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EDUCATIONAL MALPRACTICE: A CAUSE OF ACTION IN NEED OF A CALL FOR ACTION

I. INTRODUCTION

Illiteracy has recently become a focus of national concern. With increasing recognition of this national problem, spurred by a recent surge of media attention,¹ questions have surfaced concerning the overall effectiveness of public educational systems. When students attend an individual school system for twelve years or more, subsequently graduating and entering the work force as functional illiterates, the implications of illiteracy suggest the presence of some serious flaws in the educational systems.

The importance of education in contemporary American society cannot be understated. As the United States Supreme Court stated in *Brown v. Board of Education*,² “[t]oday, education is perhaps the most important function of state and local governments.”³ Education prepares children to participate intelligently and effectively in the electoral process, thus ensuring the survival of the political system.⁴ Moreover, a quality educational system will prepare citizens to exercise their most important fundamental First Amendment freedoms both as sources and receivers of information.⁵ With the increasing level of technological advancement in the twentieth century, the critical need for a thorough education of all citizens encom-

1. See, e.g., *ABC Notebook: Illiteracy* (ABC television broadcast, October 28, 1986); Lord & Horn, *The Brain Battle*, U.S. NEWS & WORLD REPORT, Jan. 19, 1987, at 60.

2. 347 U.S. 483 (1954).

3. *Id.* at 493. The United States Supreme Court added:

Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principle instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. 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.

Id.

4. *Seattle School Dist. No. 1 v. State*, 90 Wash. 2d 476, 585 P.2d 71 (1978) (holding that a state constitutional provision declaring that it is the paramount duty of the state to make ample provision for the education of resident children was not a mere preamble, but was mandatory and imposed a judicially enforceable, affirmative duty, such that compliance with that duty can only be met if there are sufficient funds derived through dependable and regular tax sources, not special excess levies).

5. *Id.* at 517, 585 P.2d at 94.

passing at least the most basic academic skills becomes even more apparent.

Despite the vital role of education in contemporary society, many American public schools have failed to provide students with adequate academic programs. The unfortunate plight of the American educational systems warranted nationwide recognition with the release of an extensive report by the National Commission on Excellence in Education in 1983.⁶ The Commission declared that "the educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people."⁷ The Commission also uncovered several alarming dimensions of the educational crisis currently facing the Nation, calling for immediate action to eliminate this crisis.⁸

The purpose of this note is to address and reform one dimension of this crisis by encouraging judicial recognition of educational malpractice claims. After providing a general background discussion of the various issues which are raised in this area, this note will illustrate the past development and failure of the educational malpractice theory as applied in the current case law. The note will then address several alternative theories of recovery that have been previously advanced. Finally, this note will propose that the theory of recovery grounded in negligence can be utilized. This note will develop an appropriate and workable standard of care to aid in judicial assessment of educational malpractice complaints through legislative recognition of such a cause of action.⁹

6. *A Nation at Risk: The Imperative For Educational Reform*, AMERICAN EDUCATION, June 1983, at 2 [hereinafter *A Nation at Risk*] (Final Report of the National Commission on Excellence in Education) (urging changes in high school graduation requirements, longer school days, increased school funding and teacher wages, and competency testing for teachers).

7. *Id.* at 3.

8. Among the findings of the Commission on Excellence in Education were the following: international comparisons of student achievement tests revealed that American students rated considerably lower than students in other industrialized nations; some 23 million American adults were found to be functionally illiterate; 13 percent of all 17-year-old individuals in the United States can be considered functionally illiterate, with functional illiteracy among minority youths estimated as high as 40 percent; the College Board's Scholastic Aptitude Tests (SAT) demonstrated a virtually unbroken decline from 1963 to 1980 during which average verbal skills scores fell over 50 points and average mathematics scores fell nearly 40 points; nearly 40 percent of 17-year-old Americans cannot draw inferences from written material; only one-fifth can write a persuasive essay; and only one-third can solve a mathematics problem requiring several steps. *Id.*

9. Although educational malpractice has received previous attention from various commentators, the proposal advanced in this note is a novel approach. The majority of the educational malpractice literature focuses on the establishment of a legal duty in the educators. See *infra* note 99. However, the underlying principle in the courts' nonrecognition of a legal duty is the general reluctance to develop and utilize a workable standard of care to determine whether a duty has been in fact breached. Instead of looking to the duty of care in the educators, this note will look to the standard of care needed in the educational malpractice arena.

II. BACKGROUND

In response to the current crisis facing the American educational systems, several students have initiated lawsuits against their schools for "educational malpractice," or failure to educate.¹⁰ Most of these student-plaintiffs graduated from high school, yet remained functionally illiterate. These students lacked the ability to form the mature and informed judgment necessary to secure gainful employment, as well as the ability to effectively manage their own lives.¹¹ The students have based their lawsuits upon various legal theories of recovery, the most popular being the traditional principles underlying professional negligence.¹²

The essential formula invoked in professional negligence cases requires the professional to possess and use the knowledge, skill, and care ordinarily employed by members of the particular profession in good standing.¹³ Pro-

10. "Malpractice" is defined as:

[P]rofessional misconduct or unreasonable lack of skill. This term is usually applied to such conduct by doctors, lawyers, and accountants. Failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss or damage to the recipient of those services or those entitled to rely upon them. It is any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct.

BLACK'S LAW DICTIONARY 864 (5th ed. 1979). Although "educational malpractice" has not been recognized by the courts as a legally remediable cause of action, the term "educational malpractice" has been used by the court and various commentators in reference to complaints against educators alleging professional misconduct similar to medical or legal malpractice. "Educational malpractice" as used in this note will refer to professional misconduct of educators. However, the scope of this note includes actions against educators based upon grounds of constitutional and contract law, as well as negligence.

11. *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976) (plaintiff remained unable to read and write above the fifth grade level despite graduation from high school, and thus unqualified for any employment other than labor which requires little or no ability to read or write); *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979) (plaintiff lacked even rudimentary ability to comprehend written English on a level sufficient to enable him to complete an application for employment); *Myers v. Medford Lakes Bd. of Educ.*, 199 N.J. Super. 511, 489 A.2d 1240 (1985) (plaintiff brought action against school district for failure to provide him with special remedial education to assist him to overcome his academic deficiencies).

"Functional illiteracy" refers to a general unsatisfactory application of basic skills in reading, writing, and arithmetic, to problems of a practical nature encountered in everyday life. See *Debra P. v. Turlington*, 474 F. Supp. 244, 258 (M.D. Fla. 1979) (upholding the constitutionality of a Florida statute requiring passage of a minimum competency test before receiving a high school diploma, although unconstitutional as applied to plaintiff because of lack of notice).

12. See *infra* note 99 and accompanying text.

13. W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 187 (5th ed. 1984) [hereinafter PROSSER & KEETON].

essional negligence cases have involved doctors,¹⁴ dentists,¹⁵ pharmacists,¹⁶ psychiatrists,¹⁷ veterinarians,¹⁸ lawyers,¹⁹ architects and engineers,²⁰ accountants,²¹ abstractors of title,²² and many other professions and trades.²³ Professionals are generally required not only to exercise reasonable care in what they do, but also to possess a certain degree of special knowledge or ability.²⁴ The law demands of professionals conduct consistent with their superior learning and experience, in addition to any special skills, knowledge, or training they may personally possess over and above that normally held by persons in that particular field.²⁵

The law of torts, which underlies professional negligence and most educational malpractice complaints,²⁶ is concerned with the allocation of losses arising out of human activities.²⁷ The purpose of the law of torts is to adjust these losses and provide compensation for injuries sustained as a result of unreasonable or socially harmful conduct.²⁸ The failure to educate a stu-

14. See, e.g., *Walls v. Boyett*, 216 Ark. 541, 226 S.W.2d 552 (1950); *Hill v. Boughton*, 146 Fla. 505, 1 So. 2d 610 (1941); *De Laughter v. Womack*, 250 Miss. 190, 164 So. 2d 762 (1964).

15. *Willard v. Hagemester*, 121 Cal. App. 3d 406, 175 Cal. Rptr. 365 (1981); *Rice v. Jaskolski*, 412 Mich. 206, 313 N.W.2d 893 (1981); See generally W. MORRIS, *DENTAL LITIGATION* (1972).

16. *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971) (pregnancy from pharmacist's negligence in filling a prescription for oral contraceptive with a tranquilizer); *French Drug Co. v. Jones*, 367 So. 2d 431 (Miss. 1978).

17. *Ray v. Ameri-Care Hospital*, 400 So. 2d 1127 (La. Ct. App. 1981); *Cotton v. Kambly*, 101 Mich. App. 537, 300 N.W.2d 627 (1980). See generally J. SMITH, *MEDICAL MALPRACTICE: PSYCHIATRIC CARE* (1986).

18. *Bartlett v. MacRae*, 54 Or. App. 516, 635 P.2d 666 (1981); *Ruden v. Hansen*, 206 N.W.2d 713 (Iowa 1973); *Posnie v. Rogers*, 533 P.2d 120 (Utah 1975).

19. See, e.g., *Ramp v. St. Paul Fire & Marine Ins. Co.*, 263 La. 774, 269 So. 2d 239 (1972); *Caltrider v. Weant*, 147 Md. 338, 128 A. 72 (1925); *McLellan v. Fuller*, 220 Mass. 494, 108 N.E. 180 (1915).

20. *Cutlip v. Lucky Stores, Inc.*, 22 Md. App. 673, 325 A.2d 432 (1974); *City of Eveleth v. Ruble*, 302 Minn. 249, 225 N.W.2d 521 (1975). See generally J. ACRET, *ARCHITECTS & ENGINEERS* (2d ed. 1984); R. VAUGH, *LEGAL ASPECTS OF ENGINEERING* (4th ed. 1983).

21. *Seedkem, Inc. v. Safranek*, 466 F. Supp. 340 (D. Neb. 1979); *Bonhiver v. Graff*, 311 Minn. 111, 248 N.W.2d 291 (1976); *Spherex, Inc. v. Alexander Grant & Co.*, 122 N.H. 898, 451 A.2d 1308 (1982).

22. *Adams v. Greer*, 114 F. Supp. 770 (W.D. Ark. 1953).

23. *Chamness v. Odum*, 80 Ill. App. 3d 98, 35 Ill. Dec. 404, 399 N.E.2d 238 (1979) (chiropractor); *Fantini v. Alexander*, 172 N.J. Super. 105, 410 A.2d 1190 (1980) (karate teacher); *Heath v. Swift Wings, Inc.*, 40 N.C. App. 158, 252 S.E.2d 526 (1979) (pilot); *Bambert v. Central Gen. Hosp.*, 77 A.D.2d 559, 430 N.Y.S.2d 336 (1980) (nurse).

24. See PROSSER & KEETON, *supra* note 13, § 32, at 185.

25. *Id.*

26. See *infra* note 100 and accompanying text.

27. PROSSER & KEETON, *supra* note 13, § 1, at 6 (discussing the wide scope of human activities covered by the law of torts).

28. *Id.* at 7.

dent in a system specifically designed and, in most cases, required to provide an education represents a prime example of blatant, unreasonable, and socially harmful conduct;²⁹ however, the law will hold a party responsible only for that which the law recognizes as unjustified.³⁰ Therefore, the courts must first recognize that the failure to educate is a justified claim.

