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PSYCHOLOGY AND LAW IN THE CLASSROOM: HOW THE USE OF CLINICAL FADS IN THE CLASSROOM MAY AWAKEN THE EDUCATIONAL MALPRACTICE CLAIM

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I. INTRODUCTION

American education has a long tradition of being a local and imprecise craft with great variability in approaches between regions, schools, teachers, and students. The idiosyncratic nature of teaching, differing efforts of students, and lack of statutory guidance have made it difficult for courts to identify a reasonable duty of care upon which to base a malpractice claim. Thus, despite many attempts the educational malpractice claim failed to gain traction in the courts. This paper, however, demonstrates how modern federal educational legislation actually establishes the basis of a duty of care for certain educational practices. This new duty of care and a continuing reliance on harmful, scientifically rejected practices in the classroom may breathe life into the elusive claim.

Federal educational legislation does not open a wide berth for educational malpractice claims. But it is argued that the federal government does fix a reasonable duty of care against the use of scientifically rejected practices in the classroom, i.e. practices that have been subjected to empirical testing within the relevant assessment community and subsequently rejected. Courts are well poised for the new educational malpractice

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claim discussed within since the necessary analytical framework for the educator's duty of care will parallel the well established tracks laid down in the *Frye* line of cases which evaluates the scientific standing of a practice or principle. Finding consensus on empirical findings within the relevant assessment community is central to *Frye* as well as the educational tort.

The historical trend against the educational malpractice claim in the courts is unambiguous. The state of the legal theory was summed up best in one judicial opinion as, "a tort theory beloved of commentators, but not of courts."[1] Judges rejecting educational malpractice claims have echoed the public policy concerns against the tort theory in excess of thirty years.[2] The lack of an identifiable standard of care in education and the imprecise nature of the educational experience are chief among the concerns.[3] Due to developments in federal legislation and educational practices, however, these and other public policy arguments are no longer universally applicable to educational malpractice claims. Critical among these developments is federal legislation against the use of scientifically rejected practices in special education under the Individuals with Disabilities Education Improvement Act[4] (IDEIA), which actually fixes a duty of care in education and opens the door to a malpractice tort based on the integrity of educational practices.

Statutes often provide the basis for a reasonable duty of care in negligence claims. The Texas Supreme Court explained, "Where the Legislature has declared that a particular act shall not be done, it fixes a standard of reasonable care, and an unexcused violation of the statute constitutes negligence or contributory negligence as a matter of law."[5] Therefore, it is

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1. Ross v. Creighton Univ., 740 F. Supp. 1319, 1327 (N.D. Ill. 1990), *aff'd in part*, 957 F.2d 410 (7th Cir. 1992).

2. *See* Peter W. v. S.F. Unified Sch. Dist., 131 Cal. Rptr. 854 (Cal. Ct. App. 1976).

3. *See, e.g.*, Ross v. Creighton Univ., 957 F.2d 410, 414 (7th Cir. 1992) ("Theories of education are not uniform, and 'different but acceptable scientific methods of academic training [make] it unfeasible to formulate a standard by which to judge the conduct of those delivering the services.'" (quoting Swidryk v. St. Michael's Med. Ctr., 493 A.2d 641, 643 (N.J. Super. Ct. 1985))).

4. Individuals with Disabilities Education Improvement Act, Pub. L. No. 108-446, 118 Stat. 2647 (2005) (codified in scattered sections of 20 U.S.C. §§ 1400-1482)[hereinafter IDEIA].

5. Mo. Pac. R.R. v. Am. Statesman, 552 S.W.2d 99, 103 (Tex. 1977).

negligence per se when someone harms another due to a transgression of the behavioral requirements of a statute if the party harmed was part of a class of persons the law was designed to protect.[6] For instance, a law requiring motorists to yield to pedestrians in crosswalks sets a reasonable duty of care for motorists. Thus, a pedestrian struck by a motor vehicle in a crosswalk may bring a tort action for damages against the driver on the basis of negligence per se due to the existence of the statute requiring motor vehicles to yield.

The instant analysis will discuss negligence per se with a duty of care borrowed from federal educational statutes. Borrowing a duty of care from federal statutes is accepted practice.[7] Moreover, there should be little opposition to fixing a duty of care from federal educational statutes since federal education statutes likewise provide broad liability protections for teachers.[8] It would be quite reasonable to view the new integrity of education tort identified herein and regular curriculum matters under an "appropriate educational environment." According to the Paul D. Coverdell Teacher Protection Act, a provision of the No Child Left Behind Act, teachers are protected from liability so long as "[t]he harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the teacher."[9] While the purpose of this clause speaks to providing educational professionals with "the tools they need to undertake reasonable actions to maintain order, discipline, and an appropriate educational environment."[10] A broad construction would serve the twin public policy goals of protecting teachers from mere negligence claims while allowing protection of students from the harm of gross negligence, whether from improper disciplinary or other educational

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6. *See* Nixon v. Mr. Prop. Mgmt. Co., 690 S.W.2d 546, 549 (Tex. 1985) ("The unexcused violation of a statute or ordinance constitutes negligence as a matter of law if such statute or ordinance was designed to prevent injury to the class of persons to which the injured party belongs.").

7. Santa Clara v. Astra USA, Inc., 401 F. Supp. 2d 1022, 1029 (N.D. Cal. 2005). ("In *Merrell Dow*, the Supreme Court held that there was no federal jurisdiction over state tort claims merely because they borrowed a duty of care from a federal statute.").

