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Function of Schools, the Status of Teachers, and the Claims of the Handicapped: An Inquiry into Special Education Malpractice, The

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THE FUNCTION OF SCHOOLS, THE STATUS OF TEACHERS, AND THE CLAIMS OF THE HANDICAPPED: AN INQUIRY INTO SPECIAL EDUCATION MALPRACTICE

Patrick D. Halligan*

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No one will doubt that the legislator should direct his attention above all to the education of youth, or that the neglect of education does harm to states. The citizen should be moulded to suit the form of government under which he lives. For each government has a peculiar character which originally formed and which continues to preserve it. The character of democracy creates democracy, and the character of oligarchy creates oligarchy; and always the better the character, the better the government.

ARISTOTLE, POLITICS, Book VIII, Ch. 1

Though the state was to derive no advantage from the instruction of the inferior ranks of people, it would still deserve its attention that they should not be altogether uninstructed. The state, however, derives no inconsiderable advantage from their instruction. The more they are instructed the less liable they are to the delusions of enthusiasm and superstition, which, among ignorant nations, frequently occasion the most dreadful disorders. An instructed and intelligent people, besides, are always more decent and orderly than an ignorant and stupid one. They feel themselves, each individually, more respectable and more likely to obtain the respect of their lawful superiors, and they are therefore more disposed to respect those superiors.

ADAM SMITH, THE WEALTH OF NATIONS, Book V, Ch. 1, Part III, Art. II

I. INTRODUCTION

The thesis of this Article is that courts should not compensate pupils who have not profited from public school instruction, even in a case where the proof establishes standards of instruction and shows both a breach of those standards and that the breach caused the failure of the plaintiff and produced foreseeable, actual damages. The reason posited is that for our common good schools should operate to socialize children for the benefit of their elders and fellows, and not specifically to serve individual pupils. The more superficial ground of this Article is that the relationship of public school teacher or public school and pupil is not of a type which the common law recognizes as creating an expectation of skill in the one to produce beneficial results in the other. Certain state statutes and recent federal statutes, including those conditioning grants-in-aid for education of the handicapped, should be read, in light of the common law, not to create private claims for money damages for misfeasance or non-feasance, and the operation of state and federal constitutional clauses should not change that conclusion. Thus, the focus of this Article concerns educational malpractice with particular emphasis on the unsuccessful education of handicapped pupils.

This Article approaches the education of handicapped pupils as part of education generally. Consistent with that view, it first reviews the common law, then inspects the special education statutes, and finally explores various constitutional and educational legislative bases upon which a handicapped pupil or other student might seek to base a claim for damages.

II. COMMON LAW

A. *The Governmental Character of School Boards*

Going to school and sending one's child to school are duties of citizenship. In fact, young citizens must attend school and their parents must send them. Failure to send one's child to school is often a crime.¹ Essentially, school attendance is the performance of a mandatory obligation, not a bargaining with an independent contractor for services. In other words, school boards are authorities who exercise governmental² power over young citizens, the pupils. The pupils are not clients, but the minor subjects of legitimate local governmental control.

Reflection upon the governmental nature of public education should reveal the detriment of creating a tort for educational malpractice. To create such a tort implies that the law should also create torts to compensate persons who claim some loss because of inefficient police patrol, tardy court administration, or inflationary management of the money supply. Despite the sympathy felt for injured crime victims, frustrated plaintiffs, and poor persons with fixed incomes, they are not allowed to sue constables, magistrates, or central bankers. Some important reasons not to permit such suits³ are the risk of error which derives from the multiplicity of causes

1. Compulsory attendance is directed both at the child, in neglect and truancy provisions, and at the parent, in penalty provisions. 68 AM. JUR. 2d *Schools* § 227 (1973); 59 AM. JUR. 2d *Parent & Child* § 57 (1971). An illustrative statutory scheme is found in ILL. ANN. STAT. ch. 122, §§ 26-1 to -12 (Smith-Hurd 1961 & Cum. Supp. 1980-1981). If a pupil or his parents dissent from the curriculum, the pupil must attend but need not participate actively in those exercises which he regards as ceremonies or liturgies of belief contrary to his own. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). This passive right of nonparticipation probably extends to nonreligious grounds of dissent which are sincere and deep. *Id.* at 634-35. But the first amendment privilege of walking out of the schoolhouse in violation of local compulsory attendance laws may extend only to religious dissent and then only after the age of 14. See generally *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

2. See 4 J. DILLON, *THE LAW OF MUNICIPAL CORPORATIONS* § 1658 (5th ed. 1911); 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 29.6, at 1624 n.30 (1956); 18 E. MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* §§ 53.30, .93 (3d ed. 1949-1951); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 980 n.98 (4th ed. 1971).

3. Besides separation of powers, the nonjusticiability of standards, and the unique difficulty of ascertaining causation in educational malpractice suits, the traditional rationales for municipal tort immunity also apply. These are: the diversion of funds from general welfare to individual claimants, the disruptive effect on local government of the litigation process itself, and the fact that absence of a profit motive in government operations entitles local government to some leniency. See 2 F. HARPER & F. JAMES, *supra* note 2, §§ 29.5-6.

of loss and the problematic nature of proof of cause in fact,⁴ the unforeseeability of many losses,⁵ and judicial incompetence to formulate, articulate, and promulgate measures of adequate governmental conduct⁶ when little consensus exists as to what are good or bad practices, and when many factions propose very different standards about which there is heated ethical, technical, and political controversy.⁷ The common theme under-

4. The multiplicity of causes and their complexity is the most frequent practical objection to creation of educational negligence torts. See Elson, *A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching*, 73 Nw. L. Rev. 641, 746-54 (1978).

5. Even if cause in fact can be ascertained, the actual consequences of government operations typically are not proximate in the legal sense. The privilege of policy makers to experiment is essential and motivates immunity from suit for legislative action by local government. 4 J. DILLON, *supra* note 2, § 1627; 18 E. McQUILLIN, *supra* note 2, § 56.36.

6. Elson, *supra* note 4, at 667-92. In *Jones v. Alexandria School Bd.*, 179 F. Supp. 280, 283 (E.D. Va. 1959), *aff'd*, 278 F.2d 72 (4th Cir. 1960), the court declared that sifting conflicting educational opinions is not a proper function of a court. Another court has made the broad statement that most educational questions are for "educators and not courts." *Stell v. Savannah-Chatham County Bd. of Educ.*, 333 F.2d 55, 62 (5th Cir.), *cert. denied*, 379 U.S. 933 (1964).

In *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd per curiam sub nom. McInnis v. Ogilvie*, 394 U.S. 322 (1969), a three-judge panel in Chicago declined the invitation of the parties to rule upon local financing methods by drawing inferences from economics. That the productivity of a dollar spent in education one place might be greater or less than the outcome or result of a dollar spent elsewhere is a question courts should not answer because they "cannot provide the empirical research and consultation necessary for intelligent educational planning." *Id.* at 336 (footnote omitted). The express rationale of the three-judge opinion is nonjusticiability. The opinion notes that nonjusticiable questions include not only political questions in the narrow sense, but also any question for the answer of which the courts lack "discoverable and manageable standards." *Id.* at 335 (footnote omitted). The opinion reasons that courts must refrain from nonjusticiable questions because their resolution is a legislative prerogative. In speaking of legislative prerogative, the court states correctly that a law may be erroneous or unscientific, but that "[m]ere errors of government are not subject to . . . judicial review." *Id.* at 333 (quoting *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 70 (1913)). The analysis of economic and financial issues in education should apply with equal weight to psychological and instructional methodological debates, and the restraining principle of *McInnis* applies with yet greater force to special education disputes.

7. In *Otero v. Mesa County Valley School Dist. No. 51*, 408 F. Supp. 162, 167 (D. Colo. 1975), *vacated*, 568 F.2d 1312 (10th Cir. 1977), the judge remarked, "When persons holding doctorates in education can't agree, it would be no more absurd for me to prescribe medical treatment than it would be for me to rank educators' tests." See also *Smuck v. Hobson*, 408 F.2d 175, 188 (D.C. Cir. 1969), where the court characterized the disputes about ability grouping and related methods as a "sea of factual contentions" not manageable by the courts.

Professor Elson has polled the nation's most illustrious educational researchers to ascertain which of any of the instructional methods labeled in a widely distributed handbook has been validated as effective. None has been so validated. Elson, *supra* note 4, at 711 & n.266. Citing sociological surveys of teacher attitudes, Professor Elson has also noted the tendency of teachers toward skepticism regarding assessment of educational techniques and materials, and their general repugnance to consult with one another unless ordered to so consult. *Id.* at 730. See also

lying these reasons is the inappropriateness of courts to determine such issues. But more importantly, to allow educational malpractice suits contradicts the bases of representative government.⁸

Public schools, like other governmental authorities, require some measure of unreviewable discretion and, more than most agencies, require the security of being able to allocate genuinely necessary review to agencies more appropriate than common law juries. Without such discretion, creative systems of instruction will never occur and the morale needed to develop enthusiasm in devising improvements for youth will fail.⁹ The cost and disruption to instruction caused by tort litigation will hurt the majority of pupils not litigating.

But more significantly, the welfare of society is not fostered by tort litigation concerning educational effectiveness. Tort litigation by individual pupil plaintiffs tends to transform public schools into a regime of laissez faire, away from their historic and realistic function of fostering order in society. The tendency of educational malpractice litigation would be to force a school board to make concessions affecting its methods, standards, and curriculum to obstinate pupils or parents in order to avoid lawsuits. Such litigation would create a drive toward a passive policy of reaction to pupil demand¹⁰ and away from attention to the needs of society as a whole. The taxpayers want schools not necessarily because of their altruism toward pupils, but for the good of society generally. To invite tort litigation is practically to de-emphasize the societal interests which principally account for the existence of public schools and to inflate the interests of pupils. It is in this sense that the rationale of educational malpractice is alien to the concept and function of public schools.

The historic reason for public schools in Western Civilization is to better enculturate young persons into society and to train them to meet

authorities cited note 52 *infra*. In these circumstances, it is not extreme to say that causes, standards, and methodology in education are topics "so bitterly contentious as to be . . . incapable of solution" by the courts. Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 345 (1924). *But see* Comment, *Damages Actions for Denial of Equal Educational Opportunities*, 45 Mo. L. REV. 281, 299-302 (1980).

8. Creation of a tort of educational malpractice is an undeniable contradiction of pure democratic principles. Elson, *supra* note 4, at 660. *See generally* *McInnis v. Shapiro*, 293 Supp. 327 (N.D. Ill. 1968), *aff'd per curiam sub nom. McInnis v. Ogilvie*, 394 U.S. 322 (1969).

9. The worst result would be conscious repeal of minimum standards. California repealed its minimum standards statute in response to rumblings about malpractice claims against those not meeting them. This vitiation of legislative stimulation to improvement illustrates the unwholesome tendency of malpractice torts. Abel, *Can a Student Sue the Schools for Educational Malpractice?*, 44 HARV. EDUC. REV. 416, 433-34 (1974).

10. If and when teacher performance becomes privately actionable, then "the student's motive and attitude change. The class turns into a clientele to be satisfied, and a skeptical one: teach me if you can." J. BARZUN, *THE HOUSE OF INTELLECT* 122 (1959).

society's expectations of them.¹¹ Public schools help preserve existing institutions by increasing the probability that children will adjust to them. This function is necessary to the continuation of modern industrial economies and parliamentary democracy, the advance of technology, national security, and to the restraint required for life in urbanized countries with large populations.¹² Even its critics acknowledge that this is and has been

11. One author has described the essential function of the public schools in cultural terms:

The essential function of a publicly supported school system is to perpetuate the culture of which it is a part. This is done by perpetuating the core values and by developing in the learner the kinds of behavior which will enable him to participate in the cultural setting as it is and as it is developing, so as to maintain the essential core values that the members of the culture want to maintain.

EDUCATION AND ANTHROPOLOGY 24 (G. Spindler ed. 1955). The development of the public school system has also been traced to society's need to train its young members for their adult roles in an increasingly complex and changing social structure:

The most important tradition in the sociological analysis of the aims of education has been the study of the relation between such aims and the general values of society, with special reference to the social control over the aims of education. The primary conclusion supported by this research is that the aims of education are in the last analysis prescribed and legitimized by the community (or society) in which the institution exists. When the culture becomes so complex that it cannot be transmitted without an additional formal system, a separate educational structure arises. This institutional enterprise is chartered by society to train society's members for adequate adult role performance. The aims of education are consonant with the conceptions of the ideal adult which society wishes to produce and the educational institution possesses legitimate power to pursue its aims only to the extent that they are in fact those which society considers desirable.

O. BRIM, SOCIOLOGY AND THE FIELD OF EDUCATION 15 (1958). See also Mailloux v. Kiley, 323 F. Supp. 1387, 1392 (D. Mass.) (public schools are expected to "indoctrinate" the younger generation in community mores, *aff'd per curiam*, 448 F.2d 1242 (1st Cir. 1971); S. KIMBALL, CULTURE AND THE EDUCATIONAL PROCESS 161 (1974) (even the cognitive domain of public school instruction "primarily constitutes cultural transmission"); R. POUNDS & J. BRYNER, THE SCHOOL IN AMERICAN SOCIETY 66 (3d ed. 1973) ("the school has developed as a separate institution in order to carry out the aims of its society . . . for the education of the young"); Project, *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1053 (1968) ("one function of elementary and even secondary education is indoctrinative—to transmit to succeeding generations the body of knowledge and set of values shared by members of the community"). See generally C. BREMBECK, SOCIAL FOUNDATIONS OF EDUCATION (2d ed. 1971).

