Fordham Urban Law Journal

Volume 7 | Number 1 Article 5

1979

Educational Malpractice: When Can Johnny Sue?

EDUCATIONAL MALPRACTICE: WHEN CAN JOHNNY SUE?

I. Introduction

Our public school system often fails miserably in its primary objective — that of educating the students. As a result, a new type of suit has developed, the suit for educational malpractice.[1] The action is brought by parents of children who were pushed through school and allowed to graduate though deficient in all basic skills.[2] To date, these suits have been unsuccessful in the courts.[3] Despite this lack of recognition, proponents of educational malpractice as a new theory of recovery are increasing.[4]

The recent case of *Donohue v. Copiague Union Free School District*[5] is a good example of the educational malpractice suit. In this case school authorities pushed the plaintiff through high school and awarded him a certificate of graduation, despite his numerous failing grades. Although school authorities were cognizant of the plaintiff's learning disabilities, they made no attempt to test or diagnose his problems or to provide remedial help. The plaintiff's suit for educational malpractice was dismissed for failure to state a cause of action.

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1. *See, e.g.*, C. SILBERMAN, CRISIS IN THE CLASSROOM (1970); J. HOLT, HOW CHILDREN FAIL (1964).

The quality of education in the public school system has long been a source of widespread concern to society. Education has also been the subject of major litigation. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954) (effects of "separate but equal" doctrine on quality of education offered to black children); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (effects which school system's reliance on local property taxation, resulting in interdistrict disparities in per-pupil expenditures, would have on quality of education offered those students residing in school districts having low property tax base); Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976) (recovery sought for school district's failure to provide student with basic academic skills).

2. *See* Donohue v. Copiague Union Free School Dist., 95 Misc. 2d 1, 408 N.Y.S.2d 584 (Sup. Ct. 1977), *aff'd*, 64 A.D.2d 29, 407 N.Y.S.2d 874 (2d Dep't 1978) [hereinafter cited as *Donohue*]; Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).

3. *Donohue*, 64 A.D.2d at 35, 407 N.Y.S.2d at 878 (citing Beaman v. Des Moines Area Community College, Law No. CL 15-8532 (Iowa Dist. Ct. March 23, 1977); Garrett v. School Bd. of Broward Co., Case No. 77-8703 (Fla. Cir. Ct. Dec. 5, 1977); Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976)).

4. Baratz and Hartle, *Malpractice in the Schools*, PROGRESSIVE, June, 1977, at 33-34; *Suing the Teacher*, NEWSWEEK, Oct. 3, 1977, at 101; Saxe, *Malpractice in the Classrooms*, Newsday, Nov. 30, 1976, at 49, col. 1.

5. 64 A.D.2d 29, 407 N.Y.S.2d 874 (2d Dep't 1978).

This Comment will consider the alternative theories which form the basis of a suit for educational malpractice[6] and weigh the arguments for and against this proposed form of legal redress.[7] Three avenues of recovery will be explored: a negligence action for malpractice, a cause of action for negligent misrepresentation, and an action sounding in negligence for breach of statutory duty.

II. Negligence Action for Educational Malpractice

The particular requirements for any negligence claim are threefold. The plaintiff must show that (1) a legal duty on the part of the defendant existed and the defendant breached the duty; (2) plaintiff in fact suffered an injury; and (3) the defendant's breach of duty was the proximate cause of the plaintiff's injury.[8] This Comment builds upon the premise that an inability to read or write at an adequate level constitutes an injury; therefore, the focus will be placed on the first two aspects of the negligence claim when establishing an educational malpractice action.

A. Duty of Care: No Single Answer

1. An Overview

The first element of any negligence case, including an educational malpractice action, is a duty recognized by law.[9] That is, an individual or entity must meet a certain standard of conduct in order to protect others against an unreasonable risk of harm.[10] In the context of an educational malpractice suit, the courts must recognize that educational institutions have a legal duty to protect students

6. For a related discussion, see Comment, *Educational Malpractice*, 124 U. PA. L. REV. 755 (1976).

7. This Comment focuses primarily on suits by illiterate high school graduates. For an example of a case indicative of the equally expanding field of suits against universities, see Trustees of Columbia Univ. v. Jacobsen, 31 N.J. 221, 156 A.2d 251 (1959).

8. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30, at 143 (4th ed. 1971) [hereinafter cited as PROSSER].

9. *Id.* § 53, at 324-26. Prosser states that duty is "an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." *Id.* at 325. So far the only clearly recognized duty which a school system owes its students is one of physical safety while at school. *See* Dailey v. Los Angeles Unified School Dist., 2 Cal. App. 3d 741, 745-47, 470 P.2d 360, 363, 87 Cal. Rptr. 376, 379 (1970); Raymond v. Paradise Unified School Dist., 218 Cal. App. 2d 1, 31 Cal. Rptr. 847 (1963).

10. *See* PROSSER, *supra* note 8, § 30, at 143. Negligence is conduct involving risk. A recognizable danger of injury comprises risk. Promoting students through the school system regardless of aptitude involves the risk that the students will graduate from high school without the ability to function in society.

against the unreasonable risk of graduating from high school deficient in basic skills. The courts must recognize and define the obligation of the school system and its teachers to students and set forth the circumstances of school liability.

A major issue concerns whether a school district has the duty of educating a student to a certain required minimum level of proficiency.[11] The school has undertaken the obligation to educate. Proponents of the cause of action argue that the school thereby assumes the corollary obligation to educate in a reasonable, careful and prudent manner.[12] If a child has not achieved the requisite level of proficiency, he should not be given a high school diploma and ushered out of the school system.[13] These arguments assume that a duty of due care in teaching lies with a child's teachers, and more fundamentally, with the school district as a whole which offers such related services as psychological counseling, remedial courses and other similar programs.[14]

Recognizing that a legal duty of care exists in a particular factual situation is a question of law and is a decision for the courts to make.[15] The finding of such a legal duty is a complex one; "duty"

11. *Donohue*, Plaintiff's Petition at 3. Plaintiff contends that he should have had an adequate enough understanding and comprehension of his various courses so that he could have achieved passing grades in these subjects and thereby qualified for a certificate of graduation.

12. *Id.* at 3, 4. The type of liability arising from educational malpractice is based upon misfeasance. Liability is much easier to find in cases of misfeasance than in cases of nonfeasance, since courts are reluctant to recognize nonfeasance as a basis of liability. Nonfeasance cases generally concern the duty to aid someone in peril and the courts generally refuse to recognize the moral obligation to aid someone in danger. Departures from this rule only occur where some special relationship exists between the parties. Although no duty enures from assisting someone in trouble, legally recognized duty exists to avoid any affirmative acts which make an individual's situation worse. These affirmative acts constitute misfeasance, rather than nonfeasance.

In applying the foregoing to educational malpractice cases, the fact that a school district has actually enrolled students in its school means the school district has arguably crossed the line into the field of misfeasance. Thus, when the school district fails to exercise proper care in educating its students, the case is one of misfeasance, rather than nonfeasance. *See* PROSSER, *supra* note 8, § 56, at 340-48.

13. *Donohue*, Plaintiff's Petition at 4.

