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No Private Right of Action under No Child Left Behind: A Case for Schools

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“Only the educated are free.”

Introduction

While running for re-election in 2004, President George W. Bush bolstered the education plank of his election platform with the alleged success of the most prominent legislation of his first term, the No Child Left Behind Act of 2001 (NCLBA). The Act, an education reform measure, was promulgated in response to concern about the declining educational performance of America’s schoolchildren. Despite President Bush’s claims, however, the level of educational advancement of our nation’s children is not encouraging.

A study on adolescent literacy achievement, conducted by the Rand Corporation, found United States schoolchildren to be underperforming. The average literacy proficiency rate of eighth grade students in the United States is 32%, and less than half the children in each state meet the National Assessment

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1. **EPICTETUS, 2 DISCOURSES OF EPICTETUS** 1 (W.A. Oldfather tr., Harvard Univ. Press 1925).
of Educational Progress proficiency standard.\textsuperscript{6} It is clear that the No Child Left Behind Act is not accomplishing its stated goals.

One of the NCLBA's many goals is "holding schools, local educational agencies, and States accountable for improving the academic achievement of all students."\textsuperscript{7} The Act, however, provides no explicit mechanism for student or parental enforcement in the form of a private right of action against the state, teachers, or educational agencies for educational malpractice. The NCLBA delegates accountability procedures to the states: state educational agencies must create a plan that advances "challenging academic content standards and challenging student academic achievement standards" for students,\textsuperscript{8} that provides for accountability, including the use of "sanctions and rewards,"\textsuperscript{9} and that measures "adequate yearly progress" of the students.\textsuperscript{10} If states fail to meet the conditions set forth under the statute, the federal government may withhold funding until the state has complied.\textsuperscript{11}

\textsuperscript{6} \textit{Id.}


\textsuperscript{10} 20 U.S.C. § 6311(b)(2)(B) (2005). A plan measuring adequate yearly progress is defined as applying the same standards to all students in the state, being statistically valid and reliable, resulting in continuous improvement for all students, including separate objectives for several distinct groups of students, and including graduation rates of secondary school students, as well as other indicators of achievement.

One commentator argues that courts should recognize a right of action for educational malpractice under the NCLBA pursuant to 42 U.S.C. § 1983.\textsuperscript{12} This article will argue that extending a right of action for educational malpractice under the No Child Left Behind Act is imprudent and that courts should continue to refuse this avenue of recovery to parents and students.

In Part I, this article will discuss educational malpractice generally. Theories underlying this cause of action include tort, contract, and constitutional approaches.\textsuperscript{13} This section will explore those theories in detail. Part II of this article will address litigation theories of educational malpractice claims under the No Child Left Behind Act, including the idea of a private right of action pursuant 42 U.S.C. § 1983. Finally, in Part III, this article will argue that courts should not allow a private right of action under the NCLBA, either under 42 U.S.C. § 1983 or otherwise.

I. Educational Malpractice Jurisprudence

Professional malpractice claims are common in many vocations, the most well-known being the fields of medicine and law. The past thirty years have seen an attempt to expand malpractice claims to the field of education, both for failure to appropriately diagnose and place students with learning disabilities and for

\textsuperscript{12} Melanie Natasha Henry, Comment, \textit{No Child Left Behind? Educational Malpractice Litigation for the 21st Century}, 92 CAL. L. REV. 1117 (2004). Because this article is, at least in part, a response to Ms. Henry’s arguments and because the organization of the law behind educational malpractice, § 1983 and the NCLBA in Ms. Henry’s paper is both sensible and accessible, this author has adopted a similar organizational structure.

failure to adequately educate students. 14 Plaintiffs 15 have brought their claims under theories of tort, contract, constitutional, and property law. Most educational malpractice claims, regardless of form, have been unsuccessful.

A. Tort Theory of Educational Malpractice

Plaintiffs most often bring their educational malpractice claims under tort law, as a claim for negligence. 16 The elements of the educational malpractice negligence tort follow the elements of a negligence tort generally. They are: demonstration of a duty owed the student; a breach of that duty by the teacher, school, or educational agency; actual damages resulting from the breach; and a causal connection between the breach and the damages. 17 State courts, for the most part, deny these claims. 18

The seminal educational malpractice case sounding in tort was Peter W. v. San Francisco Unified School District. 19 In that case, Peter W., a high-school

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14 See JOHN COLLIS, EDUCATIONAL MALPRACTICE: LIABILITY OF EDUCATORS, SCHOOL ADMINISTRATORS, AND SCHOOL OFFICIALS 7-8 (1990). At least one court has questioned, however, whether educators qualify as professionals for the sake of malpractice claims. See Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1353 (N.Y. 1979).

15 Because most educational malpractice claims arise in the context of elementary and secondary schools, the plaintiffs in such cases tend to be parents bringing suit on behalf of their children. In some cases, those involving suits against universities, for example, children do bring suit themselves. Therefore, in this article, “plaintiffs” will refer to both students bringing suit on their own behalf and parents bringing suit on behalf of their children.

