1991

Educational Malpractice: A Tort En Ventre

Frank D. Aquila
Cleveland State University

EDUCATIONAL MALPRACTICE: A TORT *EN VENTRE*

FRANK D. AQUILA*

* Associate Professor of Education, Cleveland State University; Ph.D., Kent State University, 1973; J.D., Cleveland-Marshall College of Law, 1989.

I. INTRODUCTION

A. Overview

The companion article argues that educational malpractice represents a viable cause of action. This article suggests the contrary. Arguably, to deny judicial relief for the tort of educational malpractice is essentially inconsistent with historic tort principles as well as with the traditional court role of providing injured parties with a forum for relief. Notwithstanding this rationale, courts have been extremely reluctant to apply simple negligence analysis to individual education negligence claims.[1]

There are two basic reasons why courts have not allowed educational malpractice claims to succeed: the court system does not wish to interfere in school administrative practices,[2] and imposing negligence liability would cause schools to suffer numerous burdensome claims.[3] While educational malpractice may be argued on the pleadings, a cause of action has rarely been sustained. The critical question is whether the courts should entertain these claims or whether they should be precluded based on public policy. This article asserts that such claims should not be allowed under current social and educational conditions.

This article explores the policy reasons which courts have adopted to deny a private cause of action holding educators legally liable for deficiencies in a student's education. The introductory section provides the background on the basic issue of malpractice in education. Section two examines educational malpractice case law focusing first on cases involving negligence in basic academic skill instruction, then looking at negligence in special education. Section three explores the various duty of care arguments while section four discusses three alternate theories for recovery. Section five analyzes the policy reasons for denial of the tort of educational malpractice. New directions for an educational malpractice claim against the education profession is the focus of section six. The final section discusses the question of whether education itself is a profession in the malpractice sense.

B. Background Concerns

The current crisis in American education has fostered several lawsuits by students against their schools for "educational malpractice," or the

---

[1] *See, e.g.*, Robert H. Jerry, II, *Recovery in Tort for Educational Malpractice: Problems of Theory and Policy*, 29 KAN. L. REV. 195 (1981).

[2] Donohue v. Copiague Union Free School Dist., 391 N.E.2d 1352, 1354 (N.Y. 1979).

[3] Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854, 861 (Cal. Ct. App. 1976).

failure to educate.[4] Most of the plaintiff-students graduated from high school, even though they remained functionally illiterate. They lacked the ability to form the mature and informed judgment requisite to secure employment, or even to effectively manage their own lives.[5] "Functional illiteracy" may be described as the general inability to apply the basic skills in reading, writing, and arithmetic to problems of a practical nature encountered in everyday life.[6] These student lawsuits were based on various legal theories of recovery, the most common being negligence with the root argument based on the plaintiff being functionally illiterate.

In professional negligence cases, the professional must possess and use the knowledge, skill, and care ordinarily employed by members of the particular profession in good standing.[7] Professional negligence cases have involved doctors,[8] dentists,[9] pharmacists,[10] psychiatrists,[11] lawyers,[12]

---

[4] For the purpose of this article "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. More specifically, malpractice is the 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). Even though "educational malpractice" has not been recognized as a legally remediable cause of action, the court has used the term "educational malpractice" in reference to complaints against educators alleging professional misconduct paralleling legal or medical malpractice. "Educational malpractice", will therefore refer to professional misconduct of educators. Nevertheless, the discussion will also include actions against educators based upon grounds of constitutional and contract law, as well as negligence.

[5] Peter W. v. San Francisco Unified School Dist., 131 Cal. Rptr. 854 (Cal. Ct. App. 1976) (student-plaintiff graduated but was not able to read and write above the fifth grade level despite graduation from high school, thus limiting employment other than labor which requires little or no ability to read or write); Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352 (N.Y. 1979) (student-plaintiff lacked 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., 489 A.2d 1240 (N.J. Super. Ct. App. Div. 1985) (student-plaintiff's action was for failure by the school district to provide him with special remedial education to assist him to overcome his academic deficiencies).

[6] *See* Debra P. v. Turlington, 474 F. Supp. 244, 258 (M.D. Fla. 1979), *aff'd in part and vacated in part*, 644 F.2d 347 (5th Cir. 1981) (upholding the constitutionality of a Florida statute requiring passage of a minimum competency test before receiving a high school diploma, although unconstitutional as applies to plaintiff because of lack of notice).

[7] WILLIAM L. PROSSER & W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS, at 187 (5th ed. 1984).

[8] *See, e.g.*, Walls v. Boyett, 226 S.W.2d 552 (Ark. 1950); De Laughter v. Womack, 164 So. 2d 762 (Miss. 1964).

[9] Willard v. Hagemeister, 175 Cal. Rptr. 365 (Cal. Ct. App. 1981); Rice v. Jaskolski, 313 N.W.2d 893 (Mich. 1981).

[10] Troppi v. Scarf, 187 N.W.2d 511 (Mich Ct. App. 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).

[11] Ray v. Ameri-Care Hosp., 400 So. 2d 1127 (La. Ct. App. 1981); Cotton v. Kambly, 300 N.W.2d 627 (Mich. Ct. App. 1980).

[12] *See, e.g.*, Ramp v. St. Paul Fire & Marine Ins. Co., 269 So. 2d 239 (La. 1972); McLellan v. Fuller, 108 N.E. 180 (1915).

architects and engineers,[13] accountants,[14] and many other professions and trades.[15] Generally, professionals are required not only to exercise reasonable care, but also to possess a certain degree of special knowledge or ability.[16] The law requires conduct of professionals which is consistent with their superior learning and experience, as well as any special skills, knowledge, and training which they possess over and above that normally held by persons in their particular field.[17] Most courts have denied educational malpractice claims[18] even while consistently recognizing malpractice actions against various professional groups.[19] Only one state court has included educators among the professions liable for malpractice.[20]

The very fact that school systems are specifically designed and usually required to educate students provides the argument that failure to do so is a clear example of unreasonable and socially harmful conduct. However, individuals are legally responsible only for acts and omissions which the law recognizes as unjustified.[21] The courts must initially find 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. Among the causes of action which have not been recognized by the courts are the following: an action for damages against a school district for negligent teaching, placement, or classification of students suffering from dyslexia;[22] action on behalf of a child against a school district for negligently placing child in classes for the mentally retarded under circumstances where the district knew or should have known that the child was not in fact retarded;[23] an action

---

[13] Cutlip v. Lucky Stores, Inc., 325 A.2d 432 (Md. 1974); City of Eveleth v. Ruble, 225 N.W.2d 521 (Minn. 1975).

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

[15] Chamness v. Odum, 399 N.E.2d 238 (Ill. App. Ct. 1979) (chiropractor); Fantini v. Alexander, 410 A.2d 1190 (N.J. Super. Ct. App. Div. 1980) (karate teacher); Health v. Swift Wings, Inc., 252 S.E.2d 526 (N.C. 1979) (pilot), Bambert v. Central Gen. Hosp., 77 A.D.2d 559, (N.Y. App. Div. 1980) (nurse).

[16] *See* PROSSER & KEETON, *supra* note 7, at 185.

[17] *Id.*

[18] *See* D.S.W. v. Fairbanks N. Star Borough Sch. Dist., 628 P.2d 554 (Alaska 1981); Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854 (1976); Doe v. Bd. of Educ., 453 A.2d 582 (Md. 1982); Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352 (N.Y. 1979); Hoffman v. Bd. of Educ., 400 N.E.2d 317, (N.Y. 1979); Torres v. Little Flower Children's Serv., 474 N.E.2d 223, (N.Y. 1984), *cert. denied*, 474 U.S. 864 (1985); DeRosa v. City of New York, 517 N.Y.S.2d 754 (1987).

[19] PROSSER & KEETON, *supra* note 7, at 185-86.

[20] B.M. v. State, 649 P.2d 425 (Mont. 1982).

[21] PROSSER & KEETON, *supra* note 7, 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.*

[22] D.S.W. v. Fairbanks North Star Borough Sch. Dist., 628 P.2d 554 (Alaska 1981).

