

## **Will Your College Be Sued for Educational Malpractice?**

*By Peter F. Lake*

A former student recently sued Monroe College claiming that she had not been able to obtain gainful employment because the college provided inadequate career-placement services. The student, Tina Thompson, essentially seeks restitution of the money she paid to the college and a modest sum for emotional distress. No job; money-back guarantee.

Eighteen months ago, I might have confidently asserted that the case would be an educational-malpractice plaintiff smackdown. Things have changed, however, even if not quite enough for this particular plaintiff to prevail. The state of the economy may increasingly pit students against colleges in fights about the adequacy of the educational services that students have received.

In the past, legal claims against institutions for allegedly not providing enough instruction or preparation for the work force have usually failed. Courts have lumped such claims under the heading of "educational malpractice" and then promptly turned them away. The law has been chary of dictating standards for how colleges deliver their core educational services.

One of the most commonly articulated rationales for protecting higher education is the need to preserve academic freedom. Another is concern over articulating standards that could strangle higher education and open floodgates of litigation. Cases alleging educational malpractice also raise difficult issues of causation—did the economy or other factors make it hard to find a job? Moreover, a college can often place responsibility on a student—did a student sabotage his or her own job search, or fail to show proper initiative? Finally, the "agreement" between higher-education institutions and students does not provide legal assurance of employment, or even promise a demonstrable chance of a better future. The general legal attitude has been one of caveat emptor: Students and families bear the risk of potentially wasted years of effort and the dissipation of substantial funds.

Thompson's complaint is not entirely novel but has an interesting twist. She focuses on delivery of allegedly poor career-placement services and has suggested that top students receive disproportionate help from placement personnel. That twist adds a commercial-dispute overtone to her complaint and makes her claim arguably distinct from previous "you didn't teach me" claims. She asserts her 2.7 GPA as evidence of accomplishment—not sign of poor curriculum, shoddy instruction, or careless tutoring. Average, Thompson contends, should be good enough to place, to get a good job.

Whether or not her argument gains any legal traction, it's certain that cases like Thompson's will multiply, as will pressures on colleges from other directions. Higher education's role in American society is undergoing a seismic shift, similar in magnitude to that experienced in the 1950s and 1960s. The unmistakable trend this time: public demand for greater accountability from colleges for the fulfillment of their core missions and a cry for demonstrable value, results, and efficiency.

Consider what has just happened. Future books on American higher education will probably call 1946 to 2008 the "boom" years—a distinct time in which up, up, and away was the norm in students enrolled, buildings, budgets, and endowments. But the wealth that fueled that boom is now depleted. The once seemingly invincible American economy is teetering. States have budget and infrastructure woes that make the underwriting of higher education a disposable luxury.

Moreover, in the boom period, the cost of education shifted steeply to students and families. Boom times masked that shift—so what if college costs a hundred grand, if your house just appreciated twice that much? The boom also masked issues related to accountability. When students could routinely get decent jobs with decent salaries, policy makers and families were not overly concerned about educational value and how efficiently it was delivered. Instead, they were often happy to underwrite the longest and most expensive postadolescent Saturnalia in human history.

Now the economy has altered the relationships among students, families, the government, and higher education. *The Chronicle* has reported on the race to community colleges: Students want to stay near home to cut costs, pay lower tuition, have more flexible schedules so they can work, and take classes that teach marketable skills. The Obama administration has thrown its weight behind those systems as well. Meanwhile, the federal government is recreating the student-loan landscape by federalizing it through moving from bank-based loans to direct lending, and greater conditionality in the form of requiring more proof of learning will not be far behind. And as student-loan default rates rise, the banks that provided student loans may ask some of the same questions as Tina Thompson.

All that suggests that the number of educational-malpractice lawsuits may rise as well, even if such claims ultimately flounder in court. Why not file an inexpensive complaint if you have "lost" \$70,000 ... and see what happens?

Other industries that once were not held accountable for fulfilling their core missions have already faced a similar trend. Automobile makers gave little to no thought to safety until Ralph Nader's *Unsafe at Any Speed* brought attention to traffic safety. Rachel Carson's *Silent Spring*

gave rise to sweeping legislation for the protection of the environment. The plight of migrant workers was invisible to many Americans before Cesar Chavez virtually invented the idea of morally responsible food.

A consumer revolution in each of those industries preceded major legal reformation and vastly increased accountability. Consumers of higher education do not yet have the voice of a Nader, Carson, or Chavez. But the forces of change in higher education are even greater today because the state and federal governments (and therefore taxpayers) have so heavily subsidized colleges and universities.

The worst danger in more lawsuits and the potential result of too much legal accountability too fast—especially if poorly thought out—would be the loss of academic freedom. Colleges already face a historically unprecedented degree of regulation and accountability. A major challenge in the decade to come will be reclaiming and redesigning academic freedom for the post-boom period. The ability of colleges to take responsibility for performing their core educational missions will be integral to meeting that goal.

In fact, colleges have tremendous opportunities to work positively with the emerging new consumerism. Those opportunities lie in creating student-focused higher-learning environments that emphasize planning, assessment, intentionality, and the articulation of basic objectives—such as core competencies and learning goals. For example, one way we can meet the challenges of the post-boom period is by helping each student create a comprehensive and personal master plan for his or her college experience and by creating academic mentors to support students through the process.

It is crucial that we also develop a wider and deeper body of scientifically valid higher-learning theory. The boom years actually put colleges behind elementary and secondary schools in the development of learning science: how the brain functions, how students learn, what teaching tools work best, how to help all students—not just those who are already academically accomplished—succeed, and the like. I hear calls everywhere for better teaching in higher education, but that is hard to accomplish when the science of higher learning remains relatively primitive.

Tina Thompson believes that we in higher education focus too much on the talented and successful, not the average. Her rhetoric resonates in these lean post-boom times. Even if the court system rejects her and other educational-malpractice claims—as history suggests, at least in the near term, it probably will—we would be wise to hear her voice.

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