16 This cause of action for educational malpractice has been called “pure” educational malpractice to distinguish it from other theories, such as breach of contract or violation of constitutional rights. See JOHN COLLIS, EDUCATIONAL MALPRACTICE: LIABILITY OF EDUCATORS, SCHOOL ADMINISTRATORS, AND SCHOOL OFFICIALS, 78 (1990). This article refers to all theories as “educational malpractice,” rather than distinguishing the tort form as such.

17 See RESTATEMENT (SECOND) OF TORTS § 281 (1965).

18 The one exception is Montana, which has allowed educational malpractice claims under a state statute which has been construed to establish a duty of care. See Mont. Code Ann. § 20-7-402 (2005); B.M. v. State, 649 P.2d 425, 427 (Mont. 1982).
graduate, filed suit against his former school for failure “to provide plaintiff with adequate instruction, guidance, counseling and/or supervision in basic academic skills.” The California court denied plaintiff’s educational malpractice claim, stating that “plaintiff’s allegations of his enrollment and attendance at defendants’ schools do not plead the requisite ‘duty of care,’ relative to his academic instruction,” among other reasons. Most state courts that have considered the question have also rejected educational malpractice tort claims, many of them for the reasons cited by the court in Peter W.

Likewise, three years later, in Donohue v. Copiague Union Free School District, the New York Court of Appeals refused to recognize the tort claim of educational malpractice. Rather than finding that an element of the negligence tort was not met, as in Peter W., the Donahue court held that to allow a cause of action for educational malpractice would contravene public policy. The court stated, as its primary reason for denying the plaintiff’s claim, that school

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20 Id. at 856.
21 Id. at 858.
24 Id. at 1354.
accountability was properly the province of the school board, not the courts.\textsuperscript{25}

Cases following \textit{Donahue} have echoed this sentiment.\textsuperscript{26}

Other arguments against allowing a tort-based cause of action for educational malpractice include failures of the elements of the tort, such as lack of an easily-articulated standard of care in educating children\textsuperscript{27} or an inability to show proximate cause\textsuperscript{28} and public policy rationales, such as school districts’ lack of funds to pay damages\textsuperscript{29} and the fear of engendering a flood of litigation.\textsuperscript{30}

\textsuperscript{25} Id.


\textsuperscript{30} See, e.g., Ross v. Creighton Univ., 957 F.2d 410, 414 (7th Cir. 1992) (“The sheer number of claims that could arise if this cause of action were allowed might overburden schools.”); Peter W.
B. Contract Theory of Educational Malpractice

Another theory on which plaintiffs premise their educational malpractice claims is breach of contract. As with tort claims, however, plaintiffs have had little success in this area. In *Ross v. Creighton University*, the Seventh Circuit set out the requirements for showing an educational malpractice breach of contract claim. The court conceded that the relationship between student and university is contractual in nature, but stated that, to show educational malpractice, there must be a breach of a particular promise to the student: “To state a claim for breach of contract, the plaintiff must do more than simply allege that the education was not good enough. Instead, he must point to an identifiable contractual promise that the defendant failed to honor.” Thus, if the plaintiff cannot demonstrate a breach of some particular commitment made by the educational agency, she will not prevail; a claim of mere inadequacy of education is not sufficient.

Another contract theory advanced for educational malpractice claims is that of third-party beneficiaries. In these cases, the student or parents may

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31 957 F.2d 410 (7th Cir. 1992).

32 Id. at 416 (citing *Zumbrun v. Univ. of S. Cal.*, 101 Cal. Rptr. 499, 504 (Ct. App. 1972)).

33 Id. at 416.

assert a claim in one of two ways. The first method, introduced in *Donohue*, requires an allegation that “the plaintiff is the third-party beneficiary of a duty imposed upon the defendant” by the state constitution.\(^{35}\) The *Donohue* court disposed of this claim by recognizing that the state’s constitution only provides for free education of its citizens, not for any protection “against the ‘injury’ of ignorance.”\(^{36}\)

The second method involves the student as the third-party beneficiary of an agreement between the school and the parent.\(^ {37}\) In rejecting the third-party beneficiary claim in *Paladino v. Adelphi University*, the court analogized the claim to an educational malpractice claim sounding in tort, saying, “There is nothing novel about a contract action that would permit for judicial intervention into the process of learning.”\(^ {38}\)

Other reasons courts give for disallowing contract causes of action for educational malpractice include legal arguments like the lack of a contract on which to base the claim\(^ {39}\) and plaintiff’s failure to show a particular promise

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36 *Id.* at 880.
37 Paladino v. Adelphi Univ., 454 N.Y.S.2d 868 (N.Y. App. Div. 1982). While the educational institution in question in *Paladino* was a private school, the court recognized its similarities with public schools and decided that, as with public schools, the courts had no place in determining the adequacy of a private school’s course of instruction. *Paladino*, 454 N.Y.S.2d at 872.
38 *Id.* at 872.
breached by the school\textsuperscript{40} and public policy considerations, such as an unwillingness to intervene judicially in the educational system\textsuperscript{41} or an aversion to recognizing a claim for educational malpractice in any form.\textsuperscript{42}

**C. Constitutional Theory of Educational Malpractice**

The final major area of law under which plaintiffs bring educational malpractice claims is constitutional law.\textsuperscript{43} The United States Constitution grants no fundamental right to an education.\textsuperscript{44} Any property or liberty rights afforded to students arise under state constitutions and statutes.\textsuperscript{45} Students asserting a


\textsuperscript{41}See, e.g., Christensen v. S. Normal Sch., 790 So. 2d 252, 255 (Ala. 2001) (holding that recognizing claim for educational malpractice would make courts “second-guess” schools); Alsides v. Brown Inst., Ltd., 592 N.W.2d 468, 473 (Minn. Ct. App. 1999) (rejecting claims on policy ground court would have to review pedagogical factors).