[23] Smith v. Alameda County Social Serv. Agency, 153 Cal. Rptr. 712 (1979).

against a high school where plaintiff graduated, yet remained functionally illiterate;[24] an action which alleged misclassification and improper placement in a special education program for several years to student's detriment;[25] an action brought by a former student and parents alleged the negligent evaluation and placement of a learning disabled student;[26] complaint against a school board, elementary school principal, and teacher for educational malpractice in negligently evaluating child's learning abilities;[27] an educational malpractice claim against school board for failure to provide the plaintiff with special remedial education to assist him in overcoming his academic deficiencies;[28] an action against the social services department and child care agency with which a former student who remained functionally illiterate was placed after his abandonment by his mother;[29] an action which alleged that a school board negligently failed to assess plaintiff's intellectual ability and placing him in special education program for children with retarded mental development;[30] a claim that notwithstanding receipt of a certificate of high school graduation, plaintiff remained functionally illiterate;[31] an action which alleged educational malpractice in the school by negligently evaluating and placing plaintiff in a special educational facility after being suspended from school for assaulting teacher with a knife;[32] a claim that school officials promoted the plaintiff in school through twelfth grade without teaching him to read, while nurturing his athletic ability at the expense of his formal education.[33]

II. EDUCATIONAL MALPRACTICE CASE LAW

A. Basic Academic Skill Instruction

Even a cursory review of educational malpractice case law establishes a clear distinction between malpractice claims for the failure of the school system to provide basic academic skills and malpractice claims for a school system's failure to implement its guaranteed policies and procedures in a specific area such as special education. In the special education area, student diagnosis, classification and placement is required and creates a specialized set of circumstances.[34]

---

[24] Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854 (1976).
[25] Tubell v. Dade County Pub. Sch., 419 So. 2d 388 (Fla. Dist. Ct. App. 1982).
[26] Doe v. Bd. of Educ., 453 A.2d 582 (Md. 1982).
[27] Hunter v. Bd. of Educ., 439 A.2d 582 (Md. 1982).
[28] Myers v. Medford Lake Bd. of Educ., 489 A.2d 1240 (1985).
[29] Torres v. Little Flower Children's Serv., 474 N.E.2d 223 (N.Y. 1984), *cert. denied*, 474 U.S. 864 (1985).
[30] Hoffman v. Bd. of Educ., 400 N.E.2d 317 (N.Y. 1979).
[31] Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, (N.Y. 1979).
[32] Washington v. City of New York, 422 N.Y.S.2d 20 (1981).
[33] Denson v. Steubenville Bd. of Educ., No. 85-J-31 (Ohio Ct. App. July 29, 1986).
[34] 20 U.S.C. §§ 1401-62 (1988).

The first court decision to consider whether there should be a cause of action for educational negligence was *Peter W. v. San Francisco University Unified School District*.[35] The controlling question in *Peter W.* was whether public policy should allow the recognition of a duty to teach basic academic skills to students.[36] The recognition of a duty to teach basic academic skills would imply that students failing to learn would have a potential legal claim. The court refused to impose a duty on educators grounding their decision on the following public policy positions:

1. Because no standards of care exist for educators, the court should not, unilaterally, establish such standards;
2. Establishing a duty on educators would invite judicial interference with the daily administration of schools;
3. So many factors influence the eventual outcome of a child's educational experience that plaintiffs cannot directly establish a sufficient nexus between the injury and educator;
4. As long as schools provide administrative remedies to correct grievances, the courts believe they should not interfere;
5. The tort of educational malpractice would expose education to truly burdensome litigation.[37]

In *Peter W.*, the plaintiff, a high school graduate who was unable to read beyond the fifth-grade level, was allowed to graduate from high school. He then sued the school district, the superintendent, the school board and individual school board members, alleging negligence in the failure of the defendants to provide him with basic academic instruction which they had a duty to provide. Based on the aforementioned public policy considerations, the court ruled in favor of the defendants, holding that it would create an impossible duty on educators to require them to impart basic academic skills to students.[38]

Thus, while sanctioning educational malpractice as a new area of tort liability, the court refused to exercise its newly created discretion.[39] The court's reasoning was direct and simple: educational approaches and techniques presently provide no standard of care, duty, or injury.[40] Furthermore, there are many socio-emotional, physical and environmental factors which impact on a student's ability to become educationally successful.[41] The public policy impact would be immense if schools were subjected to such burdensome litigation at a time when they are already enduring serious budget constraints.[42] Additionally, to impose the burden of a tort for educational malpractice would create a condition which was not in-

---

[35] 60 Cal. App.3d at 814, 131 Cal. Rptr. at 854.

[36] 60 Cal. App.3d at 822, 131 Cal. at 859. "[J]udicial recognition of . . . duty . . . is initially to be dictated or preclude considerations of public policy." *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* at 860.

[40] *Id.*

[41] Peter W. v. San Francisco University United Sch. Dist., 131 Cal. Rptr. 854, 861 (Cal. Ct. App. 1976).

[42] *Id.*

tended by the state legislators.[43] The California education regulations were not intended to guarantee educational results or even to guard against injury; they were administrative provisions, not protective ones.[44]

The counterargument of plaintiffs who advocated an educational malpractice cause of action did not withstand analysis. These arguments were based on the state education code, the California administrative code, and the state constitutional provisions which required schools to keep parents apprised of their child's academic progress, to instruct children in the basic skills of reading and writing, to not graduate students who have not demonstrated proficiency in basic skills, and to design the curriculum to meet the needs of the pupil. The plaintiff contended that this imposed a "mandatory duty" on the defendants,[45] based on Government Code § 815.6, which provided that if an enactment imposes a mandatory duty, "the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty."[46] The *Peter W.* court held that the state constitutional provisions were not the type of enactments to which Government Code § 815.6 applied. That code section applied to enactments intended to protect against injury while these education provisions were purely administrative.[47]

A similar educational malpractice case was *Donohue v. Copiague Union Free School District*.[48] Donohue, the plaintiff, argued that the district promoted him from grade to grade without accurately determining his ability to learn.[49] Due to this omission, Donohue lacked the basic ability to comprehend anything in writing, even a job application form.[50]

The court refused to recognize the Donohue's claim regardless of whether causation could be established or injury had occurred, holding that the regulation of a school system belongs to school officials.[51] The court stated that to recognize this cause of action would result in judicial review and "blatant interference" with the daily administration of the public school system.[52] Additionally, the court pointed out that students and parents had an alternate remedy: aggrieved parties could seek administrative remedies within the educational system.[53]

B. Negligence in Special Education Areas

Cases such as *Peter W.* and *Donohue* develop because of a school system's alleged failure to adequately teach essential academic skills. Other cases

---

[43] *Id.* at 862.
[44] *Id.*
[45] *Peter W.*, 131 Cal. Rptr. at 862 n.5.
[46] *Id.* at 862 n.6.
[47] *Id.* at 862.
[48] 391 N.E.2d 1352 (N.Y. 1979).
[49] *Id.* at 1353.
[50] *Id.*
[51] 391 N.E.2d 1352, 1354 (N.Y. 1979).
[52] *Id.*
[53] *Id.* at 1355.

involve a more traditional and specific type of negligence. This second type of case involves negligence in the placement or removal from special education programs or an initial misclassification of a student with an educational handicap. Even though there are distinctions between these types of claims, the courts' application of a policy analysis has rejected both classifications of malpractice claims.[54]

The first and representative case of this second type is *Hoffman v. Board of Education*.[55] Following *Peter W.* and *Donohue*, the courts have, to date, rejected this second type of classification of educational malpractice claims wherein the allegation involves improper diagnosis, classification and placement rather than the failure to teach basic academic skills.[56] Daniel Hoffman, a kindergarten student, was tested by a trained and certified school clinical psychologist for potential educational handicap. Daniel's intelligence quotient led to a recommendation for placement in a class for the mentally retarded; but, because Daniel had a speech impediment (which made the IQ assessment questionable), a re-evaluation was recommended within two years. Over the next ten years, no re-evaluation was conducted. When the school did retest, it was determined that he was not retarded. Daniel's school for handicapped children which he had been attending for thirteen years then refused to re-admit him because he no longer met their eligibility standards.[57]

The plaintiff alleged that the school board was negligent in its initial assessment of Daniel's intellectual ability and in its placement of Daniel in a special education classroom, as well as in its failure to re-test Daniel as per the recommendation of the school psychologist.[58] Daniel claimed injury as a result of severe emotional detriment and lower intellectual attainment as well as reduced future employment opportunities.[59] Although the trial court awarded damages of $750,000 and the appellate court affirmed the verdict as to liability (although reducing the damage award to $500,000), the New York Court of Appeals reversed the lower court decisions based on *Donohue*.[60]

The Court of Appeals reasoning is instructive and clearly demonstrates why educational malpractice is not a viable cause of action at present. It rejected the lower court's distinction that *Donohue* involved nonfeasance while *Hoffman* involved an affirmative act of misfeasance; that is, the failure to reevaluate Daniel after two years.[61] The court stated that "[t]he policy considerations which promoted our decision in *Donohue* apply with equal force to 'educational malpractice' actions based upon allegations of

---

[54] *See generally*, Anna Mary Coburn, *Hunter v. Board of Education & Doe v. Board of Education - No Cause of Action for Educational Malpractice Against Public School Teachers and Psychologists*, 42 MD. L. REV. 582 (1983).

[55] 400 N.E.2d 317 (N.Y. 1979).

[56] *Id.*

[57] 400 N.E.2d 317, 319 (N.Y. 1979).

[58] *Id.*

[59] *Id.* at 319.