12. Complexity compels public schools. Even the iconoclast economist Carnoy concedes, "In most societies, formal schooling is an important institution for transmitting knowledge and culture . . . and for developing human traits that contribute to economic output, social stability, and the production of new knowledge." M. CARNOY, EDUCATION AS CULTURAL IMPERIALISM 1 (1974). Echoing the inevitable need for public schools is the famous judicial dictum in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), which constitutes powerful evidence of the prevalence of the assumption of the cultural and socializing role of the schools:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the

the function of public education,¹³ and the prevailing opinions of legal, educational, and anthropological scholars who have considered the question agree that such a function should be the role of public schools.¹⁴ Each generation of infants requires socialization and enculturation. In that sense, civilization is never more than twenty years away from extinction. Given its vulnerability, society should foster and strengthen public school authority, not dilute it.¹⁵ Necessary criticism should come through broad, public, systematic channels, *viz.*, by way of representative government. Necessary intervention in specific cases ought to be provided through competent administrative channels,¹⁶ whose actions are not likely to cause resentment by educational officials or disrespect by pupils, either of which could destroy the governmental role of public schools. In a nutshell, educational malpractice litigation is against public policy.

In *Donohue v. Copiague Union Free School District*,¹⁷ the New York Court of Appeals used an underlying rationale of public policy to reject an educational malpractice claim. Although the complaint alleged or

performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

Id. at 493.

13. M. CARNOY, *supra* note 12, at 1. See generally I. ILLICH, *DESCHOOLING SOCIETY* (1971).

14. For an insightful and comprehensive analysis of the wide range of theories which have been postulated to explain the development of public schools and their ideal function in a period of social change, see R. POUNDS & J. BRYNER, *supra* note 11, at 526-51. The views discussed include perennialism (or neohumanism), essentialism (or social evolutionism), social realism, experimentalism, reconstructionism, *laissez faire*, and existentialism. As noted by Pounds and Bryner, perennialism "conceives of the main job of education as the development of the intellect and the transmission of the great ideas (unchanging ideas) of the past, so that they will be thoroughly understood by at least the elite of the present generation." *Id.* at 564. Essentialism emphasizes "the importance of the school as an agency for preserving the culture against some of its own defects—such as forgetfulness of the essentials of the past and the tendency to be carried away by the exigencies of the moment." *Id.* Social realism urges that "the values that the school should be teaching are those that are prevailing in the culture." *Id.* Experimentalism perceives the role of the school "as to develop critical-minded thinkers and thereby persons who will exercise creative leadership at all levels." *Id.* According to the reconstructionists, the school is an agent of society which "should help society to accomplish that which it is not able to do by itself, namely, its own reconstruction." *Id.* at 565. The *laissez-faire* view holds that the school should try "to help each individual to his own best self-realization." *Id.* Existentialism places less weight upon the school as a vehicle for cultural indoctrination, but rather is concerned with "the individual and the necessity for his free choice." *Id.* Pounds and Bryner state that adherents to the first three schools greatly outnumber adherents to the last four and include such famous commentators as J.M. Hutchins, M. Adler, and J.B. Conant. They claim that most educationalists and school officials tend toward social realism.

15. See generally J. BARZUN, *THE HOUSE OF INTELLECT* (1959).

16. See *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 444-45, 391 N.E.2d 1352, 1354, 418 N.Y.S.2d 375, 377-78 (1979).

17. 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).

intimated special learning problems of the plaintiff,¹⁸ the court of appeals acknowledged the nonjusticiability of such claims because present knowledge and the circumstances of child development made formulation of standards and proof of causation nearly impossible.¹⁹ But the opinion went beyond this reasoning. The court suggested that what made the tort repugnant was its consumerist, nongovernmental conception of public education. It analyzed the intent of the people, as set forth in the state constitution, and of the legislature as enacted in the education code, to create a school system for public purposes rather than a private entitlement of any single pupil or parent.²⁰ The justices unanimously agreed that such a claim should not be actionable even if unusually clear facts of a particular case and future research should cure the barriers of unascertainable standards and unprovable causes. In the view of the court, it is against public policy to give relief even to a hypothetically clear claim because to do so might intrude on the discretion of the legislative and administrative agencies to formulate, change, and reformulate educational systems and programs.²¹

In contexts other than damage claims by pupils for allegedly inadequate instruction, courts have considered the nature and function of public schools and the duty of local school districts. The prevailing concept is that public schools are not institutions primarily for the benefit of individuals but are agencies of government,²² and that education is a process

18. *Id.* at 442, 391 N.E.2d at 1353, 418 N.Y.S.2d at 376-77.

19. *Id.* at 443, 391 N.E.2d at 1353-54, 418 N.Y.S.2d at 377.

20. *See, e.g., Hoffman v. Board of Educ.*, 64 A.D.2d 369, 410 N.Y.S.2d 99 (1978), which sustained a damages complaint of a young man who examiners found was clearly not mentally impaired as the New York City schools had presumed for his entire school career. A tentative psychological diagnosis when the plaintiff was in kindergarten had never been reconsidered despite the psychologist's own written recommendation for re-examination within two years. Erroneous class placement and the consequential loss of cognitive development were not disputed. Given the egregious facts of *Hoffman*, it should now be read as a rare case which falls within the proviso set forth in *Donohue* that it would be incorrect "to say that there may never be gross violations of defined public policy which the courts would be obliged to recognize and correct." 47 N.Y.2d at 445, 391 N.E.2d at 1354, 418 N.Y.S.2d at 378 (quoting *New York City School Bds. Ass'n v. Board of Educ.*, 39 N.Y.2d 111, 121, 347 N.E.2d 568, 574, 383 N.Y.S.2d 208, 214 (1976)). The real complaint in *Hoffman* was not the poor quality of instruction, nor inept psychological services, but rather the total loss of a pupil by the school system. The court which decided *Hoffman* was the same court which had rejected the claim of the pupil in *Donohue* a few months earlier. *See Donohue v. Copiague Union Free School Dist.*, 64 A.D.2d 29, 407 N.Y.S.2d 874 (1978), *aff'd*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979). The public policy considerations which led to the affirmation of *Donohue* encompass *Hoffman* as well, even though the latter case is not mentioned in the *Donohue* opinion.

21. *See Elson, supra* note 4, at 642.

22. *See Scown v. Czarnecki*, 264 Ill. 305, 106 N.E. 276 (1914), where the court declared:

School districts are involuntary political divisions of the state, each embracing a certain territory and all the inhabitants thereof, organized for the public advantage and not in the interest of individuals, having for their purpose the exercise within their territory, by their inhabitants and

pupils are required to undergo for the public good.²³ General promotion of the intelligence, usefulness, and efficiency of the citizenry and labor force as a whole is the rationale of public schools.²⁴ Viewed from this perspective, school districts are subdivisions which participate in a state-regulated scheme; they implement state policy for state purposes, and ultimately are overseen by state authorities and the legislature.²⁵ These authorities recognize that schools are governmental, and that pupils are minor subjects of government officials rather than clients of professionals. This relationship between school and pupil is not the sort which traditionally gives rise to a claim for malpractice.

B. *The Nonprofessional Status of Teachers*

School boards have discretion but teachers do not.²⁶ Public school teachers are obliged to teach the subjects and to use the methods and materials their employer requires, even if they believe the methods are oppressive or idolatrous.²⁷ A school board recruits and employs teachers to impart to pupils the curriculum the board has designated, and assignment of teachers and pupils to schoolhouses and classrooms typically is performed by the school board and its high level staff.²⁸ Communications between pupil and teacher are institutional, not privileged.²⁹ The principal duty of a teacher is to obey his employer, his principal, and other supervisors his employer designates.³⁰

School teachers are often young themselves, and their preparation, a normal school diploma or an education "major" from a college, is not typically challenging.³¹ Citizens expect good character, kindness, literate-

for their benefit, of that part of the governmental function committed to them.

Id. at 314, 106 N.E. at 280.

23. See generally *Bissell v. Davison*, 65 Conn. 183, 32 A. 348 (1894); *Fogg v. Board of Educ.*, 76 N.H. 296, 82 A. 173 (1912).

24. See, e.g., *Lee v. Board of Educ.*, 234 Ill. App. 141 (1924); *Ransom v. Rutherford County*, 123 Tenn. 1, 130 S.W. 1057 (1909); *Newman v. Schlarb*, 184 Wash. 147, 50 P.2d 36 (1935).

25. See *Pierce v. Board of Educ.*, 69 Ill. 2d 89, 370 N.E.2d 535 (1977) (state education agency and local school boards are required to maintain a "system").

26. See generally *Karpelian v. Texas Woman's Univ.*, 509 F.2d 133 (5th Cir. 1975); *Brubaker v. Board of Educ.*, 502 F.2d 973 (7th Cir. 1974), *cert. denied*, 421 U.S. 965 (1975); *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973); *Adams v. Campbell County School Dist.*, 511 F.2d 1242 (10th Cir. 1975); *Hibbs v. Board of Educ.*, 392 F. Supp. 1202 (N.D. Iowa 1975).

27. See, e.g., *Palmer v. Board of Educ.*, 603 F.2d 1271 (7th Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980).

28. A board of education acts in a governmental capacity in employing and assigning teachers. *Norwalk Teachers' Ass'n v. Board of Educ.*, 138 Conn. 269, 83 A.2d 482 (1951).

29. See *Van Allen v. McCleary*, 27 Misc. 2d 81, 211 N.Y.S.2d 501 (Sup. Ct. 1961); Family Educational and Privacy Rights Act of 1974, 20 U.S.C.A. § 1232g (1978 & Cum. Supp. 1980).

30. See, e.g., ILL. ANN. STAT. ch. 122, §§ 2-3.25, 3-14.6 (Smith-Hurd 1961 & Cum. Supp. 1980).

31. Professor Elson, citing sociologists of education, calls teacher preparation intellectually "shallow." Elson, *supra* note 4, at 730.

ness, and a small bit of enthusiasm from teachers, but do not expect discretion in matters of educational strategy.³² One court explained this sentiment when it said:

The secondary school . . . acts *in loco parentis* with respect to minors. . . . Some teachers and most students have limited intellectual and emotional maturity. Most parents, students, school boards, and members of the community usually expect the secondary school to concentrate on transmitting basic information, teaching "the best that is known and thought in the world," training by established techniques, and, to some extent at least, indoctrinating in the *mores* of the surrounding society.³³

The role of a teacher is important, even critical. But it is not professional in the sense intended by the law of malpractice. It is not a learned profession.³⁴ It is governed by hierarchical bureaucracies and not by the profession itself.³⁵ 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.³⁶ The role of a teacher is not to participate in consensual

32. The surveys Elson cites indicate that most parents regard public school teachers as only a little more knowledgeable than others about child development and educational practices. *Id.*

33. *Mailloux v. Kiley*, 323 F. Supp. 1387, 1392 (D. Mass.), *aff'd per curiam*, 448 F.2d 1242 (1st Cir. 1971).

34. In American social science literature, publishers and academics typically organize the study of professions within the scope of sociology. Among other aspects of work, sociologists study: (1) demographic characteristics of memberships, (2) associations between occupation and prevailing general character and values of members, and (3) the pattern of recurring relations and methods the work itself contains. This Article is concerned with the latter collection of matters which may be called the criteria of professional work, in essence, the job description of a professional. This grouping is particularly relevant because the law of negligence is concerned with the outward conduct or behavior of persons in concrete instances, and not with their childhood origins, personalities, or behavior generally.

Reading the sources cited by Elson, *supra* note 4, leads the author, upon reflection, to conclude that there exist some 13 earmarks of a profession and that school teaching manifests none of them except the first, which it displays to excess. Further analysis is left to the reader. The 13 earmarks of a profession are these: practical applications, intellectual methods, extensive preparation, autonomous performance, self regulation, articulate principles, acute tasks, atomistic organization, discreet style, public reliance, collegial deliberations, fiduciary relations, and legal responsibility.

35. This is especially true of large, urban school systems. *See, e.g., ILL. ANN. STAT. ch. 122, §§ 34-7, 18* (Smith-Hurd 1961 & Cum. Supp. 1980-1981). For a helpful analysis of the unavoidable conflict between hierarchical control of schools and the attributes of professional work, see R. CORWIN, *A SOCIOLOGY OF EDUCATION* 277-78 (1965).

36. No one suggests that public school teacher and pupil is a fiduciary relationship like that of attorney and client or physician and patient. Trust and confidence are the essence of the attorney-client relationship. 7 AM. JUR. 2d *Attorneys at Law* § 119 (1980). Trust and confidence are also important aspects of the physician-patient relationship. 61 AM. JUR. 2d *Physicians, Surgeons, and Other Healers* § 100 (1972). In contrast, teachers are often, like constables, keepers of public peace and enforcers of mandatory attendance laws. *See ILL. ANN. STAT. ch. 122, §§ 26-9, 34-84a* (Smith-Hurd 1961 & Cum. Supp. 1980-1981).

relationships with pupils;³⁷ the duty of a teacher is to follow the orders of superiors. It would be unfair to submit a teacher to malpractice liability given such a role.³⁸ But suing school boards instead of teachers is even worse.