\textsuperscript{44}San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 31 (1973) (holding no fundamental right to education).

\textsuperscript{45}Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) (holding property interests arise under state law).
property or liberty right in some facet of their education usually rely on the
Fourteenth Amendment’s Due Process Clause to enforce that right.46

Plaintiffs have brought both procedural and substantive due process
claims for educational malpractice. To reach the Due Process Clause of the
Fourteenth Amendment to the United States Constitution, students must bring
suit under 42 U.S.C. § 1983.47 Students claiming a violation of procedural due
process assert that the procedural safeguards surrounding a deprivation of
property were insufficient.48

Courts have refused to allow educational malpractice actions under a
procedural due process theory for several reasons. One reason is that there is
simply no state action, as in the case of private educational institutions.49 Other
reasons include: no property right existed,50 plaintiff was afforded sufficient
procedural safeguards,51 and the fact that “[e]ducational malpractice, without
more, is simply not a constitutional deprivation under § 1983.”52

continued enrollment); Swany v. San Ramon Valley Unified Sch. Dist., 720 F. Supp. 764 (N.D.
Cal. 1989) (property and liberty rights in attending graduation ceremony); Bishop v. Ind. Technical
Vocational Coll., 742 F. Supp. 524 (N.D. Ind. 1990) (interference with right to pursuit of happiness
under state constitution).

47 42 U.S.C. 1983 (2005). This statute allows plaintiffs to bring an action against any person
acting under color of state law when that action results in a deprivation of rights.

(prevention of participation in graduation ceremonies and delayed award of diploma); Manning v.
appeals procedure insufficient).

49 Bittle, 6 P.3d 509 at 516.

50 Swany, 720 F. Supp. 764 at 774.

51 Bittle, 6 P.3d 509 at 516.
Educational malpractice plaintiffs claiming a violation of substantive due process identify a range of substantive rights that have been abridged. In one case, *Swany v. San Ramon Valley Unified School District*, the Court considered the plaintiff’s claim that preclusion from graduation ceremonies violated his substantive due process rights. Upon review of the facts, the Court held that Swany failed to show a constitutional violation of his rights. Preventing him from participating in graduation ceremonies was not a punishment, but a result of plaintiff’s failure to complete the requirements for graduation. The Court also found that plaintiff had notice of the consequences of failing properly to complete the class requirements. Thus, the student was unable to show that the penalty he suffered lacked a rational relationship to the end to be achieved by the policy, and there was no violation of his substantive due process rights.

Courts have also refused to find violations of substantive due process rights when there is no arbitrary state action and where there is a lack of a property interest.

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55 Id. at 779.

56 Id.

57 Ewing, 474 U.S. 214 at 223.

It can be seen that, in the general run of cases, the courts have routinely and uniformly refused to allow plaintiffs’ causes of action for educational malpractice. As noted above, educational malpractice plaintiffs rarely meet the elements for a claim in tort, rarely show provisions specific enough for a claim under contract law, and rarely show arbitrary state action required for a claim under constitutional law. In those cases in which they do manage to make out a prima facie case, courts have roundly declared that educational malpractice is against the public policy of the state. The trend with regard to educational malpractice is that it is a cause of action “beloved of commentators, but not of courts.”

II. Litigating Educational Malpractice under the No Child Left Behind Act

Having found the courthouse doors closed to their common law and constitutional claims, educational malpractice plaintiffs seeking to recover for their allegedly inadequate educations have been forced to find other avenues into court. The No Child Left Behind Act of 2001 (NCLBA),\(^\text{60}\) the most recent piece of major federal education legislation, has given some plaintiffs hope of new grounds on which to premise their educational malpractice claims. This section explores the educational malpractice routes plaintiffs and commentators have contemplated under the NCLBA: an express right of action and a right of action pursuant to 42 U.S.C. § 1983.\(^\text{61}\)

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A. Express Right of Action under the No Child Left Behind Act

The NCLBA was enacted “to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.” 62 The statute claims this goal can be accomplished by “holding schools, local educational agencies, and States accountable for improving the academic achievement of all students.” 63 A reauthorization of the Elementary and Secondary Education Act of 1965, 64 the NCLBA provides funding for improvement of schools which fall below a set standard performance rate. 65 If schools are unable to show improvement, they may lose NCLBA funding. 66

Under the Act, states develop education plans, setting out academic standards for their schools. 67 These plans are to include an accountability system, based on schools making “adequate yearly progress” toward meeting

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61 At least one commentator has also advanced a third-party beneficiary theory of recovery under the NCLBA. Amy Reichbach, Note, The Power Behind the Promise: Enforcing no Child Left Behind to Improve Education, 45 B.C. L. REV. 667 (2004). The third-party beneficiary theory is beyond the scope of this article and, consequently, will not be addressed here.


