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Julie F. Mead

Preston C. Green III

KEEPING PROMISES: AN EXAMINATION OF CHARTER SCHOOLS' VULNERABILITY TO CLAIMS FOR EDUCATIONAL LIABILITY

Julie F. Mead[*] *and Preston C. Green, III*[**]

Legal commentators have regularly argued that public elementary and secondary schools should be subject to educational liability for failing to educate, and for failing to identify learning disabilities of individual students.[1] However, since the California Supreme Court's rejection of educational liability in *Peter W. v. San Francisco School District*,[2] the judiciary has uniformly refused to hold school districts liable for the failure to meet the educational needs of students. Courts have consistently rejected educational liability claims based on both tort and statutory theories.[3] Some suggest that arguments based on constitutional theories would fare no better.[4]

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* Assistant Professor, Department of Educational Administration, University of Wisconsin-Madison. Ph.D., University of Wisconsin-Madison, 1994.

** Department of Educational Policy, Research, and Administration, School of Education, University of Massachusetts, Amherst.

1. *See e.g.*, John G. Culhane, *Reinvigorating Educational Malpractice Claims: A Representational Focus*, 67 Wash. L. Rev. 349 (1992); Catherine D. McBride, *Educational Malpractice: Judicial Recognition Of A Limited Duty Of Educators Toward Individual Students; A State Law Cause Of Action For Educational Negligence*, 1990 U. Ill. L. Rev. 475 (1990); Kevin P. McJessy, *Contract Law: The Proper Framework for Litigating Educational Liability Claims*, 89 NW. U. L. REV. 1768 (1995); Cheryl L. Wade, *Educators Who Drive With No Hands: The Application of Analytical Concepts of Corporate Law in Certain Cases of Educational Malpractice*, 32 SAN DIEGO L. REV. 437 (1995).

2. 131 Cal. Rptr. 854 (Cal. Ct. App. 1976).

3. *See* e.g., Bell v. Board of Educ. of West Haven, 739 A.2d 321 (Conn. App. Ct. 1999); Brantley v. District of Columbia, 640 A.2d 181, 184 (D.C. Cir. 1994); Doe v. Town of Framingham, 965 F. Supp. 226 (D. Mass. 1997); Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352 (N.Y. 1979); D.S.W. v. Fairbanks N. State Borough Sch. Dist., 628 P.2d 554 (Alaska 1981); Helm v. Professional Children's Sch., 431 N.Y.S.2d 246 (N.Y. Sup. Ct. 1980). Hunter v. Board of Educ., 439 A.2d 582 (Md. 1982); Hoffman v. Board of Educ., 400 N.E.2d 317 (N.Y. 1979); Loughran v. Flanders, 470 F. Supp. 110 (D. Conn. 1979); Paladino v. Adelphi Univ., 454 N.Y.S.2d 868 (App. Div. 1982); *Peter W.*, 131 Cal. Rptr. at 854; Sellers v. School Bd. of Manassas, Virginia, 960 F.Supp. 1006 (E.D.Va. 1997).

4. McJessy, *supra* note 1.

Charter schools, however, might be susceptible to educational liability claims because the rationales used by courts to reject liability in the cases of conventional public elementary and secondary institutions arguably do not apply to them. For instance, charter schools might be vulnerable to causes of action based on contract law because the charter school-parent relationship is more contractual in nature than the relationship between conventional schools and parents.[5] In addition, charter schools might be susceptible to statutory liability because the charter school legislation makes it perfectly clear that the charter schools have a mandatory duty to meet the goals established in the statutes.

This article examines whether charter schools might be vulnerable to educational liability claims based on contractual and statutory liability. The first section provides a review of judicial opinions regarding educational liability claims based on tort, statutory, and contract constitutional theories. This section also examines the arguments put forward by legal commentators regarding educational liability in traditional school settings. The second section describes the particulars of charter schools and the statutes and contracts that bind them. Particular attention is paid to the range and types of commitments these schools make to their students and their parents and the differences between charter and traditional public schools. The third section analyzes why an educational liability claim against a charter school based on contract law and/or statutory terms might be successful.

I. THEORIES OF ESTABLISHING THE EDUCATIONAL LIABILITY OF CONVENTIONAL PUBLIC SCHOOLS

Educational liability claims have been filed or suggested under four general theories: tort theory, statutory theory, constitutional theory, and contract theory. As the discussion below will illustrate, the first three have been applied and rejected in traditional public school settings by numerous courts. The final

5. Jennifer T. Wall, *The Establishment of Charter Schools: A Guide to Legal Issues for Legislatures*, 1998 BYU EDUC. & L.J. 69 (1998). Wall expands on McJessy's argument, *supra* note 1, that contract law should be the proper framework for analyzing educational liability claims, by noting that charter schools might also be susceptible to such claims. This article expands upon the framework developed by Wall and McJessy in Section III.

category, contract theory, has met with limited success but only in the private school or university setting.

A. Tort Theory

Most educational liability challenges have been based on tort theory. There are two types of tort challenges: negligence and misrepresentation. Educational liability claims based on negligence require the plaintiffs to prove duty, breach of duty, causation, and injury.[6] The courts have uniformly rejected educational liability claims based on negligence. Several courts have cited the difficulty of establishing a standard of care on the part of the schools. In *Peter W.*, for example, the California Court of Appeals refused to recognize a cause of action sounding in negligence, in part, because "classroom methodology affords no readily acceptable standards of care."[7] Establishing causation is another problem. As the *Peter W.* court explained, physical, emotional, and environmental factors outside the control of the schools might affect a student's academic achievement.[8] Moreover, several courts have questioned whether students alleging educational liability suffer from injuries for which monetary damages can be awarded.[9] The appropriate remedy for educational injury is remedial training, not monetary damages.[10] Additionally, defenses to negligence claims, such as contributory negligence, may bar students from obtaining a remedy.[11]

Courts have also cited several public policy reasons for rejecting educational liability claims based on negligence. First, the recognition of such claims would force the judiciary to review the day-to-day decision-making of public schools.[12] Second, courts do not wish to subject schools to extra financial burdens.[13] Third, the recognition of negligence claims could result

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6. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30 (5th ed. 1984).

7. *Peter W.*, 131 Cal. Rptr. at 860.

8. *Id.* at 861.

9. *Hunter*, 439 A.2d at 585.

10. Thomas G. Eschweiler, *Educational Malpractice in Sex Education*, 49 SMU L. REV. 101 (1995).

11. McJessy, *supra* note 1.

12. *Donohue*, 391 N.E.2d at 1354.

