Special Protection for Student-Athletes?

Patricia Abbott

SAIN V. CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT: PROVIDING SPECIAL PROTECTION FOR STUDENT-ATHLETES?

I. INTRODUCTION

Long ago, legal scholars held a funeral service for the tort of educational malpractice. From time to time, academics exhume the tort in law review articles for a post-mortem analysis of what courts view as its fatal flaws and to beat their chests in collective lamentation. Despite this, it is universally accepted that to use the term "educational malpractice" in a cause of action is to doom it to dismissal. That is why it was an enormous surprise when the Iowa Supreme Court, in April of 2001, breathed new life into the defunct tort by denying the defendant Cedar Rapids Community School District's motion for summary judgment.[1] In that case, a student sued the school district for negligent misrepresentation by a school guidance counselor.[2] The Iowa Supreme Court's holding was only the second time in educational malpractice's thirty-year life span where the claim emerged victorious from the jaws of summary judgment. One explanation for this unusual holding is that the court was trying to protect a category of persons considered especially vulnerable to exploitation: student-athletes.

This case note will analyze the *Sain* holding, beginning in Section II by reciting the facts of *Sain*. Section III will examine the judiciary's overwhelmingly adverse response to claims of educational malpractice. *Sain* will be contrasted with *Brown v. Compton Unified School District*,[3] having almost the same facts but the opposite outcome to show how this case would ordinarily be decided. Section IV will examine the rationale the *Sain* court used to uphold the negligent misrepresentation claim. Section V will explore the possibility that Sain received differ-

1. *Sain v. Cedar Rapid Community Sch. Dist.*, 626 N.W.2d 115, 118 (Iowa 2001).
2. *Id.* at 120.
3. 80 Cal. Rptr. 2d 171 (App. 2d Dist. 1998).

ent treatment because he is a student-athlete. Section VI will discuss the constitutional arguments that could bolster judicial recognition of a special relationship between student-athletes and educational institutions. Section VII will discuss possible impediments to recognizing a special student-athlete/school relationship and also discuss how *Sain* could serve as precedent for special protection of student-athletes.

II. THE FACTS

The plaintiff, Bruce Sain, was a student at Jefferson High School in the defendant school district.[4] He was an unusually gifted basketball player who planned on using a basketball scholarship to finance his college education. In order to be eligible to play college basketball, he had to satisfy the NCAA's high school course requirements. Sain had already satisfied many of the NCAA's requirements by his senior year, but with three trimesters left, he still needed to take three approved English courses. He completed one approved class his first trimester but disliked the course in which he was enrolled the second trimester. He met with Bowen, the school guidance counselor, who was generally familiar with the NCAA's requirements, to try to find a substitute class. Bowen suggested that Sain take a brand new course called "Technical Communications" and assured Sain that the NCAA clearinghouse would approve the course.[5]

The school, however, did not include the course on the list of classes submitted to the NCAA for approval.[6] The final trimester of high school, Sain completed a third English credit in an approved course and accepted a full five-year basketball scholarship at Northern Illinois University.[7] Shortly after graduation, however, the NCAA informed Sain that his "Technical Communications" course was not approved by the clearinghouse. The NCAA refused Sain's application for a waiver making Sain one-third credit short of meeting the English requirements. As a result, Sain lost his scholarship and was unable to

4. *Sain*, 626 N.W.2d at 118–19.

5. *Id.* at 119. Bowen and the school district deny telling Sain that the course would be approved by the NCAA. However, for the purposes of summary judgment, the facts are considered in the light most favorable to the plaintiff. *Id.* at 119 n. 1.

6. *Id.* at 119.

7. *Id.* at 119–20.

attend college or compete in Division I basketball for the 1996-97 school year.[8]

Sain sued the school district for negligently failing to submit the course to the NCAA clearinghouse and for negligent misrepresentation by the counselor in providing false information about which courses would satisfy the NCAA's requirements. The district court held that no cause of action existed as a matter of law and dismissed both counts.[9] The Iowa Supreme Court upheld summary judgment for the defendant school district on the negligence claim, so that portion of the case will not be discussed in this case note. However, the Iowa Supreme Court reversed summary judgment on the negligent misrepresentation claim.[10] It stated:

> The tort of negligent misrepresentation is broad enough to include a duty for a high school guidance counselor to use reasonable care in providing specific information to a student when the guidance counselor has knowledge of the specific need for the information and provides the information to the student in the course of a counselor-student relationship, and a student reasonably relies upon the information under circumstances in which the counselor knows or should know that the student is relying upon the information.[11]