65 20 U.S.C. § 6316(b)(1)(A) (2005) (schools not meeting adequate yearly progress for two or more years identified for school improvement).


the state academic standards.\textsuperscript{68} If schools do not follow their state’s plan, the federal government may withhold funding until the state has conformed.\textsuperscript{69}

Additionally, the Act provides a remedy for students attending schools designated as failing schools\textsuperscript{70} and corrective action for schools which do not make adequate yearly progress two years in a row.\textsuperscript{71} Unlike other remedial federal statutes,\textsuperscript{72} however, the NCLBA does not provide an express private right of action as a method of accountability. For this reason, plaintiffs have attempted to bring their educational malpractice claims under the NCLBA via 42 U.S.C. § 1983.

\textbf{B. Right of Action under § 1983}

§ 1983 allows individuals to bring suit against state officials who violate the Constitution\textsuperscript{73} or federal statutes.\textsuperscript{74} Its purpose is to enforce the terms of the Fourteenth Amendment,\textsuperscript{75} and it declares deprivation of rights “under color of”

\begin{footnotes}
\footnote{69}{20 U.S.C. § 6311(g)(2) (2005) (Secretary may withhold funds for failure to meet requirements).}
\footnote{70}{20 U.S.C. § 6316(b)(1)(E)(i) (2005) (authorizing school transfer option). These remedies include transfer to another public school within the same local educational system.}
\footnote{71}{20 U.S.C. § 6316(b)(7)(C)(iv) (2005) (identifying corrective actions for failing schools). Corrective actions include dismissal of faculty responsible for the failures; new curriculum; and extension of the school year or school day.}
\footnote{73}{Monroe v. Pape, 365 U.S. 167, 172 (1961) (allowing remedy to parties for violation of constitutional rights).}
\footnote{74}{Maine v. Thiboutot, 448 U.S. 1, 5-6 (1980) (construing phrase “and laws” in § 1983 to include federal statutes).}
\footnote{75}{Monroe, 365 U.S. at 171.}
\end{footnotes}
state law to be actionable by a private party against a government official. In the context of educational malpractice litigation, plaintiffs suing under a constitutional theory or under federal statutes have claimed that § 1983 extends to them a private right of action against state educators for a failure to educate.

1. § 1983 Generally

The Court has held that § 1983 may be used to bring suit against state actors under federal statutes. § 1983 grants a private right of action against state actors, or those acting under color of state law, for deprivation of rights only if Congress intended to create enforceable rights under the statute at issue, but §1983 remedies will not be available if Congress intended to displace them with some other remedy (which can be demonstrated by a remedial scheme within the statute itself). The Court has developed a three-prong test to determine the

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76 42 U.S.C. § 1983 (2005). The text of the act reads, “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.”


78 Maine v. Thiboutot, 448 U.S. 1, 5-6 (1980) (construing phrase “and laws” in § 1983 to include federal statutes).


outcome of the first inquiry, congressional intent in creating enforceable rights under a statute: the plaintiffs must be within the class of beneficiaries intended to be covered by the statute; the provisions of the statute must not be too vague to be judicially enforced; and the statute must impose a binding duty on state actors.  

2. § 1983 in the Education Context

Ultimately, whether or not courts will allow § 1983 actions will turn on the underlying statute and the courts’ interpretations of the rights afforded thereunder, in conjunction with the existence of a statutory enforcement scheme. The courts originally appeared to sanction § 1983 claims in the educational context. In Lampkin v. District of Columbia, homeless mothers brought suit on behalf of their children under § 1983, alleging violations of the McKinney Homeless Assistance Act. The district court found for the school system, but the case was reversed on appeal. In holding that § 1983 may be used to seek enforcement of rights under the Act, the appellate court found that the McKinney Act does confer the enforceable right to an education on plaintiffs.

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82 Id. at 341.
83 Lampkin v. Dist. of Columbia, 27 F.3d 605 (1994).
85 Lampkin v. Dist. of Columbia, 27 F.3d 605, 607 (1994) (holding that the McKinney Act does not create an enforceable right of action under § 1983).
86 Id. at 612.
and that there was no enforcement mechanism internal to the Act.\footnote{Id. at 611.} Therefore, the plaintiffs’ § 1983 claims were not precluded.