13. *Peter W.*, 131 Cal. Rptr. at 861.

in a flood of litigation.[14] Fourth, courts have claimed that the proper avenue for dispute resolution is through administrative agencies that have been established by the educational institutions.[15]

Plaintiffs have also raised educational liability challenges based on a misrepresentation theory. There are two types of misrepresentation claims: negligent misrepresentation, and intentional misrepresentation. An action for negligent misrepresentation arises when the defendant, owing a duty of care to the plaintiff, makes a false statement, the defendant intends for the plaintiff to rely on the false statement, and as a result of the reliance, the plaintiff suffers injury.[16] An action for intentional misrepresentation arises when the defendant intends to make a false statement to a particular person with the intent that it convey a certain meaning and that it be believed and acted upon by the person to whom it is made.[17] The judiciary has generally rejected negligent misrepresentation actions for the same public policy reasons as rejecting educational malpractice claims based on negligence.[18] Establishing an intentional misrepresentation cause of action is difficult because: (1) an honest belief by an educator that a representation is accurate negates the claim; and (2) even if the intent-to-deceive element is shown, the plaintiff must still prove the student relied on the representation and the reliance was justifiable under the circumstances.[19]

B. Statutory Theory

The failure of educational liability claims based on negligence and misrepresentation has forced plaintiffs to develop other theories for educational liability claims. One theory is based on state educational statutes: plaintiffs argue that state statutory schemes have established a standard of care, and that the school district has failed to comply with this standard. However, the courts have generally refused to recognize educational liability claims based on the state's statutory duty. In *Pe-*

14. *Donohue*, 391 N.E.2d at 1354.
15. *Brantley*, 640 A.2d at 184.
16. KEETON ET AL., *supra* note 6, at 107.
17. *Id.*
18. *Peter W.*, 131 Cal. Rptr. at 862.
19. Eschweiler, *supra* note 10.

ter W., for example, the California Court of Appeals found that state statutes did not create a "mandatory duty" for school districts to protect against injury, but were rather conceived "as provisions directed to the attainment of optimum educational results."[20] In *D.S.W. v. Fairbanks North State Borough School District*,[21] the Supreme Court of Alaska refused to find that its special education statute imposed liability on a school district because the state legislature did not intend statutes to provide parents with remedies for damages.[22] Moreover, the courts have held that the same public policy reasons that apply to rejecting educational malpractice claims based on negligence also apply to such charges based on statutes.[23]

However, in *B.M v. State*,[24] the Montana Supreme Court held that a duty of care existed for a child in the testing and placement in a special educational program. The court found that the sources of duty were the state's constitutional provision of education for all citizens, the mandatory attendance statute to implement the constitutional guarantee, and administrative statutes that outline procedures to be followed by individual school districts in administering special education programs. Still, *B.M.* seems to be a singular exception in the litany of educational malpractice cases based on statutory theory.

Yet, none of these cases were litigated during the current educational policy context that focuses so heavily on accountability. Speaking of traditional public schools, Paul Weckstein argues that public policy may have actually shifted to "countenanc[e]" educational liability on statutory grounds.[25] He reasons that the proliferation of state statutes specifying professional standards for teachers, performance standards for students and an increasing emphasis on high-stakes testing may now sufficiently delineate a duty and define causation. Of the public policy arguments, he writes:

> Policy arguments about the danger of putting public fiscal re-

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20. *Peter W.*, 131 Cal. Rptr. at 862.

21. 628 P.2d 554 (Alaska 1981).

22. *Id.* at 556.

23. *Id.*

24. 200 Mont. 58, 649 P.2d 425 (1981).

25. "School Reform and Enforceable Rights to Quality Education" in *Law and School Reform: Six Strategies for Promoting Educational Equity*, Jay P. Heubert, editor (1999). Yale University Press, pp. 306-389 at 356.

sources in jeopardy also seem less convincing, particularly in instances of long-term breach of educational duties resulting in injuries to children that cannot otherwise be fully compensated. The public has strong interests in assuring high-quality education, avoiding these harms, and ensuring that its resources are not wasted on failing programs and practices.[26]

C. *Constitutional Theory*

Commentators have suggested that state and federal constitutions provide a duty to educate, the violation of which could lead to an educational liability claim. In *San Antonio School District v. Rodriguez*,[27] the Supreme Court effectively invalidated the United States Constitution as a vehicle for asserting an educational malpractice claim. In *Rodriguez*, the Supreme Court found that funding disparities created by property taxes were constitutional pursuant to the Equal Protection Clause of the Fourteenth Amendment. In reaching this conclusion, the Court found that education was not a fundamental right under the Constitution.[28] This negation effectively precludes a plaintiff from claiming that the Constitution provides a mandatory duty to educate.[29]

Plaintiffs would also have a difficult time asserting that state constitutional provisions provide parents of students with an enforceable duty to educate. First, state constitutional provisions are so broadly drafted that courts may interpret them as expressing a general goal of public policy, rather than as conferring specifically enforceable rights.[30] Second, courts may find that constitutional provisions are unenforceable mandates that must be implemented through statutory provisions.[31]

D. *Contract Theory*

Kevin McJessy argues forcefully that children attending public schools should be able to base their educational liability

26. *Id.* at 357.
27. 411 U.S. 1 (1973).
28. *Id.* at 29-39.
29. Culhane, *supra* note 1.
30. McJessy, *supra* note 1.
31. *Id.*

claims on contract law.[32] A contract is defined as "a *promise*, or a set of promises, that the law will *enforce* or at least recognize in some way."[33] McJessy describes three theories of educational liability under contract law: (1) implied or express contract, (2) third-party beneficiary, and (3) promissory estoppel.[34]

To establish the breach of an implied or express contract, a plaintiff must establish six elements: (1) mutual assent, (2) consideration, (3) two or more contracting parties, (4) sufficiently definite to determine a breach, (5) legal capacity to enter into a contract, and (6) no legal prohibition precluding the formation of a contract.[35] In the public school context, the plaintiff might assert that the school promised to provide a minimal level of education either implicitly, through the goals inherent in the educational process, or expressly, through statutory or constitutional provisions.[36] In return, the plaintiff alleges that he promised not to seek private education as consideration.[37] In the alternative, the plaintiff may assert that school attendance constitutes sufficient consideration.[38]

In the conventional public school context, the implied contractual approach suffers from two major weaknesses. First, a plaintiff would have difficulty establishing offer and acceptance because mandatory laws requiring students to attend school make it difficult to establish mutual assent.[39] Second, a plaintiff might not be able to establish the existence of consideration, or "bargained-for exchange."[40] Because states provide public education free of cost to each individual student, a student cannot allege attendance as consideration.[41]