The gist of such a claim would invariably implicate some criticism of the plans, methods, organization, or supervision of the school, *i.e.*, a systematic factor.³⁹ In other words, creation of a tort of educational malpractice necessarily will produce litigation before juries regarding questions of good government or good school management. Such issues are for public political resolution in school board elections by the electorate at large, and are not suited to potentially conflicting resolutions by ad hoc panels of no more than twelve citizens. If an expectation of good government is a right in any sense, it is a general political right whose source is citizenship.

By contrast, the source of a malpractice right lies in a consensual relationship between a layman and a learned, independent, and skilled professional who exercises individual discretion to ameliorate a particular private condition or accomplish a particular private task. The law requires reasonable prudence by the professional and makes want of such care actionable in the tort of malpractice. The motives of the tort are the unique expectations that come from such a special relationship and the consensual element by which the layman chooses one professional and thus, at least for a time, practically forgoes the opportunity to attend another. Also motivating the tort is the typical obligation of the layman to pay a separately identified fee for special attention to his case, condition, or objective.

Neither public school teachers nor public school boards perform any similar function. Rather, they are tax-supported governmental institutions and their governmental function will suffer if the courts create a tort of educational malpractice because such a tort would require school boards to select curricula, methods, and budgets in a manner which is the easiest or cheapest to defend in a multitude of vexatious and potentially inconsistent trials. School policies motivated by avoidance of such litigation are

37. One author has pointed out that in institutionalized education in advanced societies pupils are taught by "strangers." S. KIMBALL, *supra* note 11, at 16. It can certainly be argued that teachers in departmentalized schools remain strangers to their pupils throughout the school year. This is inconsistent with the usual justification for liability in malpractice—an undertaking to use special ability in a voluntary, one-to-one relationship. 2 F. HARPER & F. JAMES, *supra* note 2, § 16.6, at 918; W. PROSSER, *supra* note 2, at 165.

38. Like other public employees, teachers must act in the circumstances given to them and are not free to decline a case or refuse a patient. 2 F. HARPER & F. JAMES, *supra* note 2, § 29.9, at 1635. Moreover, absent a statute authorizing indemnity by the public employer, a public school teacher, unlike a servant of a private firm, would have little opportunity to seek indemnification from her employer even in a sympathetic case. *Id.*

39. When indemnity is possible, then either the principal suit or a third party action by the public school teacher defendant will nearly always call official school plans and programs into question, thus making the state or its school board subdivision the real defendant. *Id.* § 29.9, at 1634-36.

likely to be unresponsive to the will of the entire community. The selection of means motivated by avoidance of verdicts is unlikely to coincide with methods best calculated to fulfill the discretionary, societal, civilizing, and governmental functions of local public schools. To acknowledge or create a tort of educational malpractice is to deny both the need for positive government and the value of representative government.

C. *The Curriculum*

An incisive way to ascertain the objective of a school is to inspect its program of studies or curriculum. Curricula are not left solely to local choice, much less to the choice of parent or pupil. Legislatures mandate a great part of what is taught and recently have been active in reinforcing prior requirements and conventional expectations.⁴⁰ A not untypical program prescribes inculcation in pupils of the following traits beneficial to society: good citizenship and obedience to the law, adjustment to economic roles in a mixed free enterprise system, resource conservation, safety on the highway and elsewhere, hygiene, commitment to representative government, poise, good posture, cooperation with the law, patriotism, sociability, and skill in using the English language to write and speak.⁴¹

This control over public school curricula is a matter of discretion virtually impenetrable even to first amendment attack.⁴² This curricular power is ultimately enforced by compulsory attendance laws which significantly extend the operation of mandated curricula to private schools by the typical equivalency clauses in attendance laws.⁴³ Besides banding

40. Some instruction about the United States Constitution and American institutions is mandated in every state. 8 THE ENCYCLOPEDIA OF EDUCATION 281-82 (1971). Besides the Constitution, the subjects most frequently mandated are the "three R's," followed by grammar, penmanship, spelling, and social studies, where civics, race relations, and North American geography are prominent. The next most frequent topic is hygiene, including now frequent mandates to teach about the harm of drugs, alcohol, and tobacco. Physical science and physical education are next, followed by American history. The fine arts, which usually mean vocal music and drawing, are sometimes mandated, as are nature study, agriculture, and a foreign language. Consumer and sex education courses are also becoming required. Humanities, history other than American history, most fine arts, mathematics beyond arithmetic, and biological science beyond "health" are hardly ever mandated. THE COURTS AND EDUCATION—THE SEVENTY-SEVENTH YEARBOOK OF THE NATIONAL SOCIETY FOR THE STUDY OF EDUCATION 142-45 (C. Hooker ed. 1978). See generally Edelman, *Basic American*, 6 NOLPE SCH. L.J. 83 (1976).

41. ILL. ANN. STAT. ch. 122, §§ 27-1 to -21 (Smith-Hurd 1961 & Cum. Supp. 1980-1981).

42. See cases cited notes 26 & 27 *supra*. The general failure of parents to win exemption for their children from mandatory subjects is outlined in THE COURTS AND EDUCATION—THE SEVENTY-SEVENTH YEARBOOK OF THE NATIONAL SOCIETY FOR THE STUDY OF EDUCATION 148-59 (C. Hooker ed. 1978), which also outlines the parental victories in cases attacking mandatory prayer and Bible reading.

43. The argument for narrow substantive due process limits on legislative power to designate programs for private schools was revitalized with the dicta in *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925), to the effect that the state may require certain studies plainly essential to good citizenship but may not standardize all pupils, *noted with approval in Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972). See also *Farrington v. Tokushige*, 273 U.S. 284 (1927); *Meyer v.*

together with others to form an "equivalent" private school, the only escape well recognized before 1972 was silent nonparticipation during passive attendance in ceremonial activities repugnant to one's religion.⁴⁴ But in 1972 in *Wisconsin v. Yoder*,⁴⁵ the United States Supreme Court created a privilege of nonattendance for dissenting pupils older than age fourteen who are motivated by religion in the conventional sense.⁴⁶ The power to legislate curricula, however, overpowers first amendment claims of non-conforming teachers whose dissent is not protected⁴⁷ even when motivated by religion.⁴⁸ Overall, the right of the legislature to designate the program of studies for the public schools of its state is a right rarely questioned.⁴⁹

The relationship of legislatively prescribed curricula to malpractice should be apparent. If the service performed by teachers in public schools is a governmental exercise to which unwilling pupils of unwilling parents may be subjected under sanction of punishment, then how meaningful is it to speak of instruction as a profession or trade service, negligence in which should be actionable? The question is comparable to an inquiry whether a counselor or jailer in a prison organized on a rehabilitative model should be answerable in damages to an unreformed prisoner.

D. *Handicapped Pupils and Public Purpose*

There is no good reason to suppose that legislatures or state constitutional conventions have intended ultimate curricular objectives for handicapped pupils to be different from general objectives in a way which would change the role of pupil and school. Indeed, where differences are stated, they typically emphasize the needs of society more, not less, including the containment of relief roles and integration into regular classes.⁵⁰

Nebraska, 262 U.S. 390 (1923). The *Meyer* opinion, however, notes that substantive due process principles do not imply any limit on the power of a state to prescribe curricula for schools it supports. *Id.* at 402. One authority which has analyzed this series of cases has pointed out that recently courts have not had to weigh non-religious philosophical dissent against state prerogatives. THE COURTS AND EDUCATION—THE SEVENTY-SEVENTH YEARBOOK OF THE NATIONAL SOCIETY FOR THE STUDY OF EDUCATION 130-38 (C. Hooker ed. 1978).

44. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

45. 406 U.S. 205 (1972).

46. *Id.* at 219-20, 228-29.

47. See *Mailloux v. Kiley*, 323 F. Supp. 1387, 1392 (D. Mass.), *aff'd per curiam*, 448 F.2d 1242 (1st Cir. 1971).

48. *Palmer v. Board of Educ.*, 603 F.2d 1271, 1274 (7th Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980).

49. The United States Supreme Court is convinced of the "undoubted right to prescribe the curriculum for its public schools" held by each state legislature. *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968). The *Epperson* decision affirmed state court decisions which had invalidated a law making teaching of evolutionary theories a misdemeanor.

50. For economic reasons alone a state cannot afford to abandon efforts to educate all children because experience has taught that it costs more to support a few ignorant persons or to control a few vicious persons than to educate many. See *Yale v. West Middle School Dist.*, 59 Conn. 489, 492, 22 A. 295, 296 (1890).

E. Nonjusticiable Standards and Indeterminate Causes

There are two barriers to educational torts which are often mentioned⁵¹ but less compelling than the governmental considerations to refrain from such a tort. The first is undefined standards. Educators cannot agree which educational practices are good or bad.⁵² A fortiori, the courts lack competence or conceptual resources to formulate standards⁵³ when teachers and researchers themselves cannot devise yardsticks by which to measure school methods. The second barrier often given is that causes of educational outcomes are complicated and indeterminate.

A problem perhaps even more impenetrable to adjudication is causation.⁵⁴ The sources of failure and differences in pupil achievement are what the United States Court of Appeals for the District of Columbia has called a "sea of factual contentions."⁵⁵ In any particular case, causation is even more problematic than general research conclusions about sources of school achievement or failure.⁵⁶ In one word, the merit of an educational malpractice claim is nonjusticiable.

There are, however, limits to this theory. See notes 59-61 and accompanying text *infra*. A contrary theory is the handicapped-child-centered approach. For example, compulsory attendance laws were used to imply a substantive right to special education in *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972). The court noted that the absence of any express exemption of handicapped pupils and their parents from attendance laws and correlative criminal sanctions presupposes a legislative intent to provide handicapped pupils with some instruction congenial to them. The author disagrees. Attendance laws are enactments for society and do not create substantive rights of individuals. As to the argument regarding sanctions, proof of presentation of the child to school authorities and exclusion by them would constitute a defense to a criminal prosecution. In any event, prosecution is unlikely since the school authorities themselves usually stimulate charges of the type in question, and in many locales, actually prosecute the cases.

51. See notes 4-7 and accompanying text *supra*.

52. See note 7 *supra*. See also J. DEWEY, *THE SOURCES OF A SCIENCE OF EDUCATION* 76-77 (1929); NATIONAL ACADEMY OF EDUCATION, *RESEARCH FOR TOMORROW'S SCHOOLS: DISCIPLINED INQUIRY FOR EDUCATION* 48 (1969); J. Coleman, *Methodological Principles Governing Policy Research in Social Sciences* 5 (Dec., 1972) (paper presented to meeting of the American Association for the Advancement of Science, Washington, D.C.), noted in W. COOLEY & P. LOHNES, *EVALUATION RESEARCH IN EDUCATION* 342-44 (1976).

53. See Moynihan, *The Courts and Social Science*, 54 *PUBLIC INTEREST* 12, 17 (1979) (noting that social science is labile in the extreme, tentative, unstable, and beset with variables so complex that it cannot usually predict behavior). See also *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd per curiam sub nom. McInnis v. Ogilvie*, 394 U.S. 322 (1969).

54. The concurrence in *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 445-46, 391 N.E.2d 1352, 1355, 418 N.Y.S.2d 375, 378-79 (1979) (Wachtler, J., concurring), notes that the "practical impossibility" of proving that alleged malpractice proximately caused a learning deficiency is the most fundamental objection to educational malpractice cases. See also Elson, *supra* note 4, at 746-54 (an optimistic view as to how further research might someday make proof of causation possible, but conceding the present impossibility of proving causation).

55. *Smuck v. Hobson*, 408 F.2d 175, 188 (D.C. Cir. 1969).

56. During the course of a public school career a pupil will experience a substantial number of elementary, junior high, and high school teachers. Assuming only moderate teacher turnover and infrequent residential movement by the

Federal law concerning the handicapped is no different. It defines special education to be special "instruction" and services which support "instruction" and which facilitate maximum exposure to and participation within the regular program by handicapped pupils.⁵⁷ Title 45, sections 121a.550-556 of the Code of Federal Regulations⁵⁸ restate the goal of integration into typical school experiences.⁵⁹ What these authorities imply is that the role of a special education teacher no more supports a tort of malpractice than does that of a regular teacher. Indeed, there are inevitable organizational difficulties with providing special education which weigh even more heavily against such a tort in the case of education for the handicapped.⁶⁰ Additionally, the nonjusticiability of standards and indeterminateness of causation become more acute in attempting to support a special education malpractice claim.

Regarding nonjusticiability, handicapped education is more tentative and labile than education generally. The state of the arts of psychology, teaching, and physiology has not enabled special educators accurately to diagnose causes of learning problems, much less to prescribe instructional strategies.⁶¹ But supporting a causal relationship for a handicapped student's malpractice claim is even more troublesome.

If causation of handicaps is problematic, alleged causation of handicap aggravation by misfeasance is even more so. Despite an explosive growth in research for special education over the last quarter century, handicapped pupils have experienced few significant gains from special instruction or curricula.⁶² There exists in the case of profound or complex handicaps the real possibility that even huge increases in instructional skill, manpower, and other "inputs" would not have produced any measurable increase in achievement or output. This unhappy fact makes malpractice actions especially inappropriate in special education. Such a tort might invite some juries to disregard the element of causation and provide a welfare payment or sympathy verdict to a handicapped person, not

pupil, a would-be plaintiff will encounter three or four dozen instructors in various schools. The prospect of multiparty litigation among different schools in different locales about "who caused what" would lead any sensible citizen to oppose the whole idea of educational malpractice litigation. Some of these multiple defendants would be new teachers who are not effective, but are trying to improve; some would be old-timers past their prime who once had more energy. See 2 F. HARPER & F. JAMES, *supra* note 2, § 16.6, for a discussion of the problem of beginners and the concept of average skill.