A later case, \textit{Gonzaga University v. Doe},\footnote{Gonzaga Univ. v. Doe, 536 U.S. 273 (2002) (reanalyzing \textit{Blessing} three-prong test for § 1983 claims).} heard before the U.S. Supreme Court, reanalyzed the three-prong \textit{Blessing} test in the context of plaintiffs’ § 1983 claims and came out quite differently. \textit{Gonzaga} involved the Family Educational Rights and Privacy Act of 1974 (FERPA).\footnote{Id. at 276.} The plaintiff sought to enforce a violation of FERPA through § 1983. In its analysis of the plaintiff’s claim, the Court found that the theory of an implied right of action overlapped with the plaintiff’s action under § 1983, holding that, in both cases, the initial inquiry is the same.\footnote{Id. at 283. An implied right of action exists where the statute demonstrates “an unmistakable focus on the benefited class” (Cannon v. Univ. of Chicago, 441 U.S. 677, 692, n. 13 (1979)) and an intent to “create not just a private right, but also a private remedy” (Alexander v. Sandoval, 532 U.S. 275, 286 (2001)).}

The overarching issue addressed by the Court was “whether Congress intended to create a federal right.”\footnote{Id. at 283.} The case distilled the \textit{Blessing} three-prong test into a two-part analysis: whether the statute confers enforceable rights and whether the rights were conferred upon individuals or in the aggregate.

The Court found that FERPA’s provisions did not contain congressional intent to confer a private right of action against the state, as the statute’s provisions are directed to the Secretary of Education and do not encompass the
rights of any individual students or parents. In addition, the Court found that FERPA contained an internal enforcement mechanism, thus negating the need for external enforcement through methods such as § 1983 litigation. The consequence of the *Gonzaga* decision is that federal statutes conferring rights upon individuals in the education context must be “clear and unambiguous” in their intent to do so.

### 3. § 1983 and the No Child Left Behind Act

A recent trend in educational malpractice litigation is for plaintiffs to bring suit under the No Child Left Behind Act, using § 1983 as the means of enforcement. The inaugural case in this area was *Association of Community Organizations for Reform Now (ACORN) v. New York City Department of Education*. As in *Gonzaga*, the plaintiffs brought suit against the school system pursuant to § 1983 for violation of individual rights under a federal statute. In this case, the statute claimed to have been violated was the No Child Left Behind Act.

The plaintiffs in *ACORN* claimed violation of their right to notice that the schools were designated as failing, their right to transfer their children to non-failing schools, and their right to supplemental educational services, all rights

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92 *Gonzaga*, 536 U.S. 273 at 287 (finding that provisions are not directed at individuals).

93 *Id.* at 289.

94 *Id.* at 290.


96 *Id.* at 339.

97 *Id.* at 339.
which they claim are guaranteed under the NCLBA; they accordingly brought suit under § 1983. 98 The Court, in granting defendants’ motion to dismiss, however, applied the Gonzaga factors. It held that plaintiffs failed to show a private right of action under § 1983 for three reasons.

First, the NCLBA provisions do not contain the necessary rights-creating language to confer an individual right of action. 99 The NCLBA was enacted pursuant to Congress’ spending power. 100 Spending legislation, as the Court specified in Gonzaga, generally does not confer individual rights; 101 it confers rights on a particular agency, qualifying receipt of funds on fulfillment of some obligation(s). 102 Because the language of the statute is directed at school districts and other educational agencies, and not at the individual parents or students of those educational systems, the language cannot be construed as “rights-creating.” 103

Secondly, the core of the NCLBA’s provisions is not the individual’s right to transfer or to supplemental educational services, but rather the educational well-being of children in general. 104 The Court determined that “[t]he decisions


99 Id. at 344.

100 Id. at 341.

101 Gonzaga Univ. v. Doe, 536 U.S. 273, 279 (2002) (“But we have never before held, and decline to do so here, that spending legislation drafted in terms resembling those of FERPA can confer enforceable rights”).


103 Id. at 344.
whether to seek a waiver or to enter into cooperative agreements cannot be made by individual students, and are collective judgments that affect all students attending failing schools." Thus, the Court concluded, the NCLBA had an aggregate focus, rather than the individual focus required for a right of action pursuant to § 1983.

Finally, the Court cited the kind of enforcement mechanisms in the NCLBA as a third reason to preclude individual suits under § 1983. The NCLBA gives the Secretary of Education alone the power to enforce its provisions. The Court made much of the fact that the Act explicitly did not provide for individual enforcement. Thus, the Court concluded that Congress did not intend there to be a private right of action under the NCLBA. Absent such clear and unambiguous congressional intent, under the straightforward standard enunciated in Gonzaga, plaintiffs could not sustain their § 1983 rights of action.

In this initial case adjudicating educational malpractice under the NCLBA, the Court evinced its tendency to foreclose educational malpractice claims predicated upon a § 1983 theory of individual rights. The clear message was that the NCLBA was regulatory in nature, aimed at educational agencies and

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104 Id. at 345.
105 Id.
107 Id. at 345.
110 Id. at 347.
students in the aggregate, not individuals. A recent district court decision in Ohio\textsuperscript{111} has reinforced this idea.