The courts have generally refused to recognize educational malpractice as a legally remediable cause of action.³¹ The fear of judicial involvement in

29. In light of the fundamental importance of education, as well as the vital role education plays in contemporary society, an educator's failure to educate is indeed socially harmful conduct. See *supra* notes 4-6 and accompanying text.

30. PROSSER & KEETON, *supra* note 13, § 1, at 4. "Not only may a morally innocent person be held liable for the damage done, but many a scoundrel has been guilty of moral outrages, such as base ingratitude, without committing any tort. It is *legal* justification which must be looked to" *Id.*

31. *D.S.W. v. Fairbanks North Star Borough School Dist.*, 628 P.2d 554 (Alaska 1981) (holding that action for damages could not be maintained against school district for negligent teaching, placement, or classification of students suffering from dyslexia); *Smith v. Alameda County Social Serv. Agency*, 90 Cal. App. 3d 929, 153 Cal. Rptr. 712 (1979) (holding no cause of action lay on behalf of child against school district for negligently placing child in classes for the mentally retarded under circumstances where district knew or should have known that child was not in fact retarded); *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976) (complaint dismissed where plaintiff graduated from high school yet remained functionally illiterate); *Tubell v. Dade County Pub. Schools*, 419 So. 2d 388 (Fla. Dist. Ct. App. 1982) (plaintiff's educational malpractice complaint which alleged misclassification and improper placement in a special education program for several years to his detriment was dismissed for failure to state a claim); *Doe v. Board of Educ.*, 295 Md. 67, 453 A.2d 814 (1982) (holding that complaint of former student and parents alleging the negligent evaluation and placement of a learning disabled student within the school system failed to state a cause of action); *Hunter v. Board of Educ.*, 292 Md. 481, 439 A.2d 582 (1982) (complaint against school board, elementary school principal, and teacher for educational malpractice in negligently evaluating child's learning abilities failed to state a claim); *Myers v. Medford Lake Bd. of Educ.*, 199 N.J. Super. 511, 489 A.2d 1240 (1985) (plaintiff's claim of educational malpractice against school board for failure to provide him with special remedial education to assist him to overcome his academic deficiencies was dismissed because plaintiff failed to state a claim under the state tort claims act); *Torres v. Little Flower Children's Serv.*, 64 N.Y.2d 119, 474 N.E.2d 223, 485 N.Y.S.2d 15 (1984) (former student, who remained functionally illiterate despite having received public education, unsuccessfully brought action against the social services department and child care agency with which he was placed after his abandonment by his mother); *Hoffman v. Board of Educ.*, 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979) (plaintiff's complaint, alleging educational malpractice in the school board by negligently failing to assess his intellectual ability and placing him in special educational program for children with retarded mental development, was dismissed for failure to state a claim); *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979) (dismissing action for educational malpractice based on claim that notwithstanding receipt of a certificate of high school graduation, plaintiff remained functionally illiterate); *Cavello v. Sherburne-Earlville Cent. School Dist.*, 110 A.D.2d 253, 494 N.Y.S.2d 466 (N.Y. App. Div. 1985) (holding that students could not maintain an action for lost education and training due to school's negligence in supervising other students); *Washington v. City of New York*, 83 A.D.2d 866, 442 N.Y.S.2d 20 (1981) (action dismissed where plaintiff claimed educational malpractice in the school by negligently evaluating and

the daily implementation of educational policies is perhaps the primary public policy consideration relied upon by the courts in rejecting educational malpractice claims.³² The complex and often delicate process of educating, involving the daily professional judgment of educators and administrative school officials, represents an area in which the courts are extremely reluctant to intervene absent gross violations of clearly defined public policy.³³ However, considerations of public policy demand, in the interests of justice, a legal remedy for individuals denied an opportunity to obtain a minimally adequate education.³⁴

The true victims of educational malpractice clearly suffer measurable injuries affecting both real economic and social values.³⁵ In a broader sense,

placing plaintiff in special educational facility after being suspended from school for assaulting teacher with a knife); *Denson v. Steubenville Bd. of Educ.*, No. 85-J-31, slip op. (Ohio Ct. App. July 29, 1986) (educational malpractice complaint dismissed for failure to state a cause of action and statute of limitations where plaintiff claimed school officials promoted him in school through twelfth grade without teaching him to read, while nurturing his athletic ability at the expense of his formal education).

32. See Note, *Educational Malpractice: Can the Judiciary Remedy the Growing Problem of Functional Illiteracy?*, 13 SUFFOLK U.L. REV. 27, 37 (1979) [hereinafter Note, *Judicial Remedy*] (addressing the fear of judicial activism in education).

33. The courts have not elaborated on the meaning of "gross violations of public policy" in this context, but the courts have specifically articulated their unwillingness to intervene in the administration of the public school systems except in the most exceptional circumstances involving "gross violations of defined public policy." *Matter of New York City School Bd. Ass'n v. Board of Educ.*, 39 N.Y.2d 111, 121, 347 N.E.2d 568, 574, 383 N.Y.S.2d 208, 214 (1976). See also *Hoffman v. Board of Educ.*, 49 N.Y.2d 121, 126, 400 N.E.2d 317, 320, 424 N.Y.S.2d 376, 379 (1979); *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 444, 391 N.E.2d 1352, 1354, 418 N.Y.S.2d 375, 378 (1979). However, "public policy" is defined as follows:

That principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good. . . . Thus, certain classes of acts are said to be "against public policy," when the law refuses to enforce or recognize them, on the ground that they have a mischievous tendency, so as to be injurious to the interests of the state, apart from illegality or immorality.

BLACK'S LAW DICTIONARY 1041 (5th ed. 1979). Clearly, the failure of the educational systems to provide a quality education to students is indeed injurious to the interests of the state in maintaining the general welfare of its citizens. Therefore, arguably, the courts are unwilling to intervene in educational issues even in the presence of gross violations of public policy.

34. See *supra* note 10 and accompanying text.

35. In *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 818, 131 Cal. Rptr. 854, 856 (1976), the alleged injuries suffered by the plaintiff as a result of educational malpractice consisted of a loss of earning capacity and a permanent inability to gain meaningful employment because Peter W. was unable to read and write above a fifth grade level. Furthermore, Peter W. sought special damages incurred as the cost of compensatory tutoring. See also *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979) (plaintiff unsuccessfully sought \$5,000,000 to redress his injury because, notwithstanding his receipt of a high school diploma, the plaintiff lacked even the rudimentary ability to comprehend written English on a level sufficient to enable him to complete an application for employment); *Hoffman v. Board of Educ.*, 490 N.Y.2d 121, 400

society at large suffers as a result of educational malpractice.³⁶ Although the law does not, and cannot, provide a remedy for every injury,³⁷ the interests of justice clearly require judicial intervention and legal compensation for those injuries resulting from acts of educational malpractice.³⁸ However, the right to such intervention and consequent compensation has not yet been recognized.

N.E.2d 317, 424 N.Y.S.2d 376 (1979) (At trial, the jury awarded plaintiff damages in the amount of \$750,000 for the severe injury to plaintiff's intellectual and emotional well-being and his reduced ability to obtain employment. The Appellate Division affirmed his judgment but reduced the amount of the verdict to \$500,000. However, the Court of Appeals of New York reversed the ruling and dismissed the case).

36. Speaking before more than 2,000 concerned educators and government officials in Indianapolis, President Reagan stated: "If America is to offer greater economic opportunity to her citizens, if she's to defend our freedom, democracy, and keep the peace, then our children will need wisdom, courage, and strength — virtues beyond their reach without education." *The President's Address to the National Forum on Excellence in Education*, AMERICAN EDUCATION, Mar. 1984, at 2. Business and military leaders complain that they are required to spend millions of dollars on costly remedial education and training programs in such basic skills as reading, writing, spelling, and computation. One-quarter of the recent recruits of the United States Navy cannot read at the ninth grade level, the minimal level necessary to understand written safety instructions. Without remedial training, these recruits cannot even begin, much less complete, the sophisticated training essential in the modern military. *A Nation at Risk*, *supra* note 6, at 6. As technology leaps ahead, the requirement for a literate citizenry, able to master the implications of modern technologies grows even more important. Interests of national security and the future ability of the American economy to compete in the international marketplace are at stake. Orr, *Are We a Nation of Scientific Illiterates?*, AMERICAN EDUCATION, Apr. 1983, at 24.

37. In *Howard v. Lecher*, 42 N.Y.2d 109, 113, 366 N.E.2d 64, 66, 397 N.Y.S.2d 363, 365 (1977), parents of an infant daughter who was born with and eventually succumbed to Tay-Sachs disease brought an action against a physician, seeking damages for mental distress, and contending that the physician should have known of the high risk that the fetus would suffer from the disease. Had the parents been advised that the fetus was afflicted with Tay-Sachs, they would have aborted the pregnancy. In denying recovery of the parents, the court held:

There can be no doubt that the plaintiffs have suffered and the temptation is great to offer them some form of relief. Ideally, there should be a remedy for every wrong. This is not the function of the law, however, for "every injury has ramifying consequences, like the ripples of the waters, without end. The problem of the law is to limit the legal consequences of wrongs to a controllable degree."

Id. at 113, 366 N.E.2d at 66, 397 N.Y.S.2d at 366 (quoting *Tobin v. Grossman*, 24 N.Y.2d 609, 619, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561).

38. For a discussion of the nature of educational malpractice injuries as against public policy, see *supra* note 33.

III. THE PERCEIVED FAILURE OF THE EDUCATIONAL MALPRACTICE THEORY

In *Peter W. v. San Francisco Unified School District*,³⁹ the plaintiff received a high school diploma after attending the requisite twelve years of school.⁴⁰ Despite graduating, the plaintiff was not capable of reading or writing above the fifth grade level.⁴¹ Consequently, Peter W. initiated an action against the school district seeking legal redress for injuries allegedly caused by the school's negligence: in other words, for educational malpractice.⁴²

The plaintiff in *Peter W.* contended that the defendant school district negligently failed to provide him with adequate instruction, guidance, and supervision in basic academic skills, and failed to exercise that degree of professional skill required of an ordinary prudent educator under the same circumstances.⁴³ Specifically, Peter W. alleged that the school district acted negligently by (1) failing to comprehend his reading disabilities, (2) assigning him to classes in which he could not read the books and materials, (3) allowing him to pass and advance from courses or grade levels with

39. 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).

40. *Id.* at 817, 131 Cal. Rptr. at 856. California has enacted legislation requiring students to meet certain standards of proficiency in basic skills before any diploma, certificate, or other similar document may be conferred on a pupil as evidence of completion of a prescribed course of study. CAL. EDUC. CODE § 51412 (West 1978). These standards of proficiency include reading comprehension, writing, and computation skills, in the English language, necessary to succeed in school and life experiences. *Id.* § 51215(c).

41. *Peter W.*, 60 Cal. App. 3d at 818, 131 Cal. Rptr. at 856.