14. *Id.* at 3, 4. *See also* Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d at 817, 131 Cal. Rptr. at 856. In this case the plaintiff claimed that the defendant school district, its agents and employees, neglected to provide the plaintiff with "adequate instruction, guidance, counseling and/or supervision in basic academic skills such as reading and writing, although said school district had the authority, responsibility and ability [to do so]." *Id.*

15. 60 Cal. App. 3d. at 822, 131 Cal. Rptr. at 859.

is not a term of "common parlance."[16] In *Peter W. v. San Francisco Unified School District,* the California Court of Appeals reviewed the many complex factors it had to consider in deciding whether to allow a claim of educational malpractice.[17] The court stated:[18]

> Inherent to this [decision to impose a duty of due care] are various and sometimes delicate *policy judgments*. The social utility of the activity out of which the injury arises, compared with the risks involved in its conduct; the kind of person with whom the actor is dealing; the workability of a rule of care, especially in terms of the parties' relative ability to adopt practical means of preventing injury; the relative ability of the parties to bear the financial burden of injury and the availability of means by which the loss may be shifted or spread; the body of statutes and judicial precedents which color the parties' relationship; the prophylactic effect of a rule of liability; in the case of a public agency defendant, the extent of its powers, the role imposed upon it by law and the limitations imposed upon it by budget; and finally, the moral imperatives which judges share with their fellow citizens—such are the factors which play a role in the determination of duty.

Thus, judicial recognition of the existence of a duty of care in any given factual situation is dependent upon principles of public policy.

2. *Influence of Compulsory Education Statutes*

The argument for the recognition of a legal duty in the educational malpractice field is strenghthened by compulsory education statutes requiring students to attend school until they reach the age of sixteen.[19] Forcing children to attend school is inherently illogical, if not illegal, where evidence indicates that the school fails to educate and where the school has no duty to educate.[20] The compulsory education system was not created merely to babysit. Educational malpractice cases confront the system as being only half functional: the schools keep children off the streets only to put them back onto the streets as young adults unable to obtain decent jobs.

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16. *Id.* at 821, 131 Cal. Rptr. at 858.

17. *Id.*

18. *Id.* at 822, 131 Cal. Rptr. at 859 (citing Raymond v. Paradise Unified School Dist., 218 Cal. App. 2d 1, 8-9, 31 Cal. Rptr. 847, 858 (1963) (emphasis in original)).

19. *See, e.g.,* N.Y. EDUC. LAW § 3205 (McKinney 1970). Every state in the union except Alabama has a compulsory education statute. *See* Note, *The Right to Education: A Constitutional Analysis,* 44 U. CIN. L. REV. 796, 799 n.17 (1975).

20. *See Donohue,* 64 A.D.2d 29, 407 N.Y.S.2d 874 (2d Dep't 1978); Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).

The justification for compulsory education laws lies in the recognition of the parents' duty to educate his child for the child's sake, and the parent's duty to have his child educated for the benefit of the state.[21] In *Fogg v. Board of Education*,[22] the New Hampshire Supreme Court squarely held the primary purpose of maintaining a public school system to be "the promotion of the general intelligence of the people constituting the body politic . . . ."[23]

The dual duties of a parent both to his children and to the state are the theoretical bases for our compulsory education laws. If a parent can show that sending his child to public school will not fulfill these duties, then compulsory attendance becomes paradoxical. This anamolous situation in turn calls into question the constitutionality of our compulsory education laws:[24] the due process prohibition against arbitrary confinement focuses on whether the educational program justifies compelling the student to attend school.[25]

The due process argument has been successfully asserted in right-to-treatment cases which defend the rights of those involuntarily committed to state institutions in civil proceedings.[26] The gravamen of the complaint in these cases is as follows: where an institution fails to treat those whose liberty has been taken away for the express purpose of rehabilitation, no justification for their confinement exists.[27] "To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process."[28]

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21. State v. Bailey, 157 Ind. 324, 61 N.E. 730 (1901); People v. Ewer, 141 N.Y. 129, 36 N.E. 4 (1894). In construing the constitutionality of a state compulsory education statute, the Indiana Supreme Court stated: "One of the most important natural duties of the parent is his obligation to educate his child, and this duty he owes not to the child only, but to the commonwealth . . . . The welfare of the child and the best interests of society require that the state shall exert its sovereign authority to secure to the child the opportunity to acquire an education." State v. Bailey, 157 Ind. at 329-30, 61 N.E. at 732.

22. 76 N.H. 296, 82 A. 173 (1912).

23. *Id.* at 299, 82 A. at 174-75.

24. For a discussion of the compulsory education system, see Comment, *The Rights of Children: A Trust Model, A Child's Rights in the Compulsory Education System*, 46 FORDHAM L. REV. 669, 694 (1978).

25. For a discussion of the constitutional arguments for a right to quality education, see Note, *The Right to Education: A Constitutional Analysis*, 44 U. CIN. L. REV. 796 (1975).

26. *See, e.g.*, Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

27. Wyatt v. Stickney, 325 F. Supp. 781, 784 (M.D. Ala. 1971).

28. *Id.* at 785.

The unconstitutional confinement argument with reference to education was discussed in *In re Gregory B.*[29] The court posed several hypothetical situations, such as a strike or a 75% staff cut resulting in a non-educational, baby-sitting operation in which the inadequacy of the educational program would be tantamount to confinement in violation of due process.[30] The court concluded that compelling students to attend school where the educational program amounted to non-education constituted confinement in violation of constitutional due process.[31]

Those in favor of strengthening the legal arguments for quality education must use compulsory education laws to bolster the requirement that a state consider the educational needs of all its school-age citizens. Proponents maintain the promise of a quality education is implicit in the compulsory education laws.[32]

3. *Minimum Levels of Proficiency*

Court decisions focusing on other educational issues are germane to judicial recognition of a school district's legal duty to educate its students to a minimum level of proficiency. The Supreme Court addressed itself to this issue in *San Antonio Independent School District v. Rodriguez.*[33] Justice Powell, writing for the Court, approved the constitutionality of an educational system which provided "each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."[34] No interference with funda-

29. 88 Misc. 2d 313, 387 N.Y.S.2d 380 (Fam. Ct. 1976).

30. *Id.* at 316-17, 387 N.Y.S.2d at 383.

31. *Id.*

32. "When the state chooses to provide education and makes attendance at school compulsory, it has a duty to grant to each child an equal educational opportunity . . . ." Lau v. Nichols, 483 F.2d 791, 804 (1973) (Hill, J., dissenting).

33. 411 U.S. 1 (1973). This case involved a class action by minority students in a school district with a low property-tax base. The plaintiffs claimed discrimination on the basis of wealth, under the fourteenth amendment's equal protection clause, in the education provided students. They charged that their education was not on a par with school district in areas with higher tax bases. The Supreme Court, reversing the United States District Court for the Western District of Texas, held that education is not a fundamental constitutional right. *Id.* at 35. An absolute deprivation of educational opportunities must exist before discrimination occurs under the fourteenth amendment. *Id.* at 19-20. The plaintiffs were only "relatively worse off" than students in wealthier school districts. *See id.* at 22. Justice Powell concluded that the equal protection clause cannot provide for precise equality, at least of wealth. *Id.* at 24.

34. *Id.* at 37.

mental rights was found where only relative differences in educational spending levels exist within a state's financing system.[35] As long as every student was provided with an education that met minimum standards, no deprivation existed.[36]

While the Court in *Rodriguez* denied that education was a fundamental constitutional right,[37] and stated that quality of instruction need not be absolutely equal, Mr. Justice Powell's statement regarding the provision of an opportunity to acquire basic minimal skills is significant for educational malpractice cases. This statement implies that there is a certain level of "adequate" schooling that is required.[38] However, *Rodriguez* is distinguishable from the educational malpractice suit because it is a tax-equalization case and a class action.[39] Thus, the minimum standard described in *Rodriguez* does not necessarily apply to the individual student.