III. EDUCATIONAL MALPRACTICE CASE HISTORY

The last educational malpractice case decided by the Iowa Supreme Court before *Sain* was *Moore v. Vanderloo*.[12] In *Moore*, the Iowa Supreme Court flatly refused to recognize three types of educational malpractice claims. The first type of educational malpractice claim targets the substance of the curriculum or how it is taught. Under this theory, a claim arises when a student alleges that the school failed to teach the student basic academic skills thus breaching either a common law duty, constitutional provision, or statutory provision. The second type of educational malpractice claim arises when a student alleges that the school improperly placed the student in, removed the student from, or negligently did not place the stu-

8. *Id.* at 120.
9. *Id.*
10. *Id.* at 129.
11. *Id.*
12. 386 N.W.2d 108 (Iowa 1986).

dent in a special education program or other program. The third type of educational malpractice claim arises when a student alleges that the school failed to supervise the student's performance.[13] The *Moore* court stated, "[w]ith the exception of one case, the courts in each of these three types of actions have unanimously failed to recognize a cause of action for educational malpractice."[14]

The most frequently cited case arising in an educational malpractice setting is *Peter W. v. San Francisco Unified School District*.[15] Though this case is twenty-five years old, every court facing an educational malpractice claim invokes the rationale in this case almost superstitiously, as if it were a talisman to ward off a storm of calamities that would inevitably descend upon the U.S. judicial system if a court were to recognize a claim of educational malpractice.

A. Public Policy Concerns

There are many legitimate public policy concerns inherent in educational malpractice claims. The court in *Peter W.* identifies the following policy concerns: first, there is no workable standard of care against which to judge an educator's conduct. Pedagogical techniques vary greatly with no consensus as to their respective efficacy. Second, there is no reasonable degree of certainty that plaintiff suffered an identifiable or redressible injury within the law of negligence. Third, there is no direct causal connection between plaintiff's conduct and the injury professed.[16] As the court stated, "[s]ubstantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physi-

13. *Id.* at 113.

14. *Id.* at 114 (citation omitted) (footnote omitted) (referring to *Burger ex rel. M. v. Montana*, 649 P.2d 425 (Mont. 1982)). In *Burger*, the Montana Supreme Court recognized a cause of action when a school negligently misplaces a student in a special education program. The court held 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." *Burger*, 649 P.2d at 427. However, this remained, until *Sain*, the only instance in which a court failed to grant summary judgment in favor of a defendant school district on an educational malpractice type of claim.

15. 131 Cal. Rptr. 854 (App. 1st Dist. 1976).

16. *Id.* at 861.

cal, neurological, emotional, cultural, [or] environmental . . . ."[17] The Peter W. court was also concerned that recognizing educational malpractice claims would increase the burden on public schools and open the floodgates to future litigation.[18]

In addition to these concerns, other courts have added many more. For example, courts fear that recognizing educational malpractice claims would "force the courts blatantly to interfere with the internal operations and daily workings of an educational institution."[19] Public schools' discretion to implement new programs or make changes would be limited because they would be forced to perpetually monitor whether such decisions might open them to liability. Courts are also afraid that recognizing this tort would interpose their judicial judgment for that of the legislature who ordinarily defines standards of competency.[20]

Many of the cited cases are relatively old, but the courts' fears of these adverse public policy concerns are so severe that all cases alleging educational malpractice have been summarily dismissed for twenty years. Thus, the major cases from twenty-five years ago constitute the "last judicial word" on a tort that has become a judicial pariah. As one commentator said, "the question of whether academic institutions owe a duty to impart a minimum level of proficiency has been analyzed by the judiciary as a question of law dependent on public policy considerations,"[21] often, it might be added, to the preclusion of any analysis as to whether the underlying claim is legitimate, or despite the fact that it would be deemed so in any context but an educational setting.

B. Brown v. Compton Unified School District: *Same Facts, Different Outcome*

In another case with almost the same facts as *Sain*, these public policy concerns were enough to outweigh the claim al-

---

17. *Id.*

18. *Id.*; *see Hunter v. Bd. of Educ.*, 439 A.2d 582, 585 (Md. 1982); *Moore*, 386 N.W.2d at 114.

19. *Moore*, 386 N.W.2d at 115; *see Donohue v. Copiague Union Free Sch. Dist.*, 391 N.E.2d 1352, 1354 (N.Y. 1979).

20. *Moore*, 386 N.W.2d at 115; *see Swidryk v. St. Michael's Med. Ctr.*, 493 A.2d 641, 644–45 (N.J. Super. L. Div. 1985).