In \textit{Fresh Start Academy v. Toledo Board of Education}, a supplemental educational services (SES) provider brought suit against an educational agency under § 1983, claiming misappropriation of funds under the NCLBA and preferential treatment of other SES providers, resulting in alleged financial harm to Fresh Start.\textsuperscript{112} The Court, following \textit{ACORN}, held that neither an implied right of action nor an action under 42 U.S.C. § 1983 were viable because the Act did not create individually enforceable rights.\textsuperscript{113}

The decision in \textit{Fresh Start} is indicative of the Court’s comprehensive view of individual actions under the NCLBA, although it concerned claims of SES providers and not students or parents. The trend appears to be a continued reluctance to allow individual rights of action under the statute, absent a clear and unambiguous congressional intent to confer such rights, and a continued reluctance to find such congressional intent. Given that the Ohio district court has followed so closely in the footsteps of the New York district court in \textit{ACORN}, it seems likely that other courts hearing educational malpractice claims under the No Child Left Behind Act will do the same.

\textbf{III. The Future of Educational Malpractice under No Child Left Behind}


\textsuperscript{112} Id. at *5.

\textsuperscript{113} Id. at *17.
Commentators who have addressed the issue of litigation under the NCLBA have criticized the courts for excluding students and parents from holding schools accountable for lack of progress, one of the Act’s main goals. This portion of the article will argue that, despite these criticisms, courts have taken the correct path. Allowing individuals to bring suit against failing educational agencies will not solve the problems with America’s school systems, but will rather exacerbate them.

A. The Gonzaga decision

Before even reaching litigation under the No Child Left Behind Act, one criticism of educational malpractice jurisprudence in the individual right of action context suggests that Gonzaga itself resulted in too narrow of a standard. The Court’s rendering of a two-part analysis to clarify enforceable rights under § 1983, however, was both appropriate and necessary. The Blessing test, which was replaced by the Gonzaga rule, was confusing and often misinterpreted by courts, as Justice Rehnquist noted in his majority opinion in Gonzaga.

114 See Melanie Natasha Henry, Comment, No Child Left Behind? Educational Malpractice Litigation for the 21st Century, 92 CAL. L. REV. 1117 (2004) (arguing that courts should allow a private, individual right of action for educational malpractice under the NCLBA); Amy M. Reichbach, Note, The Power Behind the Promise: Enforcing No Child Left Behind to Improve Education, 45 B.C. L. Rev. 667, 703 (2004) (“Schools and states that fail to make adequate yearly progress continue to receive money under NCLB, but they fail to meet the obligations to children and parents that the Act imposes”).


116 Melanie Natasha Henry, Comment, No Child Left Behind? Educational Malpractice Litigation for the 21st Century, 92 CAL. L. REV. 1117, 1155 (2004) (claiming Gonzaga Court did not provide adequate definition of “rights-creating language,” Court rested its decision on academic abstention, and decision allows state actors to continue to abuse their power).

117 See, e.g., Rolland v. Romney, 318 F.3d 42, 53 (1st Cir. 2003) (finding that NHRA was enacted specifically to benefit nursing home residents); but see Bryson v. Shumway, 308 F.3d 79, 88 (1st Cir. 2003) (holding that Medicaid Act was intended merely to benefit “eligible individuals”).
The Court’s decision in Gonzaga gave an always-preferable bright-line test for whether rights were conferred under a statute, which Blessing’s “intended to benefit” language119 failed to do. The Gonzaga Court, rather than imposing an impossible burden on plaintiffs, made it easier for them to determine if they had actionable rights under a particular federal statute by removing uncertainties surrounding the standard for § 1983 claims. By requiring a lack of ambiguity in a statute’s rights-creating language, the Court in fact increased judicial efficiency by preventing litigation by plaintiffs whom Congress did not intend to have a right of action under the statute at issue. In requiring a right of action and raising the bar for potential plaintiffs, the Court may have attempted to stop these claims before they arose.

B. No Child Left Behind and a Private Right of Action

Although there has been a dearth of litigation on private rights of action under the NCLBA thus far, and despite the fact that the United States Supreme Court has not addressed the issue, the lower courts appear to be following educational malpractice precedent in other contexts and rejecting plaintiffs’ individual claims under the No Child Left Behind Act.120 The courts’ refusal to

118 Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002) (“This confusion has led some courts to interpret Blessing as allowing plaintiffs to enforce a statute under § 1983 so long as the plaintiff falls within the general zone of interest that the statute is intended to protect; something less than what is required for a statute to create rights enforceable directly from the statute itself under an implied private right of action. Fueling this uncertainty is the notion that our implied private right of action cases have no bearing on the standards for discerning whether a statute creates rights enforceable by § 1983”).

119 Blessing v. Freestone, 520 U.S. 329, 340 (1997) (“Congress must have intended that the provision in question benefit the plaintiff”).

allow plaintiffs a private right of action under the statute is both essential to the continued vitality of the NCLBA as a means of improving education and proper in light of past educational malpractice decisions. For reasons textual, public policy-oriented, and otherwise, courts’ rejection of the individual private right of action should continue to be the norm.