The legal duty to provide a minimum level of education has been sustained by the New Jersey Supreme Court in *Robinson v. Cahill.*[40] The case concerned the validity of the New Jersey system of financing public education primarily via local *ad valorem* property taxation.[41] Local taxes yielded sixty-seven percent of the statewide total of operating expenses. The state paid twenty-eight percent of the expenses and federal aid paid the balance of five percent. The New Jersey State Constitution mandates the legislature to provide a thorough and efficient system of education for its students.[42] The court considered whether the state had fulfilled its obligation to afford all pupils the level of educational opportunity comprehended by the constitutional mandate in light of its financing system.[43] Relying on the significant connection between money expended per student for education and the quality of educational opportunity, the court held that the constitutional mandate had not been ful-

35. *Id.*
36. *Id.*
37. *Id.* at 35.
38. *See* text accompanying notes 33-36 *supra.*
39. 411 U.S. at 5, 6 (1973).
40. 62 N.J. 473, 515, 303 A.2d 273, 295 (1973).
41. *Id.* at 480, 303 A.2d at 276.
42. "The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this state between the ages of five and eighteen years." N.J. CONST. art. 8, § 4, par. 1.
43. 62 N.J. at 515, 303 A.2d at 295.

filled and that the financing system was unconstitutional.[44] Although the content of the constitutional mandate had never been delineated, "the Constitution's guarantee must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market."[45]

In another tax equalization case, *McInnis v. Shapiro*,[46] the United States District Court for the Northern District of Illinois held that the Illinois Constitution mandating a "thorough and efficient"[47] system of free schools whereby all children would receive a "good"[48] education did not establish rigid requirements for equal dollar expenditures for each student.[49] However, in finding that the Illinois scheme for financing public education was consistent with the state constitutional mandate, the court noted that the Illinois General Assembly had provided a foundation expenditure level of $400 per student.[50] Thus, since a minimum educational level was assured by the foundation level funds, variables in the dollar input over and above that amount were not violative of the state's constitutional mandate.[51]

Courts have implicitly recognized the state's commitment to provide a meaningful education in *Lau v. Nichols*[52] and *Serna v. Portales Municipal Schools*[53] by emphasizing the quality of education

44. *Id.*

45. *Id. See also* Board of Educ. v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978), wherein the court stated that the education clause of the New York Constitution (art. XI, § 1) "must be regarded as also guaranteeing to all the children of the State an equal opportunity to acquire basic minimal educational skills." *Id.* at 533, 408 N.Y.S.2d at 643.

46. 293 F. Supp. 327 (N.D. Ill. 1968).

47. ILL. CONST. art. X, § 1.

48. *Id.*

49. 293 F. Supp. at 336.

50. *Id.* at 330, 336.

51. *Id.* at 336.

52. 414 U.S. 563 (1974). *Lau* was a class action; the plaintiffs were minors of Chinese origin and spoke no English. They claimed they were receiving unequal educational opportunities. The case was remanded to the court of appeals for a determination of appropriate relief.

53. 351 F. Supp. 1279 (D.N.M. 1972). The plaintiffs in this class action were minors of Hispanic heritage who spoke only Spanish. The children had been admitted into school. Their parents, however, claimed that the children's right to education was denied since subjects taught only in English were meaningless to them. The court found that the school systems did not offer a meaningful education, and were thus discriminating. The court stated: "[I]t is incumbent upon the school district to reassess and enlarge its program directed to the specialized needs of its Spanish-surnamed students at Lindsey and also to establish and operate in adequate manner programs at the other elementary schools where no bilingual-bicultural program now exists." *Id.* at 1282.

being offered by the particular schools. The United States Supreme Court in *Lau* held that the school district denied Chinese-speaking children a "meaningful opportunity" to participate in the educational program because they did not understand English.[54] "Imposition of a requirement that, before a child can effectively participate in the education program, he must have acquired those basic skills is to make a mockery of public education."[55] Thus, it was not sufficient for the defendant school district to provide the plaintiffs with the same educational terms and conditions that were available to the thousands of other students in the San Francisco Unified School District.[56] The court held that equality of treatment was not satisfied simply by providing the identical facilities, teachers, textbooks and curriculum for these students.[57] The existence of certain state educational requirements contributed to the court's holding. California required English to be the language of instruction in schools,[58] insured mastery of English by all students,[59] and required proficiency in English for receipt of a diploma.[60] Thus, the Court in requiring that all students be given a "meaningful opportunity"[61] to participate in the school's educational program, has in effect set up a minimum standard of education.

Serna presented a similar factual situation. Plaintiffs in this suit were Spanish-speaking minors whose parents claimed that the school district was discriminating against children who spoke only Spanish by failing to provide "learning opportunities which satisfied both their educational and social needs."[62] Although the defendant school district had made some efforts to alleviate the language problem, the court held that these corrective measures were inadequate. The district court found "a deprivation of equal protection for a school district to effectuate a curriculum which is not tailored to the educational needs of minority students."[63] The district court's

54. 414 U.S. at 566.
55. *Id.*
56. *Id.*
57. *Id.*
58. CALIF. EDUC. CODE § 71 (West 1975) (amended version codified at *id.* § 30 (West 1978)).
59. *Id.*
60. *Id.* § 8573 (West 1975) (amended version codified at *id.* § 51225 (West 1978)).
61. 414 U.S. at 566.
62. 351 F. Supp. at 1280.
63. *Id.* at 1283.

focus on the special and particular needs of these students is in accord with the Supreme Court's emphasis in *Lau* on the necessity of providing students with a meaningful opportunity to learn and points to the recognition of a minimum standard of education.

While both these cases are distinguishable from the educational malpractice suit, principles contained therein can be applied to it. *Serna* involved a minority group and was decided on a claim of deprivation of due process and equal protection under the fourteenth amendment.[64] *Lau* also involved a minority group and was decided under section 601 of the Civil Rights Act of 1964,[65] which bans discrimination based on the ground of race, color, or national origin, in any program or activity receiving federal financial assistance.[66] Since both of these cases were class actions, the meaningful opportunity spoken of referred to a standard of education involving the entire school, and not just individual students. However, the courts have in effect set up a minimum standard of education in *Serna* and *Lau* which can be applied to the case of the functionally illiterate high school student. A school district has fallen below the requisite minimal educational level referred to in the foregoing cases when it advances students from grade to grade without providing them with the opportunity to acquire basic skills. This artificial advancement results in an education which is meaningless and incomprehensible.

4. Difficulty of Measuring a Standard of Care

If the courts recognize a legal duty of care in educational malpractice cases, they then have to determine the standard of care upon which a breach will be measured.[67] Here an analogy can be drawn to medical malpractice cases, where the standard of care requires doctors to exercise the care and skill ordinarily exercised by other members of the profession.[68]

Theoretically, teachers or school authorities could be held to a standard resembling that of doctors. However, the basis for determining educational standards among educators is unsettled. The

64. *Id.*
65. 42 U.S.C. § 2000(d)(1970).
66. *Id.*
67. *See* PROSSER, *supra* note 8, § 37, at 205.
68. McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549 (1959). *See also* PROSSER, *supra* note 8, § 32, at 162.

greatest problem with requiring teachers to exercise the care and skill ordinarily exercised by other members of their profession is that, unlike the medical profession, educators cannot agree on what care and skill ordinarily is required in a given situation.[69] In medical malpractice cases, an expert witness can take the stand and provide evidence on the correct and accepted standard of performance to which the particular doctor should have adhered. No such expert can offer a single clear-cut educational standard for the teacher to follow.

Despite the fact that three or four possible educational theories exist, a minimum standard of care can be set. The best educational theory would certainly not advocate hoping for the best and pushing an illiterate student through each grade without any remedial programs.[70] School boards often do precisely this.[71] Since this artificial advancement is often the basis upon which parents bring this kind of action,[72] school authorities should not be able to claim that a lack of a determinate standard of care prevents finding them liable. Analogously, doctors are often faced with judgmental decisions, where several courses of treatment are open to them. In such instances, an ascertainable minimum standard of care has been set, regardless of the existence of other choices.[73] A standard may reasonably be found for the educator as well.