8. *See* Paul D. Coverdell Teacher Protection Act of 2001, 20 U.S.C. §§ 6731-6738 (Supp. IV 2006).

9. *Id.* at § 6736(a)(4).

10. *Id.* at § 6732.

practices within the schools In addition, a broad interpretation would not hinder the integrity of the education claim discussed within; rather, this interpretation of the provision merely coincides with how wide states wish to open the gate to the new tort theory.

Regardless of interpretation, the liability protection provisions from the Coverdell Act codified within the No Child Left Behind Act (NCLB)[11] only protect teachers from mere negligence claims, not reckless behavior rising to the level of gross negligence. Definitions of gross negligence vary in detail among the states, but Texas provides the following definition:

> The Legislature has defined gross negligence as an act or omission: (1) "which when viewed objectively from the standpoint of the actor at the time of its occurrence, involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others"; and (2) "of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others."[12]

At first blush, it may be difficult to imagine how a special education teacher could breach the duty of care from IDEIA, by knowingly engaging in an educational practice that is scientifically rejected and poses an extreme risk of harm. Surprisingly, however, there is evidence that indicates a number of educators may regularly expose students to gross negligence by engaging in potentially harmful practices with a conscious indifference to the rights, safety and welfare of their students. The field of special education and autism in particular, is unusually prone to junk science fads offering the hope of miracle cures[13] and, unfortunately, educators occasionally abandon their professional duties and take the bait for notoriously harmful fads, despite the possible risks to their students.[14]

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11. *See generally* No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

12. Stephen F. Austin State Univ. v. Flynn, 228 S.W.3d 653, 660 (Tex. 2007).

13. *See* Jamie Nicholls, *Psychiatry: A Guide to Autism Spectrum Disorders*, THE PRACTITIONER, Oct. 20, 2006, at 5 ("In their desperation for a 'cure' for their child, parents will clutch at straws, and sadly there have been plenty of providers of these straws. Holding therapy, secretin, swimming with dolphins, various inclusion and exclusion diets, facilitated communication and recently (and fatally) chelation therapy have all attracted evangelical but misguided followings.").

14. *See* John Jacobson et al., *A History of Facilitated Communication: Science,*

A. Harmful Practices Used in Educational Settings

At present, there are at least two educational practices in use by special educators lacking scientific support and widely known to cause injury to students—Facilitated Communication[15] (FC) and Holding Therapy. A recent survey on educational practices in Georgia found these techniques are used by some educators in public schools on children with autism spectrum disorders.[16] A subsequent survey in Texas likewise indicated that these same techniques may be accepted practice in some Texas schools.[17] Both surveys relied on Simpson et. al.'s rating of thirty-three educational practices.[18] Simpson's team rated the educational practices for autism spectrum disorders according to peer review literature and graded them according to four categories: (1) "Scientifically Based" for demonstrating empirical efficacy and support of the educational practice, (2) "Promising Practice" for its efficacy and utility, (3) "Practice Having Limited Supporting Information" for having inconclusive research, but possible or potential utility and efficacy, and finally, (4) "Not Recommended" for practices lacking efficacy and having potential for harm.[19] Out of thirty-three graded practices, FC and Holding Therapy were the only two graded as "Not

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Pseudoscience, and Anti-science, 50 AM. PSYCHOLOGIST 750, 752 (1995) ("Both [parents and staff] are vulnerable to the false promise of dubious therapeutic techniques, especially when authorities in the field misrepresent or misinterpret therapeutic effects in orienting parents and training staff.").

15. *See* Brian J. Gorman, *Facilitated Communication: Rejected in Science, Accepted in Court—A Case Study and Analysis of the Use of FC Evidence under Frye and Daubert*, 17 BEHAV. SCI. & L. 517, 523 (1999) (noting that scientific and professional organizations state technique is without scientific support); Mark P. Mostert, *Facilitated Communication Since 1995: A Review of Published Studies*, 31 J. AUTISM & DEVELOPMENTAL DISORDERS 287 (2001).

16. *See* Kristen L. Hess et al., *Autism Treatment Survey: Services Received by Children with Autism Spectrum Disorders in Public School Classrooms*, 38 J. AUTISM DEV. DISORDERS 961, 961 (2008).

17. ROBIN H. LOCK ET AL., TEX. COUNCIL ON AUTISM AND PERVASIVE DEVELOPMENTAL DISABILITIES, SERVICE DELIVERY INNOVATIONS FOR AUTISM SPECTRUM DISORDERS IN THE STATE OF TEXAS (May 2008), *available at* http://www.dads.state.tx.us/autism/publications/ASDServiceDeliveryInnovationsTX.pdf (last visited Oct. 22, 2010).

18. RICHARD L. SIMPSON, ET AL., AUTISM SPECTRUM DISORDERS: INTERVENTIONS AND TREATMENTS FOR CHILDREN AND YOUTH 9 (2005).

19. *Id.*

Recommended" due to lack of scientific support and the risk of harm they pose.[20]

The risk of harm from using scientifically rejected practices such as FC and Holding Therapy ranges from mere negligence, which is protected from litigation by statute, to gross negligence, which is not protected and thus potentially actionable. For instance, liability exceptions for teachers under the Coverdell Act specifically excludes, "willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the teacher."[21] The actual harm incurred due to mere negligence is a loss of educational progress due to wasted time and opportunity to learn.[22] Public policy, however, supports the rationale behind protecting educators from such claims of poor teaching. Teaching is often an imprecise art and educators cannot be held to a mere negligence standard for all that they do without potentially bringing schools to a halt through legal action. On the other hand, public policy does support actions for gross negligence against educators who knowingly risk deprivations of civil liberties. The use of FC and Holding Therapy respectively carry the known risk of generating false allegations of sexual abuse,[23] which can result in the separation of children from parents[24] and death from the

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20. Richard L. Simpson, *Evidence-Based Practices and Students with Autism Spectrum Disorders*, 20 FOCUS ON AUTISM & OTHER DEVELOPMENTAL DISORDERS 140, 145 (2005).