21. Timothy Davis, *Examining Educational Malpractice Jurisprudence: Should a Cause of Action be Created for Student-Athletes?*, 69 Denv. U. L. Rev. 57, 96 (1992).

though the court rested its rejection of the claim on statutorily conferred immunity for public employees acting within the scope of their employment.[22] In *Brown v. Compton Unified School District,* a student sued his high school guidance counselor and school district alleging that he lost his four year basketball scholarship to USC because of the counselor's negligent misrepresentation in advising him to take a particular science course which she believed would satisfy the NCAA's requirements. USC withdrew Brown's scholarship when it turned out that the course did not meet NCAA requirements.[23]

The court held that the school had no duty to Brown, and thus, there was no cause of action for negligent misrepresentation.[24] There was no duty despite the fact that it was even clearer in this case that there was a special relationship then it was in *Sain*. Compton Unified School District proactively recruited Brown to attend high school and play basketball in its district by telling him that Manual Dominguez High School would allow him to satisfy the NCAA requirements for athletic eligibility. Brown relied on that promise in transferring schools.[25] Furthermore, unlike *Sain*, where the school denied making a statement that the "technical communications" course would meet NCAA requirements,[26] in *Brown*, the principal of the high school sent a letter to the NCAA requirements committee stating that Brown's failure to take one required course was "completely the result of misadvisement on the part of one of our school's academic counselors."[27]

Despite the school's clear admission of guilt, the *Brown* court found that "[p]olicy considerations preclude 'an actionable "duty of care" in persons and agencies who administer the academic phases of the public educational process'."[28] Not surprisingly, the court cited the policy rationale in *Peter W. v. San Francisco Unified School District* in declining to recognize Brown's claim and stated, "[t]his strong policy consideration

22. *Brown*, 80 Cal. Rptr. 2d at 172–73.
23. *Id.* at 171.
24. *Id.* at 172–73.
25. *Id.* at 171.
26. *Sain*, 626 N.W.2d at 119 n. 1.
27. *Brown*, 80 Cal. Rptr. 2d at 172.
28. *Id.* at 172 (quoting *Peter W.*, 131 Cal. Rptr. at 861).

may outweigh the allegation that Brown undertook a change in circumstances in reliance on the school district."[29]

The court based its dismissal of the claim on statutory immunity, and was thus precluded from making a definitive judgment on the identified policy concerns.[30] However, it seemed clear that the court would have dismissed the claim anyway for public policy reasons.[31] On identical facts, the court in *Sain* went through a detailed analysis of the same public policy concerns to show that they did *not* apply to the facts[32] though the *Brown* court undoubtedly felt otherwise.[33]

IV. SPECIFIC RATIONALE OF *SAIN*

The *Sain* Court went out of its way to find that considerations of public policy, which had been lethal to every other case in the last twenty years except one, did not apply.[34] The *Sain* Court distinguished *Sain* from every other educational malpractice case by stating, "[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 the educational malpractice actions."[35] If this was the court's way of saying that it was willing to distinguish the instant case on its facts, they were the first court to consider doing so in twenty years.

The *Sain* court identified the five public policy concerns listed in *Moore v. Vanderloo,* and explained why each did not apply, or did not apply with equal weight in the *Sain* case.[36] There was no interference with educational discretion because "this case does not challenge classroom methodology or theories of education."[37] It does not interfere with legislative standards of competency, nor is there any fear that an appropriate standard of care cannot be articulated. The court concluded that it

29. *Id.* at 172.
30. *Id.* at 173.
31. *See id.* at 172.
32. *Sain,* 626 N.W.2d at 121–22.
33. *See Brown,* 80 Cal. Rptr. 2d at 172.
34. *Sain,* 626 N.W.2d at 121–22.
35. *Id.* at 122 (citation omitted).
36. *Id.* at 121–22.
37. *Id.* at 122.

would be possible to formulate a standard of care because the situation is analogous to misrepresentation by professionals.[38]

Sain proves that these public policy considerations do not have to be lethal to educational malpractice suits. Public policy concerns can be resolved when a duty is imposed by the court on the school district. The court considered the other two factors of the test as well but held that a school district's duty could be severely curtailed by putting stringent limitations on who can recover.[39] The court thought that severe limitations on duty would be sufficient to prevent a flood of ensuing litigation.[40] Clearly, the court intended to severely limit those to whom the school had a duty. Perhaps the *Sain* Court was trying to create a cause of action to be used exclusively by student-athletes.

Considering the statements made by the court, it is not a stretch for courts to recognize a duty of reasonable care in preventing negligent misrepresentation. Although the court was careful to emphasize, more than once, that there can be no duty of care in situations falling under the category of educational malpractice.[41] However, the court stated that in other circumstances "[a] school clearly owes a duty of reasonable care," such as maintaining the physical facilities in safe condition or supervising students.[42] The court stated that it has recognized the tort of negligent misrepresentation in many other circumstances such as permitting a party to recover for reasonable reliance upon financial statements prepared by an accountant.[43] It applied the same test that is used for other professionals,[44] which is embodied in the Restatement (Second) of Torts section 552:

38. *Id.*
39. *Id.* at 125.
40. *See id.*
41. *Id.* at 122.
42. *Id.*
43. *Id.* at 123 (citing *Ryan v. Kanne*, 170 N.W.2d 395 (Iowa 1969)).
44. *Id.*

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.[45]

The Iowa Supreme Court decided that the *Sain* case satisfied every requirement of the Restatement's Test.[46] The court even applied the requirement that the information be supplied "for the guidance of others in their business transactions"[47] to the student/counselor relationship.[48] The dissent objected vigorously on this point stating that suggesting course curriculum is in no way a "business transaction."