5. *Influence of New York Education Regulations*

Two New York education regulations[74] would affect the courts' recognition of a legal duty in educational malpractice cases by es-

69. Shanker, *Dangers in the "Educational Malpractice" Concept*, AMERICAN TEACHER 4 (June 1975) [hereinafter cited as Shanker]. *See also* Peter W. v. San Francisco Unified School Dist., 60 Cal. App. at 824, 131 Cal. Rptr. at 861 n.4 (citing R. GAGNÉ, THE CONDITIONS OF LEARNING (2d ed. 1970), R. FLESCH, WHY JOHNNY CAN'T READ (1st ed. 1955)). There are those who favor holding slow learners back, others who rely on the "streaming" theory which places students of similar learning ability together, still others who favor a variety of remedial programs to aid those who lag behind. Shanker, *supra* at 4.

70. Shanker, *supra* note 69, at 4.

71. *See Donohue*, 64 A.D.2d 29, 407 N.Y.S.2d 874 (2d Dep't 1978); Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).

72. *See* cases cited in note 71 *supra*.

73. So long as the treatment a doctor uses is approved by a respectable *minority* of the medical profession the defendant doctor cannot be charged with malpractice. However, the ascertainable minimum is clearly a treatment which has the approval of a respectable minority of doctors. *See* PROSSER, *supra* note 8, § 32, at 163.

74. 8 N.Y.C.R.R. §§ 3.45 (amended July 2, 1976, effective June 1, 1979), 103.2 (1962).

tablishing a standard of care by which to measure the breach of this duty.

The present regulation states:[75]

> High School Diplomas. In order to secure a State diploma of any type the following requirements must be met: (a) The satisfactory completion of an approved four-year course of study in a registered four-year or six-year secondary school, including English, social studies including American history, health, physical education and such other special requirements as are required by statute and [Regents regulations] established by the Commissioner of Education.

This regulation clearly requires a "satisfactory completion" of a course of study.

The recently enacted regulation, to become effective on June 1, 1979, states:[76]

> *Diplomas.* No high school diploma shall be conferred which does not represent four years or their equivalent in grades above grade eight, and no such diploma shall be conferred upon a pupil who has not achieved a passing rating in each of the basic competency tests established by the commissioner.

This regulation clearly establishes passing grades on competency tests as a requirement for receiving a diploma.

At first glance these regulations appear to give the courts some basis for recognizing a legal duty to educate students to a minimum level as well as to establish some standard of care. They impliedly suggest the illegality of advancing a student through school with failing grades. However, a recent decision[77] by the New York Court of Appeals casts doubt upon the likelihood of judicial interpretation and enforcement of educational statutes.

In *James v. Board of Education,*[78] the New York Court of Appeals held that New York courts were generally without authority to rule on a policy decision formulated by the Chancellor of the New York School District in the exercise of his constitutional and statutory power,[79] unless such decisions were arbitrary or illegal. The parents and teachers of students in various school districts and the superintendent of the school district sought injunctive relief to prevent the

75. *Id.* § 103.2 (1962).
76. *Id.* § 3.45 (1962).
77. James v. Board of Educ., 42 N.Y.2d 357, 366 N.E.2d 1291, 397 N.Y.S.2d 934 (1977).
78. *Id.*
79. *Id.* at 366, 366 N.E.2d at 1297, 397 N.Y.S.2d at 941.

scheduled administration of comprehensive reading and mathematics examination.[80] The Chancellor of the City School District of the City of New York is required by statute to administer these comprehensive examinations.[81] Results are used to assess the programs in basic skills, reading, and mathematics in the school district and to satisfy federal requirements in connection with federal educational assistance programs.[82] The plaintiffs claimed that these exams had been fatally compromised because some classes had received advance disclosure of the examination materials, and the use of the results would thus prejudice decisions in which the results were a factor.[83] Since the legislature placed first responsibility on the Board of Education for this statute's enforcement,[84] the court held that judicial interpretation of the statute would be an unlawful interference with an educational policy judgment. Educational policy must be set by the appropriate school authorities in the exercise of their constitutional and statutory powers.[85] The court thereby retained matters concerning the general school system of the state within the control of the department of education and removed these matters from controversies in the courts.[86] In a like manner, the supervisory authority to assess an adequate level of education may very well be interpreted as a matter best left to the Board of Education itself.[87]

80. *Id.* at 362, 366 N.E.2d at 1294, 397 N.Y.S.2d at 938.

81. N.Y. EDUC. LAW § 2590-j (5a) (McKinney 1976).

82. 42 N.Y.2d at 359, 366 N.E.2d at 1293, 397 N.Y.S.2d at 937.

83. *Id.* at 364, 366 N.E.2d at 1296, 397 N.Y.S.2d at 940.

84. *Id.* at 359, 366 N.E.2d at 1292-93, 397 N.Y.S.2d at 936. The court's interpretation of the statute was based on the general legislative and constitutional system for the maintenance of public schools, a system which secures review by the board of education and, on the state level, by the commissioner of education. *Id.* at 366, 366 N.E. 2d at 1297, 397 N.Y.S. 2d at 941. *See also* N.Y. EDUC. LAW § 2590-j (5a) (McKinney 1976).

85. *Id.* at 366, 366 N.E. 2d at 1297, 397 N.Y.S. 2d at 941.

86. *Id., citing* Bullock v. Cooley, 225 N.Y. 566, 576-77, 122 N.E. 630, 633 (1919).

87. *See* Vetere v. Allen, 15 N.Y. 2d 259, 267, 206 N.E. 2d 174, 175-76; 258 N.Y.S. 2d 77, 80 (1965), in which the court of appeals explicitly stated that educational policies are solely the province of the duly constituted educational authority of New York State. *See also* Board of Educ. v. Areman, 41 N.Y.2d 527, 362 N.E.2d 943, 394 N.Y.S.2d 143 (1977). It should be noted, however, that although the legislature has granted a great deal of power to the Commissioner of Education, the courts do retain a limited scope of review on educational matters. The courts can review the Commissioner's acts when they are purely arbitrary. Vetere v. Allen, 15 N.Y.2d at 267, 273, 206 N.E.2d at 176, 179, 258 N.Y.S.2d at 80, 85. A plaintiff in an educational malpractice case would thus assert that a violation of 8 N.Y.C.R.R. § 3.45, by advancing a student from grade to grade regardless of his literacy, was a purely arbitrary act reviewable by the courts.

However, the United States Supreme Court in *Lau v. Nichols*[88] did not hesitate to interpret section 8573 of the California Education Code,[89] which requires the achievement of standards of proficiency in English as well as other designated subjects as a prerequisite to receipt of a diploma of graduation from grade 12, in conjunction with section 71,[90] which makes English the basic language of instruction in all schools, and section 12101[91] which provides for compulsory full-time education between the ages of 6 and 16, as supplying a standard by which to measure the adequacy of the education being provided.[92] In reference to the foregoing sections of the California Education Code the court states: "Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities . . .; for students who do not understand English are effectively foreclosed from any meaningful education."[93] Thus, despite the courts' refusal to recognize the existence of a legal duty in educational malpractice cases, strong arguments in support of its recognition can be proposed.

B. Causation: Who Is to Blame?

The second requirement for a cause of action sounding in negligence is causation.[94] Causation is a question of fact. A reasonable connection between the defendant's act or ommission and damage to the plaintiff must be proven:[95] the injury to the plaintiff must be within a zone of risk created by the defendant.[96] In educational malpractice, the school system's failure to teach successfully is the substantial cause of the student's failure to learn.[97] The court must ask whether the plaintiff's inability to read and write is due *primarily* or *substantially* to the negligence of the defendant school

88. 414 U.S. 563 (1974).