21. Coverdell Act, Pub. L. 89-10, Title II, § 2366(a)(4) (codified at 20 U.S.C. 6736).

22. Thomas Zane et al., *The Cost of Fad Treatments in Autism*, 5 J. EARLY AND INTENSIVE BEHAV. INTERVENTION 44, 49 (2008) ("Fad treatments provide a triple threat. They waste money that could be used in providing effective treatment. They waste precious time that a child with autism needs to be supported with therapy proven to be effective in increasing skills. However, as horrible as these facts are, the worst is the false hope that fad treatments give the concerned parents and caregivers.").

23. Comm'n on Children with Disabilities, Am. Acad. of Pediatrics, *Auditory Integration Training and Facilitated Communication for Autism*, 102 PEDIATRICS 431, 432 (1998) ("In the case of FC, there are good scientific data showing it to be ineffective. Moreover, as noted before, the potential harm does exist particularly if unsubstantiated allegations of abuse occur using FC"); *see also*, Callahan v. Lancaster-Lebanon Intermediate Unit 13, 880 F. Supp. 319 (E.D. Pa. 1994); State v. Warden, 891 P.2d 1074 (Kan. 1995); *In re* Luz, 590 N.Y.S.2d 541 (N.Y. App. Div. 1993); *In re* M.Z., N.Y.S.2d 390 (N.Y. Fam. Ct. 1992); Dep't of Soc. Serv. v. Mark & Laura S., 593 N.Y.S.2d 142 (N.Y. Fam. Ct. 1992); People v. Webb, 597 N.Y.S.2d 565 (N.Y. Co. Ct. 1993).

24. *See, e.g.*, Morris v. Dearborne, 181 F.3d 657, 673 (5th Cir. 1999); Lynn v. St. Anne Inst., No. 03 CV 1333, 2006 U.S. Dist. LEXIS 18786, 2006 WL 516796 (N.D.N.Y. Mar. 2, 2006); Covell v. Oswego, 165 F. Supp. 2d 241 (N.D.N.Y. 2001); Zappala v.

physically aversive and emotionally abusive practice of Holding Therapy.[25]

Professor Douglas Biklen of Syracuse University brought FC to the United States after observing the technique in Australia.[26] Biklen then continued to advocate widespread use of FC to a receptive audience even though it had not yet been subjected to scientific scrutiny by him or other U.S. researchers.[27] The technique could make profoundly developmentally disabled individuals suddenly appear to communicate linguistically—for the first time in their lives—via assisted typing. Thus, FC became an overnight success in homes and classrooms across the country.[28] FC is described as:

> [A] method of providing assistance to a nonverbal person in typing out words using a typewriter, computer keyboard, or other communication device. FC involves supporting the individual's hand to make it easier for him or her to indicate the letters that are chosen sequentially to develop the communicative statement.[29]

The miraculous claims of success and the surprising number of false allegations of sexual abuse made through the technique[30] eventually drew the attention of the empirically

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Albicelli, 954 F. Supp. 538 (N.D.N.Y. 1997); Callahan v. Lancaster-Lebanon Intermediate Unit 13, 880 F. Supp. 319 (E.D. Pa. 1994); *In re* Luz, 590 N.Y.S.2d 541 (N.Y. App. Div. 1993); Storch v. Syracuse Univ., 629 N.Y.S.2d 958 (N.Y. Sup. Ct. 1995); Dep't of Soc. Serv. v. Mark S., 593 N.Y.S.2d 142 (N.Y. Fam. Ct. 1992); Whaley v. Wash., 956 P.2d 1100 (Wash. Ct. App. 1998); L.L. Brasier, *Parents Cleared in Sex Case File Suit: Our Autistic Kids Suffered, They Say,* DETROIT FREE PRESS, Sept. 12, 2008, http://www.freep.com/apps/pbcs.dll/article?AID=/20080912/NEWS03/809120414&s=d&page=#pluckcomments (last visited Oct. 22, 2010).

25. Philippa Duncan, *'Holding' Debate Grows Therapist Defends Methods,* MERCURY (HOBART), June 6, 2007, at 6.

26. *See* Douglas Biklen, *Communication Unbound: Autism and Praxis*, 60 HARV. EDUC. REV. 291, 293 (1990).

27. *See* Mary Makarushka, *The Words They Can't Say,* N.Y. TIMES, Oct. 6, 1991, at 33 ("Biklen says his experience at the school, and that of others, indicates that facilitation could be used successfully for more than 90 percent of the 350,000 autistic people in America").

28. *See* Karen Levine et al., *A Plea to Professionals to Consider the Risk-Benefit Ratio of Facilitated Communication*, 32 MENTAL RETARDATION 300, 300 (1994) ("Facilitated Communication (FC) is being promoted by speech pathologists, psychologists, school principals, teachers, and direct-care workers across the country.").

29. Comm'n on Children with Disabilities, Am. Acad. of Pediatrics, *Auditory Integration Training and Facilitated Communication for Autism*, 102 PEDIATRICS 431, 431–32 (1998).