When American public educational systems were first envisioned, the country was primarily an agrarian society. Two centuries ago, perhaps, a fifth-grade reading level would suffice to prepare a child to enter adulthood. However, today such a low level of reading skill would qualify an individual for very few, if any, jobs. Despite this widely recognized fact, as the 21st century nears, many American educational systems remain geared to a schedule reflecting the needs of a 19th century agrarian society. For example, although few American students have crops to tend, most take three months of vacation from school every summer, a vacation originally designed for an agriculture-oriented society. Lord & Horn, *supra* note 1, at 60. Even with the growing technological demands facing contemporary society on an international level, a mere 15 American states require high school students to take four years of English. Only 10 states require three years of math. No state requires two years of foreign language classes. Although most states have raised science requirements, the number of qualified science teachers is shrinking so fast that often the positions are filled by people such as the school football coaches. *Id.* at 64.

42. *Peter W.*, 60 Cal. App. 3d at 818, 131 Cal. Rptr. at 856.

The alleged injuries which Peter W. asserted as part of his legal claim consisted of a loss of earning capacity and a permanent inability to gain meaningful employment, clearly laudable and compensable claims. *Id.* For a discussion of judicial recognition of plaintiffs' right to recover compensation for the impairment of earning capacity, see 22 AM. JUR. 2D *Damages* § 89; RESTATEMENT (SECOND) OF TORTS § 906 comment c (1977).

43. *Peter W.*, 60 Cal. App. 3d at 818, 131 Cal. Rptr. at 856.

knowledge that he had not achieved the skills necessary for him to succeed or benefit from subsequent courses, (4) assigning him to classes in which the instructors were either unqualified or not "geared" to his reading level, and (5) permitting him to graduate although he was unable to read above the eighth grade level, as required by California law.⁴⁴ Furthermore, to fulfill the traditional formula of elements necessary for a cause of action sounding in negligence,⁴⁵ the plaintiff argued that the requisite duty of care on the part of the school district could be established under three alternative theories.⁴⁶

The first theory which supported the existence of a duty involved an "assumption of duty" argument.⁴⁷ Under this theory, the school district assumed the function of student instruction, and such assumption necessarily imposed the duty to exercise reasonable care in its discharge.⁴⁸ At first glance, any assumption of duty by the school district did not appear to actually harm the plaintiff, since he entered the school with no education and left with some positive degree of education, albeit minimal. However, further analysis reveals that the school district could have misled the student to believe that he was receiving an adequate education, thereby depriving him of the opportunity to seek outside aid, such as aid from a private school or a tutor.⁴⁹

44. *Id.* See also CAL. EDUC. CODE § 51225 (West 1978).

45. See PROSSER & KEETON, *supra* note 13, § 30, at 164-65. The elements of a cause of action founded upon negligence are:

1. a duty, or obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
2. A failure on the person's part to conform to the standard required: a breach of the duty
3. A reasonably close causal connection between the conduct and the resulting injury
4. Actual loss or damage resulting to the interests of another.

Id. at 164-65.

46. *Peter W.*, 60 Cal. App. 3d at 819, 131 Cal. Rptr. at 857.

47. *Id.* at 819, 131 Cal. Rptr. at 858. For a discussion of the assumption of duty theory, see generally PROSSER & KEETON, *supra* note 13, § 56. By affirmatively undertaking to give aid to another, a defendant may be liable for assuming a duty and subsequently making the plaintiff's situation worse, either by increasing the danger, by misleading the plaintiff into the belief that it has been removed, or by depriving him of help from other sources. See also Note, *The ABC's of Duty: Educational Malpractice and the Functionally Illiterate Student*, 8 GOLDEN GATE U.L. REV. 293 (1978) [hereinafter Note, *The ABC's of Duty*] (arguing that a basis for establishing a school district's duty may lie in the state's voluntary assumption of the job of educating children).

48. *Peter W.*, 60 Cal. App. 3d at 820, 131 Cal. Rptr. at 858.

49. If no duty to educate existed previously, the school's voluntary assumption of the function of student instruction at least imposed the duty to avoid any affirmative acts which make the student's situation worse. See PROSSER & KEETON, *supra* note 13, § 56, at 378; *Parvi v. City of Kingston*, 41 N.Y.2d 553, 362 N.E.2d 960, 394 N.Y.S.2d 161 (1977) (police disposed of drunkard near highway, instead of jail, thereby making drunkard's situation

A second theory supporting the establishment of a legal duty involved a special relationship between students and teachers.⁵⁰ Under this "special relationship" theory, certain relationships which involve some form of power in one party and a correlative type of vulnerability in another party may give rise to a legal duty.⁵¹ Allegedly, the school district held such a position of power superior to the uneducated students, thereby leaving the students vulnerable to the unbridled discretion of the school district.⁵² This situation of inequality allegedly gave rise to a special relationship supporting the duty of the school district to exercise reasonable care in instructing the students.⁵³

A third theory involved the previous judicial recognition of a similar duty. A legal duty to exercise reasonable care in the instruction and supervision of students has warranted judicial recognition in cases involving physical injuries on schoolgrounds.⁵⁴ A logical expansion of this duty of

worse); *O'Neill v. Montefiore Hosp.*, 11 A.D.2d 132, 202 N.Y.S.2d 436 (1960) (doctor attempted to give free advice over telephone).

50. *Peter W.*, 60 Cal. App. 3d at 820, 131 Cal. Rptr. at 858.

In support of this theory, the plaintiff cited a wide-ranged array of cases which addressed various rights or privileges of public school students, but none of which involved the specific question of whether the school owed them a duty of care in the process of their education. *Id.*

51. PROSSER & KEETON, *supra* note 13, § 56, at 374. During the last century, custom, public sentiment, and views of social policy have led to judicial recognition of an affirmative duty in a limited group of relationships where no such duty to act would otherwise be imposed. *Id.* See Owen, *Civil Punishment and the Public Good*, 56 S. CAL. L. REV. 103, 104 (1982); M. SHAPO, *THE DUTY TO ACT: TORT LAW, POWER, AND PUBLIC POLICY* (1977).

A duty arising from such a special relationship has been previously recognized as existing between landlords and tenants, carriers and passengers, employers and employees, hosts and guests, and jailers and prisoners. PROSSER & KEETON, *supra* note 13, § 56, at 376-377.

52. *Peter W.*, 60 Cal. App. 3d at 820, 131 Cal. Rptr. at 858.

53. The student is also involved in another "special relationship," namely, the relationship between parent and child. The parent-child relationship has been recognized as giving rise to a legal duty of care in criminal cases. See, e.g., *State v. Rivers*, 133 Mont. 129, 320 P.2d 1004 (1958) (defendant was convicted of second degree murder for her omission to provide sufficient food and care for her three-month-old daughter); *State v. Zobel*, 81 S.D. 260, 134 N.W.2d 101 (1965) (defendant-parent convicted of murder for neglect, exposure, and deprivation of necessary food or medical care of child). In an educational malpractice action, any possibility of establishing such a duty of care in the educators under a "special relationship" theory may be superceded by the "special relationship" between parent and child. Arguably, the child is not absolutely vulnerable to the educators' whims because of the parents' contribution to the education process. The parents generally supervise homework, participate in parent-teacher meetings, and actively view their children on a daily basis. Conceivably, however, an uneducated, lower-income class parent, possibly working two or more jobs to support a family, would not be able to significantly participate in the student's education. Moreover, such a parent would be unlikely to recognize any learning deficiencies on the part of the student, thereby maintaining the special power-vulnerability relationship between the educator and student. This situation would present a stronger argument for the establishment of a legal duty of care in the school district based upon a special relationship.

54. 60 Cal. App. 3d at 821, 131 Cal. Rptr. at 858. *Mastrangelo v. West Side Union*

care for the physical safety of students results in a duty of care for the mental well-being of the students as well. Arguably, the courts' previous recognition of a duty to exercise reasonable care in the instruction and supervision of students included the duty to exercise reasonable care in providing students with education.⁵⁵

Despite the plausibility of these theories for establishing a legal duty of care in the school district, the *Peter W.* court rejected all three theories "for want of relevant authority."⁵⁶ The court relied upon considerations of public policy in refusing to recognize the duty.⁵⁷ Citing *Rowland v. Christian*,⁵⁸ the court first delineated the various public policy considerations warranting non-recognition of a duty in the educational systems, including the foreseeability of harm to the plaintiff, the closeness of the connection between defendant's conduct and the injury suffered, and the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach.⁵⁹ These general policy considerations laid the groundwork for the more specific actual public policies enunciated as the reasons for denial of the duty.

The primary public policy concern in the *Peter W.* court's analysis was defined as the absence of a workable standard of care against which an educator's conduct could be measured.⁶⁰ As the court stated: "Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standard of care, or cause, or injury."⁶¹ The court

High School Dist., 2 Cal. 2d 540, 42 P.2d 634 (1935) (explosion in chemistry class resulting in loss of student's hand and eye); *Damgaard v. Oakland High School Dist.*, 212 Cal. 316, 298 P. 983 (1931) (explosion in chemistry class causing student to lose eye); *Klenzendorf v. Shasta Union High School Dist.*, 4 Cal. App. 2d 164, 40 P.2d 878 (1935) (injury in woodshop class causing loss of fingertips); *Dutcher v. City of Santa Rosa High School Dist.*, 156 Cal. App. 2d 256, 319 P.2d 14 (1957) (explosion in auto mechanics class resulting in death of one student and severe injuries to another); *Bellman v. San Francisco High School Dist.*, 11 Cal. 2d 576, 81 P.2d 894 (1938) (injury from tumbling exercise in physical education class). See generally *Note, The ABC's of Duty*, *supra* note 47.

55. *Peter W.*, 60 Cal. App. 3d at 821, 131 Cal. Rptr. at 858.

56. *Id.*

57. *Id.* at 823, 131 Cal. Rptr. at 859.

58. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968) (action for injuries sustained by social guest of tenant when knob of cold water faucet broke while he was using it).

59. *Id.* at 112-13, 443 P.2d at 564, 70 Cal. Rptr. at 100. *Peter W.*, 60 Cal. App. 3d at 823, 131 Cal. Rptr. at 859-860.

60. *Peter W.*, 60 Cal. App. 3d at 825, 131 Cal. Rptr. at 861.

61. *Id.* at 824, 131 Cal. Rptr. at 860-61.

The *Peter W.* court added:

The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might — and commonly does — have his own emphatic views on the subject. The "injury" claimed here is plaintiff's inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil

reasoned that, because so many variable factors influence the process of education, no single standard of care could be applied to the educators. Another public policy consideration utilized by the court in refusing to recognize a legal duty involved the fear that to hold educators to an actionable duty of care would expose the schools to countless tort claims and ultimately result, in terms of public time and money, in consequences beyond calculation.⁶²

A later decision involving educational malpractice in the New York court system followed the lead of the California decision in *Peter W.* The essence of the plaintiff's claims in *Donohue v. Copiague Union Free School District*⁶³ was substantially similar to that in *Peter W.*⁶⁴ The plaintiff in *Donohue* attributed his educational deficiency to the failure of the defendant school district to perform its duties and obligations to provide an adequate education.⁶⁵ Like *Peter W.*, the *Donohue* court denied a cause of action for educational malpractice.⁶⁶

subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified.

Id.

62. *Id.* at 825, 131 Cal. Rptr. at 861.