89. CAL. EDUC. CODE § 8573 (West 1975) (amended version codified at *id.* § 51225 (West 1978)).

90. *Id.* § 71 (West 1975) (amended version codified at *id.* § 30 (West 1978)).

91. *Id.* § 12101 (West 1975) (amended version codified at *id.* § 48200 (West 1978)).

92. 414 U.S. at 566. It should be noted that this case concerned a minority group. Thus, the case was based on a suspect classification of constitutional dimensions. *See* notes 52-66 *supra* and accompanying text.

93. *Id.*

94. *See* text accompanying note 8 *supra.*

95. PROSSER, *supra* note 8, § 41, at 236.

96. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

97. *See Donohue,* 64 A.D.2d at 42, 407 N.Y.S.2d at 883.

system. This question in turn raises may legal problems concerning contributory or comparative causes for lack of learning ability. Many extraneous factors may contribute to a child's inability to learn: the student's home environment, his physical, psychological, or neurological problems, his innate disadvantages, and various cultural factors.[98] Thus, as the appellate division stated in *Donohue*: "The failure to learn does not bespeak a failure to teach. It is not alleged that the plaintiff's classmates, who were exposed to the identical classroom instruction, also failed to learn. From this it may reasonably be inferred that the plaintiff's illiteracy resulted from other causes."[99]

While it may be difficult to prove proximate cause in an educational malpractice suit, the injury to the plaintiff is very real. The mere fact that certain elements of a cause of action are difficult to prove should not be the crucial factor in categorically denying a cause of action. The dissent in *Donohue* stated: "Whether the failure of the plaintiff to achieve a basic level of literacy was caused by the negligence of the school system, as the plaintiff alleges, or was the product of forces outside the teaching process, is really a question of proof to be resolved at a trial."[100] Certainly where an illiterate student is permitted to graduate without remedial programs, and without recognition of his learning difficulties, a school cannot easily deny its responsibility in the plaintiff's failure to learn.

In the law of negligence, multiple contributing factors exist where either one of them operating alone would be sufficient to cause the identical result.[101] The defendant's conduct is a material element and a substantial factor in bringing the event about.[102] The test for causation is one of significance, rather than of quantity.[103] If the

98. *See* note 69 *supra* and accompanying text.

99. *Donohue*, 64 A.D.2d at 39, 407 N.Y.S.2d at 881.

100. *Id.* at 41, 407 N.Y.S.2d at 883.

101. PROSSER, *supra* note 8, § 41, at 239.

102. *Id. supra* note 8, § 41, at 240; RESTATEMENT (SECOND) OF TORTS § 431 (1965). The classic example of this type of situation is where the defendant sets a fire, which joins with another fire to burn down the plaintiff's property, but either one of the fires could have destroyed the property by itself. *See* Anderson v. Minneapolis, St. P. & S.S.M. Ry., 146 Minn. 430, 179 N.W. 45 (1920). Each cause was such an important factor in producing the result that neither should be relieved of responsibility on the ground that the harm would have occurred anyway. *Id.* at 438-39, 179 N.W. at 48.

103. McDowell v. Davis, 104 Ariz. 69, 448 P. 2d 869 (1969). "It is not how little or how large a cause is that makes it a legal cause, for a proximate cause is *any* cause which in a natural and continuous sequence produces the injury and without which the result would not have occurred." *Id.* at 71-72, 448 P.2d at 871-72 (emphasis added).

defendant's conduct was a substantial factor in causing the plaintiff's injury, liability will not be removed simply because other causes have also contributed to the same result.[104]

Despite the law of negligence regarding multiple contributing factors, boundaries must always be set to liability. Legal responsibility is limited to those causes which are closely and significantly related to the result.[105] The determination of this limit is often one of policy.[106] Fear of excessive litigation caused by the creation of a new zone of liability and the difficulty of proving proximate cause are two general policy considerations which have been a substantial impediment to the success of an education malpractice suit.[107] Part IV of this Comment will treat such policy considerations in greater depth.

III. Negligent Misrepresentation

An alternative cause of action for educational malpractice is based on the tort of negligent misrepresentation. Negligent misrepresentation is grounded on one of two theories of liability: negligence or fraud.[108] These two distinct theories of liability give rise to different limits of liability and different defenses.[109] However, it would be extremely difficult to prove negligent misrepresentation under the fraud theory because the plaintiff would have to prove intent.[110] Thus, this theory is probably not significant in educational malpractice cases.

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104. *See* Brand v. J.H. Rose Trucking Co., 102 Ariz. 201, 427 P.2d 519 (1967); Kinley v. Hines, 106 Conn. 82, 137 A. 9 (1927).

105. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.W. 99 (1928).

106. *See* Tobin v. Grossman, 24 N.Y. 2d 609, 249 N.E. 2d 419, 301 N.Y.S.2d 554 (1969); Battalla v. State of New York, 10 N.Y. 2d 237, 176 N.E. 2d 729, 219 N.Y.S. 2d 34 (1961), and text accompanying note 18 *supra*.

107. *See Donohue*, 64 A.D.2d at 40, 407 N.Y.S.2d at 882 (1978); Peter W. v. San Francisco Unified School Dist. 60 Cal. App. 3d at 822, 131 Cal. Rptr. at 859.

108. PROSSER, *supra* note 8, § 105, at 684.

109. *Id.* § 107, at 706-07. Under a theory of negligent misrepresentation based on deceit, the plaintiff must prove an intent to deceive or intent to induce reliance on the defendant's part. *Id.* at 706. This theory would encompass the situation where school authorities intentionally misrepresented a student's lack of ability to parents. A defendant is liable to anyone who could be influenced by his statements if they are intentionally false, *id.* at 703-04, whereas liability is more restricted in cases based on the negligence theory. *Id.* at 706-07. Although contributory negligence is a good defense in an action based on the negligence theory, it is not a defense to an intentionally misleading statement because the plaintiff has a right to rely on the statement. *Id.* at 706.

110. *Id.*

A. The Negligence Theory: Requirements for the Cause of Action

In order to establish a cause of action for negligent misrepresentation, four elements must exist: (1) defendant's knowledge (or its equivalent) of a serious purpose in the plaintiff's quest for information; (2) an intent on the part of the plaintiff to rely on the information sought; (3) injury to the plaintiff as a result of this reliance; (4) a relationship between the parties which justifies both the reliance by the plaintiff and the defendant's duty to impart the information with care.[111]

The relationship between the parties is a primary consideration in determining the extent of liability recognized by the courts.[112] A defendant is not liable to everyone who could be influenced by his negligently false statements.[113] The special relationship between the parties must justify reliance by the plaintiff; therefore, the defendant must use due care when imparting information to the plaintiff. This duty has been found in the following situations: a prospective relationship of trustee and *cestui que* trust,[114] a prospective contractual relationship,[115] exclusivity of the defendant's knowledge not founded on a contractual relationship,[116] and a gratuitous representation of a professional while practicing in his or her field.[117]

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111. International Prod. Co.. v. Erie R.R., 244 N.Y. 331, 338, 155 N.E. 662, 664 (1927).

112. PROSSER, *supra* note 8, § 104, at 706-07. *See, e.g.*, Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922); Doyle v. Chatham & Phoenix Nat'l Bank, 253 N.Y. 369, 171 N.E. 574 (1930); International Prod. Co. v. Erie R.R., 244 N.Y. 331, 155 N.E. 622 (1927).

113. PROSSER, *supra* note 8, § 107, at 707-08.

114. Doyle v. Chatham & Phoenix Nat'l Bank, 253 N.Y. 369, 171 N.E. 574 (1930). In this case a trustee told a prospective buyer that certain bonds were adequately secured when in fact they were not. The court held for the plaintiff. Although essential elements in the court's holding were the defendant's knowledge of the seriousness of purpose for which the information was requested and the plaintiff's reliance on the information, the court based its holding on a finding of a prospective relationship of trustee and *cestui que* trust between the parties.