30. Joseph Berger, *Shattering the Silence of Autism: New Communication Method is Hailed as a Miracle and Derided as a Dangerous Sham,* N.Y. TIMES, Feb. 12, 1994, at 21 ("More than 50 allegations of sexual abuse have risen out of facilitated

based assessment community. After a number of independent scientific tests, it became apparent that FC not only failed to reveal "hidden literacy" in people who could not otherwise speak, but the empirical research showed that the typing attributed to the FC user actually arose from the facilitator who helped the individual type.[31] General rejection of FC by the relevant assessment community was then codified in a number of resolutions by respected professional bodies.[32] In this connection, the harm caused by FC is not merely an historical phenomenon. Children were recently removed and a parent jailed for eighty days before a Michigan prosecutor realized that the alleged communications claiming sexual abuse through FC made at school were unreliable and false.[33]

Holding Therapy, sometimes known as "Coercive Restraint Therapy,"[34] is an intervention that seeks to restore the bond between caregiver and child. The practice requires the forced restraint of a child—despite any physical resistance offered—until he or she "surrenders" to the authority of the adult.[35] Like FC, Holding Therapy is an unorthodox[36] fad treatment promoted primarily through the popular press.[37] It appears

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communication, and this flurry has prompted urgent questions about a method that just five years ago was widely greeted as a shining breakthrough.").

31. GINA GREEN & HOWARD SHANE, FACILITATED COMMUNICATION: THE CLINICAL AND SOCIAL PHENOMENON 157–225 (Howard Shane, ed., Singular Publishing Group) (1994); Mark P. Mostert, *Facilitated Communication Since 1995: A Review of Published Studies*, 31 J. AUTISM & DEVELOPMENTAL DISORDERS 287, 287–313 (2001).

32. *See, e.g.*, AM. PSYCHOL. ASS'N, RESOLUTION ON FACILITATED COMMUNICATION (L.A. 1994) ("Facilitated communication is a controversial and unproved communicative procedure with no scientifically demonstrated support for its efficacy."); Am. Speech-Language-Hearing Ass'n, POSITION STATEMENT ON FACILITATED COMMUNICATION (Md. 1994) ("No conclusive evidence that facilitated messages can be readily attributed to people with disabilities . . . It is the position of the American Speech-Language-Hearing Association (ASHA) that the scientific validity and reliability of Facilitated Communication have not been demonstrated to date."); Am. Acad. of Child and Adolescent Psychiatry, *Facilitated Communication* (1993) (endorsing the policy statement by the Am. Acad. of Pediatrics).

33. Brasier, *supra* note 24, at 7.

34. Jean Mercer, *Radio and Television Programs Approve of Coercive Restraint Therapies*, 2 THE SCI. REV. OF MENTAL HEALTH PRAC. 154, 163–64 (2003).

35. Juane Heflin & Richard L. Simpson, *Interventions for Children and Youth with Autism: Prudent Choices in a World of Exaggerated Claims and Empty Promises. Part I: Intervention and Treatment Option Review*, 13 FOCUS ON AUTISM & OTHER DEVELOPMENTAL DISORDERS 194, 195 (1999).

36. *See generally* JEAN MERCER, ET AL., ATTACHMENT THERAPY ON TRIAL: THE TORTURE AND DEATH OF CANDACE NEWMAKER (Hiram E. Fitzgerald & Susanne Ayres Denham, eds., Praeger 2003).

37. *See generally* MARTHA G. WELCH, HOLDING TIME: HOW TO ELIMINATE

that only a few studies, with some as yet translated into English, have been done in support of Holding Therapy.[38] It comes as little surprise that U.S. researchers have been reluctant to study a practice that is patently dangerous given the reliance on physical restraint and intrusive practices.[39] In Africa this technique involved holding a child's arms above his or her head for hours at a time.[40] An officer of the Australian Psychological Society, however, claimed that the forcible restraint of children through Holding Therapy was linked to seventeen deaths.[41] Two deaths in the U.S. were attributed to holding therapies in 2002 alone.[42] The courts likewise reflect cases where holding therapy was used in an abusive manner in the U.S.[43]

CONFLICT, TEMPER TANTRUMS, AND SIBLING RIVALRY AND RAISE HAPPY, LOVING, SUCCESSFUL CHILDREN (Simon & Schuster 1988).

38. *Id.* at n.36. "Few studies have been done and even fewer translated into English to support effectiveness of Holding Therapy."

39. *See* Monica Pignotti & Jean Mercer, *Holding Therapy and Dyadic Developmental Psychotherapy Are Not Supported and Acceptable Social Work Interventions: A Systematic Research Synthesis Revisited*, 17 RES. ON SOCIAL WORK PRAC. 513, 514 (2007), *available at* http://rsw.sagepub.com/content/17/4/513 ("HT [Holding Therapy] has obvious potential for physical injury because it involves physically and psychologically enforced restraint of the child and physically intrusive practices such as grabbing, poking, and lying on top of the child with the full weight of the adult's body, and this potential has been realized in a number of cases" (citation omitted)).

40. Andrea Botha, *Parents Take on School in Autism Treatment Battle*, ALLAFRICA.COM (Mar. 22, 1999), http://allafrica.com/stories/199903220180.html.