Thus, the court manifested its reluctance to recognize a cause of action for educational malpractice by refusing to impose a legal duty of care upon the school district based on public policy considerations. In affirming the dismissal of *Peter W.*'s complaint, the court also rejected the cause of action based upon negligent misrepresentation in accordance with its previous analysis of the negligence action, where the court failed to find a duty of care. *Id.* at 828, 131 Cal. Rptr. at 862. Furthermore, the alternative cause of action for intentional misrepresentation was dismissed because the pleadings did not show the requisite element of "reliance" as required under California law. *Id.* at 828, 131 Cal. Rptr. at 863. Consequently, the court's decision to not recognize a duty of care in *Peter W.* has had a substantial impact on subsequent educational malpractice actions.

63. 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).

64. *Peter W.*, 60 Cal. App. 3d at 814, 131 Cal. Rptr. 854.

Like *Peter W.*, *Donohue* was a high school graduate unable to comprehend even written English on a level sufficient to enable him to simply complete an application for employment. *Donohue*, 47 N.Y.2d at 442, 391 N.E.2d at 1353, 418 N.Y.S.2d at 376.

65. *Id.*

66. *Donohue*'s complaint consisted of two separate causes of action, the first of which sounded in the traditional negligence principles of a professional malpractice action, and the second of which alleged the negligent breach of a constitutionally imposed duty to educate. The court quickly dismissed the second cause of action by noting that the New York Constitution (art. IX, § 1) provides for a state duty only to maintain and support a system of public education, and was not intended to impose a duty to ensure that each individual pupil receive a minimum level of education. *Donohue*, 47 N.Y.2d at 443, 391 N.E.2d at 1353, 418 N.Y.S.2d at 377. In addressing *Donohue*'s first cause of action, the court conceded that within the strictures of a traditional negligence or malpractice action, a complaint sounding in educational malpractice could be formally pleaded, and the creation of a workable standard of care in which to assess an educator's performance of a duty did not necessarily pose an insurmountable burden. *Id.* at 443, 391 N.E.2d at 1353, 418 N.Y.S.2d at 377. The court further reasoned

Following the reasoning applied in *Peter W.*, the *Donohue* court dismissed the plaintiff's complaint citing public policy considerations as the primary justification.⁶⁷ The court summarized these public policy considerations as follows:

To entertain a cause of action for "educational malpractice" would require the courts not merely to make judgment as to the validity of broad educational policies — a course we have unalteringly eschewed in the past — but, more importantly, to sit in review of the day-to-day implementation of these policies. Recognition in the courts of this cause of action would constitute blatant interference with the responsibility for the administration of the public school system lodged by Constitution and statute in school administrative agencies.⁶⁸

The *Donohue* court concluded that the sole authority to make any educational policy determinations was vested in the New York Board of Regents and the Commissioner of Education, not the courts.⁶⁹

In analyzing both *Peter W.* and *Donohue*, it becomes apparent that the courts were relying upon seemingly tenuous arguments in refusing to recognize a cause of action for educational malpractice. The *Peter W.* court used a "floodgate" theory in rejecting the claim, voicing the fear that to recognize educational malpractice would virtually "open the floodgates" for countless tort claims.⁷⁰ Additionally, the *Peter W.* court found no workable standard of care against which the educators' conduct could be measured.⁷¹ However, the court in *Donohue* specifically stated that the creation of a workable standard of care did not pose an insurmountable burden.⁷² Moreover, the *Donohue* court conceded that an educational malpractice action fit within the strictures of a traditional negligence action.⁷³ Despite this concession, *Donohue's* complaint was nevertheless dismissed because the court did not want to sit in review of the day-to-day implementation of broad educational policies. This reasoning becomes weaker when considered in

that the elements of proximate cause and injury could also be established. *Id.* at 443, 391 N.E.2d at 1353-54, 418 N.Y.S.2d at 377. See also PROSSER & KEETON, *supra* note 13, § 107, at 741. However, in the court's reasoning, the fact that a complaint alleging educational malpractice could be formally pleaded under the traditional principles of tort law did not, in itself, require a court to entertain such a claim. 47 N.Y.2d at 444, 391 N.E.2d at 1354, 418 N.Y.S.2d at 377.

67. *Id.* at 444, 391 N.E.2d at 1354, 418 N.Y.S.2d at 377.

68. *Id.* at 444-45, 391 N.E.2d at 1354, 418 N.Y.S.2d at 378 (citations omitted).

69. *Id.* at 444, 391 N.E.2d at 1354, 418 N.Y.S.2d at 377. See N.Y. CONST. art. V, § 4; *Id.* art. XI, § 2; N.Y. EDUC. §§ 207, 305 (McKinney 1969 & Supp. 1987).

70. See *supra* note 62 and accompanying text.

71. *Id.*

72. See *supra* note 66.

73. *Donohue*, 47 N.Y.2d at 443, 391 N.E.2d at 1353, 418 N.Y.S.2d at 377.

light of the vast amount of day-to-day policy-making activities that most courts are willing to review such as those undertaken by doctors, lawyers, and accountants.⁷⁴

Following *Peter W. and Donohue*, the next major case involving educational malpractice was *Hoffman v. Board of Education of City of New York*.⁷⁵ Although *Hoffman* was labeled as an educational malpractice action, the case involved student claims of improper classification and placement within the educational system, instead of general claims for failure to educate.⁷⁶ Despite the different nature of the claims presented in *Hoffman*, the *Hoffman* court followed *Peter W. and Donohue* and refused to recognize a cause of action in the plaintiff's complaint.

The plaintiff in *Hoffman* initiated an action against the Board of Education of the City of New York. The complaint contained allegations of negligence in the school board's original assessment of the plaintiff's intellectual ability and failure to retest him pursuant to the original recommendation by the school board psychologist.⁷⁷ The plaintiff claimed that the school board's negligent acts and omissions caused him to be misclassified and improperly enrolled in the program for children with retarded mental development, resulting in severe injury to his intellectual and emotional development and a substantially reduced ability to obtain employment.⁷⁸ The

74. See *supra* notes 13-23.

75. 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979).

76. See Note, *Nonliability for Negligence in the Public Schools for 'Educational Malpractice' From Peter W. to Hoffman*, 55 NOTRE DAME LAW. 814 (1980) [hereinafter Note, *Nonliability*] (arguing that *Hoffman* was incorrectly labeled as an educational malpractice action).

Hoffman represents a form of educational malpractice quite different from that found in *Peter W. and Donohue*. Daniel Hoffman developed a severe speech impediment at an early age. Upon entering kindergarten in the New York City school system, a certified clinical psychologist employed by the defendant school board administered a primarily verbal intelligence test and determined that Hoffman had an intelligence quotient (IQ) of 74, only one point below the maximum score statutorily required for student placement in classes for Children with Retarded Mental Development (CRMD). *Hoffman*, 49 N.Y.2d at 123, 400 N.E.2d at 318, 424 N.Y.S.2d at 377. Based on the results of the IQ test, the clinical psychologist recommended Hoffman's placement in a CRMD class and re-evaluation within two years. *Id.* at 124, 400 N.E.2d at 319, 424 N.Y.S.2d at 377. Pursuant to the recommendation, Hoffman was enrolled in the CRMD program in 1957; however, his intelligence was not re-evaluated until 1969. *Id.* at 124, 400 N.E.2d at 319, 424 N.Y.S.2d at 378. After Hoffman had been "closeted with retarded children for more than twelve years," in a program specifically designed for children with retarded mental development, he was finally administered an intelligence test for adults and found to possess a full scale IQ of 94, thus placing him within the normal range of intelligence. *Id.* at 124, 400 N.E.2d at 319, 424 N.Y.S.2d at 378. Thereafter, Hoffman, then over eighteen years old, was informed that he was no longer qualified to attend the Queens Occupational Training Center, a manual and shop training center designed specifically for retarded youths. *Id.* at 124, 400 N.E.2d at 319, 424 N.Y.S.2d at 378.

77. *Id.*

78. *Id.* at 125, 400 N.E.2d at 319, 424 N.Y.S.2d at 378.

plaintiff maintained the position that, but for the school's misclassification and improper enrollment of the student, he would have been exposed to a normal education, thereby receiving the important academic, social, and cultural values necessary for functioning normally in society.⁷⁹

The lower courts agreed with Hoffman's position. The trial court awarded Daniel Hoffman a judgment of \$750,000.⁸⁰ The intermediate appellate court affirmed the trial court's ruling distinguishing *Peter W.* and *Donohue* as cases involving educational torts for mere nonfeasance, whereas Hoffman's claim involved misfeasance in failing to follow the individualized and specific prescription of the defendant school board's own clinical psychologist.⁸¹ The intermediate court added:

Therefore, not only reason and justice, but the law as well, cry out for an affirmance of plaintiff's right to a recovery. Any other result would be a reproach to justice. In the words of the ancient Romans: "Fiat justitia, ruat coelum" (Let justice be done, though the heavens fall).⁸²

However, the intermediate court reduced the verdict to \$500,000.⁸³

In a four-to-three decision, the New York Court of Appeals reversed and dismissed Hoffman's complaint because the claim sounded in "educational malpractice." Following *Donohue*, the Court of Appeals held that such a cause of action should not, as a matter of public policy, be entertained by the courts.⁸⁴ Rejecting the lower court's misfeasance-nonfeasance distinction, the Court of Appeals applied the same policy considerations that prompted its decision in *Donohue*.⁸⁵ Although the complaint in *Hoffman* did not allege a failure to educate, as in *Peter W.* and *Donohue*, the court nevertheless classified and dismissed the allegations as involving "edu-

79. *Id.*

80. *Hoffman v. Board of Educ. of City of New York*, 64 A.D.2d 369, 387, 410 N.Y.S.2d 99, 111 (1978), *rev'd*, 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979).

81. If the door to "educational torts" for nonfeasance is to be opened . . . , it will not be by this case which involves *misfeasance* in failing to follow the individualized and specific prescription of defendant's own certified psychologist, whose very decision it was in the first place, to place plaintiff in a class for retarded children, or in the initial making by him of an ambiguous report, if that be the fact.

Hoffman, 64 A.D.2d at 386, 410 N.Y.S.2d at 110. See Diamond, *Education Law*, 29 SYRACUSE L. REV. 103, 150-51 (1978) (arguing that liability should be found in *Hoffman* because the thrust of the plaintiff's case was not a failure to provide a positive program for a student, but rather, affirmative acts of negligence by the school board). For a discussion of liability in tort for nonfeasance as compared to misfeasance, see PROSSER & KEETON, *supra* note 13, § 56, at 373-75.

82. *Hoffman*, 64 A.D.2d at 387, 410 N.Y.S.2d at 111.

83. *Id.*

84. *Hoffman*, 49 N.Y.2d at 126, 400 N.E.2d at 320, 424 N.Y.S.2d at 379.

85. *Id.*

catational malpractice.”

Following these three cases, educational malpractice actions can generally be classified into either one of two distinct categories: (1) those alleging a failure to provide an adequate education, and (2) those alleging misclassification and improper placement within the school system.⁸⁶ By broadening the scope of educational malpractice actions, the courts have perhaps stretched too far. In effect, any case containing the words “education” and “negligence” with “physical injuries” is immediately labeled by the courts as “educational malpractice” and quickly dismissed without regard to the merits of the claim.

At least one court has refused to attach the fatal “educational malpractice” label to this type of claim. In *B.M. v. State*,⁸⁷ a case involving a fact situation similar to that in *Hoffman*, the Montana Supreme Court reached a decision tending to follow the *Hoffman* dissent.⁸⁸ Although *B.M.* was eventually dismissed on other grounds,⁸⁹ the court’s analysis sheds a ray of hope for future victims of negligence in the school systems.