Under the second approach, the plaintiff would claim that the school district and the teachers enter into a contract with the students as third party beneficiaries.[42] A plaintiff would assert that the teacher-school board agreement serves as the con-

32. McJessy, *supra* note 1.
33. E. FARNSWORTH, CONTRACTS § 1.1 (1982).
34. McJessy, *supra* note 1.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*

tract on which educational liability could be established.[43] In addition, policies and regulations promulgated by the school board could serve as implied terms in the teachers' contract.[44] A plaintiff would further assert that the agreement would require the school either to place students in the proper educational program or to refrain from promoting students who fail to meet the legally imposed requirements.[45]

There are two major obstacles that must be overcome in order for a court to recognize an educational malpractice claim on the part of a third-party beneficiary. The first obstacle is the general reluctance of the courts to accord third parties benefits in connection with governmental contracts.[46] However, courts are more likely to recognize third-party beneficiary claims if: (1) consequential damages are not involved, so that the promisor's risk is more limited;[47] (2) the contract is one to perform a duty that the government owes to members of the public;[48] or (3) the duty assumed by the promisor has been narrowed from a general duty to the public to a specific duty to a small group of individuals.[49] A plaintiff would also have to convince a court not to reject a third-party beneficiary claim due to the public policy reasons used to reject educational liability claims under other legal theories.[50]

The third approach, promissory estoppel, has an advantage over the other two approaches because the absence of contractual elements does not foreclose recovery.[51] Promissory estoppel is defined as:

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43. McJessy, *supra* note 1.

44. *Id.*

45. *Id.*

46. *See* E. FARNSWORTH, *supra* note 33, at § 10.4.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Torres v. Little Flower Children's Services*, 64 N.Y.2d 119, 474 N.E.2d 223 (1984), stands for this proposition. In *Torres*, a functionally illiterate former student sued a childcare agency that had entered into a contractual agreement with a city governmental agency to educate him. The Court of Appeals of New York rejected the student's contractual claim because it "could not overcome the policy objections to the courts' involvement in these matters." 474 N.E.2d at 227. The dissent countered: "[T]here is ample proof, when measured against the obligations of the municipal defendants under statute and regulation, and of defendant Little Flower, under statute, regulation and contract of which plaintiff was the third-party beneficiary, to require denial of defendants' motions." *Id.* at 228.

51. McJessy, *supra* note 1.

> A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.[52]

A parent might have more success with a promissory estoppel claim than the other contractual approaches because the parent merely has to show that she relied on the promises made by the school or school district, and that the school or school district had reason to expect reliance, instead of having to establish consideration.[53] Additionally, the parents would not have to establish that they were intended beneficiaries, as is the case with third-party beneficiary claims.[54] However, the parents might find establishing reliance in the context of a conventional public school difficult: because attendance to the conventional public school is based on school zoning regulations, schools may not have any incentive to make any statements that would induce reliance on the part of the parent to choose a particular school.

In other educational contexts, such as student-university relationships and student-private school relationships, courts have been more willing to find that an implied or express contract exists, thus entitling students to damages awards. In the student-university relationship, the first element for proving the existence of an implied or express contract is mutual assent. This is established when the university extends an offer of admission that is accepted by the applicant.[55] As consideration, the student foregoes offers from other universities. The difficulty arises in determining the terms of the agreement that are sufficiently certain for establishing a contractual relationship. *Ross v. Creighton University*[56] provides guidance in making this determination. In *Ross*, the Seventh Circuit examined the claim brought by a Creighton University student (Ross) who was on scholarship to play on the men's basketball team. Realizing that Ross' academic preparation was far below that of the average Creighton student, the university induced him to

52. RESTATEMENT (SECOND) OF CONTRACTS § 91(1) (1981).
53. McJessy, *supra* note 1.
54. *Id.*
55. *Id.*
56. 957 F.2d 410 (7th Cir. 1992).

attend by assuring Ross that he "would receive a meaningful education while at Creighton."[57] However, after four years at the university, Ross had the language skills of a fourth grader and the reading skills of a seventh-grader.[58] Ross sued the university alleging liability under tort law, and breach of contract. The Seventh Circuit dismissed the educational liability claim based on negligence,[59] but found that a viable breach of contract claim had been made.[60] In reaching its decision, the court found that Ross had identified specific promises that could serve as a sufficient foundation upon which to bring a breach of contract claim.[61]

In a more recent higher education case, *Gupta v. New Britain General Hospital*,[62] the Supreme Court of Connecticut, while rejecting the student's claim, explained that there are "at least two situations wherein courts will entertain a cause of action for institutional breach of contract for educational services."[63] The first would involve "a showing that the educational program failed in some fundamental respect" and the second would "arise if the educational institution failed to fulfill a specific contractual promise distinct from any overall obligation to offer a reasonable program."[64]

An implied or express contract also exists between students and private elementary and secondary schools. The first element, mutual assent, is established when the private school extends an offer to educate the student for a fee, which is accepted.[65] As consideration, the student foregoes other

57. *Id.* at 411.

58. *Id.* at 412.

59. *Id.* at 414-15.

60. *Id.* at 416-17.

61. *Id.* at 417.

62. 687 A.2d 111 (Conn. 1996).

63. *Id.* at 120.

64. *Id.* In fact, a recent case was brought by parents of children in a New Haven elementary school alleging that their traditional public school had failed the children under the first *Gupta* exception. The school had instituted a teaching methodology called the "responsive classroom method" that the parents claimed was responsible for the deterioration of student discipline and the creation of an unsafe learning environment. It was the only school in the district employing the methodology. The court rejected the claim since the complaint "sounds in tort, not breach of contract." However, the court reiterated the two "*Gupta* exceptions" as proper theories for bringing educational liability claims. *Bell*, 739 A.2d 321.