[60] *Id.*

[61] *Id.* at 320.

educational misfeasance and nonfeasance."[62] The *Hoffman* court held that a dispute of this type was best resolved through administrative procedures because imposing a judicial remedy would interfere with educators' professional judgment.[63]

The distinction between educational misfeasance and nonfeasance may provide a cognizable cause of action in the future. Public policy basis for rejecting the claims in *Peter W.* and *Donohue* do not apply with equal force to a school's failure to implement its own recommendations. The school has, in the latter case, defined its professional responsibility, thereby relieving the courts of undue speculation.[64]

However, even where injury followed acts or omissions, courts have to date been unwilling to adopt even a limited cause of action for educational malpractice. In one case,[65] the school district failed to treat or even attempt to correct a diagnosed handicap for two dyslexic students.[66] The facts clearly showed that the school district had been negligent. Still, the plaintiff's claims were denied on public policy grounds.[67] The court rejected this educational malpractice claim because it felt that excessive litigation[68] would result and that it would lead to inappropriate judicial interference in school administration.[69] The court added that because there were administrative remedies available, monetary relief was not necessary to make the plaintiff "whole."[70]

Doe v. Board of Education[71] contained equally sympathetic facts and was similarly rejected by the courts. In *Doe*, the Board's school psychologist determined that the child was either retarded or had borderline intellectual function. A reevaluation was recommended in ten months. The school district did not reevaluate, and the child continued in the special education classroom. One year later Doe was evaluated by a private physician who determined that Doe was dyslexic, not retarded. Neither the board nor the health department responded to this information. In addition, neither the board nor the health department reevaluated Doe for seven years. The same school psychologist who had originally tested Doe recommended that he not be removed from the special program for

---

[62] Hoffman v. Bd. of Educ., 400 N.E.2d 317, 320 (N.Y. 1979).

[63] *Id.*

[64] 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.

Id.

[65] D.S.W. v. Fairbanks North Star Borough Sch. Dist., 628 P.2d 554 (Alaska 1981).

[66] *Id.* at 556.

[67] *Id.* at 555.

[68] *Id.*

[69] *D.S.W.*, 628 P.2d.

[70] *Id.* at 557.

[71] Doe v. Bd. of Educ. of Montgomery County, 453 A.2d 814 (Md. 1982).

children with mild learning handicaps. One year later, this psychologist recommended a complete eye examination for Doe which was also not implemented.[72] Doe's suit questioned the performance of the school authorities with the gravamen of the complaint sounding in malpractice based on the improper treatment of the child. Once again, the court rejected the malpractice option refusing to substitute its judgment for that of school administrators.

There have been similar cases where courts in educational negligence situations have failed to adopt a new public policy posture. One oft-cited case involved the claim of a non-English speaking Hispanic child who was incorrectly assessed as borderline, developmentally retarded.[73] In a more recent case,[74] the school district classified the plaintiff as retarded; and, discovered three years later that the child was not retarded but deaf.[75] The court again dismissed this educational malpractice claim citing precedent.

III. DUTY OF CARE ARGUMENTS

The law does not, and should not, provide a remedy for every injury.[76] For example, the 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. They contended that the physician should have known the high risk that the fetus would suffer from the disease. If the parents had been advised that the fetus was afflicted with Tay-Sachs, they claim they would have aborted the pregnancy. In denying recovery to 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 however, is not the function of the law for "[every] injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree."[77]

Of the traditional elements necessary for a negligence action,[78] "duty

---

[72] *Id.* at 818-19.

[73] Torres v. Little Flower Children's Services, 474 N.E.2d 223 (N.Y. 1984), *cert. denied*, 474 U.S. 864 (1985).

[74] DeRosa v. City of New York, 517 N.Y.S.2d 754 (1987).

[75] *Id.* at 755.

[76] Howard v. Lecher, 366 N.E.2d 64, 66 (N.Y. 1977).

[77] *Id.* at 66 (quoting Tobin v. Grossman, 249 N.E.2d 419, 424 (N.Y. 1969)).

[78] *See* PROSSER & KEETON, *supra* note 7, at 164-65. The elements of negligence action 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 165-65.

of care" is often the most difficult to establish. There are three alternative theories which are posed as establishing the requisite duty of care.[79]

"Assumption of duty" is the first theory supporting the existence of a duty. By affirmatively undertaking to give aid to another, a defendant's school district could 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.[80] Under this theory, the school district assumed the function of student instruction, and such an assumption necessarily imposed the duty to exercise reasonable care in its discharge.[81] At first glance, any assumption of duty by the school district would not appear to actually harm a plaintiff, since he or she would enter the school with no education and leave with some positive degree of education, albeit minimal. It is arguable however, that the school district could mislead students into believing that they were receiving an adequate education, thereby depriving them of the opportunity to seek outside aid, such as aid from a private school or a tutor.[82]

The second theory deals with the establishment of a legal duty involving a special relationship between students and teachers.[83] Under a "special relationship" theory, certain relationships which involve power to one and a parallel weakness in another party may give rise to a legal duty.[84] The argument is that the school district holds a position of power so superior to the uneducated students, that they are left vulnerable to unbridled discretionary acts by the school district.[85] This inequality would

---

[79] Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. at 854, 857 (1976).

[80] *Id.* at 858. For a discussion of the assumption of duty theory, *see generally* PROSSER & KEETON *supra* note 7, at 56. *See also*, Judith H. Berlinerconer, Note, *The ABC's of Duty: Educational Malpractice and the Functionally Illiterate Student*, 8 GOLDEN GATE U.L. R. 293 (1978) (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).

[81] *Peter W.*, 131 Cal. Rptr. at 858.

[82] Even if no duty to educate previously existed, the school's voluntary assumption of the function of student instruction would impose the duty to avoid any affirmative acts which make the student's situation worse. *See* PROSSER & KEETON, *supra* note 7, at 378; Parvi v. City of Kingston, 362 N.E.2d 960 (N.Y. 1977) (police disposed of drunkard near highway, instead of jail, thereby making drunkard's situation worse); O'Neill v. Montefiore Hosp., 202 N.Y.S.2d 436 (1960) (doctor attempted to give free advice over telephone).

[83] *Peter W.*, 131 Cal. Rptr. at 858. The plaintiff in *Peter W.* cited various cases which addressed many rights or privileges of public school students, but none which involved the specific question of whether the school owed them a duty of care in the process of their education. *Id.*

[84] PROSSER & KEETON, *supra* note 7, 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* David G. Owen, *Civil Punishment and the Public Good*, 56 S.CAL. L. R. 103, 104 (1982); MARSHALL S. SHAPO, THE DUTY TO ACT: TORT LAW, POWER, AND PUBLIC POLICY (1977).

[85] *Peter W.*, 131 Cal. Rptr. at 854, 858 (1976).

create a special relationship supporting the duty of the school district to exercise reasonable care in instructing the students.

When arguing educational malpractice, establishing such a duty of care in the educators under a "special relationship" theory could be defeated by another "special relationship" between parent and child. Clearly, the child is not absolutely vulnerable to the educators' actions because of the parents' contribution to the education process. Parents have opportunities to supervise homework, to participate in school activities, and to interact with their children on a daily basis. On the other hand, a lower-income parent without an education who works two jobs to support a family would not be able to significantly participate in the student's education. Such a parent might not recognize any learning deficiencies on the part of the student, thereby emphasizing the importance of the relationship between the educator and the student. This example provides a strong argument for establishing a legal duty of care in the school district based upon a special relationship.

A third theory was developed by expanding a similar duty previously recognized by the courts. A legal duty to exercise reasonable care in the instruction and supervision of students has been recognized in cases involving physical injuries on school grounds.[86] The basis of the argument is that the courts' recognition of a duty to exercise reasonable care in the instruction and supervision of students includes the duty to exercise reasonable care in providing students with education.[87]

All three theories have been rejected "for want of relevant authority"[88] and public policy considerations.[89] These policy considerations include: (1) foreseeability of harm to the plaintiff; (2) closeness of the connection between defendant's conduct and the injury suffered; and, (3) extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach.[90]

The primary public concern was the absence of a workable standard of care against which an educator's conduct could be measured.[91] As the *Peter W.* court stated: "Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standard of care, or cause, or injury."[92] The Montana Supreme Court's analysis in

---

[86] Klenzendorf v. Shasta Union High Sch. Dist., 40 P.2d 878 (Cal. 1935) (injury in woodshop class causing loss of fingertips); Dutcher v. City of Santa Rosa High Sch. Dist., 319 P.2d 14 (Cal. 1957) (explosion in auto mechanics class resulting in death of one student and severe injuries to another); Bellman v. San Francisco High Sch. Dist., 81 P.2d 894 (Cal. 1938)) (injury from tumbling exercise in physical education class); *Peter W.*, 131 Cal. Rptr. at 858; Mastrangelo v. West Side Union High Sch. Dist., 42 P.2d 634 (Cal. 1935) (explosion in chemistry class resulting in loss of student's hand and eye); Damgaard v. Oakland High Sch. Dist. of Alameda County, 298 P. 983 (Cal. 1931) (explosion in chemistry class causing student to lose eye).

[87] *Peter W.*, 131 Cal. Rptr. at 858.

[88] *Id.*

[89] *Id.* at 859.

[90] *Id.* at 859-60.

[91] *Peter W.*, 131 Cal. Rptr. at 861.

[92] *Id.* at 860-61.

B.M. v. State provides hope for future victims of negligence in the school systems: "We have no difficulty in finding a duty of care owed to special education students."[93] Nevertheless, current educational malpractice case law demonstrates the general fear of court involvement in virtually any intangible dimension of public education.