In *B.M.*, the plaintiff’s foster mother alleged that the state was negligent in placing B.M. in a segregated special education program, and that the alleged misplacement violated the child’s constitutional rights of due

86. Although *Hoffman* fell into the second category, several commentators have suggested that claims similar to *Hoffman* should not be labeled as true “educational malpractice” actions. See Funston, *Educational Malpractice: A Cause of Action in Search of a Theory*, 18 SAN DIEGO L. REV. 743, 758 (1981) (arguably, it may be incorrect to conceptualize *Hoffman* as an educational malpractice case); Note, *Nonliability*, *supra* note 76 (arguing that the New York Court of Appeals erred in its classification of the facts in *Hoffman* as “educational malpractice” because *Hoffman* did not present a claim of educational malpractice in the traditional sense).

The one paragraph dissenting opinion in *Hoffman* stated:

[T]his case involves not ‘educational malpractice’ as the majority in this court suggests but discernible affirmative negligence on the part of the board of education in failing to carry out the recommendation for re-evaluation within a period of two years which was an integral part of the procedure by which plaintiff was placed in a CRMD class, and thus readily identifiable as the proximate cause of plaintiff’s damages.

Hoffman, 49 N.Y.2d at 127, 400 N.E.2d at 321, 424 N.Y.S.2d at 380 (Meyer, J., dissenting) (citations omitted).

The scope of this note is limited to educational malpractice claims against public school systems. Several similar cases have been successfully litigated against private schools, although generally pleaded under theories of recovery sounding in contract law. See *Pietro v. St. Joseph’s School*, 48 U.S.L.W. 2229 (BNA N.Y. Sup. Ct. Suffolk Co. 1979) (educational malpractice action against a private school recognizing that tuition may be recovered if the school breached an express contractual agreement with the parent that the student would attain a certain proficiency level after completing a specified curriculum).

87. 200 Mont. 58, 649 P.2d 425 (1982).

88. *Id.* See *supra* note 86 and accompanying text.

89. *B.M. v. State*, 698 P.2d 399 (Mont. 1985).

process and equal protection.⁹⁰ The Supreme Court of Montana remanded the case for further proceedings.⁹¹ However, with regard to the existence of a legal duty of care imposed upon the state to exercise reasonable care in testing and placing the child in an appropriate educational program, the court stated: "We have no difficulty in finding a duty of care owed to special education students."⁹² The court deferred to the state constitution and other state statutes specifically designed to govern the administration of special education programs as evidence of a legal duty of care on the part of the state.⁹³

90. *B.M.*, 200 Mont. at 59, 649 P.2d at 425. Like Daniel Hoffman, while attending kindergarten in a Montana school, B.M. displayed learning difficulties at an early age, apparently the result of a speech impediment. *Id.* at 60, 649 P.2d at 426. Upon the recommendation of the State Superintendent of Schools, the child was evaluated by a psychologist of the Eastern Montana Regional Mental Health Center. The psychologist recommended that B.M. either repeat her year in kindergarten or receive special educational help. *Id.* Pursuant to this recommendation, the school officials sought state funds for the development of a special education program for first graders, including B.M. In an effort to secure the necessary funds, an application and plan outlining the special needs of the children were submitted to the Superintendent of Public Instruction. The application contained a classification of B.M. as "educable mentally retarded" (EMR), a status for which state policy required an individual learning aptitude score of 50 to 75. However, B.M.'s overall IQ score was determined to be 76. The state superintendent subsequently approved the application and the program was implemented whereby the four children in the program were to attend the regular first grade classroom. A special education teacher was to provide the special help and support necessary for the children "without segregating and labeling them." This process is sometimes referred to as "mainstreaming," which allows the instruction of children with special educational needs in the normal classroom. By not segregating the special students, they are exposed to the important socialization functions which generally are accomplished only in the normal classroom. The students are not separated or labeled, and therefore do not feel the usual "retarded" stigma so often attached to the students when viewed as "outsiders."

After five weeks, the children in the special education program were found to be easily distracted and thereafter moved to a separate classroom for their morning classes. B.M.'s foster parents were not informed of this change in the program format until after the child had been attending the segregated class for nine weeks. *Id.* at 61, 649 P.2d at 426-27. Consequently, the foster mother immediately removed B.M. from the special education program and the school officials abruptly terminated the program. *Id.* at 61-62, 649 P.2d at 427. During the nine week period in which B.M. attended the segregated classroom, the child's foster mother witnessed a dramatic worsening in B.M.'s behavior, exemplified through the child's refusal to dress herself and eat properly. *Id.* at 62, 649 P.2d at 427.

In the court's brief opinion, the sovereign immunity contention was quickly dismissed by noting that the Montana Constitution (art. II, § 18) abolished such immunity absent express contrary legislation. *Id.* at 62, 649 P.2d at 427.

91. *Id.* at 64, 649 P.2d at 428.

92. *Id.* at 63, 649 P.2d at 427.

93. *Id.* The constitutional provision relating to education for citizens in Montana states: "It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state." MONT. CONST. art. X, § 1 (1972).

The *B.M.* court rejected plaintiff's claims of unconstitutional violations of due process and equal protection as without merit and remanded the case for further proceedings to determine

Compared to *Hoffman*, B.M.'s fourteen-week wrongful placement in the special education program was substantially less harmful in effect than Hoffman's twelve-year ordeal; however, the Montana court was readily willing to accept B.M.'s complaint without labeling it as "educational malpractice." Although B.M. was eventually dismissed on other grounds,⁹⁴ the court had "no difficulty in finding a duty of care" owed to the student.⁹⁵ Therefore, the B.M. court apparently had no difficulty in finding a workable standard of care to determine whether the state had breached this duty. The *Hoffman* court, however, did not find a legal duty of care, simply because the complaint "smacked" of educational malpractice. The obvious disparity between the Montana and New York courts' treatment of "misclassification" and "misplacement" cases demonstrates the need for clarification in the educational malpractice arena.⁹⁶

The current educational malpractice case law demonstrates the general fear of the courts to become involved in virtually any non-tangible dimension of public education. This fear, however, has unfortunately left several true victims in the dust of its fleeting path. With the exception of Montana, the courts have generally applied an "educational malpractice" rubber stamp to these otherwise plausible claims under the guise of public policy. Perhaps, however, the very public policy that the courts so willingly rely upon in rejecting these claims is the same public policy that "cr[ies] out for an affirmation of plaintiff's right to recovery."⁹⁷

whether the state had indeed breached its legal duty of care in the negligence claim. *B.M.*, 200 Mont. at 64, 649 P.2d at 427-28.

94. *B.M. v. State*, 698 P.2d 399 (Mont. 1985).

95. *B.M.*, 200 Mont. at 63, 649 P.2d at 427.

96. Several cases involving allegations similar to those found in *Hoffman* and *B.M.* have been initiated pursuant to the provisions in the federal Education for All Handicapped Children Act (EAHCA) of 1975. 20 U.S.C. §§ 1401-1461 (1982). The EAHCA establishes federal aid for state schools complying with its provisions in identifying handicapped children and developing individualized special education programs that meet the unique needs of the handicapped child. The term "handicapped children" is defined as meaning "mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services." 20 U.S.C.A. § 1401(a)(1) (West Supp. 1987). The Act provides a detailed format of procedural safeguards whereby handicapped children and their parents or guardians can assure the provision of a free appropriate education by the state educational agencies and units. 20 U.S.C. § 1415 (1982). The Act also establishes the right of an aggrieved parent or child to bring a private civil action in federal court after exhaustion of all other available remedies provided by the statute. 20 U.S.C. § 1416 (1982). See Levinson, *The Right to a Minimally Adequate Education for Learning Disabled Children*, 12 VAL. U.L. REV. 253, 276-81 (1978).

97. *Hoffman v. Board of Educ. of the City of New York*, 64 A.D.2d 369, 387, 410 N.Y.S.2d 99, 111 (1978). For discussion of the use of "public policy" grounds, see *supra* note 33.

IV. ALTERNATIVE THEORIES OF RECOVERY

To date, no plaintiffs bringing complaints which the courts have labeled as "educational malpractice" have prevailed in their actions.⁹⁸ The courts' uniform rejection of these complaints has prompted discussion from several legal commentators and publicists regarding the plausibility of educational malpractice claims under different theories of recovery.⁹⁹ The most popular theory of potential recovery appears to lie under the traditional tort principles of professional negligence.¹⁰⁰ The other theories of recovery sug-

98. See *supra* note 31 and accompanying text.

99. See Elson, *A Common Law Remedy For the Educational Harms Caused by Incompetent or Careless Teaching*, 73 Nw. U.L. REV. 641 (1978) (analyzing the general policy considerations underlying the courts' reluctance to make decisions concerning educational policies); Funston, *supra* note 86 (arguing that the existent theories of recovery are logically unsound and inadequate to support an educational malpractice claim, and even if a legally sufficient justification for recognizing such a cause of action could be found, compelling considerations of public policy argue against such recognition); Jerry, *Recovery in Tort for Educational Malpractice: Problems of Theory and Policy*, 29 U. KAN. L. REV. 195 (1981) (arguing that refusal to recognize a cause of action for educational malpractice is incompatible with accepted tort principles, and that a cogent theory supporting nonrecognition cannot be articulated within the confines of the accepted principles and the general policies upon which those principles are based); Comment, *Educational Malpractice: When Can Johnny Sue?*, 7 FORDHAM URB. L.J. 117 (1978) [hereinafter Comment, FORDHAM URB. L.J.] (addressing the alternative theories which form a basis of a suit for educational malpractice and suggesting that an action for negligent misrepresentation may be the best theory for establishing liability); Note, *The ABC's of Duty*, *supra* note 47 (analyzing various theories upon which to establish a legal duty of care on the part of the educators and comparing physical injuries on school grounds to academic injuries received from educational malpractice); Note, *Nonliability*, *supra* note 76 (arguing that *Hoffman* was incorrectly labeled as an educational malpractice action, thus significantly expanding the scope of the term "educational malpractice"); Note, *Judicial Remedy*, *supra* note 32 (investigating the feasibility of educational malpractice grounded in negligence, focusing on legislative developments regarding the quality of education and the potential impact of competency tests, and urging the judiciary to extend the present liability that educators face for physical harm to encompass emotional and economic injury as well); Note, *Educational Malfeasance: A New Cause of Action for Failure to Educate?*, 14 TULSA LAW J. 383 (1978) (considering the viability of educational malpractice actions in light of the educational accountability and competency-based education movements in some states); Comment, *Educational Malpractice*, 124 U. PA. L. REV. 755 (1976) [hereinafter Comment, U. PA. L. REV.] (addressing different theories of recovery and arguing that a negligence suit stands the most chance of success with a comparative standard of care, that is, the level of skill and learning of the minimally acceptable teacher in the same or similar communities); Note, *Educational Malpractice and a Right to Education: Should Compulsory Education Laws Require a Quid Pro Quo?*, 21 WASHBURN L.J. 555 (1982) [hereinafter Note, *Right to Education*] (suggesting that students may bring an action for educational malpractice by arguing that compulsory school attendance requires the state to provide a student and his parents with a quid pro quo in order to avoid a constitutional violation of substantive due process).