65. McJessy, *supra* note 1.

educational opportunities, including public schooling.[66] *Squires v. Sierra Nevada Educational Foundation, Inc.*[67] demonstrates that this contractual relationship might also expose private, elementary and secondary schools to breach of contract claims. In *Squires*, the parents chose to send their son Brandon to Cambridge School because they suspected that he might have difficulties learning to read.[68] The principal advised the Squires that Cambridge "had the capabilities and the facilities to diagnose and remediate any reading difficulties which might develop,"[69] and employed a "highly qualified" staff.[70] The Squires enrolled Brandon in Cambridge, and for four years (pre-kindergarten through second grade) he received positive progress reports.[71] However, in the fourth quarter of the second grade, the school reported that Brandon's reading ability was significantly below grade level, and that he needed to repeat the second grade.[72] The Squires sued Cambridge for breach of contract, alleging that Brandon was taught by inexperienced interns, rather than highly qualified staff.[73] Additionally, the Squires obtained an affidavit from a reading expert that Brandon's reading deficiencies "were more likely than not the result of inappropriate instruction and intervention during Brandon's four years at Cambridge School."[74] The court concluded that the contract between the parent and the school "sufficiently particularized services to support a claim for breach of contract."[75]

II. DESCRIPTION OF CHARTER SCHOOLS

There is no doubt that charter schools have altered the educational landscape since the various cases described above were litigated. Charter schools, although public schools, differ from traditional public schools in that they must commit themselves to educational outcomes by means of a charter contract. In ad-

66. *Id.*
67. 107 Nev. 902, 823 P.2d 256 (1991).
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 257.
74. *Id.*
75. *Id.*

dition, these schools have no natural student population from which to draw. Rather, they must entice parents to enroll their children.[76] Parents then use the equivalent of a "voucher" from the state to pay for the child's education.[77]

As of this writing, thirty-five states plus the District of Columbia and Puerto Rico make provision for charter schools.[78] These special public schools are constituted by means of a charter contract between a designated chartering authority and those who wish to operate a school. The particulars regarding how and under what circumstances a charter school may be established vary from state to state. For example, some states allow only school districts to charter schools.[79] Others require applicants to seek approval from the state educational agency.[80] Still others extend chartering authority to universities.[81] Finally, the State of Wisconsin has granted chartering authority to the City of Milwaukee.[82] Charter school statutes also vary according to the number that may be established in a given time frame,[83] whether private schools may convert to public charter school status,[84] and the length of time a charter may be granted.[85]

However, even with this variability, charter schools have several characteristics in common. First of all, charters are granted in a *quid pro quo* attempt to reform education. States

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76. Some state statutes explicitly state that no child can be compelled to attend a charter school. *See e.g.*, WIS. STAT. §118.40(6).

77. These "voucher" amounts are calculated based upon the state's per/pupil aid formula.

78. Those states are: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Virginia, Wisconsin, and Wyoming. See the US Charter Schools home page for information on the charter school movement in the United States. *See* U.S. Charter Schools (Jan. 17, 2001) <http://www.uscharterschools.org/>.

79. For example: California, Colorado.

80. For example: Massachusetts, North Carolina.

81. For example: Michigan, Wisconsin.

82. *See* WIS STAT. 118.40(2r).

83. For example: Alaska limits the number of charter schools to 30 statewide (ALASKA STAT. §14.03.250 (Michie 1995)).

84. For example: Wisconsin, Arizona, Michigan allow conversion, while New York does not.

85. Most charters are granted from 3–5 years. Arizona grants the longest charters, which may be given for a period of 15 years.

relieve charter schools of certain state laws and regulations in exchange for the charter school's commitment by means of a contract to specific outcomes. Charter schools may not charge tuition, but utilize per pupil state aid dollars to fund their efforts. Schools must outline their mission and curricular focus and undergo some sort of review process to determine whether they have sufficiently mapped out their program to qualify for charter school status. Once those proposing a school have adequately justified their educational plan to the chartering entity,[86] they must enter into a contract to deliver those services to the children who will elect to attend.

Charter school statutes dictate the required content of charter school applications and contracts. Table 1 quotes statutory language related to student outcomes from five state statutes.[87] As noted, while charter statutes may free charter schools from some of the rules and regulations binding traditional public schools, they are held bound to the academic standards established by that state. Most states also require charter schools to participate in any statewide achievement or proficiency testing. In addition, as the language below illustrates, charter schools must carefully delineate their educational plans and must specify precise educational goals for their students and the means by which progress toward those goals will be established.

86. State Educational Agency, school district, university, or other entity designated with chartering authority by statute.

87. These five states were selected as exemplars: Minnesota has the oldest charter school statute (1991); Arizona and California have chartered the most schools; Michigan was the first, and at this time, only, state to grant chartering authority to universities; Wisconsin was the first to grant chartering authority to a municipality.

Table 1: Examples of statutory language related to Student Outcomes

Arizona	4. That it designs a method to measure pupil progress, toward the pupil outcomes adopted by the state board of education pursuant to section 15-741.01 including participation in the Arizona instrument to measure standards test and the nationally standardized norm-referenced achievement test as designated by the state board and the completion and distribution of an annual report card as prescribed in chapter 7, article 3 of this title.
California	(A) A description of the educational program of the school, designed, among other things, to identify those whom the school is attempting to educate, what it means to be an "educated person" in the 21st century, and how learning best occurs. The goals identified in that program shall include the objective of enabling pupils to become self-motivated, competent, and lifelong learners. (B) The measurable pupil outcomes identified for use by the charter school. "Pupil outcomes," for purposes of this part, means the extent to which all pupils of the school demonstrate that they have attained the skills, knowledge, and attitudes specified as goals in the school's educational program. (C) The method by which pupil progress in meeting those pupil outcomes is to be measured.

Michigan	(ii) A copy of the educational goals of the public school academy and the curriculum to be offered and methods of pupil assessment to be used by the public school academy. To the extent applicable, the progress of the pupils in the public school academy shall be assessed using at least a Michigan education assessment program (MEAP) test or an assessment instrument developed under section 104a of the state school aid act of 1979, being section 388.1704a of the Michigan Compiled Laws, for a state-endorsed high school diploma, or 1 or more of the following nationally normed tests: the California achievement test, the Stanford achievement test, or the Iowa test of basic skills.
Minnesota	2) specific outcomes pupils are to achieve under subdivision 10; Subd. 10. Pupil performance. A charter school must design its programs to at least meet the outcomes adopted by the state board for public school students. In the absence of state board requirements, the school must meet the outcomes contained in the contract with the sponsor. The achievement levels of the outcomes contained in the contract may exceed the achievement levels of any outcomes adopted by the state board for public school students.
Wisconsin	3. A description of the educational program of the school. 4. The methods the school will use to enable pupils to attain the educational goals under s. 118.01. 5. The method by which pupil progress in attaining the educational goals under s. 118.01 will be measured.[88]

Michigan provides an interesting example of precisely defining students' educational success. For example, a guide for those seeking charter school status from Central Michigan

88. WIS. STAT. § 118.40 (2)(d) requires that "the chartering or contracting entity . . . shall . . . Administer the examinations under ss. 118.30 (1m) and 121.02 (1) (r) to pupils enrolled in charter schools under this sub-section."