57. 20 U.S.C. § 1401(16)-(17) (1976).

58. (1979).

59. To give an example applicable to one handicap, 20 U.S.C. § 1451 (1976), authorizes grants and loans of materials for deaf education designed to bring deaf pupils into "better touch with the realities of their environment" by showing them materials important to "the general and cultural advancement of hearing persons."

60. See generally Milofsky, *Why Special Education Isn't Special*, 44 HARV. EDUC. REV. 437 (1974).

61. *Id.* at 438.

62. *Id.* at 438-39. See generally R. MACKIE, SPECIAL EDUCATION IN THE UNITED STATES: STATISTICS, 1948-1966 (1969).

because the defendant school caused him harm, but because it could do little for him to begin with. The tendency of such sympathy to convert educational appropriations of public money from intended school purposes to welfare grants is a serious jeopardy. If, as a people, we should support unfortunate persons more generously and appropriate correspondingly less resources to governmental alternatives such as the public schools, then let us do so by evaluation of competing claims for money in the legislative process and not by creating a new tort.

F. *Volunteers, Promisors, Warrantors,
and Similar Roles*

In cases which recognize contractual rights of students,⁶³ defendants have typically been colleges, usually private colleges, and the claims have been for damages for refusal to promote or graduate and not for want of knowledge imparted.⁶⁴ The position of an elementary or secondary pupil in a public school is different from that of a college student. Neither consideration nor detrimental reliance exists to support claims of the former because attendance is mandated and free. Public schools impose requirements,⁶⁵ but do not make promises or warranties. Nor do public schools make representations of fact on which pupils or parents could reasonably rely even if they had the means to choose alternatives which would make reliance real.⁶⁶

Not only do schools fail to make promises to students, but neither do school officials volunteer to instruct.⁶⁷ They legitimately present instruction as an act of local government. Instructional activity is unlike that of rescuers, safety inspectors, or similar volunteers. School activity operates nearly continuously for over thirteen years, rather than in separate episodes, and failure is manifested more or less steadily, not suddenly. Thus,

63. See, e.g., cases collected in 15A AM. JUR. 2d *Colleges and Universities* § 31, at 293 n.67 (1976).

64. Under a contractual theory, the plaintiff challenged the content and value of a course for which tuition had been collected in *Zumbrum v. University of S. Cal.*, 25 Cal. App. 3d 1, 11, 101 Cal. Rptr. 499, 505 (1972), but the court found it unnecessary to decide the issue.

65. See notes 27 & 28 and accompanying text *supra*.

66. In *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 827-28, 131 Cal. Rptr. 854, 863 (1976), the court rejected an argument based on representations and promises of several teachers, and noted that poverty makes choice of schools by most claimants an illusion, rendering "reliance" by virtue of enrollment in a public school a figment also. Principles of public contract law corroborate the point in that they closely limit claims based either on promises or representations of public servants whose limited authority to make warranties and promises shields the public from liability for their inaccurate statements. "Puffing" by a school teacher of his subject or class is commonplace boasting, and it is only the most unwise of parents who trusts it without inspection.

67. The *Peter W.* court rejected the argument that school officials voluntarily assume a duty to exercise care in instruction, and distinguished imposition of a duty upon teachers and schools to guard against physical harm to pupils where liability is based upon a statute and not on common law liability of volunteers. *Id.* at 820-21, 131 Cal. Rptr. at 858.

the classical theory of tort liability of a volunteer would fail even for a free academy: its actions do not lull plaintiffs away from alternative sources of services before it is too late, and do not inhibit or deter more efficient operators.

III. STATE SCHOOL CODES

Neither general articles nor special education articles of state statutes are intended to create private causes of action for ineffective instruction. They tend to read like intergovernmental rules with state control evident.⁶⁸ Nor is there cause to believe that Congress intended to change this situation.

IV. FEDERAL GRANT-IN-AID STATUTES

A. *Private Right or Not*

1. Rehabilitation Act and Title VI

Section 504 of the Rehabilitation Act of 1973⁶⁹ is part of a grant-in-aid statute between sovereigns. The detailed provisions of the Act indicate no intent to create a private right. On the contrary, it creates elaborate administrative compliance, audit, and adjudicatory enforcement mechanisms. Section 721(b)⁷⁰ provides for an administrative trial, while section 721(d)⁷¹ provides for judicial review by federal courts of appeals. There is no provision for private suit in a federal district court or state court. That is not the purpose of the Act.

The purpose of the Rehabilitation Act of 1973 is to provide grants-in-aid and the regulation thereof. The statute creates no express private right, and none is required to accomplish the purpose of extending a grant-in-aid. The usual rule of statutory construction is that remedial consequences are implied only if necessary or essential to accomplish legislative purposes.⁷² The existence of administrative enforcement machinery makes private suits unnecessary. The machinery is outlined in title 45, section 84.61 of the Code of Federal Regulations,⁷³ which incorporates by reference the procedures HEW uses to enforce Title VI.⁷⁴ The background information to those regulations, promulgated pursuant to section 504 of the Rehabilitation Act,⁷⁵ notes that "[t]he language of Section 504 is almost identical to the comparable nondiscrimination provision of Title

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

69. 29 U.S.C. § 794 (Supp. II 1978).

70. 29 U.S.C. § 721(b) (Supp. II 1978).

71. 29 U.S.C. § 721(d) (Supp. II 1978).

72. 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 55.03 (4th ed. 1973).

73. (1979).

74. 45 C.F.R. §§ 80.6-10, 18.1-131 (1979).

75. 29 U.S.C. § 794 (Supp. II 1978).

VI of the Civil Rights Act of 1964"⁷⁶ There is a strong segment of legal opinion which believes that the Civil Rights Act⁷⁷ does not create a private right of action.⁷⁸

A recent case has construed Title VI as not creating a private claim in the public education setting. In *Coates v. Illinois State Board of Education*,⁷⁹ the United States Court of Appeals for the Seventh Circuit expressed the view that Title VI does not create a private cause of action to compel affirmative action in public education and expressed doubt that Title VI creates any private action to review educational administration. The Supreme Court of the United States has never decided the issue.⁸⁰

In the absence of a definitive Supreme Court ruling, the *Coates* opinion is strong authority supporting the conclusion that in the Rehabilitation Act, Congress intended to create no private cause of action because the language of Title VI construed in *Coates* is similar to the language of section 504. Moreover, construction of section 504 of the Rehabilitation Act not to create a private right is consistent with the general character and other provisions of the Act. Like the Education for All Handicapped Children Act,⁸¹ it is a grant-in-aid statute which provides for administrative procedures and intentionally does not provide for private suits in court.

Although the trial court in *Lloyd v. Regional Transportation Authority* had construed the Rehabilitation Act not to create a private right, the United States Court of Appeals for the Seventh Circuit reversed,⁸² even though it acknowledged the similarity of language between Title VI and the Act. The specific rationale for the decision was the nonexistence of administrative remedies. The case involved bus design, not education, and rested in part upon the Urban Mass Transportation Act.⁸³ Since the time of that decision, elaborate and detailed regulations for enforcement of the Rehabilitation Act in education have taken effect. Moreover, other overlapping statutes and regulations exist in the educational field to protect pupils and provide administrative remedies. For that reason, the rationale

76. 42 Fed. Reg. 22,676 (1977).

77. 42 U.S.C. §§ 2000d to 2000d-6 (1976).

78. A leading commentator has suggested that the existence of a private right under Title VI is not established. C. ANTEAU, FEDERAL CIVIL RIGHTS ACTS § 138 (1971). *But see id.* (Cum. Supp. 1979). The better rule emerging is that a private right to sue is absent unless the continuation of the federal assistance adversely affects the particular plaintiff. For a collection of Title VI cases in areas outside education, see 15 AM. JUR. 2d *Civil Rights* § 93 (1976). For a collection of Title VI cases in which suit was brought by private persons for educational wrongs, see *id.* § 96.

79. 559 F.2d 445, 449 (7th Cir. 1977).

80. *See, e.g.,* *Lau v. Nichols*, 414 U.S. 563 (1974) (the standing of plaintiffs who alleged violations of the equal protection clause and Title VI was not raised, tried, or reviewed).

81. 20 U.S.C. §§ 1401-1461 (1976 & Supp. II 1978).

82. 548 F.2d 1277 (7th Cir. 1977).

83. 49 U.S.C. §§ 1601-1618 (1976 & Supp. II 1978).

in *Lloyd* applied to education dictates that there is no room for a private right of pupils under the Rehabilitation Act, given the wealth of administrative remedies which now exist.

The most authoritative court to consider the existence of a private right under the Rehabilitation Act in an educational setting followed the logic of *Lloyd* and hesitantly concluded that a right existed.⁸⁴ But subsequent regulations and enforcement activity by HEW led another court in the Second Circuit to reach the opposite conclusion using the same logic one year later.⁸⁵ The United States District Court for the Southern District of New York distinguished the earlier cases⁸⁶ as resting on the previous hiatus or delay in agency activity. The view that the Rehabilitation Act creates a private right has been rendered obsolete by virtue of HEW's vigorous enforcement activities.

The view that a private right exists is untenable for a number of other reasons. One is that the inference of a private cause of action would produce anomalous results: school districts receiving no federal funds would not be liable to private suit, while those receiving such funds would be liable to private suits involving amounts which in principle could exceed the amount of federal aid. Courts should not construe statutes so as to produce such anomalous and unreasonable results. A second reason is congressional silence. Since Congress has often created express private rights in civil rights laws, one should assume that Congress is not inadvertent in drafting important statutes. Thus, its silence in the statutes under discussion indicates an intent to create no private right. Nor are these the only reasons. Courts should not read section 504 of the Rehabilitation Act alone. The intent of Congress in section 504 as it relates to education is discovered by examining the educational statutes creating the federally assisted programs in question. This is no more than the familiar principle that statutes should be construed *in pari materia*. One such statute to be construed *in pari materia* is the Education for All Handicapped Children Act.⁸⁷

2. Education for All Handicapped Children Act

Administration and enforcement of the Act by HEW is described in the Code of Federal Regulations.⁸⁸ That statute, so administered, creates no private cause of action for damages. Had Congress intended such a right it would have expressed it. The omission cannot have been inadvertent but must have been intentional because a separate section of the statute addresses the question of procedural remedies of pupils and par-

84. *Kampmeier v. Nyquist*, 553 F.2d 296, 299 (2d Cir. 1977).

85. *Doe v. New York Univ.*, 442 F. Supp. 522 (S.D.N.Y. 1978). One case which the *Doe* court distinguished, *Crawford v. University of N.C.*, 440 F. Supp. 1047 (M.D.N.C. 1977), had found a private right, but deferred final ruling to await action by HEW, which was still in a start-up phase in enforcing the Act.

86. 442 F. Supp. at 523.

87. 20 U.S.C. §§ 1401-1461 (1976 & Supp. II 1978).

88. 45 C.F.R. §§ 121a.1-754 (1979).

ents, including limited judicial review of administrative actions.⁸⁹ That section and the implementing regulations provide for case by case local administrative due process hearings, omit independent judicial remedies, and leave no room for implication of any right to sue for monetary damages.⁹⁰

The intention to create no private cause of action is expressed in other ways as well. The statute creates two tiers of administrative oversight. At one point Congress requires state enforcement,⁹¹ and later provides for administrative hearings between state and local agencies.⁹² Then, 20 U.S.C. § 1416⁹³ provides for federal administrative adjudication between HEW and recipients with review by the federal courts of appeals. Administrative litigation, however, is not the only apparatus.

The implementing regulations require the state to take note of the outcome of individual due process hearing decisions,⁹⁴ and require the state to provide opportunities for public comment on handicapped education in the state.⁹⁵ Thus, aggrieved persons may try their particular cases before hearing officers and may report to the state any general failures they believe their case represents. They may seek judicial review of administrative adjudications but may not file independent suits or sue for money damages.

A well-reasoned authority supporting the argument that Congress did not intend a private cause of action for money damages in the Education for All Handicapped Children Act is *Loughran v. Flanders*.⁹⁶ In *Loughran*, the plaintiff sued for monetary and injunctive relief. The school had de-

89. 20 U.S.C. § 1415 (1976). See *Eberle v. Board of Public Educ.*, 444 F. Supp. 41 (W.D. Pa. 1977), *aff'd mem.*, 582 F.2d 1274 (3d Cir. 1978), which indicates that the statute and accompanying regulations allow courts to review hearing records to assure compliance with administrative procedures, but do not allow the consideration of substantive educational questions *de novo*.

90. 20 U.S.C. § 1415 (1976).

91. 20 U.S.C. § 1412(5)-(7) (1976).

92. 20 U.S.C. § 1413(a)(8) (1976).

93. (1976).

94. 45 C.F.R. § 121a.193(c) (1979).

95. 45 C.F.R. § 121a.120 (1979).