115. *See* Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931); Suit v. Scandrett, 119 Mont. 570, 178 P.2d 405 (1947).

116. De Atucha v. Manufacturer's Trust Co., 155 N.Y.S.2d 537 (Sup. Ct. 1956), *aff'd*, 3 A.D.2d 902, 163 N.Y.S.2d 402 (1st Dep't 1957). In this case, the plaintiff relied on the bank's negligent misrepresentation that a deposit had been made in the bank. The court found that the relation between banker and depositor required the defendant bank to use due care in giving information which was solely in its possession.

117. Valz v. Goodykoontz, 112 Va. 853, 72 S.E. 730 (1911); Buttersworth v. Swint, 53 Ga. App. 602, 186 S.E. 770 (1936); Virginia Dare Stores v. Schuman, 175 Md. 287, 1 A.2d 897 (1938).

The facts of the *Donohue*[118] case, as alleged in the plaintiff's brief and affidavit, illustrate a situation in which the requirements for a negligent misrepresentation cause of action are met. Although this legal theory was not discussed in *Donohue,* it could present a basis for finding liability. In *Donohue* the parents claimed that the defendant school district made false representations of fact concerning methods to be used to improve the plaintiff student's educational problems. In response to repeated parental inquiries, the school psychologist allegedly assured the student's mother that school personnel would handle the student's problems via testing, discussions, and other procedures which the school district had at its disposal. These procedures were never carried out.

Even if the school district did not in fact know these representatives concerning prospective remedial measures were false, it certainly should have known. Thus, knowledge or its equivalent was present. A parent's inquiry into methods to be used for helping a child's learning problems is obviously an inquiry for a serious purpose. Since the school authorities had testing facilities as well as trained personnel at their disposal, the parent's reliance on the school authorities' assurances was reasonable. The student was injured by the misrepresentation in that he was unable to find suitable employment as a result of the poor education he received.

The relationship between the parents and the educators is arguably one which justified both the school district's duty to give the parents accurate information, as well as the parent's reliance on the information. The relationship was potentially one of trustee and *cestui que* trust[119] and the defendant had exclusive knowledge of the steps being taken to aid the student's academic difficulties.[120]

The factual situation in the *Peter W.* case is similar.[121] The school district knew or should have known that representations made regarding the student's performance as at or near grade level in basic academic skills were false. The seriousness of purpose for which information regarding the student's performance was sought is self-evident. As in *Donohue*, the relationship between the parties justi-

118. *Donohue*, Plaintiff's Petition.

119. *See* note 114 *supra.*

120. *See* note 116 *supra.*

121. Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).

fied the parent's reliance on the information and created the school district's duty to impart the information with care. However, the action for negligent misrepresentation was dismissed in the *Peter W.* case on the same policy grounds discussed with respect to the negligence cause of action.[122]

It is not clear in *Peter W.* whether the student's parents made regular inquiries about his progress as the *Donohue* parents allegedly did. However, a cause of action for negligent misrepresentation can be established even where such regular inquiries are not made. A plaintiff in a negligent misrepresentation case does not have to prove verbal misrepresentation; a document is enough to establish the existence of a misrepresentation.[123] The presentation of a high school diploma arguably carries with it an implicit guarantee that the student receiving it has achieved a certain minimal level of instruction. As Dean William Prosser stated: "Merely by entering into some transactions at all, the defendant may reasonably be taken to represent that some things are true—as, for example, that a bank which receives deposits is solvent."[124] The plaintiff in an educational malpractice suit would contend that by entering into a transaction with a school a parent can expect that his child will receive a rudimentary education. When the diploma is not an assurance of certain capabilities, then it is valueless, not only for those who do not meet its implied standards, but also for those who have met them. The New York education regulations[125] validate the presumption that a child whom the school promoted grade by grade has basic knowledge of reading and writing.[126]

B. Defenses to the Negligent Misrepresentation Cause of Action

To escape liability, the defendant school district can claim a lack of reliance by the parents on the information supplied by the school authorities.[127] To show a lack of reliance, the court must find that the parents would not have changed their course of action on the

122. *Id.* at 825, 827, 131 Cal. Rptr. at 861, 862.

123. Leonard v. Springer, 197 Ill. 532, 64 N.E. 299 (1902).

124. PROSSER, *supra* note 8, § 106, at 694.

125. 8 N.Y.C.R.R. §§ 3.45, 103.2 (1962). *See* notes 74-76 *supra* and accompanying text.

126. *See* text accompanying notes 74-76 *supra.*

127. PROSSER, *supra* note 8, § 108, at 714-15. *See also* Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922).

basis of the school's statements.[128] Thus, any indication of switching schools would strengthen the parents' position. The school district could also argue that it only rendered an opinion of what was essentially an immaterial fact because the parents could have judged the student's shortcomings themselves, a judgment requiring no expertise in educational matters.[129]

The defendant can also raise proximate cause arguments similar to those employed in an ordinary negligence cause of action. For example, many other factors, extraneous to schooling, are causes of a particular student's failure to learn;[130] different philosophies of school administration and instruction advocate different solutions for poor learning.[131]

Additionally, contributory negligence is a good defense against a claim of negligent misrepresentation.[132] Therefore, parental conduct such as a failure to demand special testing and evaluation when the parents know a child is receiving failing grades could be considered contributory negligence.[133]

C. Estoppel

An alternative cause of action in misrepresentation would be one founded on estoppel.[134] Estoppel is an equitable remedy. Its application in educational malpractice cases would prevent one party from profiting by a situation arising from his own misleading statements.[135]

In cases like *Donohue* or *Peter W.*, where a school district made representations that were not in fact true, the school district would

128. PROSSER, *supra* note 8, § 108, at 714-15. *See also* Tsang v. Kan, 78 Cal. App. 275, 177 P.2d 630 (1947).

129. PROSSER, *supra* note 8, § 109, at 720-21.

130. *See* note 98 *supra* and accompanying text.

131. *See* note 69 *supra*.

132. PROSSER, *supra* note 8, § 107, at 706.

133. *See* Donohue, 64 A.D.2d at 38, 407 N.Y.S.2d at 880.

134. PROSSER, *supra* note 8, § 105, at 691. Estoppel prevents a party from taking a particular legal position because of some impediment or bar which is recognized by the law. It was originally used to prevent a party from challenging the validity of a legal record, or deed. Later the equity courts used estoppel to prevent a party from taking inequitable advantage of a situation in which his own conduct had placed his adversary. Thus, equitable estoppel is defined as "an impediment or bar, by which a man is precluded from alleging, or denying, a fact, in consequence of his own previous act, allegation or denial to the contrary." *Id.* (quoting 2 JACOB, LAW DICTIONARY 439 (1811); J. EWART, PRINCIPLES OF ESTOPPEL 4 (1st ed. 1900)).

135. PROSSER, *supra* note 8, § 105, at 691.

be estopped from asserting the truth, which might be a defense to some other action.[136] Thus, where a school district in effect told parents that the child read at a normal grade level, the district would be estopped from raising the defense of proximate cause in the educational malpractice suit.

IV. Breach of Statutory Duty

A third theory of educational malpractice liability is a breach of statutory duty. This Comment will focus on New York statutes and cases which provide an example of how the courts have viewed recovery under this theory of liability.