> [T]he majority's logic flies in the face of experience. To accept the majority's decision, one must be willing to view the mentoring relationship between a guidance counselor and a student as no different than a business relationship between a purveyor of information and a consumer. I disagree with that premise. We may live in an information age, but experience tells me the sharing of knowledge in school is different than the sale of information in the marketplace.[49]

In previous cases, the tort of negligent misrepresentation had only been recognized in the context of commercial transactions. The court conceded, "no jurisdiction has recognized a tort in the context of a school counselor and a student."[50] The court justified its expansion of the tort by pointing out that neither Section 552 nor Iowa case law requires that the case's subject matter arise in a commercial or business setting.[51] It only requires that the defendant be a person in the "business of supplying information to others," which the court found applies to a school counselor.[52]

---

45. *Restatement (Second) of Torts* § 552 (1994).
46. *Sain*, 626 N.W.2d at 128.
47. *Restatement (Second) of Torts* § 552.
48. *Sain*, 626 N.W.2d at 128.
49. *Id.* at 129.
50. *Id.* at 125.
51. *Id.*
52. *Id.* at 126.

The test the court applied from Section 552 is stringent and difficult to satisfy, but the court plunged through it, seemingly undaunted by the new territory into which it was expanding the tort. The dissent attributes this willingness to impose liability on the court's desire to afford special protection to the unique needs of student-athletes.[53]

V. THE CASE FOR RECOGNIZING A SPECIAL RELATIONSHIP BETWEEN SCHOOLS AND STUDENT-ATHLETES

A. Public Policy Arguments in Support of a Special Relationship

In the last few years, many legal scholars have suggested that the unique needs of student-athletes can be met by expanding schools' duty to protect the interests of their student-athletes. The majority in *Sain* considered these arguments and cited a law review article entitled, *Examining Educational Malpractice Jurisprudence: Should a Cause of Action Be Created for Student-Athletes?*[54] For the purpose of brevity, this note will refer to student-athletes by the masculine pronoun because most female student-athletes do not experience the pressure that male athletes do to focus on athletics to the neglect of academics. To the extent that they do, however, the same arguments apply to female athletes.[55]

The Davis article urges the imposition of a special relationship between a university and a student-athlete,[56] but, as the *Sain* Court recognized, the same logic applies to a public high school and a student-athlete. The gist of the argument is that a college and an athlete are mutually dependent on one another. A student-athlete generates substantial revenue for the university, and, in return, the athlete depends on the university to provide him with an education.[57] Furthermore, in participating in school athletics, the student-athlete submits his educational autonomy to the direction of the coaches and staff who often

53. *Id.* at 130.

54. *Id.* at 121 (citing Davis, *supra* n. 21 at 61).

55. Sarah E. Gohl, Student Author, *A Lesson in English and Gender: Title IX and the Male Student-Athlete,* 50 Duke L.J. 1123 (2001).

56. Davis, *supra* n. 21 at 59.

57. *Id.* at 92.

discourage certain majors because those majors' time demands might conflict with the student-athlete's practice times. Coaches and staff may also choose the student-athlete's classes for him to help him avoid classes that might be too challenging.[58] The article suggests that student-athletes "become dependent on agents of their schools to protect their academic interests."[59] The article points out that though the relationship is one of mutual dependency, the school is the dominant party, and thus acquires a duty to "protect[] the interests of student-athletes" at least as well as they protect their own.[60]

Though the article specifically addressed the relationship between a university and a student-athlete, the same concerns apply at the high school level. This is particularly true as sports at all levels become more commercialized, and schools have more incentive to treat athletes as marketable commodities rather than just students.

Court recognition of a special relationship between schools and their student-athletes will prevent the type of inequitable result that occurred in the *Brown* case referred to above. In *Brown*, the Compton Unified School District went out of its way to recruit Brown to play basketball for their school district, assuring him that his new high school would assist him in completing all of the NCAA eligibility requirements.[61] Brown appears to have fulfilled his end of the agreement in playing basketball well enough to win a full-tuition scholarship to USC. By its own admission, however, the school breached its end of the agreement. The *Sain* court appeared to be trying to avoid this type of inequitable result.[62]

The dissent in *Sain* recognized the majority opinion's rationale for what it was: "[i]mplicit in the majority's reasoning is the suggestion that, when it comes to NCAA eligibility rules and athletic scholarships, business *is* the name of the game."[63] Seen in this light, it does not seem as though referring to a guidance counselor advising a student- athlete as guiding others in their business transactions is such a stretch. Perhaps the

58. *Id.* at 93.
59. *Id.*
60. *Id.* at 94.
61. *Brown,* 80 Cal. Rptr. 2d at 171–72.
62. *Id.* at 172.
63. *Sain*, 626 N.W.2d at 130.