41. Duncan, *supra* note 25, at 6–7.

42. Neil Boris, *Attachment, Aggression and Holding: A Cautionary Tale*, 5 ATTACHMENT AND HUMAN DEV. 245, 245 (2003) ("There were at least two deaths in the USA in 2002 attributed to interventions designed to address the specific 'attachment problems' of children. The forensic details suggest that the treatments employed in these cases were somewhat different; however, in both instances forcible restraint (e.g., a form of holding therapy) was used in an effort to 'promote re-attachment.' Available media reports suggest that mental health professionals hired to address what were deemed attachment disorder symptoms were actively involved in shaping what appear to have been coercive physical interventions in both cases.").

43. *In re* S.M.A., No. C8-97-76, 1997 WL 526299, at *3, (Minn. Ct. App. Aug. 26, 1997) ("We conclude there is ample record support for the district court's findings and conclusion that although holding therapy may be accepted by some medical professionals, the Abbotts' implementation of holding therapy became abusive and endangered S.M.A.'s physical and emotional health and impaired her emotional development."); Morris v. Washington, No. 47964-4-I, 2003 Wash. App. LEXIS 127, at *8–9 (Wash. Ct. App. 2003) ("As described in testimony during trial, during one of these holding therapy sessions, two of Gray's colleagues restrained Phillip while another pretended to be Phillip's drug- and alcohol-addicted prostitute mother. While being forcibly held and while the role-playing female confronted him, Phillip yelled and screamed obscenities at her.").

There is simply no justification for randomly using potentially harmful practices like FC and Holding Therapy with students. Yet, many educators set aside their professionalism for the allure of a miracle cure despite the known risks.[44] Therefore, such perilous fads[45] continue to displace less glamorous, but scientifically supported, educational practices for autistic children.[46] Thus, the question begged by these developments is whether or not courts will recognize the educational malpractice tort theory in light of this new statutory and educational landscape. It is argued that courts should recognize the tort theory since it will do what professionalism, a federal statute imposing a reasonable duty of care, and common sense have failed to do—influence educators to refrain from following unsupported fads and taking harmful and unjustified risks with children.

II. SUPPORT FOR THE INTEGRITY OF EDUCATION MALPRACTICE CLAIM

Four main public policy concerns provided justification for denial of the adequacy of education claim in state courts.[47] They include the following: a) the lack of a satisfactory standard of care by which to evaluate an educator, b) the imprecise cause and nature of damages, c) the potential flood of litigation, and d) the possibility of embroiling the courts in the day-to-day operations of schools.[48] These policy concerns speak to a certain chaos judges expected to follow recognition of the educational malpractice tort. These courts, however, turned a blind eye to developments in special education, which set a precedent for civil litigation in education. The Individuals with Disabilities Education Act (IDEA) provides parents with the

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44. *See* Health Section, *Intense Therapy Shows Signs of Helping Autistic Children*, WASH. POST, Jan. 24, 1995, at Z10 ("'There's a lot of mystique about autism and a lot of myths,' Green noted. 'It's very seductive — the notion that you can be the one to create a miracle, to break through to this child that no one else can reach.'").

45. *See* Jacobson et al., *supra* note 14, at 762 ("Fad treatments are not benign; they supplant use of proven and reliable methods when these methods do not also appear to produce dramatic breakthroughs.").

46. *See, e.g.*, Svein Eikeseth, *Outcome of Comprehensive Psycho-Educational Interventions for Young Children with Autism*, 30 RES. DEVELOPMENTAL DISABILITIES 158 (2009).

47. Ross v. Creighton Univ., 957 F.2d 410, 414 (7th Cir. 1992).

48. *Id.*

right to bring civil appeals in state or federal court over the educational program of their child in special education.[49] Parents routinely bring action when they disagree with their child's Individual Education Program (IEP).[50] The success of IDEA demonstrates that civil litigation over education can exist without bogging down the courts or wreaking havoc over the daily operations of schools. Otherwise, the remaining obstacles may be overcome by following precedent for damages in a previous FC case where the technique was used by a local government[51] and by borrowing a duty of care from federal statutes discussed *infra*.

A. The Rejected Adequacy of Education Malpractice Claim

The court in *Bell v. Board of Education* referred to educational malpractice as a recent expansion of traditional tort law based on causes of action such as (a) failure to counsel adequately, (b) failure to educate students adequately, and (c) failure to test and place students appropriately.[52] The court in *Donohue v. Copiague Union Free School District*[53] identified the difficulties in proving such claims. The difficulty lies in establishing the causation element of the claim due to "the practical impossibility of proving that the alleged malpractice of the teacher proximately caused the learning deficiency of the plaintiff student."[54] The challenging task in *Donahue* was establishing the legal cause for the plaintiff's inability to complete an employment application after having received a high school diploma and after some twelve years of schooling.[55] Judge Wachtler's concurrence in *Donahue* likewise questioned

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49. Individuals with Disabilities Education Act, 20 U.S.C. § 1415(i)(2)(A) (2004) [hereinafter IDEA] ("[A]ny party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.").

50. *See id.* at §§ 1400(d)(1)(A) et seq. (the IEP contains educational assessments and planning details for individual students).

51. Bill Alden, *County Liable to parents for $750,000: Use of 'Facilitated' Speech for Disabled Child at Issue*, N.Y.L.J., Nov. 7, 1997, at 1. "A federal jury last Friday returned the verdict . . . voting 8-0 to find the county liable under 42 USC § 1983 to Luz Prieto, now 16 years old, and her parents, Augusto and Luz Prieto."

52. 739 A.2d 321, 324 n.7 (Conn. App. Ct. 1999) (internal cites omitted).