96. 470 F. Supp. 110 (D. Conn. 1979). *But cf.* *Howard S. v. Friendswood Independent School Dist.*, 454 F. Supp. 634 (S.D. Tex. 1978) (court ordered a district to assume and pay private school tuition which had accrued from the time the impasse between parent and school district had developed until the court ordered the district to comply with the statute and plan for the pupil; the monetary order, however, was properly viewed as an incidental part of equitable relief). In *Loughran*, equitable issues had become moot. But in another case litigated in the district court, equitable issues were not moot and the judge granted plaintiff equitable relief from expulsion on account of behavior supposedly produced by his handicap. *Stuart v. Nappi*, 443 F. Supp. 1235 (D. Conn. 1978). This Article reasons against creation of a tort of special education malpractice which might lead to a money judgment for consequential damages. Left to another forum is the question of a private cause of action for equitable relief. Suffice it to say that the author dissents from construction of grant-in-aid statutes to create such rights to equitable relief. The reader is left to decide how many of the reasons given to oppose availability of monetary relief apply as well to the issue of availability of equitable relief to private litigants alleging noncompliance with a condition of a grant-in-aid.

vised a plan and begun special instruction before trial. The equitable issues having become moot, the United States District Court for the District of Connecticut addressed damages. It noted that the suit was, in effect, a suit for special education malpractice. The judge dismissed the damages count and concluded that the statute created no private right. The court offered five principal reasons for its decision. First, it found that the purpose of the Act and its predecessor statutes was the regulation of grants-in-aid and not the creation of a private right.⁹⁷ Second, the district court found no suggestion in committee reports or other legislative history that Congress intended such a right.⁹⁸ Third, recognition of such a claim would conflict with the scheme of the Act.⁹⁹ Besides conflicting with administrative procedures, the court found that damages litigation would contradict those parts of the Act which encourage local planning, research, and innovation—what the judge called the “catalytic” aspects of the law.¹⁰⁰ The court perceived that recognition of such claims would produce a tendency to make insulation from damages the primary goal of local planners. The fourth reason for dismissing the damages claim was tradition.¹⁰¹ The court noted that damage actions are usually created by state legislatures or courts and not by Congress. The fifth reason for not recognizing the claim was its nonjusticiability.¹⁰² In the judge’s opinion, special education methodology presents a “‘myriad of intractable economic, social, and even philosophical problems.’”¹⁰³

Current United States Supreme Court interpretations of other statutes support these conclusions. The trend of Supreme Court decisions in the last five years demonstrates an unwillingness to infer causes of action unexpressed by a statute. The recent cases were collected by Justice Stevens in a footnote to his opinion in *Cannon v. University of Chicago*.¹⁰⁴ In *Cannon*, Justice Stevens referred to the “recent” policy of the Court as a “strict approach” against inference of private rights.¹⁰⁵ The recent cases include well-publicized litigations which began before the enactments upon which the plaintiff in *Cannon* relied.¹⁰⁶

97. 470 F. Supp. at 113.

98. *Id.* at 114.

99. *Id.* at 115.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* (citing *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 42 (1972)).
See also *Dandridge v. Williams*, 397 U.S. 471, 487 (1970).

104. 441 U.S. 677, 690 n.13 (1979).

105. 441 U.S. at 698.

106. See *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977) (no private cause of action by injured investors implied from § 14(e) of the Securities Exchange Act of 1934); *Cort v. Ash*, 422 U.S. 66 (1975) (no private cause of action under an election finance reform law); *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975) (receiver of failed broker had no cause of action against corporation under Securities Investors Protection Act of 1970 on behalf of damaged customers of defunct firm); *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453 (1974) (no private cause of action implied under act designating services Amtrak must provide).

The exception to the recent decisions is *Cannon* itself, which the opinion characterized as "atypical."¹⁰⁷ Justice Stevens acknowledged that the courts themselves created a false sense of certainty about issues which were actually problematic and unusually controversial. That is, the lower courts in 1972 had created an "impression" among congressmen about the implication of private rights.¹⁰⁸ The Court reasoned that it should make a one-time exception to its present policy of nonimplication because the "legal context" in 1972 at the time of enactment of the statute implicated in *Cannon*, bore upon the intent of Congress at that time.¹⁰⁹

The opinion stressed that the issue was the intent of Congress in 1972 in enacting the particular Act in question and not the intent at other times motivating other statutes and, in particular, not the intent of Congress eight years earlier when the Civil Rights Act of 1964¹¹⁰ passed.¹¹¹ The Court suggested that the "impression" Congress had of the lower courts' "legal context" opinions was erroneous and that the lower court cases upon which Congress relied either did not address issues Congress thought they settled or settled them on bases different from what Congress supposed.¹¹² But today, when a court ascertains congressional intent in 1972, even erroneous impressions of the persons whose intent is investigated are relevant. The Court limited the effect of prior lower court cases construing Civil Rights legislation to this peculiar use of ascertaining later legislative intent. Two essential rationale of such use of lower court cases were the great amount of reliance by members of Congress on the lower court cases and the persistence of lower court assumptions about the implication of private rights.¹¹³ But the opinion noted that those assumptions were challenged after enactment of the *Cannon* statute.¹¹⁴ Hence, the supposition is that the reasoning in the *Cannon* opinion of congressional reliance on unexamined judicial assumptions will fail for enactments after 1972.

3. Construction of Other Statutes

The trend of recent case law destroys the rationale of congressional reliance because in visible 1971-1972 federal court litigation, including cases with agencies of the federal government or federal corporations, elements of the bar noisily attacked the notion of implied rights. Beginning in 1974, the United States Supreme Court adopted many of these arguments against implication. Much of this antedated the Rehabilitation Act,¹¹⁵ and nearly all of it antedated the Education for All Handicapped

107. 441 U.S. at 717.

108. *Id.* at 710-11.

109. *Id.* at 698-99.

110. 42 U.S.C. §§ 2000d to 2000d-6 (1976).

111. 441 U.S. at 710-11.

112. *Id.* at 696-98.

113. *Id.* at 696.

114. *Id.* at 696-98.

115. 29 U.S.C. §§ 701-796i (1976 & Supp. II 1978).

Children Act, which passed in late 1975 and did not become fully effective until September 1, 1978.¹¹⁶ By way of notifying Congress, the bar, and the public that its acquiescence in uncritical congressional reliance upon possibly mistaken lower court opinions is now over, the Court noted that it has never ruled upon the question whether private rights arise from grant-in-aid statutes with language like that in the statutes now under discussion.¹¹⁷

Where congressional silence is not attributable to its confusion about judicial construction of prior laws, then the Supreme Court will not imply a private cause of action even in a so-called "civil rights" statute.¹¹⁸ This suggests the likelihood that the Court will not infer creation of private causes either in Title VI of the 1964 Civil Rights Act,¹¹⁹ which passed before unanalyzed judicial assumptions and conflicting judicial interpretations regarding implied private rights were made, or in grant-in-aid clauses passed in 1973 and 1975 after comparable assumptions and interpretations concerning other statutes had come before courts for close analysis and intense litigation as separate points destined for Supreme Court adjudication. An express warning to the Congress and the bar occurred in *Cannon*, when the Court admonished that express provision for private causes where intended is the better course and is the indication the Court will seek.¹²⁰ As the concurrence of Justice Rehnquist put it, the *Cannon* decision apprised Congress "that the ball, so to speak, may well now be in its court."¹²¹

The Supreme Court's analysis of these statutes is especially germane to education. The intent of Congress in each of them is evidence of legislative intent in all. The most reasonable construction of the statutes is that none of them creates any private cause of action for damages. Congress intended none. All are grant-in-aid statutes which carry conditional provisions. But these grants and conditions are between the federal government and the member states and are no legitimate cause for private suit by a private party. In a nutshell, these statutes constitute "a matter between two sovereign powers, and one which private parties cannot bring into discussion."¹²²

116. Pub. L. No. 94-142, 89 Stat. 773 (1975) (current version at 20 U.S.C. §§ 1401-1461 (1976 & Supp. II 1978)). 20 U.S.C. § 1412(2)(B) (1976), requires services or plans for services for handicapped pupils ages 3 to 18 as of September 1, 1978, and requires a plan to service handicapped pupils ages 3 to 21 beginning September 1, 1980.

117. *Cannon v. University of Chicago*, 441 U.S. 677, 702 n.33 (1979).

118. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (holding that the Indian Civil Rights Act creates no private cause of action).

119. 42 U.S.C. §§ 2000d to 2000d-6 (1976).

120. 441 U.S. at 717.

121. *Id.* at 718 (Rehnquist, J., concurring).

122. *Mills County v. Railroad Cos.*, 107 U.S. 557, 566 (1882). *See also Downer v. Graham*, 21 F.2d 732, 733 (8th Cir. 1927); *Jones v. Brush*, 143 F.2d 733, 735 (9th Cir. 1944).

B. Primary Agency Jurisdiction

Enforcement of the federal statutes in question is within the primary agency jurisdiction of HEW and the various state educational agencies. For that reason, a court confronted with claims of violation of any of these statutes should either postpone trial on those counts to obtain the viewpoint of HEW or dismiss the statutory counts outright.¹²³ The choice between postponement or dismissal requires the court to consider the nature of the statutes, the nature of the claim, the competency of agency action to accomplish statutory goals and provide relief, and the opportunity the plaintiffs have had to participate in agency action.¹²⁴

Due process hearings for each and every individual pupil are required by the Education for All Handicapped Children Act, and pupils have a right to communicate with administrative agencies or complain to them.¹²⁵ Participation in agency action by amici is permitted under both the Rehabilitation Act¹²⁶ and Title VI of the Civil Rights Act.¹²⁷ Far less opportunity for agency participation and administrative relief existed in *Gordon v. Forsyth County Hospital Authority, Inc.*¹²⁸ In *Gordon*, regulations gave plaintiffs only the right to file a complaint and submit written data to a state agency. Invoking the doctrine of primary agency jurisdiction and citing Professor Davis,¹²⁹ the United States District Court for the Middle District of North Carolina dismissed the complaint in which plaintiffs had asked for a court order that they be provided with free hospital treatment under the Hill-Burton program administered by HEW. Other cases to the same effect have arisen in other contexts.

For example, the United States Court of Appeals for the Seventh Circuit invoked primary agency jurisdiction to uphold dismissal of the complaint in *Bradford School Bus Transit, Inc. v. Chicago Transit Authority*.¹³⁰ In *Bradford*, a bus company sued the Chicago Transit Authority for noncompliance with the Urban Mass Transit Act, alleging direct competitive injury. The only administrative access the company had was a right to complain to the Urban Mass Transit Administrator, but the appellate court nonetheless applied the primary agency jurisdiction doctrine.

There are instances, of course, where the primary agency jurisdiction doctrine does not apply. For example, in *Lloyd v. Regional Transportation Authority*,¹³¹ the trial court invoked the doctrine to dismiss plaintiffs' action, but the court of appeals reversed on the ground that plaintiffs had no access to the administrative agency enforcing the transportation pro-

123. See generally 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 19.07 (1958).

124. See generally *id.*

125. 45 C.F.R. § 121a.506 (1979).

126. 45 C.F.R. § 84.61 (1979).

127. 45 C.F.R. §§ 81.21-23 (1979).

128. 409 F. Supp. 708 (M.D.N.C.), modified, 544 F.2d 748 (4th Cir. 1976).

129. 409 F. Supp. at 722 n.13 (citing 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 19.09, at 53 (1958)).

130. 537 F.2d 943, 948-49 (7th Cir. 1976), cert. denied, 429 U.S. 1066 (1977).

131. 548 F.2d 1277 (7th Cir. 1977).

visions of the Rehabilitation Act. The rationale employed by the *Lloyd* court, however, does not apply in the context of education. Pupils and their parents have multiple opportunities to participate in administrative review and remedial hearings, including HEW processes. Since the competency of HEW to administer federal educational enactments has been demonstrated, and the issuance of comprehensive regulations in May and August of 1977¹³² shows that HEW is about its work, a private suit is unnecessary to seek general enforcement of educational rights and privileges. As to individual pupils and special cases, any parent or pupil may seek an impartial administrative due process hearing on the student's evaluation and program placement as required by 20 U.S.C. § 1415,¹³³ and title 45, section 121a.568 of the Code of Federal Regulations.¹³⁴

*C. Obligations of Recipients Under
the Rehabilitation Act and Education
for All Handicapped Children Act*

1. The Rehabilitation Act Obligations

In the first occasion the Supreme Court has had to construe the Rehabilitation Act,¹³⁵ it expressly declined to decide the question of whether the Act creates private choses in action.¹³⁶ The Court found it unnecessary to rule on that issue because it decided for the defendant college on another issue. The defendant refused to admit a hard-of-hearing girl to a nursing program because her handicap interfered with receipt of clinical instruction as then organized. The college refused to modify substantially its methods of clinical instruction to enable plaintiff to obtain it. The Court found that the statute does not require affirmative action or substantial modification of programs to accommodate a person who will not otherwise be able to participate fully and does not require reduction of health or other standards of admission for program participation.¹³⁷ In the view of the Court, the law forbids only exclusion from existing programs by reason of a condition that does not impair full participation without program alteration.¹³⁸

2. The Education for All Handicapped
Children Act Obligations

The obligations of the Education for All Handicapped Children Act¹³⁹ are narrower than champions of pupils realize. Nowhere does the Act prescribe programs. The only requirement of program content in its

132. 45 C.F.R. §§ 84.1-.61, 121a.1-.754 (1979).

133. (1976).

134. (1979).