IV. ALTERNATE THEORIES OF RECOVERY

As stated previously, courts have almost uniformly rejected educational malpractice claims. This rejection has provoked an unusually large and rich discussion from legal scholars regarding the plausibility of educational malpractice claims under different theories of recovery.[94] The most

---

[93] B.M. v. State, 649 P.2d 425, 427 (Mont. 1982), *appeal after remand*, 698 P.2d 399 (Mont. 1985).

[94] *See* John Elson, *A Common Law Remedy For the Educational Harms Caused by Incompetent or Careless Teaching*, 73 NW. U.L. REV. 641 (1978) (reviewing the general policy considerations underlying the court's reluctance to make decisions concerning educational policies); Richard Funston, *Educational Malpractice: A Cause of Action in Search of a Theory*, 18 SAN DIEGO L. REV. 743 (1981) (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, *supra* note 1, at 196 (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"); Joan Blackburn, Comment, *Educational Malpractice: When Can Johnny Sue?*, 7 FORDHAM URB. L.J. 117, 118 (1978) (analyzing "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); Berlinconer, *supra* note 79 (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); Wallison, *supra*, note 64 (considers whether Hoffman was incorrectly labeled as an educational malpractice action, thus significantly expanding the scope of the term "educational malpractice"); Alice J. Klein, Note, *Educational Malpractice: Can the Judiciary Remedy the Growing Problem of Functional Illiteracy?*, 13 SUFFOLK U.L. REV. 27 (1979) (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, educators may face expansion of liability for physical harm to encompass emotional and economic injury as well); Nancy L. Woods, Note, *Educational Malfeasance: A New Cause of Action for Failure to Educate?*, 14 TULSA L. J. 383 (1978) (considers the viability of educational malpractice actions in light of malpractice actions for educational accountability and competency-based education due to the movement in some states toward educational accountability); Comment, *Educational Malpractice*, 124 U. PA. L. REV. 755, 804 (1976) [hereinafter Comment, U.Pa. L. Rev.] (reviewing 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"); Charles M. Masner, Note, *Educational Malpractice and a Right to Education: Should Compulsory Education Laws Require a Quid Pro Quo?*, 21 WASHBURN L.J. 555 (1982) (questions whether 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).

popular theory of potential recovery is the traditional tort principle of professional negligence.[95] Other theories of recovery include interpretations of contract law, misrepresentation, and constitutional grounds.[96]

A. Contract

The contract theory of recovery includes several different approaches. One involves an implied contract between the student and the teacher, or between the student and the school or school district.[97] The plaintiff argues that the school promised to teach the student and provide a certain level of education.[98] In theory, the school's promise could have been either express, as in a state constitution and statutory provisions for education,[99] or implied from the very circumstances of the education process *viz.*, to provide an education sufficient to prepare a student for a proper role in society. In exchange for the promise of an education, the student claims to have not attempted to seek private school education, or that their public school attendance creates the necessary consideration.[100] The student then alleges that the school district failed to fulfill its promise, thus breaching the implied contract of providing an acceptable minimal level of education.

---

[95] See *supra* notes 2-5 and accompanying text.

[96] *See* Blackburn, *supra*, note 94 (misrepresentation); Berlinerconer, *supra* note 80 (contract); Masner, *supra* note 94 (constitutional grounds).

[97] *See* Comment, U. PA. L. REV., *supra* note 94 at 784-89; Masner, *supra* note 94, at 563-64. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 4 cmt. 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.

Id.

[98] *See* Jerry, *supra* note 2, at 195.

[99] *See, e.g.*, ALASKA CONST. art. VII, § 1; CAL. CONST. art. IX, § 1; COLO. CONST. art. IX, § 2; CONN. CONST. art. 8, § 4; DEL. CONST. art. X, § I; GA. CONST. art. 8, § 1; IDAHO CONST. art. 9, § 1; ILL. CONST. art. X, § 1; KAN. CONST. art. 6, § 1; KY. CONST. § 183; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. 5, art. II; MICH. CONST. art. VIII, § 2, (amended 1970); MINN. CONST. art. XIII, § 1; MO. CONST. art. IX, § 1(a); NEV. CONST. art. 11, § 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. XIII, § 1; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 1; WYO. CONST. art. VII, § 1.

[100] "Consideration" is defined as: "The inducement to a contract. The cause, motive, price, or impelling influence which induces a contracting party to enter into 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).

One difficulty in using the contract theory of recovery is in establishing consideration or "a bargained-for-exchange."[101] Because public education is provided free of cost, students themselves do not directly pay money in exchange for receiving public education.[102] Secondly, in that school attendance is compulsory until a certain age, school attendance alone would not suffice as the necessary consideration. If students could actually establish consideration through forbearance from seeking an education elsewhere, this would preclude students from lower-income households from raising a contract claim. Thus, the contract theory of recovery would be available only to students from families wealthy enough to afford private education.[103]

An alternate contract-based approach is to consider the student as a third-party beneficiary of an employment contract between the teacher and the school district.[104] The student would have to demonstrate an "intent to benefit" a third party in order to enforce the contract.[105] There is some rationale for this position because the employment of teachers and the appropriation of taxpayers' money concerns the benefit to students in receiving a certain level of education.

Yet, should third-party beneficiary status be established, there would still be significant recovery concerns. An individual teacher or employee's liability would be based upon a breach of contract, not upon a tortious act. Thus, under contract law a school district would not be vicariously liable.[106] Additionally, whether a promisor should be liable to a third-party beneficiary is usually a public policy consideration. Based on a public policy analysis, the courts have generally rejected such educational malpractice claims.[107] When the recovery is based on the law of contracts, the courts have traditionally been less flexible than when claims are brought under traditional tort theory.[108]

---

[101] "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 the consideration." *Id.* at § 71, cmt. b.

[102] Of course, taxpayers pay money to support the school systems.

[103] *See* Blackburn, *supra* note 94, at 185.

[104] *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 promise 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. at § 302.

[105] *See* Comment, U. PA. L. REV., *supra* note 94, at 786. *See also* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 17-2, at 693 (rd. Ed. 1977).

[106] *See supra*, notes 8-18.

[107] *See, e.g.*, Lucas v. Hamm, 56 Cal. 2d 583, 588, 364 P.2d 685, 687, *cert. denied*, 368 U.S. 987 (1962).

[108] *See* Funston, *supra* note 93, at 763; Grant Gilmore, THE DEATH OF CONTRACT (1974).

B. Misrepresentation

A second theory of recovery for educational malpractice is misrepresentation. The misrepresentation theory has already been addressed and dismissed by the courts. In *Peter W.*[109] the plaintiff alleged both intentional and negligent misrepresentation.[110] The court dismissed the negligent misrepresentation claim on the same public policy grounds that justified the dismissal of the plaintiff's negligence claim.[111] The intentional misrepresentation contention was dismissed because the plaintiff failed to include in the pleading any allegation of the "reliance" necessary to support the claim.[112] The court did not indicate whether intentional misrepresentation might have been considered if reliance had been properly pleaded. Therefore, it is possible that a properly pleaded complaint might have been successful.

It should be noted that an action for intentional misrepresentation, unlike negligent misrepresentation, requires the specific intent to induce reliance on the false or misleading representation.[113] Therefore, a teacher's statement to the student and/or parents, (e.g., through report cards) might be considered an actual misrepresentation in an educational malpractice case.[114] A plaintiff would still bear the heavy burden of establishing the teacher's intent to deceive.[115] A teacher's honest belief that a representation is true, no matter how unreasonable, will defeat an intentional misrepresentation action.[116] It would be a difficult obstacle to establish proof of an intent to deceive in an intentional misrepresentation complaint.[117]

---

[109] Peter W. v. San Francisco Unified School Dist., 131 Cal. Rptr. 854 (1976).

[110] "Defendant school district, its agents and employees, false 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. . . ." *Id.* at 862. Either the defendants knew that the representations were false, or they 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.*

[111] *Id.* at 862.

[112] *Peter W.*, 131 Cal. Rptr. at 863. *See* PROSSER & KEETON, *supra* note 7, at 749.

[113] *Peter W.*, 131 Cal. Rptr. at 863.

[114] Misrepresentation is defined as follow: "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, but also a high school diploma representing completion of the 12th grade. Even though Peter W. could only read and write at the fifth grade level. Thus, the report cards and diploma served as evidence of the alleged misrepresentation. 131 Cal. Rptr. at 863.

[115] *See* PROSSER & KEETON, *supra* note 7, 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.

[116] *Id.* at 742.

[117] Of course, 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

Even if an intent to deceive is evident, students must demonstrate that they justifiably relied on the educator's false representations.[118] A misrepresentation action is similar to a contract-based claim in requiring proof of reliance. The plaintiff must prove that had it not been for the misrepresentation, they would have been sent to a private school or provided private tutoring.[119] Additionally, the justifiability of that reliance may be impossible to establish considering a parent's limited opportunity to view and assess their children's educational development.[120]

Unlike intentional misrepresentation an action for negligent misrepresentation could go forward even if the representation was made with an honest belief. Liability for negligent misrepresentation is based upon the defendant's negligence in failing to exercise reasonable care and competence in supplying correct information for the guidance of others.[121] A negligent misrepresentation theory of recovery would be based on the use of report cards, intelligence quotient tests, diplomas, or statements negligently provided by the school.