Sain majority was simply enlightened enough to recognize a business dealing when they saw it.

B. Recognizing a Special Relationship in Other Student-Athlete Contexts

So far, this note has explored the potential for the exploitation of student-athletes in only one context, but the wisdom of the *Sain* court becomes more apparent in exploring other contexts in which the potential for student-athlete exploitation is high. The most famous student-athlete case is *Ross v. Creighton University*.[64] Creighton University recruited high school basketball star Kevin Ross and offered him a scholarship despite the fact that they knew it would be almost impossible for him to succeed academically at the university. In 1978, the average student registering at Creighton had received 23.2 points out of a possible 36 on the American College Placement Test (ACT). Ross, on the other hand, had received a 9. With great effort, the coaching staff kept him eligible for the basketball team for four years by enrolling him in classes such as ceramics, marksmanship, and the respective theories of basketball, track and field, and football. Such haphazard class selection was against University rules, but the school made a special exception to keep Ross eligible.[65] Ross claimed that the school contributed to his academic failure by "failing to provide 'adequate and competent tutoring services'" and "failing 'to afford the plaintiff a reasonable opportunity to take full advantage of tutoring sessions'."[66] Finally, the school enrolled him in remedial courses at a local private elementary school and high school, but it was too little too late. At the end of his eligibility, Ross had no degree, carried a D average, and had the reading skills of a seventh-grader and language skills of a fourth-grader.[67]

The district court dismissed Ross's ensuing lawsuit against Creighton University by stating, "educational malpractice has been repeatedly rejected by the American courts."[68] The court

64. 740 F. Supp. 1319 (N.D. Ill. 1990), *rev'd in part and aff'd in part*, 957 F.2d 410 (7th Cir. 1992); *see* Johnny C. Parker, *Educational Malpractice: A Tort is Born*, 39 Clev. St. L. Rev. 301, 303–05 (1991).

65. *Ross*, 740 F. Supp. at 1322.

66. *Id.* at 1331.

67. *Id.* at 1322.

68. *Id.* at 1327.

cited the usual public policy concerns as its rationale: difficulty of determining proximate cause, lack of duty, and the possibility of triggering large amounts of litigation.[69]

Applying the rationale in the Davis article, the school would be liable if the court found that the school did not "give at least as much attention to protecting the interests of student-athletes as to protecting their own [interest]."[70] Ross and Creighton were clearly mutually dependant on each other. Ross, as a prominent local basketball player, helped generate considerable revenue for Creighton University by helping the basketball team's overall success and by attracting fans to watch his performance. As the dominant party in the relationship, the university had a special duty to protect Ross's interests, which they neglected or intentionally breached by misleading him and causing him to believe that if he matriculated at Creighton, he would succeed academically. The university also neglected his interests by persuading him to take "soft" courses in order to maintain his eligibility, rather than encouraging him to take courses that are useful in obtaining a degree. Under this analysis, as the dominant party exercising control over Ross's academic decisions, the university assumed a special obligation to protect his interests at least as well as they protected their own interest and should be liable for failing to do so.

In a similar case, *Jones v. Williams*,[71] a student-athlete claimed that an Idaho Junior College and the Detroit Board of Education "academically carried" him in order to keep him eligible for basketball, despite the fact that he could neither read nor write.[72] Jones claimed that peer ridicule because of his illiteracy caused him a nervous breakdown.[73]

The schools treated the students in both these cases differently because they were gifted athletes. Instead of holding them to the same standard as regular students or helping them improve their skills so that they could achieve that standard, the schools exploited their athletic prowess for the school's economic gain until the student-athlete's eligibility expired. Upon completion of their athletic eligibility, the schools left them to

69. *Id.* at 1328–29.

70. Davis, *supra* n. 21 at 94.

71. 431 N.W.2d 419 (Mich. App. 1988).

72. *Id.* at 422.

73. *Id.*

fend for themselves with the sub-par skills they had acquired. Davis characterizes the relationship between a student-athlete and a university as "institutionalized powerlessness."[74] Perhaps judicial intervention is necessary to correct this imbalance and the resulting abuse of superior power.[75]

In her article, "A Lesson in English and Gender: Title IX and the Male Student-Athlete," Sarah Gohl adds to the argument that student-athletes require special protections in order to prevent their exploitation.[76] She argues that athletically talented males are socialized to believe that sacrificing their focus on academics to focus on sports is a fair trade-off.[77] Young male athletes are socialized to believe that they will not need a good education to succeed but instead will receive generous compensation for their athletic skills as a professional athlete.[78] Iowa State football coach Jim Walden stated that, "[n]ot more than 20 percent of the football players go to college for an education."[79] Most college athletes are there because they are hoping to turn pro. They do not object when the coaching staff schedules practices during scheduled study or tutoring times, as in *Jackson v. Drake University*,[80] or when tutors complete the athletes' term papers, as occurred at the University of Tennessee.[81] They do not object because they plan to turn pro and will have no use for an education.