135. *Southeastern Community College v. Davis*, 442 U.S. 397 (1979).

136. *Id.* at 404 n.5.

137. *Id.* at 408-09.

138. *Id.* at 410.

139. 20 U.S.C. §§ 1401-1461 (1976 & Supp. II 1978).

guidelines is that which makes instruction of handicapped pupils together with nonhandicapped pupils "to the maximum extent appropriate" a condition of receipt of grants-in-aid.¹⁴⁰ This is often called the goal of "mainstreaming." The only other requirement of the law is that a recipient provide the services it has committed itself to provide in an educational plan developed in a certain way.¹⁴¹ In a real sense, the Act does not create specific obligations or establish program standards other than "mainstreaming." Rather, it obliges recipients to plan services in a certain way and then, but only then, to provide them. The meetings and reviews the Act contemplates are more planning or rule making than they are adjudicatory. The scheme of parental participation is as much in the nature of guaranteed access to planners as it is a guarantee of due process protection against school exclusion. Stated differently, the only program obligations of recipients are to plan in writing after collecting data in a certain way, to make good efforts to fulfill plans once written, and to "mainstream" when they can. The implication is that the Act generates only three substantive rights: first, an expectation of some exposure to normal pupils; second, a right to expect fair efforts to fulfill written commitments once made; and third, a right to present suggestions to planners in the nature of a right to petition the planners. This last right is similar to the right to petition the legislature for redress of grievances.

A plaintiff will not be able to allege substantial breach of any of these three obligations where his parents have participated in planning meetings, especially if they have employed lawyers or consultants to assist in the planning process. The opportunities to allege and prove insincerity or total want of effort to fulfill written plans will be few. In most instances, a plaintiff will want to allege that the plan drawn for him does not suit him. But that allegation is not actionable. While the statute assures a parent access to a state planning agency, it guarantees no one, neither HEW, the United States (the grantor of grants-in-aid), nor any pupil that the plan will fulfill any substantive standard except attention to "mainstreaming" in appropriate cases. Therefore, the only duty of public schools is to plan ahead somewhat. Having fulfilled that duty, no entity or individual is entitled to take anything from the schools as relief—not the sovereign grantor United States, not HEW, and not a pupil plaintiff.

V. EDUCATION AND SCHOOL ARTICLES IN STATE CONSTITUTIONS

A. *Common School Articles*

Common school clauses in state constitutions were usually drafted when the governmental conception of public schools was strong and explicit, so they are unlikely sources of private rights to sue.¹⁴² Indeed, as to handicapped pupils, such clauses may even damage arguments advanced for a

140. 20 U.S.C. § 1412(5) (1976).

141. 20 U.S.C. § 1401(18) (1976).

142. See cases cited notes 22-24 *supra*.

private claim at common law because there is the suggestion that the special education of handicapped persons is not "common schooling" in the sense intended by such clauses.¹⁴³

B. *Education Articles*

A goal of more recently drafted articles is the education of all children. But such language is deemed hortatory only,¹⁴⁴ so that by itself, without legislation, the language may be construed not to require special education services by the state or any district.¹⁴⁵ In any event, where constitutional language is determined to be a mandate rather than a mere exhortation, the mandate operates only as a command by the state to a subdivision, and not as the generator of a private right. This is the gist of the ruling in *Donohue v. Copiague Union Free School District*.¹⁴⁶ The state school law authorities recognize the governmental nature of schools and insulate them from malpractice suits. But does this governmental character afford a handicapped pupil a different cluster of rights to recover for ineffective instruction?

VI. EQUAL PROTECTION GUARANTEES

A. *Federal Guarantees*

In *Keyes v. School District No. One*,¹⁴⁷ the trial court rejected the argument that want of affirmative action to correct *de facto* segregation violates constitutional guarantees,¹⁴⁸ but nevertheless ordered correction of the racial imbalance in schools not affected by any *de jure* segregation because those schools (the *de facto* segregated schools) produced educational achievement unequal to achievement of other schools in the district.¹⁴⁹ On appeal, the United States Court of Appeals for the Tenth Circuit rejected this finding.¹⁵⁰ The United States Supreme Court did not review this aspect of the case.¹⁵¹ The Supreme Court, however, later did hear a number of such arguments for construction of the Constitution to afford a right of equal educational opportunity distinct from the right not to be instructed in a *de jure* dual school system. The Supreme Court has steadfastly rejected the arguments.

143. See *Department of Pub. Welfare v. Haas*, 15 Ill. 2d 204, 212-13, 154 N.E.2d 265, 270 (1958).

144. See, e.g., *Blase v. State*, 55 Ill. 2d 94, 99, 302 N.E.2d 46, 49 (1973). A court might also seize upon the rule of construction which favors harmonizing new provisions with antecedent provisions on the same subject. 16 AM. JUR. 2d *Constitutional Law* § 102 (1979).

145. See, e.g., *Pierce v. Board of Educ.*, 69 Ill. 2d 89, 92, 370 N.E.2d 535, 536 (1977). See generally 16 AM. JUR. 2d *Constitutional Law* §§ 139-149 (1979).

146. 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).

147. 313 F. Supp. 61 (D. Colo. 1970), *aff'd in part and rev'd in part*, 445 F.2d 990 (10th Cir. 1971), *modified*, 413 U.S. 189 (1973).

148. *Id.* at 76-77.

149. *Id.* at 83.

150. 445 F.2d 990, 1004 (10th Cir. 1971), *modified*, 413 U.S. 189 (1973).

151. 413 U.S. 189, 195, 198 (1973).

In *McInnis v. Shapiro*,¹⁵² a three-judge court rejected the argument that the Constitution guarantees equal school inputs, expenditures, or resources for the pupils in a state. It reviewed the school equal protection cases and found them to be based on *de jure* racial policies. It found in school inputs or resource allocation no classification requiring constitutional scrutiny. The evidence showed that Illinois aided local school districts with flat grants per pupil and equalization grants which assured every district resources of at least \$400 a year per pupil. Per pupil expenditures varied among districts from \$400 a year to in excess of \$1,000 a year. Local sources were *ad valorem* property taxes. Assessed values varied widely. Poor districts could raise little revenue, while rich districts had less difficulty. Ironically, districts with the lowest resources per pupil had the highest tax rates, whereas school districts with large resources had relatively low tax rates. The court found local choice in selection of local services, local taxes, and expenditures an adequate justification for the statutory system.¹⁵³ The court found expressly that the United States Constitution does not require a state to allocate resources in proportion to need.¹⁵⁴ It also reasoned that ascertainment of need and of appropriate allocations were nonjusticiable.¹⁵⁵ The United States Supreme Court summarily affirmed the decision.¹⁵⁶ Claims of a federal constitutional right to equal educational resources also fell in *Burruss v. Wilkerson*.¹⁵⁷ The Supreme Court of the United States again affirmed summarily.¹⁵⁸

In *San Antonio Independent School District v. Rodriguez*,¹⁵⁹ the United States Supreme Court expressly found that education is not a right explicitly or implicitly guaranteed by the Constitution, and that when a state chooses to provide for public schools it may create or tolerate large differences in programs and resources among schools and pupils on non-racial bases, and that such disparities in treatment will not be strictly reviewed or treated as suspect but can be justified by meeting only a "reasonableness" standard.¹⁶⁰ Local experimentation and choice in tax rates and service levels were, as a matter of law, adequate justifications of reasonableness absent proof showing inadequacy of the minimum program the disparities might cause. The line defining the scope of equal protection in school cases is minimal reasonableness, except for racial classifications. The Supreme Court has never rested its equal protection judgment in any school case on a concept of equal resources. So far as the author can find, the Court has never again even used phrases like "equal education"

152. 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd per curiam sub nom.* *McInnis v. Ogilvie*, 394 U.S. 322 (1969).

153. *Id.* at 331-34.

154. *Id.* at 331-32.

155. *Id.* at 335-37.

156. *McInnis v. Ogilvie*, 394 U.S. 322 (1969) (per curiam).

157. 310 F. Supp. 572 (W.D. Va. 1969), *aff'd per curiam*, 397 U.S. 44 (1970).

158. 397 U.S. 44 (1970) (per curiam).

159. 411 U.S. 1 (1973).

160. *Id.* at 29-37.

or "equal educational opportunity" since its famous 1954 dictum in *Brown v. Board of Education*,¹⁶¹ except to summarize arguments of counsel or lower court dicta it refused to accept or endorse. Indeed, in the celebrated case of *Swann v. Charlotte-Mecklenburg Board of Education*,¹⁶² the Court went out of its way to note that *Brown* and its progeny are solely concerned with elimination of *de jure* dual schools, and are not to be read or cited as authority for the "myriad factors of human existence which can cause discrimination in a multitude of ways."¹⁶³ The *Swann* Court stated that the specific scourge of separation of the races "was what *Brown* was all about," not educational achievement.¹⁶⁴ Given this posture of the Court, it is not surprising that the Supreme Court applied its precedent in *San Antonio v. Rodriguez* to the special education context in the case of *Kruse v. Campbell*,¹⁶⁵ where the trial court's decision commanding enrollment of a handicapped plaintiff based on the equal protection clause was reversed and remanded.

B. State Guarantees

Not all state constitutions contain guarantees of equal protection of the law, but where they do, standards for review of state action under the state clause will either be similar to standards used to apply the federal equal protection clause, or less strict so as to afford fewer grounds for citizens to challenge classifications.¹⁶⁶ One recent state court opinion ruled that an allegation of arbitrary discrepancies is not sufficient to invoke the state equal protection clause.¹⁶⁷ Another case held that discrimination must be both purposeful and invidious to fall under the prohibition of the state clause.¹⁶⁸

Decisions in states without an equal protection clause sometimes read an equal protection component into due process and other terms of the state constitution. But the component is likely to be a smaller device than the federal equal protection engine. For example, the Illinois Supreme Court declared that the judicial and constitutional limits on unequal public treatment would go no further than to prohibit the worst sort of invidious

161. 347 U.S. 483, 493 (1954).

162. 402 U.S. 1 (1971).

163. *Id.* at 22.

164. *Id.* at 6.

165. 434 U.S. 808 (1977). The Supreme Court decision in *Kruse* appears to undercut three previous lower court decisions: *McMillan v. Board of Educ.*, 430 F.2d 1145 (2d Cir. 1970); *Hairston v. Drosick*, 423 F. Supp. 180 (S.D.W. Va. 1976); *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971).

166. *Department of Mental Hygiene v. Kirchner*, 62 Cal. 2d 586, 400 P.2d 321, 43 Cal. Rptr. 329 (1965); *Fox v. Rosewell*, 55 Ill. App. 3d 860, 371 N.E.2d 287 (1977).

167. *Contemporary Music Group, Inc. v. Chicago Park Dist.*, 57 Ill. App. 3d 182, 372 N.E.2d 982 (1978).

168. *Summers v. Illinois Commerce Comm'n*, 58 Ill. App. 3d 933, 374 N.E.2d 1111 (1978).

class legislation.¹⁶⁹ All in all, it is safe to predict that the state reviewing courts will not recognize violations of state equal protection guarantees in circumstances where federal precedents recognize no violation of the fourteenth amendment.¹⁷⁰

VII. GUARANTEES OF DUE PROCESS OF LAW

A. Federal Guarantees

Were a handicapped plaintiff to allege poor instruction as a denial of due process of law, then the short answer to the allegation would be that the fourteenth amendment does not by itself create any substantive entitlement,¹⁷¹ but only guarantees procedural protection of substantive property or liberty rights created by other sources. For that reason, the failure of a plaintiff to allege a substantive federal right to better educational services or instruction implies a failure to state a constitutional claim of violation of due process guarantees under the fourteenth amendment. The Supreme Court has expressed this in an educational context in *Board of Regents v. Roth*:¹⁷² "[P]roperty interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . ."¹⁷³ The Supreme Court reached a similar conclusion

169. *Doolin v. Korshak*, 39 Ill. 2d 521, 236 N.E.2d 897 (1968).

170. *See, e.g., People v. Francis*, 40 Ill. 2d 204, 239 N.E.2d 129 (1968) (Illinois Supreme Court expressed opinion that equality doctrines are not violated when the state legislature and dispensing agencies award differing amounts of money and facilities to various junior colleges; proper for General Assembly to delegate discretion in the matter with only general guidelines).

171. When state law has provided for a right to attend common schools, then that right in turn is protected by the fourteenth amendment. Lower federal courts have occasionally invoked the due process clause to justify granting relief to parties alleging expulsion or exclusion of handicapped persons from school without good cause, hearings, or alternative procedures to ascertain good cause. A smaller number of cases have granted relief from program changes or school reassignments which were so major that they could constitute partial expulsion or exclusion. *See Note, Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103, 1105 (1979).

The fourteenth amendment may be a source of protection against governmental action which is so damaging as to constitute deprivation of a liberty interest to seek employment or a means to live. It is difficult to envision how a public school placement program could so violate a protected liberty interest. To avoid a demurrer, a plaintiff seeking to allege deprivation of his liberty interest without due process of law on account of a special placement program would have to plead an untrue, derogatory publication by defendants about plaintiff which seriously stigmatized him in the community, coupled with an expulsion or exclusion comparable to a discharge of an employee. These are the necessary elements of such a fourteenth amendment liberty interest claim. *See Codd v. Velger*, 429 U.S. 624 (1977); *Bishop v. Wood*, 426 U.S. 341 (1976); *Paul v. Davis*, 424 U.S. 693 (1976); *Colaizzi v. Walker*, 542 F.2d 969 (7th Cir. 1976), *cert. denied*, 430 U.S. 960 (1977). The United States Supreme Court cases have vitiated the lower court decisions which found the unintended stigmatization from inaccurate assessment or placement to be an actionable constitutional violation.