Various problems underlie the negligent misrepresentation theory of recovery. Again, the plaintiff must establish justifiable reliance on the negligent misrepresentation.[122] Even if these obstacles can be overcome, a court could still simply dismiss this educational malpractice complaint based on the same policy considerations which apply to ordinary negligence theories.[123]

C. Constitutional Right

Although free public education is provided under state constitutions,[124] the right to receive an education is not explicitly afforded protection under the United States Constitution.[125] In *Brown v. Board of Education*,[126] the Supreme Court stated that "education is perhaps the most important

---

(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.

[118] *See* PROSSER & KEETON, *supra* note 7, at 749. "Not only must there be reliance but the reliance must be justifiable under the circumstances." *Id.*

[119] *See* Blackburn, *supra* note 94.

[120] *Id.*, at 133. If for example, a parent witnessed a child's inability to read and write, the justifiability of the reliance could be defeated.

[121] *See* RESTATEMENT (SECOND) OF TORTS § 552 comment a (1976).

[122] For discussion of justifiable reliance, see cases cited *supra* note 8. Again, this would have the anomalous effect of precluding lower-income class plaintiffs from raising the negligent misrepresentation claim.

[123] The *Peter W.* court dismissed the negligent misrepresentation allegation for the same public policy considerations utilized in dismissing the negligence cause of action, 131 Cal. Rptr. at 862 (1976).

[124] See *supra* note 100.

[125] San Antonio School District v. Rodriquez, 411 U.S. 1 (1973).

[126] 347 U.S. 483 (1954).

function of state and local governments."[127] The Court however, later recognized that education is not a fundamental right guaranteed protection under the Constitution.[128]

Despite the absence of a federal constitutional right to an education, an alternative constitutional approach for educational malpractice claims involves a substantive due process argument. Here the plaintiff alleges that the state must provide a *quid pro quo*[129] in return for the deprivation of his or her constitutional liberty interest.[130] Using this argument, students attending schools under compulsory attendance laws are comparable to involuntarily confined mental institution patients.[131] In

---

[127] 347 U.S. at 493.

[128] 411 U.S. 1. Rodriguez was a class action suit brought on behalf of students enrolled in the Texas public schools. Being members of minority groups residing in school districts having a low property tax base, plaintiffs argued that the Texas system of financing public education, funded through local property taxation, discriminated against students from poor schools districts. Based on this discrimination, the plaintiffs claimed that the state had a duty to ensure the equal protection of their fundamental right to obtain an education.

The plaintiff's were denied. 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.* at 37. *Rodriquez* may, therefore, be construed as holding that the quality of education need not be absolutely equal.

[129] "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).

[130] Masner, *supra* note 94, at 568. *See also* Patricia Wright Morrison, Note, *The Right to Education: A Constitutional Analysis*, 44 U. CIN. L. REV. 796, 810 (1975).

The United States Supreme Court has recognized fourteenth amendment constitutionally-protected liberty interests in students and parents. In *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), the Court stated:

> 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.

In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court recognized the "liberty of parents and guardians to direct the upbringing and education 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.

It would seem that 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.

[131] *See* Masner, *supra* note 94, at 568.

Donaldson v. O'Connor,[132] the Fifth Circuit held that where an involuntarily confined mental patient was confined under the theory of *parens patriae*,[133] due process required that minimally adequate treatment be provided.[134] Furthermore, the *Donaldson* court held that if the confinement occurred under the state's police power,[135] due process required the state to provide a *quid pro quo* unless the conventional procedural safeguards of the criminal process were applied.[136]

The lower court's reasoning in *Donaldson* has been advanced as a potential theory of recovery in educational malpractice claims.[137] Under this theory of recovery, the plaintiff-students argue that the school violated their substantive due process rights to receive a minimally adequate education, i.e., *quid pro quo* in return for their compulsory attendance at school.[138]

Without question, this theory contains serious flaws. In *Youngberg v. Romeo*,[139] the Supreme Court, in a case of first impression, considered the substantive due process rights of involuntarily committed mental patients. The issue involved is whether the patients had the constitutional right to safe conditions of confinement, minimally adequate habilitation and freedom from bodily restraint.[140] The Court held that safe conditions of confinement and freedom from bodily restraint were protected liberty interests, but that the claim of a right to a minimally adequate habilitation was "more troubling."[141] The Court stressed the importance of de-

---

[132] 493 F.2d 507 (5th Cir. 1974), *vacated*, 422 U.S. 563 (1975).

[133] *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). Using 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* Masner, *supra* note 94, at 572.

[134] *Donaldson*, 493 F.2d at 521.

[135] "Police Power" is:

> [t]he 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 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. Masner, *supra* note 94, at 572.

[136] *Donaldson*, 493 F.2d at 522.

[137] *See* Masner, *supra* note 94; A. MORRIS, THE CONSTITUTION AND AMERICAN EDUCATION 128-31 (2d ed. 1980).

[138] Masner, *supra* note 94 at 568.

[139] 457 U.S. 307 (1982).

[140] *Id.* at 309-10. 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.

[141] *Id.* at 2458.

ference to the judgment of a professional, commenting that judges and juries are considerably less capable of evaluating what is "minimally adequate training."[142]

In light of the *Youngberg* holding, it appears that federal constitutional grounds in an education malpractice complaint are unlikely to succeed. In fact, no student has successfully alleged that a school totally failed to provide an education. School-based claims are necessarily weaker than those in *Youngberg* since students, unlike mental patients, are not involuntarily confined on a 24-hour-per-day basis. The Court's deference to the judgment of professionals in assessing the scope of "minimally adequate training" would likely extend to the professional judgment of teachers in defining minimally adequate education. A constitutionally-based theory of recovery would therefore probably not provide recovery for educational malpractice.

V. COMPARATIVE POLICY CONSIDERATIONS FOR EDUCATION MALPRACTICE CLAIMS

A. Policy Considerations for Failure to Provide Basic Educational Skills

In rejecting educational malpractice as a cause of action, courts have adopted the position that public policy considerations outweigh the traditional negligence analysis which would allow a student-plaintiff's injuries to trigger an action for damages. Recognizing the tort of educational malpractice would impose a legal responsibility on educators for the growth and development of an individual student.

The traditional negligence claim requires the plaintiff to prove that a legal duty of care was owed to him/her, and that a breach of duty actually or proximately caused the plaintiff's injury.[143] It is a question of law as to whether there is, in fact, a recognized duty.[144]

By not imposing a legal duty on educators to guarantee that students acquire basic academic skills, the courts are taking the position that public policy dictates that no legal obligation should be recognized. This skirts the essential question: whether a plaintiff's interests are entitled

---

[142] *Id.* at 2462. The Court added the following:

> we 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.

Id. at 2461.

[143] *See* PROSSER & KEETON, *supra* note 7, at 164-65.

[144] *Id.* at 236.

to legal protection against the defendant's conduct. It should come as no surprise that the problem of duty is as broad as the very law of negligence and no universal duty test has been formulated. Regardless, a duty analysis is firmly embedded in the law and will remain, if for no other reason than because there is no satisfactory substitute designed to limit a defendant's responsibility. "Duty" itself is not sacrosanct, but merely an expression of the sum total of policy considerations which causes the law to protect a plaintiff.[145]

1. Duty Cannot Be Established Without A Standard of Care.

The courts have found no standard of care for the general education of students which creates a legally-recognized duty. The belief that teaching children does not allow for a standard of care which the court could recognize was the very basis for the court decisions in *Peter W.* and *Donohue*.[146] Courts have been unable to define the overriding standards which guide education.[147] As one court stated, "[c]lassroom methodology does not provide readily acceptable standards of care, or causation, or even injury. The pedagogical field is overrun with different and conflicting theories of how or what a child should be taught. . . ."[148]

Operative educational policies are not formulated at a national level, but rather at the local district level, and thus adds to the lack of professional consensus in determining a standard of care.[149] Establishing classroom teaching objectives has been left to school building administrators while goals are set by state and local school boards that adopt policy statements that teachers must follow. Local districts, and not individual teachers, develop policies which control teaching methodology, instruction and supervision as well as determining pupil development. Teachers not only lack control of their own profession, but there is also a vast divergence of opinion as to what is a correct and proper educational practice. As long as educators are unable to agree on what ordinary care and skill is required in a specific situation, courts will not support educational malpractice. It would be almost ridiculous to establish a legal standard when teachers themselves cannot agree on what ordinary care and experience would be in a given situation. Thus, courts are rightfully hesitant to make a determination as to "what is customary and usual in a profession."[150]

---

[145] *Id.* at 357-58.

[146] Peter W. v. San Francisco Unified School Dist., 131 Cal. Rptr. 854 (1976).

[147] *See, e.g.*, Patrick D. Lynch, *Education Policy and Educational Malpractice* in CONTEMPORARY LEGAL ISSUES IN EDUCATION 212-13 (M. McGhehey ed. 1979).