University requires that applications describe:

- Specific performance indicators
- Use the MEAP (Michigan Educational Assessment Program)/HSPT (High School Proficiency Test)
- Use a nationally norm-referenced achievement test
- State specific timelines for success
- State who must accomplish the goal, what is to be accomplished, how success is to be measured and when it is to be accomplished.[89]

This guide also provides samples of academic goals. For instance:

- Academic achievement will increase for all students in the areas of math, science, reading and social studies. This will be measured by 70% of all 1st grade students scoring at or above grade level on the total battery score of the Metropolitan Achievement Test by June 2000.
- Students will be able to read effectively. This will be measured by 90% of all 2001 graduates scoring at the proficiency level on the High School Proficiency Test in 11th grade on the Informational Reading section.[90]

The import of such specificity relates to another shared characteristic of all charter schools. Charter schools are all subject to performance reviews and failure to perform satisfactorily may result in revocation or non-renewal of the charter. Although specific standards for revocation and/or non-renewal vary, all states condition the continuance of a charter on the attainment of particular performance indicators. Some statutes specify grounds for non-renewal and revocation.[91] Some simply

89. CENTRAL MICHIGAN UNIVERSITY & CHARTER SCHOOLS: A COMMITMENT TO STUDENT ACHIEVEMENT, PHASE II APPLICATION TO CHARTER FOR 1999-2000, 3 (2000).

90. *Id.*

91. For example California specifies the following grounds for revocation:

(a) Gross financial mismanagement that jeopardizes the financial stability of the

note that non-renewal or revocation may occur for failure to fulfill the obligations of the contract.[92] So whether the student performance indicators are required in the application or the contract itself, a charter school's existence is predicated on the achievement of those articulated goals. Failure to provide an educational environment in which students attain this goal may result in revocation of the charter. Therefore, it could be argued that each charter school contract is a compact that binds the school to certain student outcomes in exchange for the state educational funds provided through the contract. In fact, the United States Department of Education lists "failure to meet student achievement goals and expectations" as one of the three most frequent rationales for charter revocation.[93]

As mentioned earlier, charter schools must compete for students. Therefore, promotional literature takes on heightened importance in such a market-driven, "contractual" context. The claims made in an attempt to attract students could also form the basis for claims of misrepresentation later on. In addition, since brochures, web sites, etc. may form the basis by which parents make decisions to send their children to a particular charter school, those sources may further define the duty the

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charter school.

(b) Illegal or substantially improper use of charter school funds for the personal benefit of

any officer, director, or fiduciary of the charter school.

(c) Substantial and sustained departure from measurably successful practices such that

continued departure would jeopardize the educational development of the school's pupils.

CAL.EDUC.CODE §§ 47600- 47616.5 (West 1999).

Similarly, Wisconsin lists the following:

(a) The charter school violated its contract with the school board or the entity under sub. (2r) (b).

(b) The pupils enrolled in the charter school failed to make sufficient progress toward attaining the educational goals under § 118.01.

(c) The charter school failed to comply with generally accepted accounting standards of fiscal management.

(d) The charter school violated this section.

WIS. STAT. § 118.40 (1999)/

92. For example, Arizona law allows non-renewal when the charter school "has failed to complete the obligations of the contract or has failed to comply with this article." Revocation may occur at any time "if the charter school breaches one or more provisions of its charter." ARIZ. REV. STAT. §§ 15-181 - 15-189 (2000).

93. "[F]inancial mismanagement, [and] a violation of the charter agreement" are the other two. See "The Charter School Roadmap, September 1998" U.S. Department of Education.

school has assumed for particular student outcomes.

For instance, the following mission statements were taken from charter schools' web sites. Note how each makes affirmative statements about the abilities students will acquire at their schools. The first example comes from Horizons Community High School of Wyoming, Michigan[94] and the second from Renaissance Charter Jr./Sr. High School of Irving, Texas.[95]

> Horizons must provide up-to-date technology so that students can:
>
> - expand their knowledge bases;
> - improve their critical thinking, problem solving, and decision making skills;
> - access, analyze, evaluate and communicate information in expedient, efficient, and creative formats;
> - work ethically, independently, and collaboratively with a diverse and changing population both within the classroom and school, and beyond-across school, state, national and international boundaries.
>
> Renaissance Charter Jr./Sr. High School faculty and staff insure an environment of safety, respect, and accountability while students prepare to improve the quality of life in world communities. The school provides an equitable opportunity for students to acquire a sound academic and career-focused education. Students receive a strong foundation in humanities, science, mathematics, and career technology. Interdisciplinary curriculum is presented in a way that is relevant to each student's world. Specialized support is provided for students preparing for careers that require post-secondary training. Students will prepare to be full participants in the 21st century. Graduates enter the global labor force with marketable skills while embracing positive work ethics.

The following additional examples were taken from a web page designed by the Pioneer Institute to show those aspiring to start a charter school how to compose a mission statement.[96]

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94. *Horizons* (visited Jan. 17, 2001) <http://www.horizons.k12.mi.us:80/>.

95. *Cyberramp* (visited Jan. 17, 2001) <http://www.cyberramp.net/~tomlong/renaissance/>.

96. The institute describes itself as follows: "Pioneer Institute is a nonprofit, nonpartisan, Boston-based public policy research institute." *Pioneer Institute For Public Policy Research* (visited Jan. 17, 2001) <http://www.pioneerinstitute.org>.

The mission of the Lowell Middelesex Academy is to enable students to achieve academic, social and career success by providing a supportive community that identifies, encourages, and develops each student's interests and abilities. . . . Upon graduating from the academy, each student will have:

- A high school diploma;
- A clearly demonstrated set of academic skills;
- Experience in the workplace and in community service;
- A clear awareness of their rights and responsibilities as citizens;
- A personal development plan for the years beyond high school.

The Neighborhood House Charter School of Boston believe[s] that the underpinnings of change rely on the creation of a learning community, where everyone has something to learn and something to teach. . . . The mission of the Neighborhood House Charter School is to develop in each child the love of learning, an ability to nurture family members, friends, and self, the ability to engage in critical thinking and to demonstrate complete mastery of the academic building blocks necessary for a successful future.

The mission of YouthBuild Boston, Inc., a youth development organization, is to "provide disenfranchised young people with the academic, vocational, social and leadership skills they need to leave life on the street, rebuild their lives, and take responsibility for themselves, their families, and the revitalization of their community. . . . The YouthBuild Boston Academy offers young people who have dropped out of school a hands-on, interactive, family-like learning environment in which to reclaim their education and prepare for a lifetime of continued learning and economic independence. The academy is designed for students who failed school or for whom the school system has failed."[97]

97. *Pioneer Institute for Public Policy Research* (visited Jan. 17, 2001) <http://www.pioneerinstitute.org/csrc/ch2.html>. The Pioneer Institute also suggests that charter schools "Make sure that your mission statement is published in all your marketing and other literature, including handbooks, parent information forms, newsletters, student handbooks, and press releases."