172. 408 U.S. 564 (1972).

173. *Id.* at 577.

in *Perry v. Sindermann*.¹⁷⁴ Applying this doctrine are two recent decisions of the United States Court of Appeals for the Seventh Circuit.

The first is *Webster v. Redmond*.¹⁷⁵ The opinion indicates that the fourteenth amendment confers no substantive right, and accordingly, guarantees no right to a hearing where other constitutional provisions or statutes do not independently create an express substantive entitlement protected by the due process clause.¹⁷⁶ Yet more recent is the case of *Palmer v. Board of Education*,¹⁷⁷ where the court commented, "The Fourteenth Amendment does not create a protected interest . . ."¹⁷⁸ Thus before that amendment operates there must be an "independent source" of entitlement which is worthy of denomination as a protected property or liberty interest.

Moreover, even where an arguable substantive right exists, failure to afford a procedure to ascertain it does not in itself constitute a cause of action for monetary damages, absent pleading and proof of actual individual loss proximately caused by violation of or trespass upon the underlying substantive property or liberty right.¹⁷⁹ *Carey v. Piphus*¹⁸⁰ teaches that failure to afford due process is not generally compensable without proof that the outcome of the proceedings affording due process would have secured for plaintiff a real benefit in property or liberty rights which was lost for lack of due process.¹⁸¹

Nor should one presume that bureaucratic methods for procuring teachers and resources, and then allocating them among programs and classes of pupils, including handicapped pupils, could not withstand due process scrutiny. In such an inquiry, expert consultation is an adequate procedure and an adversarial hearing is not required.¹⁸² The general teaching of *Mathews v. Eldridge*¹⁸³ is that the flexible balancing of interests, which is the essence of the application of the due process clause, will not typically require an adversary hearing. More specifically, the case holds that where the entitlement implicated in a case is one of a class of rights, the determination of the existence of which usually requires expert inference and does not usually require ascertainment of the credibility of testimony about concrete occurrences, then an adversary hearing is not required in any particular case fairly placed within that class. Anxious mothers and beleaguered teachers sometimes quarrel about a pupil and in later meetings dispute who said what during the spat. But such incidents are rarely relevant and never critical. In a few words, public school personnel and resource management fulfill the *Mathews* requirements even

174. 408 U.S. 593 (1972).

175. 599 F.2d 793 (7th Cir. 1979), *cert. denied*, 444 U.S. 1039 (1980).

176. *Id.* at 796-97.

177. 603 F.2d 1271 (7th Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980).

178. *Id.* at 1274.

179. *Carey v. Piphus*, 435 U.S. 247 (1978).

180. *Id.*

181. *Id.* at 259-61.

182. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

183. *Id.*

though they do not satisfy all citizens. Furthermore, the more formal administrative methods now available, under federal regulations, to contest the adequacy of resources allocated to a class or a child are procedures which provide protection far exceeding the prophylaxis the due process clause obligates.¹⁸⁴

B. State Guarantees

While the doctrine of substantive due process may linger in the law some places, the author has been unable to find any jurisdiction which has suggested that it may ground a claim for defective teaching of pupils. Rarely will a state due process clause give a pupil or his parents more rights than those the federal clause gives.¹⁸⁵

VIII. CIVIL RIGHTS ACT OF 1871

A. Procedural Character

The 1871 Civil Rights Act¹⁸⁶ literally creates a civil cause of action for violation of substantive rights contained in federal statutes, treaties, and substantive constitutional articles. It does not create new federal obligations or federal rights, but makes invasions of a federal right by officials acting under color of state law actionable in state and federal courts. The Act expands remedies but does not create new substantive entitlements.¹⁸⁷

It follows that the nonexistence of other federal claims for damages by a handicapped person for failure or ineffectiveness of instruction destroys his claim for damages under section 1983.¹⁸⁸ The purpose of section 1983 was to supplement remedies or remove state law bars to remedies,¹⁸⁹ not to produce new property or liberty rights. Nor will the existence of state-law based substantive rights trigger section 1983. State-law created substantive rights are not made actionable by section 1983.¹⁹⁰ In particular, persons hurt by the negligence of professionals employed by the state may not sue the professionals under section 1983.¹⁹¹

As recently as May 1979, the United States Supreme Court, in *Chapman v. Houston Welfare Rights Organization*,¹⁹² again advised that the right to sue under section 1983 is derivative and conditional, *i.e.*, adjective or procedural only. In *Chapman*, the Court found that the federal district courts do not have jurisdiction to hear cases seeking to invalidate state

184. See Note, *supra* note 171, at 1105.

185. See *Lavin v. Board of Educ.*, 22 Ill. App. 3d 555, 317 N.E.2d 717 (1974); 16 AM. JUR. 2d *Constitutional Law* § 811 (1979). See also 20 AM. JUR. 2d *Courts* § 225 (1965).

186. 42 U.S.C. § 1983 (1976).

187. C. ANTIEAU, *supra* note 78, § 43; 15 AM. JUR. 2d *Civil Rights* § 19 (1976).

188. 42 U.S.C. § 1983 (1976).

189. 15 AM. JUR. 2d *Civil Rights* § 16 (1976).

190. C. ANTIEAU, *supra* note 78, § 80; 15 AM. JUR. 2d *Civil Rights* § 19 (1976).

191. See, *e.g.*, *Fisher v. Cahill*, 474 F.2d 991 (3d Cir. 1973). But see Comment, *Damages Actions for Denial of Equal Educational Opportunities*, 45 Mo. L. Rev. 281 (1980).

192. 441 U.S. 600 (1979).

welfare regulations because of conflict between them and the Federal Social Security Act.¹⁹³ The plaintiffs invoked the subject matter jurisdictional grants in 28 U.S.C. § 1343(3)-(4),¹⁹⁴ which gives courts the power to decide allegations of violations of rights created by the Constitution or by statutes establishing civil rights and equal rights. The plaintiffs, however, did not invoke general federal question jurisdiction, perhaps because they were not prepared to allege and prove individual amounts in controversy of sufficient size.¹⁹⁵ Instead, the plaintiffs alleged that the supremacy clause and 42 U.S.C. § 1983¹⁹⁶ were provenances of underlying rights in themselves. The Supreme Court found that the supremacy clause generates no conditions, benefits, privileges, or federal rights which would not independently be expected absent the clause, but rather protects rights emanating from other sources by creating a procedural rule for state courts.¹⁹⁷ The Court also found that the Social Security Act produces substantive rights but that they are not "civil rights." Consequently, ascertainment of violations of the Act is not within the civil rights subject matter jurisdiction of district courts, as opposed to general federal question jurisdiction which the plaintiffs declined to plead.¹⁹⁸

The assertion by the plaintiffs of subject matter jurisdiction based on section 1983 as a source of rights was thoroughly rejected by the Court. The Court rejected the assertion because section 1983 does "not provide for any substantive rights—equal or otherwise."¹⁹⁹ The Supreme Court noted the procedural character of section 1983 and that "one cannot go into court and claim a 'violation of s. 1983' for s. 1983 by itself does not protect anyone against anything." Both by "its terms as well as its history, it does not provide any rights at all."²⁰⁰ The opinion quotes an assurance of Senator Edmunds, a proponent of the statute, that it "'only gives a remedy,'" and that any suit praying its remedies will "'not [be] based upon it,'"²⁰¹ but upon other laws granting rights or entitlements to citizens which exist outside the events which happen in courthouses. This legislative history was essential to the final ruling in *Chapman*; the Court found want of subject matter jurisdiction in the federal courts and dismissed the suits.

B. *Entity Liability and Elements*

The plaintiff must prove the usual elements of tort litigation in a section 1983 count: duty, breach, fault, damages, causation, and foreseeability.²⁰² The duty must be a reasonably well defined one and the

193. *Id.* at 606.

194. (1976).

195. 441 U.S. at 606.

196. (1976).

197. 441 U.S. at 612-13.

198. *Id.* at 620-23.

199. *Id.* at 617.

200. *Id.* at 618.

201. *Id.* at 617-18 (footnote omitted).

202. *See generally* *Monroe v. Pape*, 365 U.S. 167 (1961).

breach must be an act or policy of the defendant itself; there is no room for *respondeat superior* in section 1983 cases.²⁰³

Thus, the plaintiff in a section 1983 case must allege involvement by the defendant in the misfeasance. Moreover, he must allege a higher degree of culpability than that usually found in professional malpractice cases. Allegation of a mere failure to act, even if negligent, is insufficient to sustain a "1983" complaint against demurrer.²⁰⁴ Culpability greater than simple negligence usually must be pleaded.²⁰⁵ The cases announcing a simple negligence standard of fault are almost all cases of physical harm done to a prisoner or detained person.²⁰⁶ Besides pleading damages and cause in fact, the plaintiff in a section 1983 case must plead proximity of causation of his loss of entitlement.²⁰⁷

Typically, the school record of a problem pupil reveals a multiplicity of causes of failure, and the unforeseeability of results of educational method selections and teacher efforts. This suggests the impossibility of ascertaining the parts of school failure attributable to methods of teaching, teaching personnel, the home, the impairment or handicap, and the free will of the pupil himself. All the reasons which dictate that the common law should not recognize a tort of educational malpractice apply with equal weight to section 1983 actions. State and federal courts should not construe section 1983, even if it were more than a procedural provision, as authorizing any such claim.

C. Immunities Applicable to Federal Claims: Legislation and Good Faith

Two defenses often should prevent recovery against school boards, school board members, and high officials in would-be malpractice cases. The first is legislative immunity, and the second is good faith immunity. The two often converge. When a plaintiff attacks a "program" or "system" as opposed to individual classroom teachers, then in effect he attacks policy making. Activity of that sort, however, is immune from challenge in a section 1983 case, unless the plaintiff pleads *mala fides* to overcome the legislative immunity.²⁰⁸ The scope of immunity varies proportionately with the degree of discretion or judgment the challenged decisions possess.²⁰⁹ Research uncovers no case in which any court has limited the degree of discretion or judgment of local boards in planning curricula and methods for a school system, or in recruiting and assigning special education teachers. One may argue that there exist few public planning functions which involve more judgment. Such planning is legislative in essence and should

203. *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

204. *See McDonald v. Illinois*, 557 F.2d 596 (7th Cir. 1977), *cert. denied*, 434 U.S. 966 (1978); 15 AM. JUR. 2d *Civil Rights* § 20, at 319 n.5 (1976).

205. *Baker v. McCollan*, 443 U.S. 137 (1979).

206. C. ANTIEAU, *supra* note 78, § 87.

207. *See generally* *Monroe v. Pape*, 365 U.S. 167 (1961).

208. C. ANTIEAU, *supra* note 78, §§ 41-42.

209. *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

be immune from challenges, except under a plea of specific intent to damage a plaintiff.

Defendant school boards will also claim a good faith immunity and innocent unawareness of claims made by a plaintiff. This is a second doctrine of immunity which operates in public education, and even operates in matters where the transaction challenged is not legislative in nature but is action specific to one pupil. The doctrine was fully articulated in the United States Supreme Court decision in *Wood v. Strickland*.²¹⁰ That case held that school boards and their members are immune from money damage suits, unless the plaintiffs prove either specific intent to harm the pupil or actual knowledge by defendants that their act was illegal, or that the action was so obviously illegal that the defendants must have known it was illegal. Specific intent is rarely present in malpractice and would be difficult to prove. The very novelty and controversy of all branches of special education demonstrate that the rights, if any, of pupils who fail are so unclear that defendants will rarely know that any program of theirs violates a right of some pupil. The principles in *Wood* which immunize a school board should also immunize high level officials such as a superintendent of schools.

IX. DEFENSES GENERALLY

Some special precepts of fairness also weigh against special education malpractice claims: consent, contributory misconduct, statutes of limitations, and state law immunities applicable to state law claims.

A. Consent

Consent is a well-known defense. It operates most visibly in such torts as conversion, nuisance, battery, and trespassory torts generally. But the defense is also raised in trespass on the case or negligence, where it lodges in the doctrine of assumption of risk. Additionally, it is a principle which operates in equity jurisprudence. Altogether it pervades civil law. It is sometimes expressed in the broad maxim, *volenti non fit injuria*. Consent should be a defense to most claims of special education malpractice.

A young child is not in a position to consent, but his parent is, and the consent of the parent should be imputed to the child in special education contexts. Imputation of consent of parent to his child is not unheard of in damages cases based on federal constitutional law.²¹¹ Nor is it strange to the law of negligence, which occasionally charges negligence of parent to child.²¹² Contributory negligence is conceptually distinct from consent or assumption of the risk in the strict sense, but the two doctrines often converge in particular cases²¹³ and imputation of one should

210. 420 U.S. 308 (1975).

211. See, e.g., *Stump v. Sparkman*, 435 U.S. 349 (1978).

212. 58 AM. JUR. 2d *Negligence* §§ 469-472 (1971).