[148] *Peter W.*, at 860-61.

[149] Lynch, *supra* note 147, at 232.

[150] PROSSER & KEETON, *supra* note 7, at 189.

2. Courts Do Not Wish To Interfere With Educational Policy Making.

In order to prevent excessive intrusion into the educational process, courts have also been hesitant to judicially determine specific educational standards.[151] Courts have great difficulty determining what is the proper exercise of professional judgment and what is a negligent educational act because educational policies have historically been developed locally.[152] Consider how difficult it would be for a court to establish the appropriate standard of care in a situation where teachers exercise personal judgment in choosing between the differing instructional methodologies and injury results. Such judicial speculation is carefully avoided because it poses the realistic threat of excessive interference with school policy formation. Courts are justifiably hesitant to "guess" the appropriate standard of care because this would be to place the court directly into the educational process.

3. Proximate Cause Is Difficult To Establish.

The basic reason that courts have refused to recognize an educational negligence tort is that it is difficult for the plaintiff to establish the school system as the sole or proximate cause of the injury. For example, the "injury" in *Peter W.* was the general inability to read and write. Notwithstanding this proven inability to read and write, a large body of educational and psychological authority holds that school failure and illiteracy are controlled by varied factors impacting each child differently. Often these factors are outside of the formal educational sphere. These difficulties ". . . may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified."[153] The *Donohue* court clearly addressed this proximate cause problem holding that as a question of policy, educational malpractice should not be accepted as a legally recognized cause of action.[154]

Of course, plaintiffs regularly experience difficulty in establishing proximate cause in negligence cases. While it is more difficult to prove that

---

[151] Donohue v. Copiague Union Free School Dist., 418 N.Y.S.2d 375, 378 (1979); Hoffman v. Board of Educ. 400 N.E.2d 317, 320 (N.Y. 1979).

[152] Torrence P. Collingsworth, *Applying Negligence Doctrine to the Teaching Profession*, 11 J.L. & ECON. 479, 495-96 (1982).

[153] *Peter W.*, 131 Cal. Rptr. 854 (1976).

[154] The practical problems raised by a cause of action sounding in educational malpractice are so formidable that I would conclude that such a legal theory should not be cognizable in our courts. These problems . . . include the practical impossibility of proving that the alleged malpractice of the teacher proximately caused the learning deficiency of the plaintiff student. Factors such as the student's attitude, motivation, temperament, past experience and home environment may all play an essential and immeasurable role in learning.

Donohue, 391 N.E.2d 1352, 1358, (N.Y. 1979).

educators proximately caused the educational deficiencies, it could be argued that this proximate cause difficulty is not one which should preclude the recognition of a cause of action for educational malpractice. In such a scenario, establishing cause would merely be another bridge which a plaintiff had to cross to establish prima facia negligence.[155] Because causation is a proof problem, a plaintiff will lose the suit if this proof test is not met.

4. Administrative Remedies Are Available To Correct Inequities.

A key reason which courts have given for not recognizing the tort of educational malpractice is that there are administrative remedies within the school system for aggrieved parties.[156] This argument is grounded on the judicial belief that educational malpractice torts would involve the court in educational policy making. By deferring to the school system's administrative remedies, the courts allow schools to establish their own policies and to develop intra-system remedies.

5. Excessive Costs For The School System.

In *Donohue*, the court indicated that one reason for denying educational malpractice as a generalized cause of action is because of the fear of a "flood" of litigation.[157] School systems have been easy targets for various claims including failure to maintain equipment and negligent supervision, because school systems have lost much of their sovereign immunity.[158] The court's current position indicates the policy that to add an educational malpractice cause of action based on general education failure is unacceptable.

B. Policy Considerations in the Special Education Area

It is in the area of special education where the legal remedy of educational malpractice, although possibly not denominated as such, may eventually be recognized. Revolving around the concept of duty[159] is the judicial prerogative to evaluate policy issues in making a determination as to whether to allow a cause of action. Courts have held that there are

---

[155] Collingsworth, *supra* note 152, at 498-99.

[156] *Donohue*, 391 N.E.2d at 1355 (N.Y. 1979); Hoffman v. Board of Educ., 400 N.E.2d 317, 320 (N.Y. 1979).

[157] 407 N.Y.S.2d 874 (1978).

[158] Most states have legislatively or judicially abrogated the defense of sovereign immunity. EUGENE T. CONNORS, EDUCATIONAL TORT LIABILITYAND MALPRACTICE 13 (1981).

[159] PROSSER & KEETON, *supra* note 7, at 357-58.

valid policy reasons for rejecting all educational malpractice claims;[160] however, if a cause of action is delimited to include only misclassification or misplacement of children in special education situations, these policy concerns are far less persuasive. The following are the same policy reasons discussed regarding general education as applied to a special education complaint. Each policy reason will now be considered in light of a limited cause of action for negligence in classification, diagnosis and placement in special education classes.

1. A Duty to Educationally Handicapped Students.

While state constitutional and statutory educational provisions do not explicitly provide for common law damage relief for educational malpractice, these provisions could be used as a basis to establish an educational duty.[161] This is possible even though state educational provisions are usually not enacted to confer a benefit on an individual student but to support and maintain the public school system. These state provisions relating to education are "not of a type normally thought to create a tort duty. They are not intended to protect individual children against the injury of an education but are instead designed to promote the general welfare through the development of a literate and productive population".[162]

Federal legislation provides a specific duty to a handicapped student through Education of the Handicapped Act (EHA).[163] While subject to debate,[164] it would appear that courts can apply minimal standards for implementing procedures in the special education area. The EHA provides federal funding to encourage the establishment of state and local special education programs and services. With participation in this federal support program, a duty is imposed on the state or local entity to identify, locate, and evaluate those children in need of services.[165] The goal of state or local EHA programs is to assure all handicapped

---

[160] Hoffman v. Bd. of Educ., 400 N.E.2d 317 (N.Y. 1979).

[161] *See* B.M. v. State, 649 P.2d 425, 427 (Mont. 1982) (Recognized an educational malpractice cause of action, based on the educational provisions of the state constitution, the compulsory attendance law, and legislation governing the administration of special education programs).

[162] Funston, *supra* note 94, at 776-77.

[163] 20 U.S.C. §§ 1401-1462 (1988).

[164] *See generally* Remz, *Legal Remedies for the Misclassification or Wrongful Placement of Educationally Handicapped Children*, 14 COLUM. J.L. & SOC. PROBS. 389 (1979) (arguing that the Education of the Handicapped Act supports a cause of action for special education malpractice). *But see* Halligan, *The Function of Schools, the Status of Teachers, and the Claims of the Handicapped: An Inquiry into Special Education Malpractice*, 45 MO. L. REV. 667 (1980) (arguing against any private cause of action premised on the Education of the Handicapped Act).

[165] 20 U.S.C § 1402(2)(C)(1988).

children[166] the right to a free appropriate public education. The term "appropriate" does not require instruction which maximizes individual performance.[167] Instead, the term "appropriate" refers to a specially designed instruction which results in an educational benefit to the handicapped child.

A free appropriate education under the Act must be implemented "in conformity with the individualized educational program" (IEP).[168] An IEP is a document prepared by various school representatives who are qualified to design programs for handicapped children.[169] The IEP is prepared in cooperation with the parent and includes, but is not limited, to the following: (1) educational performance status; (2) annual educational goals; (3) instructional objectives; (4) appropriate objective criteria and evaluation procedures; (5) present educational services being provided; and, (6) an annual review schedule to determine whether the agreed upon objectives are being met.[170] All states are presently implementing a program funded through EHA.[171]

Recent Supreme Court decisions reinforce the position that the EHA not only provides for funding but also includes procedural guidelines.[172] The EHA therefore confers procedural due process rights to handicapped students in public education. Participating states receive federal financial assistance upon the state's conformance to EHA. States seeking to qualify for federal handicapped funding must develop policies assuring all disabled children the "right to a free appropriate public education." The primary vehicle for implementing these congressional goals is the "individualized educational program" mandated for each disabled child.[173] EHA also includes administrative review procedures[174] as well as a special

---

[166] *Id.* § 1412(1). The EHA defines "handicapped children" as "mentally retarded, hard of hearing, deaf, speech 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." *Id.* at 1401(1).

[167] Board of Education v. Rowley, 458 U.S. 176 (1982). *See generally* Gail S. Fleig & Daniel J. Reschly, *Special Education and the Law*, in EDUCATORS, CHILDREN AND THE LAW 105 (1985).

[168] 20 U.S.C. § 1401(a)(18) (1988).

[169] 20 U.S.C. § 1401(a)(19) (1988).

[170] *Id.*

[171] PHILLIP R. JONES, A PRACTICAL GUIDE TO FEDERAL SPECIAL EDUCATION LAW 30-31 (1981).

[172] Honig v. Doe, 484 U.S. 305 (1988). In *Honig*, school administrators unsuccessfully attempted to circumvent the "stay-put" provision of the EHA, 20 U.S.C. 1415(e)(3) (1988), wherein students must remain in their current educational placement during administrative proceedings, by indefinitely expelling two emotionally disturbed children. *Honig*, 484 U.S. at 313.