In each of the five examples given, schools articulate various promises to those who elect to send their children to them. Statements can be read to promise identification of problems, services to address problems, and various levels of student outcomes including students' "complete mastery" of subject matter. Horizons Community High School even appears to promise to maintain "up-to-date technology." Of course, each of these promises begs the question, "what recourse do parents have if the school falls short of its promise?"

III. EDUCATIONAL LIABILITY AND CHARTER SCHOOLS

As reviewed earlier, some authors have argued that any traditional public school may now be held liable for failure to adequately educate the children in their care.[98] Yet, these theories may be insufficient to overcome judicial reluctance given the long line of cases delineating concerns with claims of educational malpractice. However, those reservations may not be as visceral when applied to the special circumstance of charter schools. The particular characteristics of charter schools appear to make them especially vulnerable to renewed efforts to hold schools accountable through educational liability claims made in judicial settings. Based upon these special characteristics, claims using either a contract theory or statutory theory may now be viable causes of action against a charter school.

A. Using Contract Theory to Found Educational Liability Claims Against Charter Schools

Charter schools are more susceptible to breach of contract claims than conventional public schools, because the charter school-parent relationship is inherently contractual in nature. Like universities and private schools, charter schools take a market-based approach that emphasizes competition and choice.[99] Under such an approach, parents are consumers that use information provided by the charter schools to choose among various educational options.[100] Additionally, the charter between the school district and the sponsoring agency is contractual in nature. In exchange for freedom from various state

98. *See supra* note 1.

99. Wall, *supra* note 5.

100. *Id.*

regulations, the school agrees to enter into greater accountability as defined by the charter.[101] Also, charter schools are required to describe their educational program in specific detail.[102] This requirement leads to the development of specific promises that can be identified in a breach of contract cause of action.

Charter schools may be able to state a claim based on a theory of an implied contract because of the application and selection process employed by charter schools. Parents apply to a charter school in writing that either accepts or rejects the application by written notification. The offer of a seat and the parents' resulting acceptance could be viewed as mutual assent for the "bargained-for exchange" or consideration of the parents' commitment to enroll their child in the charter school, thereby allowing the school to "claim" that child for the per/pupil funding provided through the charter statute. This process directly contrasts with traditional public schools where attendance is dictated by place of residence and arguably no such bargain exists. Of course, a court might conclude that a charter school would not be vulnerable to educational liability claims based on theory of an implied contract between the parent and the school because the written contract exists between the sponsoring agent and the school.

Parents may be better able to make either a third-party beneficiary claim, or promissory estoppel claim. An analysis of an actual charter school provision illustrates these points. The Bowling Charter School in Sacramento, California states that it uses an efficacy model, that, *inter alia*, challenges students in their "zone of development."[103] The zone of development is defined as the area a little beyond the student's current abilities and knowledge.[104] If a student is being educated beyond his zone of development, then he becomes frustrated. If his educational program is below that zone, then he becomes bored.[105] The school also identifies strategies that it may use to help students get into and stay in their zones of development, in-

101. J. NATHAN, CHARTER SCHOOLS: CREATING HOPE AND OPPORTUNITY FOR AMERICAN EDUCATION (1996).

102. *Id.*

103. *U.S. Charter Schools* (visited Jan. 17, 2001) <http://www.uscharterschools.org/res_dir/res_primary/res_bowling.htm>.

104. *Id.*

105. *Id.*

cluding: (1) using the strong side over the weak side attribute theory; (2) using feedback to find each student's personal learning zone; and (3) developing and using a support group.[106]

If Bowling Green fails to conduct assessments to identify a particular student's zone of development, but placed that child in an inappropriate educational setting, then it is possible that the child might be able to articulate a claim based on a third party beneficiary claim. Like *Ross* and *Squires*, the charter contains a specific promise – that the school will use assessments to determine the educational content and approach for an individual student—that can serve as the foundation of a breach of contract claim. Also, Bowling Green has contracted to perform a duty, educating students, that is required by the state's constitution and through its compulsory education statute. Additionally, the charter school has not contracted to perform a general duty, but a specific duty to educate those students who are attending the charter school. If a court refused to find that a contract does exist between Bowling Green and the sponsoring agency, thus negating a third party beneficiary claim, the parent might be able to convince the court to apply the theory of promissory estoppel. This is because it is evident that the charter's promise to provide each student with an educational program within his zone of development would induce a parent to have her child attend Bowling Green, and that the school's promise was intended to induce that reliance.

Furthermore, a court might find that the public policy problems identified in the conventional public school context would not exist in this hypothetical situation. First, an educational liability claim based on contract would not immerse the court into the day-to-day operation of Bowling Green because, as is the case in breach of contract claims against universities and private schools, the court would merely have to determine whether the school has carried out the specific promise of using procedures designed to identify a student's zone of development.[107]

Second, the courts would not be subjecting Bowling Green and other charter schools to undue financial hardship because

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106. *Id.*

107. *See Ross*, 957 F.2d at 417 ("Ruling on [a breach of contract] would not require an inquiry into the nuances of educational processes and theories, but rather an objective assessment of whether the institution made a good faith effort to perform on its promise.").

of the limited nature of damage awards provided by contract law. Unlike tort claims, which permit monetary awards for consequential and punitive damages, the remedy for breach of implied contracts and third-party beneficiary claims is generally limited to the injured party's expectation interest, or the amount that will place the person in as good a position as she would have been if the contract had been performed.[108] Additionally, the recovery under contract law is subject to three limitations: (1) the injured party may not recover damages that she could have avoided if she had taken appropriate action; (2) the injured party may not recover for losses that the party in breach could not have foreseen; and (3) the injured party may not recover damages for loss beyond the amount that she proves with reasonable certainty.[109] Contract law is also advantageous because if monetary damages are deemed unsuitable, then contract law permits specific performance – *i.e.*, the rendering of the promised performance.[110] If the court recognizes a recovery under the theory of promissory estoppel, the parent may recover her expectation interest (limited by foreseeability, of course), or reliance interest (the cost of the promisee to the detriment she incurred in reliance of that promise).[111] A court would probably choose the expectation interest because of the difficulty of computing the reliance interest.[112] Thus, in the case of the hypothetical situation, damages would be limited to the cost necessary to raise the student's academic performance to an acceptable level, as defined in the charter school's performance standards. The award could come in the form of monetary damages to pay for remediation, or if specific performance is the correct method of recovery, then the state or school district could provide remediation for the student.