Universities feed these notions by encouraging student-athletes to spend more time improving their athletic prowess than studying because student-athletes have become powerful revenue-generating machines. What these students do not realize is that out of 50,000 NCAA football players and 13,000 NCAA male basketball players, only 310 per year make it to the NFL and 50 a year are drafted into the NBA. This is a 3.3% chance and a 1.9% chance, respectively.[82]

---

74. Davis, *supra* n. 21 at 94.

75. *Id.*

76. Gohl, *supra* n. 55 at 1126.

77. *Id.* at 1126–27.

78. *Id.* at 1132–43.

79. *Id.* at 1134 (quoting Andrew Zimbalist, *Unpaid Professionals: Commercialism and Conflict in Big-Time College Sports* 39 (Princeton U. Press 1999)).

80. 778 F. Supp. 1490, 1492 (S.D. Iowa 1991).

81. Gohl, *supra* n. 55 at 1141.

82. *Id.* at 1134.

Under the current system, universities have no duty and thus no incentive to protect any academic interest of their student-athletes. Because they have no duty, most schools are not concerned with seeing that their student-athletes graduate or leave their universities equipped with skills to help them succeed in their post-university lives. While universities certainly cannot be held liable if a student does not succeed, they can and should be liable if they actively contribute to the student's failure and prevent their success in order to further their own interests. For this reason, it can be argued that courts should create a special relationship between schools and their student-athletes in order to protect student-athletes from exploitation.

VI. CONSTITUTIONAL ARGUMENTS IN FAVOR OF A SPECIAL STUDENT-ATHLETE/SCHOOL RELATIONSHIP

The source of the problem between student athletes and the schools they attend is that the legislative branch has been unresponsive to the needs of student-athletes. The argument for a special relationship between student-athletes and their school would be bolstered if there was a constitutional basis for recognizing a special relationship in the student-athlete/school relationship. So far, however, student-athletes have been unable to obtain redress when they are unfairly forced by academic institutions to choose between involvement in athletics and the opportunity to obtain a sound education. The nature of the injury lends itself to a Fourteenth Amendment argument: that they have either been denied due process, or that they are being denied equal protection of the laws, student-athletes could provide a compelling reason for courts to intervene on their behalf. This note will describe a hypothetical due process claim for purposes of illustration.

Student-athletes could argue that the courts' perpetual denial of their educational malpractice claims is a violation of due process. Student athletes have been denied due process of law because of their lack of political power compared to the politically powerful educational institutions. This inherent imbalance between student-athletes and education institutions means that, without judicial intervention, student athletes' rights cannot be adequately protected.

Well established case law provides for judicial intervention when legislation fails to adequately protect the constitutional

rights of an underrepresented group. Footnote four of *United States v. Carolene Products*[83] has been used to strike down legislation that is detrimental to "discrete and insular minorities," or that "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[84] However, the representation-reinforcement rationale of footnote four can also be invoked to provide a liberal interpretation of existing legislation when the legislative branch fails to adequately protect the interests of an under-represented minority through existing legislation.

It cannot be argued that existing legislation adequately protects student-athletes. The only attempt Congress has made to protect the interests of student-athletes is through Title IX of the Education Amendments of 1972, which provides that "[no] person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[85] This statute is commonly thought of as providing equal opportunities for female athletes, but it also protects any student-athlete from being denied equal access to educational opportunities.

Courts have considered Title IX much too vague, however, to provide a cause of action for student-athletes who are denied equal access to educational opportunities. Neither the legislature, nor the judiciary through interpretation of Title IX has ever provided enhanced protection to student-athletes on the basis of Title IX. Indeed, as Kevin Ross and many other student-athletes have found, they have no recourse, even when they are the victims of what would be actionable negligence or deliberate mistreatment in any context except a student-school context. The kind of outrageous treatment received by student-athletes would never be tolerated in any other context.

Under the representation-reinforcement schema, a student-athlete would be able to say that they are being denied due process because neither Title IX nor judicial interpretation of Title IX affords them any protection from actionable negligence by their schools. Student-athletes, in their "institutional powerlessness" could be considered a discrete and insular minority,

83. 304 U.S. 144 (1938).

84. *Id.* at 153 n. 4.