The No Child Left Behind Act\(^\text{121}\) was enacted to improve the quality of America’s schools.\(^\text{122}\) Indeed, its immediate predecessor was entitled the Improving America’s Schools Act of 1994.\(^\text{123}\) Changing the name of the Act does not change its purpose: it is funding legislation enacted, pursuant to Congress’ spending power, to funnel resources to the schools and school districts which need it most.\(^\text{124}\) In the run of cases, spending legislation does not give rise to a private right of action for individual parties.\(^\text{125}\)

In those rare cases where the Court has allowed a private right of action under Spending Clause statutes,\(^\text{126}\) it was because no ambiguity of the statutory


\(^{122}\) 147 Cong Rec E437 (statement of Rep. Boehner) (“This legislation...reflects President Bush's efforts...to work with States to push America's schools to be the best in the world”).


\(^{124}\) 20 U.S.C. § 6301(5) (2005) (“distributing and targeting resources sufficiently to make a difference to local educational agencies and schools where needs are greatest”).


language would allow for a decision otherwise.\textsuperscript{127} No such clear congressional intent to confer individual rights exists in the NCLBA. The language in the Act confers rights only on states and educational agencies.\textsuperscript{126} Nowhere in the Act is there language to indicate that educational agencies will be accountable to parents or children for any failure in a student’s education.\textsuperscript{129} This focus on school systems, as opposed to individual recipients of an education, is as clear and unambiguous an intention as the court could possibly require. Thus, because the Gonzaga requirement of rights conferred on an individual is not met, the NCLBA cannot be analogized to those statutes under which the Court has allowed a private right of action, and plaintiffs’ claims to individual rights of action pursuant to § 1983 should fail.

Secondly, the lack of an explicit private right of action in the NCLBA militates against allowing § 1983 claims to go forward. When Congress intends to allow a private right of action under a statute which is or might be considered ambiguously worded, it explicitly provides that private right of action.\textsuperscript{130} When it does not, the presumption should be that no such right exists. Consequently, if

\textsuperscript{127} See, e.g., Wright, 479 U.S. at 430 (“The intent to benefit tenants is undeniable.”); Wilder, 496 U.S. at 510 (“There can be little doubt that health care providers are the intended beneficiaries of the Boren Amendment.”).


\textsuperscript{129} A review of the “Accountability” section of the statute, 20 U.S.C. § 6311(b)(2), reveals only references to State accountability systems, which are used to show that students, in the aggregate, are making progress. There is no reference to individual students or parents.

Congress had intended for the NCLBA to be individually enforceable, a private right of action could have been explicitly provided.

The statute does explicitly prohibit liability against teachers for any “act or omission...on behalf of the school”\textsuperscript{131} indicating that Congress was thinking in terms of educational malpractice, at least as far as teachers are concerned, when drafting the Act. The preclusion of claims against teachers individually indicates Congress’ intent to forestall individual educational malpractice claims, which is logically extended to educational agencies, in whose stead individual teachers stand. When coupled with the group-focused framework and language of the statute,\textsuperscript{132} this is even more compelling evidence that a private right of action was not intended and, thus, should not be permitted.

Even assuming plaintiffs can convince courts to grant them a private right of action under the NCLBA, it is an exercise in futility. In the educational malpractice cases involving contract and constitutional theories of recovery, the courts have repeatedly emphasized their aversion to plaintiffs’ attempts to “repackage” educational malpractice tort claims in order to prevail on facts under which they wouldn’t if proceeding in tort.\textsuperscript{133} Just as clothing these tort claims in the garb of contract law or constitutional violations will be inadequate to succeed in the general educational malpractice arena, neither will a similar effort suffice in


\textsuperscript{132} See, e.g., 20 U.S.C. § 6301 (“The purpose of this title is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education...”) (emphasis added).

\textsuperscript{133} Ross v. Creighton Univ., 957 F.2d 410, 416 (7th Cir. 1992). Accord Lawrence v. Lorain County Cmty. Coll., 713 N.E.2d 478, 480 (Ohio Ct. App. 1998) (“A claim that educational services provided were inadequate constitutes a claim for educational malpractice.”). But see Malone v. Acad. of Court Reporting, 582 N.E.2d 54, 59 (Ohio Ct. App. 1990) (breach of contract claim stated).
the realm of § 1983 claims. Plaintiffs’ § 1983 actions under the NCLBA are nothing more than an end-run around the statute’s lack of an explicit private right of action. In a transparent bid to repackage state law educational malpractice claims as federal claims under the provisions of the NCLBA, plaintiffs gain nothing, as the doctrine of stare decisis will preclude the courts from ruling in their favor.

In addition, public policy considerations weigh heavily against allowing a private right of action under the NCLBA. Opening the door to plaintiffs’ educational malpractice claims in such a fashion will have dire consequences for school systems. The primary goal of the NCLBA is to increase funding to schools which are lacking the monetary resources to provide adequate educations to our nation’s children.\textsuperscript{134} Allowing students and parents to bring suit against those same school districts will divert crucial financial means away from the classroom and into the courtroom. Instead of promoting pecuniary independence in the country’s school systems, the NCLBA could be transformed into the vehicle which bankrupts them.