Third, the recognition of an educational liability claim under contract law would probably not result in a flood of litiga-

108. *See* FARNSWORTH, *supra* note 33, at § 12.1.

109. *Id.*, § 12.8.

110. *Id.*, § 12.6.

111. *Id.*, § 2.19.

112. *Id.* Upon first glance it might appear that measuring the reliance interest would be easier than the expectation interest because the reliance interest would merely consist of choosing the charter school over another school. However, the reliance interest is made more complicated by the fact that the child also has to make an effort, in reliance of the promise made by the school, to make her educational program work. It would be difficult to compute this reliance interest. Consequently, a court may choose to use the expectation interest because this is much easier than reliance.

tion. One limitation is that the student's remedy would be limited to her expectation interest. Therefore, unlike tort law, the incentive for obtaining large damage awards does not exist. In addition, the number of breach of contract claims is limited by the fact that courts would recognize a claim only where a charter school failed to fulfill specific promises – such as the placement of students, or the provision of educational services.

Fourth, although educational institutions have established administrative agencies to resolve disputes, the function of most of these agencies is to correct on-going educational concerns, instead of redressing injury.[113]

B. Using Statutory Theory to Found Educational Liability Claims Against Charter Schools

Similarly, statutory theory may provide a viable framework for asserting an educational liability claim. As mentioned earlier, prior courts have been reluctant to find that statutory requirements created any actionable obligation on the part of the states, both because of concerns for the definition of a "duty" owed and because of public policy concerns about using educational funds for remedies in such complaints.[114] Still, the applicability of those previous cases diminishes when applied to a charter school context. Therefore, given the special features of charter schools, a new possibility exists for the construction of a statutory theory of educational liability.

Charter school contracts and the statutes upon which they are based arguably shift the focus from that of describing "optimum educational results"[115] to identifying and quantifying educational outcomes. Charter schools are the apex of an educational accountability movement that has been prevalent in state legislatures. Charter statutes rank with increased teacher certification requirements including teacher proficiency tests, defined state standards, and student competency, proficiency, and graduation tests as measures enacted to hold schools and teachers accountable for student learning.

In *Cannon v. University of Chicago*,[116] the Supreme Court

113. McJessy, *supra* note 1.

114. *Peter W.* 131 Cal. Rptr. at 854 (1976); D.S.W. v. Fairbanks North State Borough School District, 628 P.2d 554 (Alaska 1981).

115. *Peter W.* 131 Cal. Rptr. at 862.

116. 441 U.S. 677 (1979).

crafted a test to determine whether a federal statute made a remedy available to someone seeking to establish such a claim. Although any statutory theory of educational liability in the charter school context will be dependent on state rather than federal law, the factors established by *Cannon* are still instructive. They are:

1) whether the statute was enacted for the benefit of a special class of which the plaintiff is a member,

2) whether there is any indication of legislative intent to create a private remedy,

3) whether implication of such a remedy is consistent with the underlying purpose of the legislative scheme, and

4) whether implying a federal remedy is inappropriate because the subject matter involves an area basically of concern to the States.[117]

For these purposes, the first three factors provide guidance for considering whether charter school statutes and contracts may be used to craft a cause of action for educational liability.

Charter school statutes are created to benefit the special class of school-aged children by providing their parents some measure of independent choice without foregoing a state-funded education. As noted in the above section describing charter schools, charter schools exist to promote accountability for student learning while at the same time working toward educational reform. Therefore, the statutes are not only designed to benefit a particular group (school-aged children), they also define that "benefit" available under the law as an education that has outcomes that are both measurable and accountable. For example, one stated purpose of California's Charter Schools Act of 1992 is to "[h]old the schools established under this part accountable for meeting measurable pupil outcomes, and provide the schools with a method to change from rule-based to performance-based accountability systems."[118] Minnesota's statute likewise seeks to "establish new forms of accountability for schools,"[119] while the New Jersey statute proposes to "establish a new form of accountability for schools

117. *Id.* at 678.

118. CAL. EDUC. CODE, § 47601(f) (West 1999).

119. MINN. STAT. ANN. § 124D.10(a)(5) (West 1999).

[and] require the measurement of learning outcomes."[120] Accordingly, it can be concluded that charter school statutes are designed to benefit school-aged children by providing them the means to obtain an accountable public educational experience of their parents' choosing.

In addition, the charter school contract and statute that bind the school to stated performance objectives provide a measure of reassurance to the parents that the educational services purchased with the "voucher" will be quality services and will allow their child to make adequate (or better) educational progress. Furthermore, parents know that charter schools are subject to oversight and charter revocation if the programs do not deliver the services promised. Therefore, the parents rely on those reassurances to enter into the "educational experiment" that is a charter school. In so doing, they place their trust not only in a specific school, but also in the statutory scheme that created it. Consequently, charter school statutes define an expected level of service. That level of service is further outlined by the particulars of the specific charter school contract. In that way, parents trust in the system to deliver an explicitly specified level of service.

It is also important to note that parents, who elect to send their child to a charter school, enter into that compact for an individual child. Each voucher is calculated on a per/pupil basis and the parent is free to "spend" that individual voucher at whatever public charter or conventional school selected. Therefore, even though statutes generally refer to charter schools' pupils in the collective, the entitlement purchased by the parents with a voucher is an individual one.

The second *Cannon* factor is the "legislative intent to create a private remedy." Charter school statutes already contain "remedies" of sorts. One collective remedy is revocation of charter school status. Another individual parent remedy is transfer of their child from the charter school to the conventional public school or another charter school. However, these remedies provide no relief from "injuries" incurred by having placed trust in a school that did not deliver on educational promises. While courts are still unlikely to recognize a private remedy that allows for punitive damages, a court may read charter statutes and contracts as creating a limited private remedy to allow the

120. Charter School Program Act of 1995.

parents to recover their "investment" in the educational experiment of the charter school. Or stated another way, courts may read the clear legislative intent to create a "new kind of accountability" as encompassing the private remedies of reimbursement of the voucher amount and compensatory education.

Reimbursement and compensatory education have long been recognized as appropriate remedies in another educational context. Special education law includes a well-developed series of cases constructing remedies for a district's failure to adequately fulfill the statutory obligations of state and federal requirements.[121] Of course, there are significant differences between the Individuals with Disabilities Education Act (IDEA),[122] the state statutes enacted to comply with IDEA's mandates and charter school legislation.