100. The popularity of the negligence theory of recovery is illustrated in the case law as well as the public commentary. For a list of educational malpractice cases grounded in negligence, see *supra* note 31. See also Jerry, *supra* note 99, Funston, *supra* note 99.

gested have included notions of contract law, misrepresentation, and constitutional grounds.¹⁰¹

A. Contract

Under an action based on a contract theory of recovery, several avenues of approach have been recognized. The first of these avenues involves an implied contract between the student and the teacher, or between the student and the school district.¹⁰² Under this approach, the plaintiff alleges that the educator promised to teach the student and provide a certain level of education.¹⁰³ Theoretically, the educator's promise could have been either express, as found under the various state constitutions and statutes providing for public education,¹⁰⁴ or implied from the circumstances generally surrounding the educational process — namely, an effort to provide an education sufficient to prepare a student for a proper role in society. In exchange for this promise to provide a certain level of education, the student may claim either his choice to forebear seeking education elsewhere, as in

101. See Comment, *FORDHAM URB. L.J.*, *supra* note 99 (misrepresentation); Note, *The ABC's of Duty*, *supra* note 47 (contract); Note, *Right to Education*, *supra* note 99 (constitutional grounds).

Some of these alternative theories have been advanced in the case law. In *Peter W.*, two alternative theories of recovery were advanced, negligence and misrepresentation. *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854. *B.M.* included claims for both negligence and constitutional violations of due process and equal protection. *B.M. v. State*, 200 Mont. 58, 649 P.2d 425.

102. See Comment, *U. PA. L. REV.*, *supra* note 99, at 784-89; Note, *Right to Education*, *supra* note 99, at 563-64.

See also RESTATEMENT (SECOND) OF CONTRACTS § 4 comment a (1981):

Contracts are often spoken of as express or implied. The distinction involves, however, no difference in legal effect, but lies merely in the mode of manifesting assent. Just as assent may be manifested by words or other conduct, sometimes including silence, so intention to make a promise may be manifested in language or by implication from other circumstances, including course of dealing or usage of trade or course of performance.

103. See *Jerry*, *supra* note 99, at 195.

104. See, e.g., ALA. CONST. art. XIV, § 256 (amended 1956); ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; CAL. CONST. art. IX, § 1; COLO. CONST. art. IX, § 2; CONN. CONST. art. 8, § 4; DEL. CONST. art. X, § 1; GA. CONST. art. 8, § 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. 9, § 1; ILL. CONST. art. X, § 1; KAN. CONST. art. 6, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. 5, § II; MICH. CONST. art. VIII, § 2 (1963, amended 1970); MINN. CONST. art. XIII, § 1; MISS. CONST. art. 8, § 201 (1890, amended 1960); MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1; NEV. CONST. art. 11, § 1; N.H. CONST. pt. 2, art. 83; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 1; N.D. CONST. art. VIII, § 1; OHIO CONST. art. VI, § 3; OKLA. CONST. art. XIII, § 1; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; VT. CONST. ch. II, § 68 (1793, amended 1954, 1964); VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 1; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3 (1848, amended 1972); WYO. CONST. art. VII, § 1.

private schools, or that his attendance in the public schools serves as the necessary consideration.¹⁰⁶ The student may then allege that the school district failed to fulfill its promise, thereby breaching the implied contract by not providing the agreed upon minimal level of education.

The major problem under a contractual theory of recovery is the establishment of the consideration or "bargained-for-exchange."¹⁰⁶ First, public education is provided to all students free of cost. The students themselves do not directly pay money in exchange for receiving public education.¹⁰⁷ Second, since school attendance is compulsory until a certain age, school attendance cannot suffice as the necessary consideration. Yet, even if the student could establish consideration through forbearance from seeking education elsewhere, this situation would have the anomalous effect of precluding students from lower-income households from raising the contract claim, leaving the contractual theory of recovery available only to those students from families wealthy enough to afford private education.¹⁰⁸

An alternative approach under a contract-based theory of recovery would be to consider the student as a third-party beneficiary of an employment contract between the teacher and the school district, or of an implied contract between the taxpayers and the school district.¹⁰⁹ In either case, the student will have to demonstrate an "intent to benefit" a third party in order to enforce the contract.¹¹⁰ Clearly, the guiding purpose behind the

105. "Consideration" is defined as follows:

The inducement to a contract. The cause, motive, price, or impelling influence which induces a contracting party to enter into a contract. The reason or material cause of a contract. Some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other.

BLACK'S LAW DICTIONARY 277 (5th ed. 1979). See also Comment, U. PA. L. REV., *supra* note 99, at 784-85.

106. "To constitute consideration, a performance or a return promise must be bargained for" RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981). "In the typical bargain, the consideration and the promise bear a reciprocal relation of motive or inducement: the consideration induces the making of the promise and the promise induces the furnishing of consideration." *Id.* § 71, comment b.

107. However, the taxpayers do pay money to support the school systems.

108. See Comment, FORDHAM URB. L.J. *supra* note 101, at 185.

109. See RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981):

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

Id.

110. See Comment, U. PA. L. REV., *supra* note 99, at 786. See also J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 17-2 (1977). The "intent to benefit" exists if the benefi-

employment of teachers and the appropriation of taxpayers' money concerns the benefit to students in receiving a certain level of education.

Even if a student could establish his status as a third-party beneficiary, practical problems of recovery remain. First, any liability for an individual teacher or employee would be based upon a breach of contract, not upon a tortious act. Therefore, the school district would not be vicariously liable.¹¹¹ With liability resting on the teacher alone, the likelihood of receiving any substantial monetary recovery is very remote.¹¹² Moreover, the question of whether a promisor should be liable to third-party beneficiaries is generally controlled by public policy considerations, which the courts have heavily relied upon in rejecting educational malpractice claims.¹¹³ Finally, a further obstacle under the contractual theory of recovery arises because the law of contracts has traditionally been less flexible than the law of torts, and less receptive to novel applications.¹¹⁴ Therefore, potential recovery under the contract theory appears highly unlikely.

B. Misrepresentation

The misrepresentation theory of recovery for educational malpractice actions has previously been addressed by the courts. In *Peter W.*,¹¹⁵ the plaintiff alleged both intentional and negligent misrepresentation.¹¹⁶ The *Peter W.* court quickly dismissed the negligent misrepresentation claim on the same public policy grounds that justified the dismissal of the plaintiff's

ciary would be reasonable in relying on the promise as manifesting an intention to confer a right on him. *Id.*

111. See Funston, *supra* note 86, at 762.

112. See *supra* note 11.

113. See *Lucas v. Hamm*, 56 Cal. 2d 583, 588, 364 P.2d 685, 687, 15 Cal Rptr. 821, 823 (1961), *cert. denied*, 368 U.S. 987 (1962):

[T]he determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of public policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury, and the policy of preventing future harm.

114. See Funston, *supra* note 86, at 763; G. GILMORE, *THE DEATH OF CONTRACT* (1974).

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

116. *Id.* at 827, 131 Cal. Rptr. at 862.

"Defendant school district, its agents and employees, falsely and fraudulently represented to plaintiff's mother and natural guardian that plaintiff was performing at or near grade level in basic academic skills such as reading and writing" The representations were false. The charged defendants knew that they were false, or had no basis for believing them to be true. "As a direct and proximate result of the intentional or negligent misrepresentation made . . . , plaintiff suffered the damages set forth herein."

Id.

negligence claim.¹¹⁷ Furthermore, the court dismissed the intentional misrepresentation contention because of the plaintiff's failure to include in the pleadings any allegation of the requisite element of "reliance."¹¹⁸ The court's silence concerning the viability of a cause of action for intentional misrepresentation if reliance had been properly pleaded could be construed to imply that a properly pleaded complaint might have been successful.

An action for intentional misrepresentation, unlike negligent misrepresentation, requires the specific intent that a representation be directed to a particular person or class of persons, who subsequently acted in reliance upon that representation.¹¹⁹ A teacher's representation to the student and/or parents, through report cards or teacher commentary, of passing grades and satisfactory classroom performance, would suffice as the actual misrepresentation under such a cause of action.¹²⁰ However, the student would also have to demonstrate that the teacher or school district possessed the requisite intent to deceive.¹²¹ An honest belief that the representation is true, however unreasonable, on the part of the educator-defendant, will defeat an action for intentional misrepresentation.¹²² Proof of such intent to deceive will be a difficult obstacle in an intentional misrepresentation complaint.¹²³

117. *Id.* at 828, 131 Cal. Rptr. at 862. See *supra* note 62.

118. *Peter W.*, 60 Cal. App. 3d at 828, 131 Cal. Rptr. at 863. See PROSSER & KEETON, *supra* note 13, § 108, at 749.

119. *Peter W.*, 60 Cal. App. 3d at 828, 131 Cal. Rptr. at 863.

120. Misrepresentation is defined as follows: "Any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts. An untrue statement of fact." BLACK'S LAW DICTIONARY 903 (5th ed. 1979). In *Peter W.*, the plaintiff not only received satisfactory report cards and passing grades from his teachers, but also a high school diploma representing achievement of a 12th grade level of education. However, Peter W. could only read and write at the fifth grade level. Therefore, the report cards and diploma served as tangible evidence of the misrepresentation made to the student.

121. See PROSSER & KEETON, *supra* note 13, § 107, at 741-45. The most important intent in intentional misrepresentation actions is the intent to deceive, mislead, or convey a false impression. *Id.* at 741.

122. *Id.* at 742.

123. However, proof of an intent to deceive on the part of the educator does not necessarily pose an insurmountable burden. The RESTATEMENT (SECOND) OF TORTS § 526 (1976) provides:

A misrepresentation is fraudulent if the maker

- (a) knows or believes that the matter is not as he represents it to be,
- (b) does not have the confidence in the accuracy of his representation that he states or implies, or
- (c) knows that he does not have the basis for his representation that he states or implies.

The *Restatement* then asserts the general rule:

One who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he intends or has reason to expect to act or to refrain from

Even if an intent to deceive is present, students must demonstrate that they justifiably relied on the educator's false representations.¹²⁴ As under the contract-based theory of recovery, reliance would have to be shown by proving that, had it not been for the misrepresentation, the student would have been sent to a private school or provided private tutoring.¹²⁵ Moreover, the justifiability of the reliance may be difficult to prove in light of the parents' opportunity to view and assess their children's educational development.¹²⁶

Unlike intentional misrepresentation, an action for negligent misrepresentation may proceed even if the representation was made with an honest belief in its truth. Liability for negligent misrepresentation is based upon the negligence of the actor in failing to exercise reasonable care or competence in supplying correct information for the guidance of others.¹²⁷ A claim could be brought under a negligent misrepresentation theory of recovery through the use of report cards, intelligence quotient tests, diplomas, or other statements or opinions of fact negligently made by the school or teachers.

Several problems underlie the negligent misrepresentation theory of recovery. Like intentional misrepresentation, the plaintiff must demonstrate justifiable reliance on the negligent misrepresentation.¹²⁸ Furthermore,

action in reliance upon the misrepresentation, for pecuniary loss suffered by them through their justifiable reliance in the type of transaction in which he intends or has reason to expect their conduct to be influenced.