The cost to school systems will not be solely economic, however. The time and effort which school administrators, and perhaps even teachers, will have to invest in defending claims of this nature will also take their toll on the quality of academic instruction students receive. Administrators who must balance the unusual duties of dealing with attorneys, giving depositions, and making courtroom appearances will have little time to spend on managing the

\textsuperscript{134} 20 U.S.C. § 6301(5) (2005) (“distributing and targeting resources sufficiently to make a difference to local educational agencies and schools where needs are greatest”).
academic curriculum, supervising teachers, and disciplining students, to the
detriment of the school and the educational goals of the students.

Will we face an educational malpractice crisis similar to the medical
malpractice issues facing the country today? In the wake of skyrocketing
educational malpractice claims engendered by allowing a private right of action
under the NCLBA, educational agencies may feel pressured to adopt a system of
educational malpractice insurance. Requiring malpractice insurance, as is the
norm in the medical and legal fields, increases costs for school districts, but
foregoing it could leave educational agencies exposed to large awards from
educational malpractice claims, if the courts begin to recognize the private right
of action under the NCLBA. Either way, the heightened expenses could serve,
effectively, to put schools out of business.

Finally, parties arguing in favor of a private right of action under the
NCLBA disregard the idea that there are remedies already available under the
Act. While these remedies are not individualized, as a private right of action
would be, they do exist and could prove beneficial to plaintiffs who feel their
child’s education is suffering.

The NCLBA does hold schools responsible for failing to perform. If
schools do not meet the requirements of the statute, they will not receive federal
funds until they have complied. In addition, the Act gives “all children” the


option to transfer to a higher-performing school\textsuperscript{137} if the school they are currently attending is identified for “school improvement.”\textsuperscript{138} Thus, the NCLBA does provide adequate relief for students at failing schools, in the form of educational opportunities at other institutions, while accomplishing the goal of the Act by encouraging reform of inadequate school systems.

Allowing a private right of action under the NCLBA, as the courts which have addressed the issue have noted, is an exceedingly dangerous idea which would produce unacceptable results for both students and schools. There was no congressional intent that such a right be afforded to educational malpractice plaintiffs. The costs, both economic and educational, to the country’s school systems would simply be too damaging. Federal courts considering the matter seem to be following the lead of state courts in rejecting plaintiffs’ claims. This course of action is correct and should be maintained, due to the multitude of public policy worries generated by an acknowledgement of a private right of action under the NCLBA.

\textbf{Conclusion}

Over the past thirty years, educational malpractice theories have slowly developed out of tort, contract, and constitutional law. Most state courts which have addressed the issue of educational malpractice have declined to recognize such a cause of action.\textsuperscript{139} Judicial reluctance to interfere in what is considered the province of the school districts, an inability to articulate a workable standard\textsuperscript{139} See, \textit{e.g.}, supra notes 16, 27-30, 39-42 and accompanying text.


\textsuperscript{138} \textit{Id.}

\textsuperscript{139} See, \textit{e.g.}, supra notes 16, 27-30, 39-42 and accompanying text.
of care for educators, a fear of allowing plaintiffs to “repackage” their tort claims into other forms, and failures by plaintiffs to prove the elements of their claims have all led to the courts refusing to allow recovery for educational malpractice.\textsuperscript{140}

The latest endeavors by educational malpractice plaintiffs for judicial recognition of their claims arise under federal laws. Plaintiffs have begun to use § 1983 to bring suit against state educational actors under various federal statutes, including the NCLBA.\textsuperscript{141} The courts, however, have seen through these ventures and the current trend is to deny educational malpractice claims under federal statutes as well.\textsuperscript{142}

The NCLBA simply was not meant to be individually enforceable. Its language, its structure, and its goals support the argument that it is a statute targeted at improving school systems and educational opportunities for children in general, not at the sufficiency of any one particular student’s education. In addition, the rights conferred by the NCLBA, an appropriations statute, are not the type of rights intended by Congress to be individually enforceable. They merely address a state’s duties in obtaining funding from the federal government,

\textsuperscript{140} See supra discussion in Part I.


not the liability of school systems which fail to provide children with an adequate education.

While the Supreme Court has not addressed the issue of whether a private right of action exists under the NCLBA, at least two courts of appeal have. They come out on the side of schools: no private right of action under the NCLBA. Should the Supreme Court take up this issue, it is likely to hold the same, based on the strict standard it has enunciated for analyzing § 1983 claims. A clear and unambiguous congressional intent to confer a statutory right of action is not present in the No Child Left Behind Act.

Such an outcome is not just textually appropriate. Public policy concerns, many of which underlie state court decisions in standard educational malpractice claims, have as much bearing in the context of construing a federal statute. By allowing a private right of action under the NCLBA, courts would open the door to a flood of litigation which would threaten to sweep away school districts.

Although it may sound incongruous, to truly leave no child behind, courts must continue to reject plaintiffs' educational malpractice claims. The NCLBA can only achieve its goals of improving education for every child by maintaining a focus on the quality of education for children as a whole. It is quite true that “the


145 Gonzaga Univ. v. Doe, 536 U.S. 273 (2002) (setting standard as whether statute confers enforceable rights and whether rights are conferred on individual or in aggregate).
law does not provide a remedy for every injury." For educational malpractice plaintiffs, it means that they must forgo a private right of action under the No Child Left Behind Act.

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