85. 20 U.S.C. § 1681(a) (2000).

which cannot remedy its own situation through the political process because of its relative political powerlessness. Though students are not blocked by any statutory impediment from participating in the political process, students as a whole do not have the financial resources nor the political experience to be able to effectively lobby for political change. There are no student-athletes in Congress and unlike educators, there is no interest group organized specifically to protect their interests.

On the other hand, The National Education Association (NEA) has 2.6 million members and is the largest union in the United States and one of the most powerful lobbies in Washington.[86] One political writer noted of the NEA's political power, "[t]his kind of clout makes it a political kingmaker."[87] During the 2000 Democratic National Convention, one in twelve delegates was a member of the NEA. The total number of NEA delegates, 350, was larger than the entire delegation from the state of California.[88] Educational institutions and public schools have both the financial and political resources to effectively block legislation in many jurisdictions that would abolish their governmental immunity to suit or be otherwise detrimental to their interests. If it were not so, we would not have seen unprecedented expansion in all areas of tort liability in the last thirty years while in the area of educational liability alone, there has been no expanded liability. Indeed, the tort of educational malpractice has been all but dead. This is because educational institutions and public schools are one of the most effective and politically powerful lobbies in the United States.

Public schools and universities are so powerful that their political clout has been sufficient to prevent any recognition of the tort of educational malpractice. At the same time, liability has expanded greatly in other areas of tort law despite the existence of many of the same impediments that have completely prevented expanded liability in education. Under the common law, school districts and educational institutions were not liable for injuries resulting from their negligence.[89] Similarly, under the common law, a plaintiff could not recover for the

---

86. Joel Mowbray, *The NEA's Political Machine: New Evidence Indicates Misuse of Tax-Exempt Dues* 1 <http://www.capitalresearch.org/publications/labor_watch/lw0111.pdf> (Nov. 2001).

87. *Id.*

88. *Id.*

89. Parker, *supra* n. 64, at 313.

common law tort of intentional infliction of emotional distress (IIED). As late as 1934, there was no protectable interest in mental and emotional stability.[90] Since then, however, the tort has become recognized and even included in the Restatement of Torts.

Courts didn't recognize IIED for many of the same policy reasons they don't recognize educational malpractice: proximate cause and lack of judicial remedy.[91] The courts have resolved their policy concerns sufficiently to recognize a cause of action for IIED, but the courts still claim that the policy issues implicated in proximate cause and lack of judicial remedy are unresolvable for the purpose of educational malpractice litigation.

These courts' claims may not be accurate though. The New York Court of Appeals in *Donohue v. Copiague Union Free School District*, while refusing to uphold the cause of action, recognized that proximate cause was not an impenetrable barrier to recovery.[92] "The. . . court found that, despite the obvious difficulties, a plaintiff might indeed be able to demonstrate that defendant caused his or her injury. It also noted that an applicable standard of care might be found."[93]

Although these same policy issues have been successfully resolved in medical malpractice and other professional malpractice cases, the combined force of policy concerns and political clout have allowed educational institutions to escape liability in similar contexts. This inequity is certainly beyond the political power of student-athletes to remedy. An effective remedy for student-athletes would require a court that is motivated by a representation-reinforcement framework to intervene on student-athletes' behalves.

Title IX may be the answer that student-athletes have been looking for. A liberal interpretation of Title IX would give a cause of action to student-athletes who were unfairly denied an opportunity to obtain an education by the institution for which they competed athletically.[94]

---

90. *Id.* at 312.

91. *Id.* at 311–12.

92. 391 N.E.2d at 1353–54.

93. John G. Culhane, *Reinvigorating Educational Malpractice Claims: A Representational Focus*, 67 Wash. L. Rev. 349, 359 (1992).

94. *See* Gohl, *supra* n. 55, at 1125.

In enacting Title IX, Congress was silent as to whether a private right of action exists when a student-athlete is denied equal access to educational opportunities; however, the court may still imply such a cause of action from the statutory language. Courts make implications all of the time. Arguably, the most important private right of action in securities law has been implied from a statute that is as vague as Title IX.[95] Because courts saw a pressing need to protect investors, Rule 10b-5 of the Securities Act of 1933 has been interpreted to prohibit material misrepresentations and omissions in connection with the purchase or sale of any security. Chief Justice Rehnquist noted that Rule 10b-5 is now "a judicial oak which has grown from little more than a legislative acorn."[96]

If the judiciary were to infer a cause of action from Title IX, universities would be forced to shift their emphasis from athletics to academics or face the risk of liability. Thus, schools would have an incentive to invest more of their time and resources towards ensuring that student-athletes are both qualified to attend the school and that they receive quality educations. At the very least, schools would be compelled not to misrepresent the likelihood of the student-athlete being academically successful. Universities would no longer be able to do things that prevent the academic success of their student-athletes, such as scheduling practices during study times or choosing "soft" classes to maintain the student-athlete's eligibility.