Id. at § 531. Conceivably, a teacher could report the satisfactory performance of a student knowing the performance to be, in fact, unsatisfactory. Possibly, the teacher would be reluctant to report failing grades for fear of the resulting reflection of the teacher's own performance and possible loss of employment. Perhaps, also, a teacher may represent that a student has reached a certain level of proficiency in mathematics, knowing the representation to be false, so as to keep the student on the school basketball team. Indeed, also conceivable is the possibility that teachers could be coerced to make these misrepresentations by the school district, in an effort to appear to have a "good record," favorable community reputation, or even a successful football team. Although these are only possibilities, perhaps given similar real factual circumstances, an educational malpractice action under an intentional misrepresentation theory of recovery may be successful.

124. See PROSSER & KEETON, *supra* note 13, § 108, at 749. "Not only must there be reliance but the reliance must be justifiable under the circumstances." *Id.*

125. See Comment, FORDHAM URB. L.J., *supra* note 99. See also text accompanying note 101.

126. See Comment, FORDHAM URB. L.J., *supra* note 99, at 133. For example, if the parents witnessed their children's inability to read and write, the justifiability of the reliance may be defeated.

127. See RESTATEMENT (SECOND) OF TORTS § 552 comment a (1976). See also Comment, FORDHAM URB. L.J., *supra* note 99, at 133.

128. For discussion of justifiable reliance, see PROSSER & KEETON, *supra* note 13, § 108. Again, this would have the anomalous effect of precluding lower-income class plaintiffs from raising the negligent misrepresentation claim.

where the negligent misrepresentation results in only pecuniary loss, not physical harm, the courts have been more conservative in extending liability because of the magnitude of losses which may result from careless misinformation.¹²⁹ Moreover, even if these obstacles can be overcome, a court may still dismiss such an educational malpractice complaint by relying on the same policy considerations underlying rejection of educational malpractice actions based on ordinary negligence theories.¹³⁰

C. Constitutional Right

Although free public education is provided under state constitutions,¹³¹ the right to receive an education is not explicitly afforded protection under the United States Constitution. In *Brown v. Board of Education*,¹³² the United States Supreme Court recognized that "education is perhaps the most important function of state and local governments."¹³³ In *San Antonio School District v. Rodriguez*,¹³⁴ however, the Court recognized that education is not a fundamental right afforded explicit or implicit protection under the Constitution.¹³⁵

Despite the absence of a federal constitutional right to an education, an alternative constitutional approach has been proposed for educational malpractice claims.¹³⁶ This approach involves a substantive due process ar-

129. RESTATEMENT (SECOND) OF TORTS § 552, comment a. PROSSER & KEETON, *supra* note 13, § 107, at 745. "If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Ultramares Corp. v. Touche, Niven & Co.*, 255 N.Y. 170, 174 N.E. 441 (1931).

130. *See supra* note 33 and accompanying text. The *Peter W.* court dismissed the negligent misrepresentation allegation for the same public policy considerations utilized in dismissing the negligence cause of action. 60 Cal. App. 3d at 827, 131 Cal. Rptr. at 862.

131. *See supra* note 104.

132. 347 U.S. 483 (1954).

133. *Id.* at 493.

134. 411 U.S. 1 (1972).

135. *Id.*

Rodriguez involved a class action suit brought on behalf of students enrolled in the Texas public schools as members of minority groups residing in school districts having a low property tax base. The plaintiffs argued that the Texas system of financing public education, via amounts collected through local property taxation, discriminated against students from poor schools districts. As a result of this discrimination, the plaintiffs alleged, the state had a duty to ensure the equal protection of their fundamental right to obtain an education.

The Court rejected the plaintiff's contentions by concluding that no fundamental right was abridged where only relative differences in spending levels were involved and where "no charge fairly could be made that the system fails to provide 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." *Id.* Therefore, *Rodriguez* may be construed as meaning that the quality of education need not be absolutely equal.

136. *See Note, Right to Education, supra* note 99.

gument alleging that the state must provide a *quid pro quo*¹³⁷ in return for the deprivation of a constitutional liberty interest.¹³⁸ Under this argument, students attending schools under compulsory attendance laws are compared to involuntarily confined mental institution patients.¹³⁹ In *Donaldson v. O'Connor*,¹⁴⁰ the Fifth Circuit held that where an involuntarily confined mental patient was confined under the theory of *parens patriae*,¹⁴¹ due process required that minimally adequate treatment be provided.¹⁴² The *Donaldson* court further held that if the confinement occurred under the state's police power,¹⁴³ due process required the state to provide a *quid pro quo*

137. "What for what; something for something. Used in law for the giving one valuable thing for another. It is nothing more than the mutual consideration which passes between the parties to a contract, and which renders it valid and binding." BLACK'S LAW DICTIONARY 1123 (5th ed. 1979).

138. Note, *Right to Education*, *supra* note 99, at 568. See also Note, *The Right to Education: A Constitutional Analysis*, 44 U. CIN. L. REV. 796, 810 (1975) [hereinafter Note, *Constitutional Analysis*].

The United States Supreme Court has recognized constitutionally protected liberty interests in students and parents. In *Meyer v. Nebraska*, 262 U.S. at 399, the Court referred to a fourteenth amendment liberty interest, stating:

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home, and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness among free men.

Id. (emphasis added).

In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court recognized the "liberty of parents and guardians to direct the upbringing of children under their control." *Id.* at 534-35. In *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969), the Court recognized that students have independent constitutionally protected rights. Therefore, because the Supreme Court has recognized these liberty interests, a student or parent may be able to raise a substantive due process argument in an educational malpractice action. See also Note, *Right to Education*, *supra* note 99, at 573.

139. See Note, *Right to Education*, *supra* note 99, at 568.

140. 493 F.2d 507 (5th Cir. 1974), *vacated*, 422 U.S. 563 (1975).

141. *Parens patriae* "refers traditionally to the role of state as sovereign and guardian of persons under legal disability." BLACK'S LAW DICTIONARY 1003 (5th ed. 1979). Under a *parens patriae* rationale for confinement, the individual confined is in need of care or treatment, and may be dangerous to himself, but he does not present a danger to others. See Note, *Right to Education*, *supra* note 99, at 572.

142. *Donaldson*, 493 F.2d at 521.

143. "Police power" is defined as:

The power of the State to place restraints on the personal freedom and property rights of persons for the protection of the public safety, health, and morals or the promotion of the public convenience and general prosperity. The police power is subject to limitations of the federal and State constitutions, and especially to the requirement of due process. Police power is the exercise of the sovereign right of a government to promote order, safety, health, morals, and general welfare within constitutional limits and is an

unless the conventional procedural safeguards of the criminal process were applied.¹⁴⁴

The court's reasoning in *Donaldson* has been advanced as a theory of recovery in educational malpractice claims.¹⁴⁵ Under this theory, the student argues that the school violated the student's substantive due process rights to receive a minimally adequate education or a quid pro quo in return for his compulsory attendance at school.¹⁴⁶ However, this theory contains several serious flaws, as demonstrated by a recent United States Supreme Court decision.

In *Youngberg v. Romeo*,¹⁴⁷ the United States Supreme Court considered for the first time the substantive due process rights of involuntarily committed mental patients. *Youngberg* involved claims that such patients had constitutional rights to safe conditions of confinement, freedom from bodily restraint, and minimally adequate habilitation.¹⁴⁸ The Court found that safe conditions of confinement and freedom from bodily restraint were judicially recognized liberty interests, but that the claim of a right to a minimally adequate habilitation was "more troubling."¹⁴⁹ The Court added:

[W]e agree that respondent is entitled to minimally adequate training. In this case, the minimally adequate training required by the Constitution is such training as may be reasonable in light of respondent's liberty interests in safety and freedom from bodily restraints. In determining what is "reasonable" — in this and any case presenting a claim for training by the State — we emphasize that courts must show deference to the judgment exercised by a qualified professional.¹⁵⁰

The court continued by expanding upon the importance of deference to the judgment of a professional, noting that judges and juries are considerably less capable of judging what is "minimally adequate training."¹⁵¹

essential attribute of government.

BLACK'S LAW DICTIONARY 1041 (5th ed. 1979). Under the police power rationale for confinement, the patient is dangerous to himself as well as others. Note, *Right to Education*, *supra* note 99, at 572.

144. *Donaldson*, 493 F.2d at 524.

145. Note, *Right to Education*, *supra* note 99; Note, *Constitutional Analysis*, *supra* note 138; A. MORRIS, *THE CONSTITUTION AND AMERICAN EDUCATION* 128-31 (2d ed. 1980).

146. Note, *Right to Education*, *supra* note 99, at 568.

147. 457 U.S. 307 (1982).

148. *Id.* at 2457. The case involved a profoundly retarded 33-year-old individual who was involuntarily committed to a Pennsylvania state institution. The case was filed following reports of injuries suffered by the patients, including Romeo's son.

149. *Id.* at 2458.

150. *Id.* at 2461.

151. *Id.* at 2462.

In light of the *Youngberg* decision, any federal constitutional grounds in an educational malpractice complaint are not likely to meet with success. Indeed, in all of the educational malpractice cases on the books to date, no student has successfully alleged that a school completely failed to provide an education. In addition, unlike the mental patients, students are not involuntarily confined on a 24-hour-per-day basis, rather, only on a eight-hour-per-day, 5-day-per-week basis. Moreover, since the Court accorded great weight to the judgment of professionals in assessing the scope of "minimally adequate training," the Court would also likely defer to the professional judgment of teachers the question of what constitutes a minimally adequate education. Thus, a constitutionally based theory of recovery may not provide the necessary recovery sought by victims of educational malpractice.

V. THE NEGLIGENCE THEORY OF RECOVERY

The most popular theory of recovery appears to lie under the traditional tort principles of professional negligence.¹⁵² The traditional formula for pleading a cause of action containing allegations of negligence includes four basic and essential elements. First, a duty recognized by law requiring a party to conform to a certain standard of conduct for the protection of others against unreasonable risks must be established. Second, that duty must be breached. Third, a reasonably close causal connection between the conduct and the resulting injury must be present. Finally, actual loss or damage resulting to the interests of another must be demonstrated.¹⁵³

The first element of negligence, legal recognition of a duty on the part of the defendant, first met with failure and was dismissed on public policy grounds in *Peter W.*¹⁵⁴ The *Peter W.* court found support from *Raymond v. Paradise Unified School District*¹⁵⁵ in refusing to recognize the existence of a legal duty. The *Raymond* court articulated the proposition that judicial recognition of a duty in the defendant is initially to be dictated by public policy considerations.¹⁵⁶

An affirmative declaration of duty simply amounts to a statement that two parties stand in such relationship that the law will impose on one a responsibility for the exercise of care toward the other. Inherent in this simple description are various and

152. See *supra* note 31.

153. See PROSSER & KEETON, *supra* note 13, § 30, at 164-65.

154. *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976). See *supra* notes 57-62 and accompanying text.

155. 218 Cal. App. 2d 1, 31 Cal. Rptr. 847 (1963) (in action against school district for injuries sustained by a seven-year-old student at school bus loading zone on high school property, the school district had a duty to provide adequate supervisory measures to protect primary school children using the loading zone).

156. *Id.* at 8, 31 Cal. Rptr. at 851.