53. 391 N.E.2d 1352, 1355 (N.Y. 1979).

54. *Id.*

55. *Id.*

whether the student's attitude, motivation, and temperament to the classroom contributed to the failure to learn.[56]

Thus, the parade of test cases brought under adequacy of education claims in regular education did little to advance the educational malpractice legal theory over the past thirty years.[57] The all-too-common plaintiff's profile of the dissatisfied individual seeking damages for that which they failed to learn, garnered little sympathy and met defeat in the courts of various states.[58] It appears that the prospect of a tort based on general educational adequacy will continue to face an uphill battle when test cases are brought by adults looking back with surprise at what they failed to learn after years of education. In such cases, courts will likely continue to abide by the meritorious notion that the ultimate responsibility for academic success "remains always with the student."[59] Failed malpractice cases from the adequacy line of cases, were also less compelling because they were mere negligence claims that did not rise to the level of gross negligence. There are, however, new circumstances, which render the adequacy line of cases moot. Chief among these changes are the protection educators receive from mere negligence claims, the effects of the accountability movement in education, and new federal education laws.

There is a notable exception, however, to the adequacy line of malpractice cases from Montana,[60] which was routinely distinguished by courts rejecting the educational malpractice claim.[61] Montana did recognize a duty of care for the

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56. *Id.* (Wachtler, J., concurring) ("Factors such as the student's attitude, motivation, temperament, past experience and home environment may all play an essential and immeasurable role in learning.").

57. *See, e.g., id.*

58. *See* Peter W. v. S.F. Unified Sch. Dist., 131 Cal. Rptr. 854 (Cal. Ct. App. 1976) (high school graduate on eighth grade reading level dissatisfied with low earning potential); Ross v. Creighton Univ., 740 F. Supp. 1319, (N.D. Ill. 1990), *aff'd in part*, 957 F.2d 410 (7th Cir. 1992) (collegiate athlete dissatisfied with scholarship for supplemental preparatory education); *see also*, Miller v. Loyola Univ., 829 So. 2d 1057, 1060–62 (La. Ct. App. 2002) (law student dissatisfied with professional ethics class); Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1355 (N.Y. 1979) (nearly illiterate, dissatisfied high school graduate).

59. Ross v. Creighton Univ., 740 F. Supp. 1319, 1328 (N.D. Ill. 1990), *aff'd in part*, 957 F.2d 410 (7th Cir. 1992).

60. *See* B.M. v. State, 649 P.2d 425, 427 (Mont. 1982) (allowing educational malpractice claims to go forward based on state statutory duty of care).

61. *See, e.g.*, Ross v. Creighton Univ., 740 F. Supp. 1319, (N.D. Ill. 1990), *aff'd in part*, 957 F.2d 410 (7th Cir. 1992); Bell v. Bd. of Educ., 739 A.2d 321, 32 (Conn. App.

appropriate testing and placement of students based on state statute.[62] The recognition of a mere negligence claim is otherwise unprecedented in the context of an educational adequacy malpractice claim. However, this type of claim is consistent with the right we have seen in special education to litigate matters and is also consistent with a trend toward accountability.

B. The Accountability Movement and the Duty of Care in Regular Education

Ironically, over the past thirty years, when state courts were building a consensus over the rejection of the educational malpractice claim, the accountability movement[63] in education was slowly setting the stage for recognition of the tort. The landmark case rejecting the educational malpractice claim[64] was decided around the same time the accountability movement started.[65] The accountability movement increasingly removed ambiguity from the educational experience by increasing the use of empirical approaches on teaching, assessment, and policy. As a result scientific approaches to education have become a guiding principle for major education legislation[66] and initiatives such as the Institute of Education Sciences.[67] Accountability and the use of scientifically based

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Ct. 1999)); Miller v. Loyola Univ., 829 So. 2d 1057, 1060-62 (La. Ct. App. 2002).

62. *See* B.M. v. State, 649 P.2d 425, 427 (Mont. 1982).

63. Allan C. Ornstein, *About Teachers and Teaching*, 65 PEABODY J. EDUC. 14 (1988) ("In the face of severe difficulties in agreeing on a system for accountability, emphasis has been shifting toward minimum competency testing for students and teachers. In order to ensure that students learn to read, write, and compute at a minimally acceptable level, 25 states since 1976 have started to administer tests for student promotion and graduation.").

64. *See* Peter W. v. S.F. Unified Sch. Dist., 131 Cal. Rptr. 854 (Cal. Ct. App. 1976).

65. *See* Ornstein, *supra* note 63, at 15.

66. U.S. DEPARTMENT OF EDUCATION, STRATEGIC PLAN 2002–2007 (2002), *available at* http://www2.ed.gov/about/reports/strat/plan2002-07/plan.pdf ("The *No Child Left Behind Act* and its principles for reform—accountability, flexibility, expanded parental options and doing what works—are embedded throughout this strategic plan, and will be our North Star in the years to come. Those same principles will be embedded in future legislative proposals, in areas including special education, vocational education and higher education.").

67. *See About Institute of Education Sciences*, U.S. DEPARTMENT OF EDUCATION, http://www.ed.gov/about/offices/list/ies/index.html (last visited Oct. 22, 2010) ("The Education Sciences Reform Act of 2002 established within the U.S. Department of Education, the Institute of Education Sciences (IES). The mission of IES is to provide

research is a major thrust of NCLB[68] and the IDEIA, which is a reauthorization of the IDEA.[69]

The NCLB repeatedly speaks to the use of scientifically based approaches throughout the statute.[70] Scholars Yell et. al. and Zane et. al, actually go so far as to state that the NCLB requires the use of scientifically based strategies and methods in regular education.[71] The requirement, however, is actually a de facto requirement since it is not explicitly mandated, but rather required as a prerequisite to receive essential federal funding.[72] The Secretary of Education likewise spoke of NCLB's de facto requirement to use evidence based research in regular schools.