Most tellingly, IDEA establishes an individual entitlement to a "free appropriate public education"[123] for each eligible child with a disability and specifies elaborate administrative procedures to enforce that right. In addition, IDEA specifically allows reviewing courts to "grant such relief as the court determines is appropriate."[124] Charter statutes generally do not specify administrative or appellate procedures for parents dissatisfied by their child's charter school experience. Nonetheless, remedies under IDEA provide an interesting analogue for considering potential remedies under charter school statutes.

Notice first that the duty owed to the children and their parents on their behalf under both IDEA and charter statutes both involve a specified level of service. In the case of special education, IDEA specifies a level of service (a free appropriate public education) that is further defined by the child's individualized educational program (IEP). For charter schools, the charter statutes specify a level of service (measurable and accountable progress toward established standards) that is further defined by the charter school contract. Interestingly, "free appropriate public education (FAPE)" has no unitary meaning

121. See *e.g.*, Burlington School Committee v. Department of Education, 471 U.S. 359 (1985); Florence County School District Four v. Carter, 510 U.S. 7 (1993) (compensatory education); Jefferson County Board of Education v. Green, 853 F.2d 853 (11th Cir. 1988); Lester H. v Gilhool, 912 F.2d 865 (3d Cir. 1990) (stating school district responsible for tuition reimbursement).

122. 20 U.S.C. 1400 *et seq.* (2000).

123. 20 U.S.C. §1401(d)(1)(A) (2000).

124. 20 U.S.C. §1415(i)(2)(B)(iii) (2000).

but must rather be determined by examining the abilities and needs of an individual child with a disability.[125] In contrast, charter school statutes and contracts, as illustrated above, are quite specific when defining adequate educational services and progress. In that way, it could be argued that the duty owed under charter statutes is better delineated than is FAPE under IDEA.

The Supreme Court's consideration of reimbursement as a remedy under IDEA provides further instruction. In *School Committee of Burlington v. Department of Education*,[126] the court was asked whether school districts could be ordered by a court to reimburse parents for tuition at a private school if the parents were able to show that the school district failed to make available a free appropriate public education for their child. In other words, could the parents be compensated for placing their trust in a system that did not deliver on its promise of a free appropriate public education? The Court held that such relief was proper and refused to construe reimbursement as "damages."[127] Rather, the court concluded that tuition reimbursement "merely requires the Town to belatedly pay expenses that it should have borne in the first instance had it developed a proper IEP."[128]

Applying this reasoning to the charter school context, the parents' investment in the charter school in the form of the voucher could be reimbursed if the parents could show that the charter school failed to deliver on the promises made in the charter school contract. Those promises might be broken by failure to provide promised services, failure to identify and recognize learning problems, and/or failure to provide proper assistance once learning problems were recognized. Similarly, parents could receive a remedial award in the amount of the "voucher" they "wasted" on an educational environment that did not deliver. Such a court-ordered remedy would "merely require the [charter school] to belatedly pay expenses that it should have borne in the first instance had it developed a

125. The Supreme Court defined FAPE as "reasonably calculated to enable the child to receive educational benefits" The Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 184, 102 S.Ct. 3034, 3039 (1982).

126. 471 U.S. 359, 105 S.Ct. 1996, 23 Ed. Law Rptr. 1189 (1985).

127. 105 S.Ct. at 2003.

128. *Id.*

proper [educational experience]."[129]

An alternative to reimbursement under IDEA is compensatory education. Compensatory education may consist of additional months or years of educational services beyond the statutory cut-off of 21 years or additional remedial services during the summer or after-school hours. As the Eighth Circuit Court of Appeals explained, "imposing liability for compensatory educational services on the defendants [school districts] 'merely requires [them] to belatedly pay expenses that [they] should have paid all along.'"[130] As with reimbursement, compensatory education is only available when the parents can establish that the school district failed to provide the expected free appropriate public education.

Compensatory education may be an appropriate remedy in the charter school context as well. As an alternative to reimbursing the voucher amount, the charter school could be ordered to provide (either the school itself, or through funds) tutoring or other compensatory services to help the student close the gap between where the child is and where the child should be had the services been adequate.

Both reimbursement and compensatory education mitigate the traditional public policy arguments against a statutory theory of educational liability. They can both be calculated with defined amount and do not involve exorbitant punitive damages awards. Reimbursement compensates for known expenses; compensatory education compensates by providing prospective relief in the form of extended services. Compensatory education as a remedy might also be most applicable if the charter school's charter has been revoked. In that case, there would be no entity from which to collect damages. However, a court might order the state to grant a child so injured by a poor school the option of extending his/her formal education or funding compensatory educational services from another charter or conventional public school of the child's choice.

The final *Cannon* factor examined here is whether a "remedy is consistent with the underlying purpose of the legislative

129. *See Burlington*, 471 U.S. at 359.

130. Meiner v. Missouri, 800 F.2d 749, 750 (8th Cir. 1986). More recent cases ordering compensatory education include: State of Connecticut – Unified Sch. Dist. No. 1 v. State Dep't of Educ., 699 A.2d 1077 (Conn. Super. Ct. 1997); M.C. *ex rel.* J.C. v. Central Reg'l Sch. Dist., 81 F.3d 389 (3rd Cir. 1996); Punxsutawney Area Sch. Dist. v. Kanouff, 663 A2d 831 (Pa. Commw. Ct. 1995).

scheme." Certainly, providing a limited private remedy for failure to adequately deliver on educational promises is consistent with the espoused purposes of charter school legislation. As noted above, charter schools were created in part to establish schools that were more accountable to parents and the public for the educational outcomes of students. Therefore, the use of reimbursement and compensatory education as educational liability remedies would provide the kind of real accountability charter school statutes address as their purpose. In addition, these remedies make each charter school truly accountable, not only to the chartering authority and the general public, but also to individual parents.

Also, charter schools are by definition designed to spur innovation. Accordingly, when parents enroll their children in charter schools, they are participating in an educational experiment. Providing an individual remedy to compensate parents for their willingness to participate in the state's experiment seems only appropriate.

IV. CONCLUSION

As the above discussion illustrates, it may be possible to craft a viable claim for damages resulting from a charter school's failure to assist a student to obtain the educational outcomes. Such a claim may be based on either a contractual or a statutory theory of educational liability. If such claims are realized, they will mark a new era where accountability is not just a platitude, but an actionable expectation. They also may open the door to other claims in more conventional public school settings. For example, if charter schools can be compelled by courts to keep the promises they make, perhaps magnet schools that compete for students may also be so bound. Finally, if a traditional school's "competitors" are all subject to scrutiny for failure to provide adequate educational services, perhaps they too will come to be subject to the same judicial examination.