The New York State Constitution mandates the establishment of free common schools in New York.[137] Enabling legislation establishes the public school system.[138] The constitutional mandate guarantees all children in the state the right to a free education,[139] a right which cannot be invaded or denied to an individual child without the safeguards of procedural fairness.[140] Thus, it is clear that the plaintiff student is entitled to an education. However, the court in *Donohue* states that these legislative enactments merely require the creation of a public school system. Their purpose is to confer the benefit of a free education on the populace, not to protect against the injury of non-education.[141]

A number of New York cases would support the school district's argument for non-liability on statutory grounds. The leading case is *H.R. Moch Co. v. Rensselaer Water Company*,[142] where the New York Court of Appeals held that the plaintiff suing for breach of statutory duty, could not recover from the defendant public service corporation. The public service corporation was under a positive

136. *Id.*

137. N.Y. CONST. art. XI, § 1 states: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." *Id.*

138. N.Y. EDUC. LAW § 101 (McKinney 1976).

139. *In re* L. v. New York State Dep't of Educ., 39 N.Y.2d 434, 438, 348 N.E.2d 867, 868, 384 N.Y.S.2d 392, 393 (1976).

140. Madera v. Board of Educ. of City of New York, 267 F. Supp. 356 (S.D.N.Y.), *rev'd on other grounds*, 386 F.2d 778 (2d Cir.), *cert. denied*, 390 U.S. 1028 (1967).

141. *Donohue*, 64 A.D.2d at 37, 407 N.Y.S.2d at 880.

142. 247 N.Y. 160, 159 N.E. 896 (1928). In this case, the defendant had entered into a contract with the city of Rensselaer, New York, to provide water for various city purposes, including firefighting. Plaintiff, a citizen, sued the company when his house burned down, alleging that defendant had not provided adequate water pressure to extinguish a fire.

statutory duty to furnish the city with water for extinguishing fires; however, this statutory duty was merely one to furnish water and there was nothing in the statutory requirements "to enlarge the zone of liability where an inhabitant of the city suffers indirect or incidental damage through deficient pressure at the hydrants."[143] The court's decision was based largely on policy reasons, restricting what otherwise might be excessive liability.

A later case, *Steitz v. City of Beacon*,[144] relied on *H.R. Moch Co.*[145] and furthered the arguments contained therein. In *Steitz*, a city charter provided that the city maintain and operate a fire department.[146] The court stated that the charter of the city was not designed to protect the personal interest of any individual, and that the legislature would clearly have to express an intention to "impose upon the city the crushing burden of such an obligation."[147] Again, the court's concern for unrestricted liability on the part of a municipality was apparent.

A third case supporting the school district's freedom from liability on statutory grounds is *Riss v. City of New York*.[148] Here, the plaintiff sued the City of New York because the police department failed to supply her with protection from a former male friend who had repeatedly threatened her.[149] Although she often requested the protection of the police, none was offered until after an attack by her former "friend."[150] She based her claim on the statute establishing

143. *Id.* at 169, 159 N.E. at 899.

144. 295 N.Y. 51, 64 N.E. 2d 704 (1945).

145. 247 N.Y. 160, 159 N.E. 896 (1928).

146. 295 N.Y. at 54, 64 N.E. 2d at 705.

147. *Id.* at 55, 64 N.E. 2d at 706. The dissent in *Steitz* would have established an action for educational malpractice on a statutory basis. Judge Desmond, dissenting, would have grounded liability on a state statute requiring the City of Beacon to operate a fire department. Judge Desmond found that cities of New York state have been held liable for defaults connected with state-mandated services. This liability stems from an implied contract with the state, based on the acceptance of the city's charter, whereby the city will carry out the duties imposed by the charter. In its discussion of the implied contract, the dissent quoted *Corpus Juris*: "a municipal corporation, when charged in its corporate character with the performance of a municipal function, the duty being absolute or imperative and not merely such as under a grant of authority is entrusted to the judgment and discretion of the municipal authorities, is civilly liable for injuries resulting from misfeasance or nonfeasance with respect to such duty . . . ." *Id.* at 60, 64 N.E.2d at 708 (citing 43 CORPUS JURIS § 1703, at 927 (1927) (Desmond, J., dissenting).

148. 22 N.Y. 2d 579, 240 N.E. 2d 860, 293 N.Y.S. 2d 897 (1968).

149. *Id.* at 581, 240 N.E.2d at 860, 293 N.Y.S. 2d at 897.

150. *Id.* at 584, 240 N.E.2d at 862, 293 N.Y.S. 2d at 900.

police protection.[151] Policy arguments prevailed. The court refused "to proclaim a new and general duty of protection in the law of tort, even to those who may be the particular seekers of protection based on specific hazards . . . ."[152]

These cases strongly suggest that an individual student would not be able to establish a cause of action based on a breach of a statutory duty, because of the "well-established principles of torts that statutes which are not intended to protect against injury, but rather are designed to confer a benefit upon the general public, do not give rise to a cause of action by an individual to recover damages for their breach."[153] Nonetheless, other New York cases have interpreted the State's mandatory statutory duties as intending to benefit and protect the public at large. These cases have allowed an individual to recover damages for the breach of the statutory duty.[154]

In *Runkel v. City of New York*,[155] the plaintiffs sustained personal injuries when an abandoned three-story multiple dwelling, bordering on a public street, collapsed on them. A city inspector had actual notice that the building would collapse but did nothing about it.[156] The appellate division held the city liable for failure to order the removal of the vacant building. The city's failure violated a mandatory statutory duty, which required the city to abate a public

151. *Id.*

152. *Id.* at 582, 240 N.E. 2d at 860-61, 293 N.Y.S. 2d at 898. However, the dissent opined that withdrawal of sovereign immunity would not overburden municipalities. Therefore, a suit should be allowed where a claim of negligence is as strong as in this case. *Id.* at 585, 240 N.E. 2d at 863, 293 N.Y.S. 2d at 901 (Keating, J., dissenting).

153. *Donohue*, 64 A.D.2d at 37-38, 407 N.Y.S.2d at 880.

154. Runkel v. City of New York, 282 A.D. 173, 123 N.Y.S.2d 485 (1st Dep't 1953); Foley v. State of New York, 294 N.Y. 275, 62 N.E. 2d 69 (1945). *See also* Bernardine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945). In this case the city was held liable for personal injuries allegedly sustained by the plaintiff when he was run down by a police horse. Liability was based on a statute which waived the municipality's immunity for employee negligence in the operation of municipally owned vehicles or other facilities of transportation. In Meistinsky v. City of New York, 309 N.Y. 998, 132 N.E.2d 900 (1956), the city was held liable for the wrongful death of an individual who was shot by a police officer during a gun battle with robbers. The city was found negligent because it failed to properly train the police officer in the use of small firearms. Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958), held the city liable for the wrongful death of an individual who was shot and killed because he supplied the police department with information leading to the arrest of a dangerous criminal. The city was found negligent because it failed to supply the decedent with proper police protection.

155. 282 A.D. 173, 123 N.Y.S.2d 485 (1st Dep't 1953).

156. *Id.* at 174-76, 123 N.Y.S.2d at 487-88.

nuisance of such an inherently dangerous character. The court found the plaintiffs to be within the class of persons that the statute was intended to benefit or protect.[157]

In *Foley v. State of New York*,[158] the state had a statutory duty to maintain traffic control lights on state highways.[159] The New York State Vehicle and Traffic Laws imposed this duty for the sole purpose of protecting individuals.[160] Since the intent of the statutory enactment was to protect individuals, the court of appeals held that the plaintiff had a cause of action in tort where the defendant state violated its duty to maintain traffic lights on its highways.[161]

The classification of educational malpractice into one group or the other is largely a question of policy. So far, policy arguments have not favored educational malpractice cases. However, the New York regulations[162] may presage a new trend of decisions in this area. The regulations could be construed as having been enacted for the sole purpose of protecting those students who were injured by being promoted from grade to grade while lacking basic skills.[163] A court could thus find, as did the court in *Runkel*,[164] that the plaintiffs were within the class of persons that the statute was intended to benefit or protect. However, such a construction of the statute by the courts would have to overcome the hurdles presented by *James v. Board of Education*[165] namely, whether a court interpretation of the statute would be an unlawful interference with an educational policy judgment.[166]

V. Policy Considerations

Courts will consider questions of policy before they will permit the establishment of any new cause of action.[167] In denying a cause of

157. *Id.* at 177, 123 N.Y.S.2d at 489.