> This new law rests on four pillars: accountability, local control, options for parents, and, importantly, evidence-based instruction that works. . . . Because for the first time ever, we are applying the same rigorous standards to education research as are applied to medical research, and other fields where lives are at stake. For the first time ever, we are insisting that states pay attention to the research. And for the first time ever, we are insisting on evidence-driven teaching methods that really work.[73]

NCLB does not go as far as IDEIA in explicitly mandating a duty of care for educators. Thus, it cannot be said for the purposes of this analysis that NCLB explicitly established a duty of care by statute for negligence per se. The NCLB comes

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rigorous evidence on which to ground education practice and policy. This is accomplished through the work of its four centers.").

68. *See* NCLB, *supra* note 11.

69. IDEA, *supra*, note 51 at §§1400–1487 (2004) (providing funding for all states to ensure that all children, regardless of disability, have the right to free, appropriate public education).

70. *See* NCLB, *supra* note 11.

71. Mitchell L. Yell et al., *No Child Left Behind and Children with Autism Spectrum Disorders*, 20 FOCUS ON AUTISM & OTHER DEV. DISABILITIES 130 (2005) ("NCLB requires that educators use scientifically based strategies and methods, which represent the primary tools that will allow schools to make meaningful changes in the academic achievement of their students."); Zane et al., *supra* note 22, at 44 ("Even the federal education law requires that teachers use 'scientifically-based practice' when working with children, both typical and those with special needs.").

72. *See* Yell et al., *supra* note 71, at 133 ("A central principle of NCLB is that federal funds will support only those educational procedures, materials, and strategies that are backed by scientifically based research.").

73. Roderick Paige, U.S. Secretary of Education, Consolidation Conference, (Nov. 18, 2002), http://www2.ed.gov/news/speeches/2002/11/11182002.html (last visited Oct.22, 2010).

as close as possible to creating a duty of care for regular education and does not present any appreciable leanings against it, yet it appears to fall short by a plain reading. NCLB's statement of purpose merely seeks to ensure access to scientifically based instruction.[74] For example, with regard to the Reading First initiative, NCLB only seeks to provide assistance in establishing reading programs based on scientifically based reading research.[75] Moreover, when specifically addressing instructional strategies, NCLB once again speaks in encouraging terms when it states that it will "advance teacher understanding of effective instructional strategies that are "based on scientifically based research."[76] The Reading First program requires the use of research-based instruction,[77] but it is another mere de facto requirement influencing compliance as a condition to receive important federal funding.[78]

It takes skill to come so close to establishing a duty of care and linguistically fall short by a hair. This dilemma is most likely due to the extreme caution legislators took in crafting a law that broke new ground, challenging the bounds of local control over education. The fact that education is traditionally under local control may fuel the argument that federal statutes

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74. *See* NCLB, *supra* note 11, at § 6301(9) ("[P]romoting schoolwide reform and ensuring the access of children to effective, scientifically based instructional strategies and challenging academic content.").

75. *See, e.g.* OFFICE OF ELEMENTARY AND SECONDARY EDUCATION, U.S. DEPARTMENT OF EDUCATION GUIDANCE FOR THE READING FIRST PROGRAM 13 (2002), http://www.ed.gov/programs/readingfirst/guidance.pdf.

76. NCLB, *supra* note 11, at § 7801(34)(A)(vii).

77. Margaret Spellings, U.S. Secretary of Education, Written Statement Before the House Committee on Education and Labor, released May 10, 2007. http://www2.ed.gov/news/speeches/2007/05/05102007.html (last visited Oct. 22, 2010) ("On the issue of research-based instruction, the statute specifies that instructional methods and materials, as well as related professional development, must incorporate the five essential elements of effective primary-grade reading instruction: (1) phonemic awareness; (2) decoding; (3) vocabulary development; (4) reading fluency, including oral reading skills; and (5) reading comprehension strategies.").

78. *Program Description*, U.S. DEPARTMENT OF EDUCATION, http://www2.ed.gov/programs/readingfirst/gtepreadingfirst.pdf ("This program [Reading First] focuses on putting proven methods of early reading instruction in classrooms. Through Reading First, states and districts receive support to apply scientifically based reading research—and the proven instructional and assessment tools consistent with this research—to ensure that all children learn to read well by the end of third grade. The program provides formula grants to states that submit an approved application . . . . Only programs that are founded on scientifically based reading research are eligible for funding through Reading First.").

were never intended to provide the basis for a duty of care for educators. It has become apparent, however, that federal control has intentionally encroached for some time now through discretionary and other incentives on the states and localities despite notions of federalism, which traditionally speak to deference to the states on such matters.[79]