213. 57 AM. JUR. 2d *Negligence* § 278 (1971).

be authority for imputation of the other in certain types of litigation. Imputation is proper in educational contexts because there usually exists a practical identity of interest between parent and child in school matters, and parents typically advocate the interests of children vigorously. In the matter of consent to program placement, a parent is a sort of proxy or attorney-in-fact if not a veritable *alter ego* of the pupil who is his or her child.

B. *Contributory Misconduct*

Just as the law recognizes that a child can commit contributory negligence and crime, so, in a suit for alleged special education misfeasance or even nonfeasance, courts should recognize that pupils are responsible for their development in large measure. Courts should apply a doctrine which denies relief to one who has himself misbehaved and approaches the court often having wasted part of his youth or infancy.

C. *Statutes of Limitations*

Because limitations law is local law, one cannot do more than identify issues which may arise. A threshold matter is the question when the statute begins to run. The age of majority is local law also, and majority for one purpose may not be majority for another. A related question is whether an educational handicap constitutes an incapacity which suspends the running of a statute. This question is important because the handicap may persist after the age of majority. Finally, there is the question how much time must pass to bar a claim for damages for inadequate special education or instruction, *i.e.*, what clause of the statute governs?

The objects barred by some clauses (harms barring clauses) are damages or harms, while the objects barred by other clauses (fault bars) are wrongs or invasions. Some clauses speak of harm done and define bars with reference to the plaintiff and his loss (*e.g.*, personal actions and property damage), while others speak not of the harm to plaintiff but of the fault of the defendant and define bars in terms of the trespass, breach, or delict of the defendant. To use classical forms, the one clause identifies some *damnum* while the other specifies some *injuria*. Clauses barring "negligence" or "malpractice" are examples of fault barring clauses as is a clause barring a claim "based on a statute" which creates a substantive right, while a clause barring a claim for bodily harm would be an example of a harm barring clause.

But what is the fault (*injuria*) of educational malpractice and what is the harm (*damnum*)? In terms of *injuria*, the plaintiffs typically allege negligence and noncompliance with statutes. Clauses barring relief for the consequences of such faults will generally operate to bar such claims. But a clause barring professional malpractice claims should not apply to teachers because, whether or not teachers may claim the status of professionals, it is unlikely that legislators drafting and enacting such clauses contemplated teachers as professionals for purposes of special clauses in the statutes of limitations.

Regarding the *damnum*, what is the nature of ignorance? Is it time lost equal to the time when the plaintiff might have learned? Or can one say it is interrupted human development? One component of the loss is diminished earning capacity. Others would be isolation and inability to appreciate certain aesthetic pleasures. On balance, all of these are personal harms and are not the sorts of harms legislators contemplate when enacting clauses to bar claims concerning property or a contract. The *bonum* of development sufficient to permit "mainstreaming," manifested by the federal and state special education laws, likewise is personal, so that the *damnum* of failure of such development is personal also. By the same token, the harm of a denial of equal protection, which includes indignity and isolation, is personal. Similarly, the good secured by guarantees of due process is partly dignitary, and consequently should be subject to personal harm barring clauses, even when the underlying entitlement is "property" for purposes of substantive constitutional law.

When the claim is based on federal substantive law, one first must ascertain the interest that Congress or the ratifying member states sought to protect, and the correlative harm to be proscribed. This is a federal law question. But then one must classify the harm so identified in the scheme of the state statute of limitations, deciding if the federally defined and proscribed harm approaches some class of harm given in the clauses of the state statute. The latter question is one of state law. Put briefly, one applies harm bars by using state categories to determine time limits for a suit implicating federal interests and correlative harms. But the same two-stage process of construction must occur also with fault barring clauses. First, one limns the federal obligation and converse deviating breach by construing federal law. Second, one compares the fault so delineated with the categories enacted in the state law to determine which state delict or other violation of right is closest to the fault defined by federal law, and hence, which clause of the statute of limitations applies. This two-stage process is unavoidable. The reason is that Congress has adopted state statutes and their state court interpretations as federal law for lawsuits based on federal statutes or constitutional provisions which do not themselves provide a limitations period.²¹⁴

This adoption of state adjective law to accompany federal substantive law has caused some confusion. All the commentators agree, however, that where the federal character of the claim the plaintiff makes and its actionability under federal substantive law are so clear that resolution of the affirmative defense of limitations requires the court to ascertain the intent not of Congress but rather of the state legislature, then the state decisions control and are the binding rules of decision even in federal courts as to federal claims.²¹⁵ Absent an adoption statute or federal limitations statute,

214. See 28 U.S.C. § 1652 (1976).

215. C. ANTIEAU, *supra* note 78, § 85; 51 AM. JUR. 2d *Limitation of Actions* §§ 74-75 (1971).

federal courts have been inclined to adopt state limitations. A prior congressional adoption statute had incorporated state laws only for "actions at law," but the federal courts followed the practice of limiting equitable federal claims not only by the doctrine of laches but by applying state limitations statutes.²¹⁶ Moreover, the United States Supreme Court has directed the federal courts to follow state court interpretations of state limitations acts even if to do so requires federal courts to overrule prior federal precedents. In *Bausermar v. Blunt*,²¹⁷ the Court held that a later construction by the state court would be followed in federal courts even though federal courts had earlier construed the state statute of limitations contrary to the subsequent state court opinion. In effect, Congress has, with full judicial cooperation, inserted state limitations provisions into federal statutes and constitutional clauses, and into the procedural and remedial statutes implementing them. In particular, Congress made the state limitations statutes, as construed by state courts, a part²¹⁸ of the Civil Rights Act of 1871.²¹⁹

D. State Law Immunities from State Law Claims

Because state educational systems are implemented by local subdivisions which still raise most of their revenue locally, the eleventh amendment will not prevent suits in federal court against local districts seeking money damages for special education malpractice.²²⁰ But state law may prevent suits in state court by creating state law immunities. Elements of both parental and governmental immunity from damages suits operate in school settings. Even where a state has abolished general sovereign immunity, it may by statute or decision have provided for a parental or other qualified immunity for local subdivisions and government servants in many instances. Examples of other qualified immunities are immunity from suit on account of acts constituting policy making, acts done while relying on laws or regulations, immunity of superiors from liability for acts of subordinates, and immunity from suit for failure to enforce laws.²²¹ Most prominent in schools is parental immunity.

The parental immunity, although not express, is often readily implied from statutes or cases clothing teachers with the status *in loco parentis* for

216. See Annot., 162 A.L.R. 724 (1946).

217. 147 U.S. 647 (1893).

218. 28 U.S.C. § 1652 (1976).

219. 42 U.S.C. § 1983 (1976).

220. See *Adams v. Rankin County Bd. of Educ.*, 524 F.2d 928 (5th Cir. 1975).

221. See, e.g., exceptions to Federal Tort Claims Act, listed in 28 U.S.C. § 2680 (1976). A representative state statute is ILL. ANN. STAT. ch. 85, §§ 2-201 to -212 (Smith-Hurd 1966), which clearly preserves immunity for state officials when performing certain functions and in specific circumstances. See also 3 K. DAVIS, *supra* note 123, § 25.13. Davis argues that an agency's immunity should extend to officers of that agency because the costs of the government enterprise should not be borne by nonmalicious servants. *Id.* § 26.02. Davis believes that the courts should vigilantly protect immunity of officers from suit for nonmalicious torts by readily granting summary judgment in cases where plaintiff alleges malice but has small chance of proving it. *Id.* § 26.04.

many purposes.²²² The realistic role of teachers is less like that of professionals and more like that of mothers (or perhaps aunts), so that a qualified parental or familial immunity of teachers from suit for poor tutelage is realistic.

It goes without saying, however, that state law immunities, as opposed to the federal immunities judiciously fashioned in *Wood v. Strickland*,²²³ bar only claims a plaintiff seeks to ground on state law.

X. COMMON GOOD AND INDIVIDUAL DIGNITY

The principles of jurisprudence, including respect for the separation of powers, honest intention to find legislative intent, and recognition of judicial competence and incompetence are adequate reasons not to create a new tort. But they generally are not adequate reasons to judge unequal exposure of pupils to different instructional abilities in teachers as good and just. Even in one school district, the distribution of instructional talent among classrooms is uneven. For the countervailing reasons given in this Article, one may legitimately decline to create a tort to correct the inequality and still denounce the unequal distribution of teacher talent among pupils and classrooms. In other words, limiting courts to their proper function is itself a good which competes with distributive justice in a school district, and should lead us to forbid creation in that district of a compensatory tort. Still, it is natural to ask a more transcendent question: will refusal to compensate some pupils for unequal exposure to bad teachers be ethically right, assuming clear proof, agreed standards, and a legitimate tribunal available to take the evidence and apply the standards? To explore this question, the author will postulate a hypothetical initial condition of the type Professor Rawls has made famous.²²⁴

Assume that there exists a jurisdiction with a parliamentary representative government. Its education minister reports to parliament. There are no written constitutions and no guarantees of due process, equal protection, free education, common schools, etc. In fact, the jurisdiction operates one system of public schools and does not allow private schools. In this hypothetical jurisdiction there is nothing like a local school district. Parliament and its minister control schools directly. Assume further that parliament has written and implemented a twenty-one year budget which

222. Their status *in loco parentis* constitutes for teachers a limited defense of justification to what would otherwise be torts of battery or false imprisonment in school discipline. *Ingraham v. Wright*, 430 U.S. 651 (1977); 68 AM. JUR. 2d *Schools* §§ 256-259 (1973). The doctrine also immunizes teachers and their employing districts from ordinary negligence suits for bodily injury to pupils. *Thomas v. Chicago Bd. of Educ.*, 60 Ill. App. 3d 729, 377 N.E.2d 55 (1978); Annot., 86 A.L.R.2d 489 (1962). See also K. DAVIS, *supra* note 123, § 25.04.

223. 420 U.S. 308 (1975).

224. J. RAWLS, *A THEORY OF JUSTICE* (1971). Rawls proposes a neo-Kantian ethical technique to evaluate competing rules of conduct, especially rules of distributive justice, in which each of us is hypothetically ignorant of his or her status, ability, and the personal consequences of any one rule. The hypothetical posited here is not so elementary a situation as Rawls requires for his analysis.

fixes expenditures on education at a given amount each year and that pupil population does not change from year to year. That is, the overall educational budget and per pupil expenditures are limited and do not vary from year to year. The specific content, however, provided in the educational system is variable as long as the total budget is not exceeded. One variable the parliament is considering is whether to use some of the educational budget to compensate or relieve pupils who have had the misfortune to be instructed by more than their share of ignorant or uncaring instructors. Any such relief must come from the set budget and will reduce resources available for other pupils. Assume further in this hypothetical republic that there exists a consensus about what traits, acts, and practices of instructors promote the goals of the educational system and which do not. In short, the teaching methods which are sound and those which are not have been agreed upon. For these purposes one should also assume that the education minister and parliament are aware that many incompetent teachers are employed and that they are doing their best to eliminate them. But they are concerned about what to do with pupils who, in the meantime, encounter more than their share of these incompetent teachers not yet removed.

To make the hypothetical complete one should also assume that the records of pupils and of teachers are full, complete, detailed, and trustworthy. Additionally, the sciences of pediatrics, pedagogy, psychology, and educational measurement are advanced and the courts in this jurisdiction have convenient access to all records and to excellent expert consultation in the advanced fields of science. Stated differently, one may assume that, in this imaginary jurisdiction, standards and causation are justiciable.

Parliament is interested in practical questions, but also in the ethical question whether some of the educational budget should be diverted from services directed to the majority of pupils in order to compensate the minority of pupils who will have the misfortune to spend more than their share of time in classes taught by ignorant teachers. Consider an assembly of citizens each of whom expects to become a parent or grandparent during the next twenty-one years. Each citizen, so assembled, faces the risk that his or her child or grandchild will be one of the few who gets "stuck" for more than his or her share of semesters in the classes taught by worthless instructors whom the minister has not yet weeded out. Given the opportunity, would a majority of such citizens vote for or against creation of a tort of educational malpractice?

The author supposes that a vast majority of such persons would vote "no" and reject such a tort. Some would give a utilitarian rationale: differences in morale and innovation, the nondiversion of resources, and the maintenance of authority associated with rejection of the tort will so far advance the well-being of most pupils that those differences more than compensate for the harm that the unlucky pupils will experience. But this author also supposes that a large number of persons would give as their

sincere reason for rejecting the tort the neo-Kantian rationale for toleration of unequal results, namely, benefit to the least advantaged persons.²²⁵ In other words, the order, creativity, morale, and preserved resources of a school system immune from suit will likely produce a better learning experience for all students, even for the boy or girl subjected during thirteen-plus years to a disproportionate amount of bad instruction, than would thirteen years in a vulnerable system which tries to equalize the discrepancy between pupils who have suffered only a proportionate share of bad teachers and those who have suffered a disproportionate amount. Immunity is calculated a priori to make every pupil better off than he or she would be under a regime which acknowledges a tort of public school educational malpractice. If this be true, then one may conclude with the categorical statement that the unanimous rejection of the tort by courts reflects durable wisdom and fundamental justice.

225. The term "least advantaged persons" refers not to handicapped persons, but rather to persons who have, by chance or otherwise, spent the most time in classes managed by the least able teachers. The hypothetical is readily adjusted for special education by speaking of the subset of faculty who are special education teachers, and the subset of parents whose offspring will be at risk, and who know that risk but nothing else special about their offspring. For the case of special education, the budgetary and related assumptions should be altered to provide for fixed special education funding and a stable population of handicapped pupils.