[173] *Id.* at 310-11.

[174] 20 U.S.C. § 1415 (1988).

review of administrative actions.[175] When all administrative remedies are exhausted regarding a misdiagnosis or misplacement, the best avenue for relief may be a state law damage action. At present, this may be the only effective way for special education children to secure relief for an injury.

2. Judicial Interference with School Administrative Policies

The earlier discussion indicated that educational malpractice claims for general negligence actions would not be supported. Applying a medical or legal malpractice analogy to education is not effective. Unlike law and medicine, education does not have generally accepted professional standards.[176] In contrast, the likelihood of a judicially-imposed remedy in the malpractice area is possible in special education misplacement and misdiagnosis situations. In these situations, the court can apply available standards rather than creating standards which might interfere.[177] There has been little or no difficulty in judicial recognition of duties for other professionals when those whom they serve are injured. Courts have done this even though they lack personal expertise as to the standards in those professions. Thus, while lacking expertise in medicine, courts have allowed medical malpractice claims to go forward. Expert testimony must be used to determine whether a professional has breached the applicable standard of care.[178] A similar use of experts would be appropriate in a special education malpractice action because the duties and responsibilities are more clearly delineated than are those of education in general.

In the special education area, the focus would be on the individual student so that the courts can more easily derive a standard of care regarding negligent treatment. Unlike the teaching of basic academic skills, special educators have generally accepted standards regarding a child's classification and placement for special education purposes. A judicial review of those placement procedures could be structured to avoid judicial interference in educational policies.[179] While educators sometimes

---

[175] *Id.*

[176] *See supra* note 37 and accompanying text.

[177] *See generally* Remz, *supra* note 163 (suggesting a common law remedy for negligent diagnosis, classification, or placement of children in the special education setting).

[178] Courts have always recognized that the practice of a profession involves intangibles and many unknown quantities. The existence of uncertainties in the practice of medicine has received specific recognition in the judicial doctrine that the degree of skill and the standard care required of a physician may be evaluated only by others in the profession.

Case Comment, *Educational Negligence: A Student's Cause of Action for Incompetent Academic Instruction*, 58 N.C.L. REV. 561, 590 n.158 (1980).

[179] *See generally* Remz, *supra* note 164 (suggesting a common law remedy for negligent diagnosis, classification, or placement of children in the special education setting).

disagree over specific special education classifications, customary practice and consensus can serve as a basis for establishing minimum standards. The courts could apply these "developed" standards without establishing educational policy by merely insuring that educators properly implement standards established in the IEP. This would hold educators to minimum acceptable and self-imposed standards in student classification and placement. There would be minimal interference because the judiciary would utilize standards developed by educators to determine acceptable behavior. The result would be a limited tort which imposed liability on educators when they negligently implement their own policy.

A situation of this kind occurred in *Hoffman*. The school district's liability was held to be based on the district's failure to implement its policy of retesting after two years. The failure to retest the child was not a professional judgment problem, but rather a failure to implement the school's stated policy.

This analogy to "self-imposed standards" applies in other malpractice contexts as well. For example, in a legal malpractice action a Code violation may not give rise to a malpractice action, but the self-imposed standards related to the lawyer's professional code of conduct "may be a relevant consideration in a tort action."[180] Similarly, self imposed standards can be used to delimit an educational malpractice cause of action.[181]

3. Establishment of Cause

Generally, a school district's exposure to liability will be limited if a cause cannot be identified or if other causes are not ruled out.[182] Proof of causation will be easier to establish for plaintiffs alleging misdiagnosis, misclassification, and misplacement in special education programs than for plaintiffs alleging general negligent instruction. With special education, outside environmental factors are not as heavily implicated. For example, if an educator misdiagnoses, seriously misclassifies or incorrectly places the child in a highly restrictive and educational environment, cause can be proximately linked to the educational failure. The self-imposed procedures in the special education arena make it far easier to trace the specific action or inaction that led to the injury than in a general academic skills context.

---

[180] Dennis Horan & George Spellmire, ATTORNEY MALPRACTICE: PREVENTION AND DEFENSE at 135 (1985).

[181] *See, e.g.*, D.S.W. v. Fairbanks N. Star Borough School Dist., 628 P.2d 554 (Alaska 1981) (holding a school district not liable upon discovering plaintiffs' dyslexia but began treatment then terminated treatment even though students dyslexia had not been resolved); Doe v. Board of Educ., 453 A.2d 814 (Md. 1982) (finding a school system failed to adopt its own psychologist's recommendation that child be reevaluated was not actionable negligence); DeRosa v. New York, 517 N.Y.S.2d 754 (1987) (finding no cause of action where school district failed to re-test child, who was not mentally retarded but only hard of hearing after having placed the child for three years in a class for mentally retarded children).

[182] *See* Collingsworth, *supra* note 152.

4. Administrative Remedies

The EHA and various state special education programs contain comprehensive administrative procedures. The EHA provides for a due process hearing and notice requirements to insure that parents can seek special education or challenge placement decisions.[183] Should a parent challenge a school district's decision, EHA provides an impartial due process hearing.[184] This local hearing can be appealed to the state educational agency,[185] and can be appealed in a civil action in a state or U.S. district court.[186]

A plaintiff may not raise an educational negligence action prior to exhausting administrative remedies. If administrative remedies are not exhausted, a legal defense is created. This has the effect of both reducing liability exposure as well as reducing excessive judicial interference. The process allows the school system an opportunity to solve the problem which further reduces judicial involvement. The extensiveness of the EHA provisions and administrative procedures would assure that an educational malpractice action supplementing these procedures would not result in excessive judicial activism and educational policy development.

5. Financial Burden on the School System

With education being considered a public rather than an individual benefit,[187] the judiciary has resisted transferring funds which are dedicated to the education of children to individual students through litigation. Although it is entirely possible that the recognition of general education negligence suits would result in increased litigation, this potentially burdensome volume of litigation would be significantly reduced if only special education claims were allowed.

Whether educational malpractice claims will prove to be excessive and burdensome is more properly a legislative rather than a judicial concern. State legislatures can impose specific sovereign immunity to government entities. For example, even where sovereign immunity has been abrogated then restored, litigation against educators regarding physical supervision, proper instruction in high risk classes (e.g., physical education, shop, and science) and maintenance of equipment has continued.

---

[183] 20 U.S.C. § 1415 (1988).

[184] *Id.* § 1415 (b)(2).

[185] *Id.*

[186] *Id.* § 1415(e)(2).

[187] State constitutional and statutory provisions guaranteeing public education were originally intended to benefit the general public. Funston, *supra* note 94, at 777 (1981) ("[T]he purpose of the free public school movement was to confer the benefit of education upon the general populace."); *see also* Donohue v. Copiague Union Free School Dist., 407 N.Y.S.2d 874, 880 (1978) (State constitutional provision and legislation that created and maintained the free public school system were not intended to protect individuals against the "injury" of ignorance.).

It does not seem appropriate for the judiciary to bar causes of action that a legislature chose to allow by waiving sovereign immunity.[188] Courts have respected legislative decisions abolishing sovereign immunity in other areas. In *Snow v. State*, (after the court decided the claim was medical not educational malpractice) the state-funded nature of the institution was irrelevant because the legislature had waived sovereign immunity.[189] Furthermore, state legislatures have affirmatively barred educational negligence in other areas.[190] If exposure is so burdensome with limited educational malpractice, state legislatures could reinstitute an immunity for public schools. In reality, this approach is more appropriate because the barring of a negligence action should rest with the legislature, not the court.

VI. New Directions For Malpractice Claims

A. Action in One Jurisdiction

Only one jurisdiction, Montana, has allowed relief for educational malpractice. This state court imposed liability for educational malpractice in a *Hoffman*-like fact situation in *B.M. v. State*.[191] When the plaintiff-child exhibited learning difficulties upon entering school, the school system had an area psychologist test the child to determine if there was a learning disability. The psychologist recommended participation in special education or repeating kindergarten, and school officials decided on special education services. At first, this program included a teaching team to assist students within their regular first grade class. Then, without contacting the families, the special education services were segregated by moving the students into their own classroom.[192]

The court held for the plaintiffs, reasoning that there was no clear statutory immunity which would bar state liability for negligent administration of a special education program. It held that it was proper and necessary to allow an educational negligence action to go to trial. As the basis for its decision, the court believed that a duty of care existed toward the child because of the defendant's initial testing and placement in a special education setting.[193] Not surprisingly, the court side-stepped the

---

[188] Collingsworth, *supra* note 152, at 503 ("If the state treasury can endure these types there is no reason to discriminate solely against educational malpractice suits.").

[189] Snow v. State, 469 N.Y.S.2d 959 (1983), *aff'd* 485 N.Y.S.2d 987 (1984).

[190] *See* Helm v. Professional Children's School, 431 N.Y.S.2d 246 (1980); Paladino v. Adelphi Univ., 454 N.Y.S.2d 868 (1982).

[191] 649 P.2d 425 (Mont. 1982).