VII. POSSIBLE OBJECTIONS TO EXPANDED LIABILITY

In order to infer a cause of action for student-athletes from Title IX, several problems must be overcome. The vagueness of Title IX would need to be clarified by providing courts a standard of review to determine what constitutes actionable negligence by a university. As demonstrated by other courts, setting a standard of review that clarifies Title IX would be difficult but not impossible.[97] Second, courts would need a compelling reason to intervene. Courts would be unlikely to intervene

95. *See* William A. Klein, J. Mark Ramseyer & Stephen M. Bainbridge, *Business Associations: Cases and Materials on Agency, Partnerships, and Corporations,* 426–27 (4th ed., Found. Press 2000).

96. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975).

97. *See Donohue,* 391 N.E.2d at 1353–54.

unless motivated by a constitutional mandate to correct a Fourteenth Amendment violation. Third, courts will be reluctant to recognize a special relationship between educational institutions and student-athletes because it may be difficult to limit such a duty to student-athletes. Recovery for educational malpractice liability under an inferred Title IX cause of action would be limited, by definition, to student-athletes.

Of course, the latter issue would not limit liability under the rationale used by the *Sain* court. Whether schools will become liable to the general student population was a major concern to the dissent in *Sain v. Cedar Rapids Community School District*:

> Implicit in the majority's reasoning is the suggestion that, when it comes to NCAA eligibility rules and athletic scholarships, business *is* the name of the game. But, the cause of action we recognize today will not be limited to athletes. It will apply to all students, whether talented in music or debate or academics."[98]

It is true that it would be difficult to limit the scope of the special duty of a school to a student-athlete if such a duty is created based on the rationale used in *Sain*. The problem is that *Sain* creates liability for schools without establishing limits as to whom the school will be liable to. Iowa, in deciding *Sain*, was the first jurisdiction to recognize a cause of action for negligent misrepresentation by a school counselor to a student. There is no reason that this liability should or could be limited to allowing student-athletes to recover,[99] yet this is a risk the court appears to recognize and accept.

The risk of exposing schools to educational malpractice suits brought by all types of students will likely prevent most other jurisdictions from following Iowa's precedent. For this reason, it seems unlikely that the *Sain* case will set an immediate precedent for imposition of large-scale liability to all students.

The Constitution of the United States does not guarantee the right to education. Although many state constitutions guarantee the right to obtain an education, the U.S. Supreme Court has said that there is no right to education mandated by

98. 626 N.W. 2d at 130.

99. *Id.* at 125–129.

the U.S. Constitution.[100] Indeed, the Supreme Court said, "[e]ducation . . . is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."[101] The Supreme Court's position provides one of the reasons why courts have relentlessly rejected educational malpractice claims. It is noteworthy that *Rodriguez*, like *Peter W. v. San Francisco Unified School District*,[102] and other flagship cases cited to justify refusal to consider educational malpractice claims, is thirty years old. If the Supreme Court were to reexamine this issue, it might decide differently. However, as the case law currently stands, there is no general constitutional right to a public education.

For these reasons, potential plaintiffs would have to overcome some substantial objections to achieve a general judicial recognition of the tort of educational malpractice. Many of these objections have taken on the status of nearly irrefutable dogma, such as the policy concerns the court listed in *Peter W.* It is very doubtful that *Sain v. Cedar Rapids Community School District* will have this kind of overwhelming effect. However, it is possible, based on precedent in *Sain*, to convince courts to carve out an exception for student athletes if courts can find a way to limit a school's duty to protect from expanding to include all students.

VIII. CONCLUSION

It is difficult to know how *Sain v. Cedar Rapids Community School District* will affect the relationship between student-athletes and educational institutions in other jurisdictions.[103] The Iowa Supreme Court may receive nothing but derision from its judicial peers, or this case may begin a new and novel chapter in educational malpractice history: one in which schools become liable for their torts, at least in the limited context of student-athlete exploitation.

The *Sain* court went out of its way to hold that the Cedar Rapids Community School District could be liable for negligent

100. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

101. *Id.*

102. 131 Cal. Rptr. 854.

103. 626 N.W.2d 115.

misrepresentation. The court held this way despite the fact that a school district had never before been liable for the negligent misrepresentations of its guidance counselor to students.[104] Strong public policy arguments have prevented school liability in the past. However, it may be that in balancing those fears with the danger of allowing public schools and universities to exploit their student-athletes with impunity, the courts have discovered a countervailing interest of equal magnitude. The *Sain* court probably found the school liable because it recognized that in this time of increasing commercialization of athletic competition at all levels, student-athletes will become increasingly exploited unless courts intervene. The court was trying to create an incentive for schools to put a heavier emphasis on the "student" aspect of their responsibilities to counter the emphasis society is increasingly placing on the "athlete" portion.

Patricia Abbott

104. *Id.* at 125.