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.¹⁵⁷

A close analysis of these factors relied upon by the *Peter W.* court in refusing to recognize a legal duty of care in the school district reveals favorable support for finding such a duty. The social utility of education is, of course, of fundamental importance in society;¹⁵⁸ however, the risks involved in the process of education are equally great.¹⁵⁹ If a child does not receive a minimally adequate education, his chances of leading a fulfilled and successful life are slim. A functionally illiterate individual cannot fill out an application for employment, write checks or balance a checkbook to pay bills, read street signs, complete election ballots, or understand warning labels on dangerous medicine or machinery. The *Peter W.* court, however, apparently did not consider these significant risks associated with an inadequate education.

The kind of person with whom the educators are dealing is generally a vulnerable child. The child is greatly dependent on the individual skills of the teacher, the information provided by the teacher, and the organization of the school district. If the school district hires incompetent employees, the child suffers directly from the incompetency. Although parents are also responsible for the child's education, the parents do not accompany the child to the classroom on a daily basis. Moreover, if the child is involved in an unfortunate family situation where perhaps the parents rarely, if ever, have the opportunity to fully assess the child's educational development, the school district maintains an even greater position of power and control over the student.¹⁶⁰

157. *Id.* at 8-9, 31 Cal. Rptr. at 851-52.

158. *See supra* note 3.

159. *See supra* notes 8, 11.

160. *See supra* note 51.

Another factor in *Raymond* used in determining the existence of a legal duty involves the workability of a standard of care. The *Donohue* court specifically stated that the creation of a workable standard of care did not necessarily pose an insurmountable burden.¹⁶¹ A standard of care, although perhaps at times difficult to apply, has been developed and used by the courts in various other types of professional negligence actions.¹⁶² The standard of care generally applied in these actions is that of reasonableness in the particular field.¹⁶³

The school district's relative ability to adopt practical means of preventing injury is significantly greater than that ability of the student, because the school district has at hand the resources to use in hiring competent teachers and promoting an efficient educational system. This fact also relates to the relative ability of the parties to bear the financial burden of the injury caused by educational malpractice. The true victims of educational malpractice will most often come from low-income households, unable to pay the costs of private education or tutoring, and unable to bear the financial burden of educational malpractice.

The body of statutes and judicial precedents which color the parties relationship also favors recognition of a legal duty of care in the educator. Although the current case law reflects a consistent rejection of the cause of action labeled as "educational malpractice," most state constitutions specifically provide a free and mandatory public education for the citizenry.¹⁶⁴ Furthermore, most states have several volumes of statutes on the shelves specifically designed for the public education systems.

The prophylactic effect of a rule imposing liability could have a great impact on the quality of education. Teachers would be encouraged to be more careful not only in instructing the students, but also in accurately assessing student progress and reporting such progress to the parents. The courts have voiced concern that recognition of a cause of action for educational malpractice would result in a flood of countless tort claims against the schools.¹⁶⁵ However, since the plaintiffs must demonstrate a sufficient causal connection between the actual conduct of the school and the resultant injury, such a "floodgate" would not be opened.

Finally, the factor which looks to the moral imperatives that judges share with their fellow citizens clearly demands an opportunity for victims

161. *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 443, 391 N.E.2d 1352, 1353, 418 N.Y.S.2d 375, 377 (1979).

162. See *supra* notes 13-23 and accompanying text.

163. PROSSER & KEETON, *supra* note 13, § 32, at 187.

164. See *supra* note 104.

165. *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 825, 131 Cal. Rptr. 854, 861 (1976).

of negligent teaching to seek legal redress.¹⁶⁶ Prosser has noted that "as our ideas of human relations change the law as to duties changes with them."¹⁶⁷ Therefore, the law should change to recognize a legal duty of care for educators.

The second element necessary for pleading a cause of action for negligence is met when the student establishes a breach of a legal duty.¹⁶⁸ The breach is established by showing that the educator did not meet that standard of care required by the duty. Usually, in negligence actions, the standard of care is that which would be applied by a reasonable person.¹⁶⁹ In professional malpractice actions, the standard used is generally that level of care which is reasonable in light of the superior learning and experience, in addition to any special skills, knowledge, or training normally possessed by a person in that particular field.¹⁷⁰

In educational malpractice cases, the courts have refused to recognize a legal duty because of the general fear of developing and assessing a standard of care. By applying a professional standard of care to educational malpractice actions, the courts would indeed become somewhat involved in assessing the day-to-day implementation of broad educational policy decisions. However, the courts become similarly involved when hearing medical, accountant, or lawyer malpractice cases. Like other professional negligence cases, the courts will be able to avail themselves of highly qualified expert witnesses. Moreover, since the focus of the standard of care is placed upon reasonableness, the courts certainly are able to reach a fair determination.

The third element which must be established in a negligence action is the causal connection between the conduct and the resulting injury. In cases like *Hoffman*¹⁷¹ and *B.M.*,¹⁷² a causal connection is easily established. A specific actor either negligently classified the child or failed to follow a specific recommendation at a specific date and time. However, in cases like *Peter W.*¹⁷³ and *Donohue*,¹⁷⁴ establishing a causal connection presents a more difficult problem. Clearly the act of one particular teacher in the school system cannot cause a student to graduate from high school as a functional illiterate. Rather, the causal connection must be established as a

166. See *supra* notes 31, 82.

167. See PROSSER & KEETON, *supra* note 13, § 53, at 359.

168. *Id.* § 30, at 164-65.

169. *Id.*

170. *Id.* § 30, at 185.

171. *Hoffman v. Board of Educ. of the City of New York*, 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979).

172. *B.M. v. State*, 200 Mont. 58, 649 P.2d 425 (1982).

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

174. *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).

chain of events, acts, misrepresentations, and omissions over a period of time. Although such a chain of causation may be difficult to prove, it is possible. The lack of sufficient contact between various teachers and the parents, test scores, homework grades, teacher qualification requirements, past teacher performance, and ultimately the high school diploma will aid the plaintiff in establishing the causal connection.

The final element necessary for a negligence action includes the actual loss or damage resulting to the plaintiff. This element can be easily established by the true victims of educational malpractice. Harm resulting from a reduced ability to seek gainful employment certainly is not a novel concept for the courts. Although in most cases the student receives some degree of affirmative education, the student still suffers considerable injury by not seeking an adequate education elsewhere in time to enter the job market.

The chances of success under a negligence theory of recovery clearly appear to be favorable for the true victims of educational malpractice. Unfortunately, these chances of success themselves fall victim to the semantic game played by the courts. By simply attaching the label "educational malpractice," the courts quickly and unnecessarily deny the plaintiffs an opportunity to recover.

VI. THE CALL FOR ACTION: A PROPOSAL

Because of the almost uniform rejection of educational malpractice claims by the courts, the most plausible solution appears to lie in the individual state legislatures. Although many state officials fear the creation of new forms of state liability, the role of the legislature is to represent the will of the people. Moreover, many states have abolished sovereign immunity for certain tortious conduct. This abolition represents the will of the people to hold the sovereign responsible for negligent acts or omissions. Therefore, legislative recognition of a cause of action for educational malpractice is a viable remedy for victims of negligent instruction.

A model statute providing such legislative recognition may read as follows:

Notwithstanding any inconsistent provision of law, every school district shall be liable for, and shall assume the liability, for damages sustained by any student within the school district by reason of the professional negligence of any teacher, counselor, or official employed by the school district. For purposes of this section, "professional negligence" means any negligent act or omission to act by an education provider in the rendering of professional services, as determined in light of the educators' profession and the knowledge, skill, and care ordinarily employed by members of the profession in good standing in this state,

which act is the proximate cause of substantial injury.¹⁷⁵

This model statute will provide a workable standard of care for the courts to use in assessing educational malpractice complaints. By employing that standard of care applicable in professional negligence actions, the standard encompasses that which is reasonable for the members of the profession in good standing, in light of their special education, training, knowledge, skill, and experience.¹⁷⁶ Additionally, in utilizing a professional negligence standard, the statute focuses more on the failure to invoke minimally acceptable methods of education rather than the failure to provide a minimally adequate education. By comparing the educator's claimed tortious conduct to the methods of education accepted and used by members of the education profession in good standing, the courts may avoid the broad inquiry required to assess the adequacy of a child's education in general.

The statute intends to provide a standard of care that is both appropriate and workable. In setting forth a basis of liability, the courts will no longer be able to refuse to find a legal duty of care in the educators. The professional negligence standard of care is appropriate to determine whether this duty has been breached.

Moreover, the statute is workable because it remains flexible. Instead of specifically stating the scope of the standard of care, the statute provides a general framework for the courts to apply as different situations arise. Therefore, the statute may withstand the test of time as the profession changes with the times. In addition, despite the courts' reluctance to be-

175. This statute utilizes the commonly accepted definition of professional negligence. See PROSSER & KEETON, *supra* note 13, § 32, at 187.

The adoption of the proposed statute will not necessarily result in a "flood of litigation" and consequences beyond calculation in terms of public time and money. See *Peter W.*, 60 Cal. App. 3d at 825, 131 Cal. Rptr. at 861 (addressing the fear that to hold educators to an actionable duty of care would expose schools to countless tort claims). Several defenses remain available to a school district that will eliminate many bogus or weak educational malpractice claims. Contributory or comparative negligence, as well as supervening cause appear to be the primary defenses likely to rebut such claims. Because so many variable factors influence the process of education, see *Peter W.*, 60 Cal. App. 3d at 825, 131 Cal. Rptr. at 861, such as a child's failure to complete homework or refusal to learn, the factors will serve as defenses to a school district. These factors will also serve to discourage many potential plaintiffs contemplating an educational malpractice action. Thus the proposed statute will likely continue to preclude relief to plaintiffs with claims similar to those in *Peter W.* and in *Donohue*. For a discussion of the proximate cause requirement, see PROSSER & KEETON, *supra* note 13, §§ 41-45, at 263-321. On the other hand, the proposed statute may provide relief to plaintiffs with claims similar to those in *Hoffman* and *B.M.* where, although the same defenses are available, the causation requirement is more easily established. Therefore, the feared flood of litigation upon adoption of this statute will most likely not materialize.

176. PROSSER & KEETON, *supra* note 13, § 32, at 185.

come involved in the daily implementation of educational policies, the courts should feel comfortable with the principles underlying professional negligence.¹⁷⁷

VII. CONCLUSION

Educational malpractice has not yet been recognized as a legally remediable cause of action. The courts have refused to recognize educational malpractice because of the general fear of developing and assessing a workable standard of care by which to measure the educator's conduct. However, a profession that plays such a vital role in contemporary society should not be allowed to operate outside the realm of the justice system simply because the profession involves delicate, day-to-day policy implementation.

The uniform rejection of educational malpractice by the courts, and the unfortunate victims of negligence in the schools, illustrate the immediate need for a call to action in this area. However, the courts are unwilling to alter their paths, despite repeated attempts to persuasion. Therefore, legislative recognition of educational malpractice will prove to be the most efficient means for redressing the injuries suffered from educational malpractice. The standard of care generally applicable to professional negligence actions can be successfully used in the education profession as well. More importantly, however, recognition of this cause of action may be one approach to eliminating the illiteracy crisis currently facing the nation. Education, as a fundamental aspect of the foundation of contemporary American society, deserves consideration in the family, in the legislatures, and in the courts.

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177. For a discussion of the scope of professional negligence cases, see *supra* notes 14-23 and accompanying text.