[192] *Id.* at 426-27.

[193] *Id.* at 427.

questions as to the appropriateness of the traditional negligence elements of breach, proximate cause, and injury by indicating that these were fact questions which would be determined at trial.[194] Thus, the actual merits of the case were not considered. The existence of duty was grounded on Montana constitutional provisions requiring (1) education of all citizens; (2) a mandatory attendance statute to implement this guarantee; and, (3) numerous administrative statutes outlining special education administrative program procedures.[195]

This one court has taken the liberal position of holding that these statutes justified a recognition of a duty toward individual students.[196] The opinion clearly distinguished its case from the *Peter W.* and the *Donohue* genre. Those cases involved "negligent failure to adequately educate a child in basic academic skills." *B.M. v. State* involved the second classification, "negligent misclassification of a student as mentally retarded and subject to special education and negligent misplacement in a segregated classroom."[197]

B. Parallels From Outside of Education

Regardless of foreclosure of educational malpractice claims, this cause of action may not be completely dead. If the plaintiff claims are denominated differently, they would have some possibility of success. Court activism in fields related to education may eventually be adopted in education law. For example, in *Snow v. State*[198] where the fact pattern paralleled *Hoffman*, the plaintiff successfully argued a medical rather than educational malpractice action. Therefore, some plaintiffs injured in the educational arena may succeed if they argue their cause of action as medical, not educational, malpractice.

There is further support for this argument. In a memorandum opinion, one court accepted this alternate approach.[199] The defendants filed a motion to dismiss for failure to state a claim because an educational malpractice claim was barred by public policy. In refusing to grant the motion, the court ruled that the complaint, which alleged (1) that the school conducted psychological evaluations of the child; (2) that these evaluations revealed severe psychological problems; and, (3) that the school failed or refused to notify the mother, did not allege improper education. The plaintiff was barred from applying an educational malpractice analysis because improper education was not alleged. If the plaintiff however, had specifically charged improper education, the implication was that this court would have accepted the educational malpractice claim.[200]

---

[194] *Id.* at 427-28.
[195] B.M. v. State, 649 P.2d at 427 (Mont. 1982).
[196] *Id.*
[197] *Id.* at 428 (concurring opinion).
[198] 469 N.Y.S.2d 959 (1983), *aff'd*, 485 N.Y.S.2d 987 (1984).
[199] Savino v. Board of Educ., 506 N.Y.S.2d 210 (1986) (mem.).
[200] *Id.*

The main distinction between *Snow* and *Hoffman* is that the *Snow* plaintiff was in a state school which operated similarly to a hospital in providing continuous medical and psychological treatment.[201] The plaintiff-child was three years old when first confined to Willowbrook State School where he remained from 1965 through 1972. He was then confined to another state school from 1972 through 1974. Upon arrival, the school failed to determine that the child was deaf. School officials enlarged their error by postponing the reevaluation of his intelligence. At the same time, his educational record included selected statements that the child was bright, expressly contradicting his low IQ score.

It is important to note that the trial court addressed the issue of whether the allegation was one of educational malpractice or medical malpractice. The defendant's position in *Snow* was not supported. In *Snow*, the defendant alleged that this specific situation sounded in educational malpractice, and therefore should be dismissed. The court held that the failure to reassess the plaintiff's IQ when they had knowledge of his deafness "constituted a discernible act of medical malpractice on the part of the state rather than a mere error in judgment vis-a-vis claimant's educational progress."[202] Courts have continued to refuse to accept an educational malpractice cause of action unless presented as an alternative cause of action such as medical malpractice.

Alternate approaches have been taken in order to circumvent judicial resistance to educational malpractice claims. While not identifying their causes of action as "educational malpractice", plaintiffs have pursued various alternate guises: (1) false imprisonment; (2) negligent treatment; and, (3) violations of civil and constitutional rights as well as guaranteed equal protection and due process rights.[203] To date these efforts to circumvent an educational malpractice analysis have not been successful. The courts have consistently ruled that such complaints were educational malpractice allegations irrespective of the terminology used in the complaint.

VII. EDUCATION IS NOT A PROFESSION

Traditionally, professionals have special training, are certified by the state, and hold themselves out as possessing superior skill, training and knowledge not possessed by ordinary members of the community.[204] The question of whether teaching is to be considered a profession is far more than an idle question. Establishing the status of education as a profession would help the court to determine the appropriate standard of care to apply in negligence situations.

---

[201] Snow v. State, 469 N.Y.S.2d 959, 960-61 (1983), *aff'd*, 485 N.Y.S.2d 987 (1984).

[202] *Id.* at 964.

[203] *See* Tubell v. Dade County Pub. Sch., 419 So. 2d 388 (Fla. Dist. Ct. App. 1982); Doe v. Bd. of Educ., 453 A.2d 14 (Md. 1982).

[204] Hunter v. Bd. of Educ. of Montgomery County, 439 A.2d 582, 589 (Md. 1982).

Among the arguments against education being a profession is that education:

> . . . is not a learned profession. It is governed by hierarchical bureaucracies and not by the profession itself. It is a role in which the discretion of individual performing members is closely limited and does not require trust and confidence in the same manner that the work of a physician or lawyer requires them . . . . [T]he duty of a teacher is to follow the orders of superiors.[205]

A fundamental problem in trying to apply an educational malpractice cause of action is that education, itself, is not a profession, at least not in the sense of medicine and law. Professionalism may be considered a continuum with true "professions" at one end and "professionals, in name only," at the other end of the continuum. Medicine and law, for example, have historically been accepted as true professions, and are at one end of the continuum. Those fields of endeavor at the opposite end of the continuum have acquired the label of profession but do not meet any of the criteria against which a profession is measured. A semi-profession, such as teaching, can be placed in the middle on this continuum. This is indirectly indicated but the specific placement depends on the extent to which the semi-profession meets the established criteria of a profession.

Education has been compared to nursing and social work, and described as one of the semi-professions.[206] The court has indicated this indirectly when it applied the "duty of care" rationale.[207] Professions have a higher standard of care than do vocational fields. The Court has implied that education is not a profession by not accepting a higher standard and duty.

Various criteria have been developed to analyze a profession[208] with the following thirteen criteria most often used to characterize a profession: (1) a body of specialized knowledge; (2) autonomous decision-making authority; (3) a constantly-enlarging body of knowledge; (4) rigorous entry-level requirements; (5) control of entry; (6) self-policing of the profession; (7) a professional has autonomy; (8) attracts quality aspirants; (9) strong professional organizations; (10) a professional has freedom of action; (11) freedom of action and assumption of responsibility; (12) the public trusts a professional; and, (13) authority is recognized by clients.

These criteria offer a valid argument that education should not be classified as a profession. Educators do not control entry into or egress from their "profession". Education, unlike law and medicine, is controlled

---

[205] Halligan, *supra* note 164 at 676-77.

[206] *See* AMITAI ETZIONI, THE SEMI-PROFESSIONS AND THEIR ORGANIZATION TEACHERS, NURSES, SOCIAL WORKERS, at xi-xvii (1969); GERALD J. GRIFFIN & JOANNE K. GRIFFIN, HISTORY AND TRENDS OF PROFESSIONAL NURSING, (1973); AMERICAN ASS'N OF COLLEGES FOR TEACHER EDUCATION BICENTENIAL COMM'N. *Educating a Profession*, 5-9 (1976).

[207] *See* discussions *supra* Part III regarding duty of care.

[208] ETZIONI, *supra* note 206.

by a lay board and not a professional board. There is little doctrinaire "black letter" law in education; there are almost as many educational opinions as there are educators. This was clearly pointed out in the statement that "the greatest problem with requiring teachers to exercise the care and skill ordinarily exercised by other members of their profession is that, unlike the medical profession, educators cannot agree on what care and skill ordinarily is required in a given situation."[209] This analysis supports the present attitude of courts in not recognizing education as a profession liable for professional malpractice.

A disproportionately large body of literature exists on the topic of educational malpractice. Considering the burgeoning number of articles, comments and notes, there have been relatively few legal decisions. The reviews and commentary are largely enthusiastic in recognizing a judicial remedy for the failure to educate. Since malpractice actions are recognized in other professions, it almost seems unfair that educators are not exposed to similar potential litigation. Furthermore, because malpractice has been found to be legally compensable, malpractice in education should not be treated any differently.

There is a more powerful argument supporting the recognition of educational malpractice: the people may want it recognized. In the products liability area, the courts eventually fashioned a new cause of action in direct response to societal demands. Considering the demand for accountability, the poor performance of students, and the belief that monetary compensation will spur improvements in a supposedly failing educational system, the new tort of educational malpractice may eventually be recognized. As long as American society must endure the cold, hard reality that students are graduating from our schools unable to read their diplomas, this unrest will continue. These failures and demands for change could lead to educational reform through the law, specifically the adoption of an educational malpractice cause of action. Societal demands have not yet caused the judiciary to reassess its prior findings of public policy restrictions on educational malpractice actions. As such, educational malpractice today remains an "unborn" tort.

---

[209] *See* Blackburn, *supra* note 94.