158. 294 N.Y. 275, 62 N.E.2d 69 (1945).

159. *Id.* at 279, 62 N.E.2d at 70.

160. Steitz v. City of Beacon, 295 N.Y. at 56, 64 N.E.2d at 706 (citing Foley v. State of New York, 294 N.Y. 275, 62 N.E. 2d 69 (1945)).

161. Foley v. State of New York, 294 N.Y. at 279-80, 62 N.E.2d at 70-71.

162. 8 N.Y.C.R.R. § 3.45 (1962). For text of regulation, see text accompanying note 76 *supra*.

163. *See* note 154 *supra* and accompanying text.

164. *See* note 155 *supra* and accompanying text.

165. 42 N.Y.2d 357, 366 N.E.2d 1291, 397 N.Y.S.2d 934 (1977). *See* note 77 *supra* and accompanying text.

166. *See* note 84 *supra*.

167. *See* H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928); Riss

action for educational malpractice, the *Donohue* case raised several policy considerations: the ability of the courts to handle the amount of new litigation, the possibility of feigned claims, and the difficulties involved in proving the plaintiff's case;[168] economic considerations, such as whether the particular defendant will be able to pay the damages;[169] and preventative considerations, such as the ability of the defendant to adopt practices which would preclude injury, the possibility of establishing an agreed upon standard of conduct which would prevent injury, the possibility of proving that the defendant's conduct was the proximate cause of the plaintiff's injury, and the foreseeability of harm to the plaintiff.[170]

One of the prime concerns of the court in *H.R. Moch Co.*[171] and *Steitz*[172] was the economic problem of indefinitely enlarging the number of potential claimants. When liability is extended indefinitely, such liability arguably becomes a crushing burden on the municipality or the particular department of the municipality that is being sued. The appreciable depletion of the government's financial resources was a significant concern to the court in *Riss*.[173]

Thus, a defendant school district can argue that recovery by an individual student might reduce the amount of school money directed at ongoing instruction. Conceivably, after a few sizable recoveries against one school district, the quality of education would suffer. Channelling money into large recoveries instead of educational programs might be self-defeating, given the goal of the educational malpractice cause of action. Perhaps malpractice insurance for schools would be one answer to the question of financing liability for educational malpractice. Schools, via insurance, would then be able to spread the loss.

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v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968); Steitz v. City of Beacon, 295 N.Y. 51, 64 N.E.2d 704 (1945); *Donohue*, 64 A.D.2d 29, 407 N.Y.S.2d 874 (2d Dep't 1978); Battalla v. State of New York, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

168. 64 A.D.2d at 33, 407 N.Y.S.2d at 877. *See* Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968); H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928); Steitz v. City of Beacon, 295 N.Y. 51, 64 N.E.2d 704 (1945).

169. *Donahue*, 64 A.D.2d at 33, 407 N.Y.S.2d at 877 (2d Dep't 1978). *See* Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).

170. *Id.*

171. *See* H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. at 165, 159 N.E. at 897-98.

172. *See* Steitz v. City of Beacon, 295 N.Y. at 55, 64 N.E.2d at 706.

173. 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968).

The administrative concerns, such as increased litigation, the possibility of fraud, and difficulties of proof, which were raised in the *Donohue*[174] case, were rejected as grounds for denying a cause of action in *Battalla v. State of New York*.[175] *Battalla* was the first case to allow a cause of action for physical or mental injury where the injury was not caused by impact, but rather by fright negligently induced.[176] The New York Court of Appeals stated:[177]

> We presently feel that even the public policy argument is subject to challenge. Although fraud, extra litigation and a measure of speculation are, of course, possibilities, it is no reason for a court to eschew a measure of its jurisdiction. The argument from mere expediency cannot commend itself to a Court of justice, resulting in the denial of a right and remedy in all cases because in some a fictitious injury may be urged as a real one.

Thus, the *right* to bring an action was enforced in this case. Problems of proof were left to the determination of the court and the jury.[178]

An additional policy argument against the establishment of a cause of action for educational malpractice is the preference for using extra-legal processes to solve the educational malpractice problem.[179] The school system will assert that the remedies for educational malpractice are in the hands of the legislature or the executive body created by statute to run the school system.[180] However, these extra-legal processes have so far failed to remedy the situation. Ideally, the court system, through the educational malpractice suit, will make school systems more responsive to students' learning problems and will constrain the schools to improve the education they impart.

On the other hand, an inspection of medical malpractice suits challenges the conclusion that the result of allowing individuals to

174. *Donohue*, 64 A.D.2d at 33, 407 N.Y.S.2d at 877.

175. 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

176. *Id.* at 240-41, 176 N.E.2d at 731, 219 N.Y.S.2d at 37 (quoting Green v. Shoemaker & Co., 111 Md. 69, 81, 73 A. 688, 692 (1909)).

177. 10 N.Y.2d at 240-41, 176 N.E.2d at 731, 219 N.Y.S.2d at 37.

178. *See* notes 50-55 *supra* and accompanying text.

179. *Id.*

180. *See* note 42 *supra*.

sue institutions like food manufacturers, educational institutions, or hospitals, leads to improved conditions. Critics of medical malpractice suits contend that making doctors liable for malpractice has not improved health care, but only created the need for malpractice insurance and widespread "defensive medicine."

The California court in *Peter W.*[181] succinctly summed up the policy objections which have so far tipped the balance against educational malpractice cases. In recognizing that public schools have incurred a large measure of public dissatisfaction and are held to be responsible for many of the social and moral problems of society, the court stated:[182]

> To hold them to an actionable duty of care in the discharge of their academic functions, would expose them to the tort claims — real or imagined — of disaffected students and parents in countless numbers. They are already beset by social and financial problems which have gone to major litigation, but for which no permanent solution has yet appeared . . . . The ultimate consequences, in terms of public time and money, would burden them — and society — beyond calculation.

However cogent these policy arguments may be, an effective school system is vital to our society, and the problems which beset it are in urgent need of solutions. Indeed, the United States Supreme Court in *Brown v. Board of Education*[183] underscored the significance of education:[184]

> Education is perhaps the most important function of state and local governments . . . . It is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship . . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

It may well be too much to ask our public school system to educate its students; and it may be unwise to impose an actionable duty of care on the system. However, the courts could at least require as much honesty and fair dealing between school authorities and parents as between ordinary parties to a contract. An action for misre-

181. Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 826, 131 Cal. Rptr. 854 (1976).

182. *Id.* at 825, 131 Cal. Rptr. at 861 (citations omitted).

183. 347 U.S. 483 (1954).

184. *Id.* at 493.

presentation would contribute a great deal towards establishing this kind of honesty.[185]

VI. Conclusion

The strong public policy considerations of excessive liability and scarcity of funds are reasons successfully presented to quash educational malpractice suites. The problems of proof inherent in establishing causality for the plaintiff's poor learning create further difficulties. Negligent teaching is a concept in flux, not yet determined by expert testimony. The great number of educational theories in the field obfuscate any single standard. The success of a plaintiff's case will depend on stressing the wrong done to an individual in light of the importance of the duty vested in the school system. The action for negligent misrepresentation is the best of those surveyed for proving liability, although this theory must still overcome the obstacles of public policy erected by all courts considering the matter to date.

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185. *See* pt. II *supra*.