Even if NCLB fails to definitively establish a statutory duty of care for negligence per se by a plain reading of the text, the intent of the statute is so clear that it would take little persuasion by a court to find the duty per se for regular education. In fact it could be argued that IDEIA may be read to help determine the legislative intent of the direction of NCLB since one is an outgrowth of the other and because special education is intermingled with regular education.[80] The law requires the mainstreaming of special education students in regular classes.[81] It would be a bizarre result indeed if a teacher would have a reasonable duty of care to some students in the classroom, but not others. In like manner, it would be equally untenable to have a student subject to a duty of reasonable care in one class, while none in another. Speaking to intent, the Secretary of Education also foreshadowed the interplay between NCLB with latter legislation such as IDEIA. "Those same principles [accountability, flexibility, expanded parental options and doing what works] will be embedded in future legislative proposals, in areas including special education, vocational education and higher education."[82]

Even if the courts fail to recognize a duty of care was fixed in NCLB for regular education, claims for gross negligence

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79. *Id.*

80. Greenwood v. Wissahickon Sch. Dist., No. 04-3880, 2006 U.S. Dist. LEXIS 4274, at 2 (E.D. Pa. 2006) ("The Individuals with Disabilities Education Act's mainstreaming mandate requires that states establish procedures to assure that children with disabilities are educated with children without disabilities, to the maximum extent that can be satisfactorily achieved with the use of supplementary aids and services.").

81. IDEA, *supra* note 49, at § 1412(a)(5)(A); *see also* 34 C.F.R. § 300.114(a)(2) (2006) ("Each public agency must ensure that . . . to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.").

82. *See* U.S. Department of Education, *supra* note 66.

should still be actionable under the common law. "The common law doctrine of negligence consists of three elements: 1) a legal duty owed by one person to another, 2) a breach of that duty, and 3) damages proximately resulting from the breach."[83] In the event of a common law case, NCLB and IDEIA could certainly provide very helpful guidance to the courts.

C. Policy Implications of the New Claim for Special Education

The shifting ground under education and law of late now makes it easier than ever to distinguish the integrity of education claim from the cases that claim general inadequacy of instruction or learning. Firstly, the integrity claim applies to special education, where there is precedent for civil litigation. Secondly, a federal statute establishes a reasonable duty of care for educators. Thirdly, teacher liability protection and the educators' standard of care both serve to identify that which may be actionable and severely limit the exposure to liability. Fourthly, public policy tends to favor the integrity claim to make whole the web of the law protecting special education students who are especially vulnerable to grossly negligent educational practices. The recognition of the integrity claim will also help goad educators away from the temptation of violating their statutorily imposed duty of care, which is all too often disregarded as evidenced by the Hess study.[84] There is also a compelling fiscal policy objective since time wasted on ineffective treatments cost society billions of dollars per year for long-term care and services that could have been avoided or substantially diminished had autistic children received scientifically based early intervention services.[85]

III. THE DUTY OF CARE CONTINUUM

The IDEIA makes fewer references to scientifically based practices than NCLB, but is more direct in establishing a

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83. Greater Houston Transp. Co. v. Phillips, 801 S.W.2d 523, 525 (Tex. 1990) (internal cites omitted).

84. Hess et al., *supra* note 16, at 967.

85. Zane et al., *supra* note 22, at 6 ("It is likely that children who do not receive effective early intervention services will require long-term special and custodial care throughout their lives, which for 1996 was estimated to cost over $13 billion a year (FEAT, 1996)").

reasonable duty of care.[86] The intent and language of the statute clearly expects educators to use scientifically supported practices whenever possible and refrain from using scientifically rejected practices at all times. The fact that the duty of care is framed on a continuum should not, however, be misconstrued as failing to explicitly define behavior that fixes a duty of care.

The continuum-based standard is needed to provide leeway for new and uncontested practices, yet at the same time, hold educators to the highest empirical standard when the situation permits. New innovations of varying effectiveness and harm are routinely introduced to the field of disabilities[87] and the degree to which these practices are subject to peer review varies. Thus Simpson et. al. created a rating paradigm of educational practices to objectify the lacunae. Additionally, although the accountability movement brought a new level of scientific evaluation to education, there may always be simple uncontested practices that fail to receive the scrutiny of scientific evaluation.

The usage of the continuum in the context of IDEIA clearly means that if it is possible to use scientifically based methods one should do so. Likewise, when the IDEIA requires that all special educational services be based on peer review methods to the greatest extent possible,[88] it means it is required if available. "The phrase 'to the extent practicable' as used in this context, generally means that services and supports should be based on peer-reviewed research to the extent that it is possible, given the availability of peer-reviewed research."[89]

The regulations interpreting IDEIA reinforce the notion of a duty of reasonable care based on the highest empirical standards possible. For instance, the U.S. Department of

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86. *E.g.* IDEIA, 20 U.S.C. § 1400(c)(5)(E).

87. *See* Hess et al., *supra* note 16, at 967 ("Surprisingly, almost 40% of the strategies reported as being used by teachers in Georgia public schools were not even mentioned in the recently published Simpson et al. (2005) compendium. This may suggest proliferation of strategies at a rate that exceeds opportunity for accurate chronicling in published literature and a willingness for educators to institute treatments before they have had an opportunity to be validated.").

88. IDEIA, 20 U.S.C. § 1414(d)(1)(A)(i)(IV) ("[A] [quarterly] statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child.").

89. Statement of Special Education and Related Services, 71 Fed. Reg. 46,540, 46,665 (Dep't of Educ. Aug. 14, 2006).

Education refused to lower the standard of the supplementary aids and services section from peer review research standard to a mere "evidenced-based" or "emerging best practices" standard.[90]

> Section 300.320(a)(4) incorporates the language in section 614(d)(1)(A)(i)(IV) of the Act, which requires that special education and related services and supplementary aids and services be based on peer-reviewed research to the extent practicable. The Act does not refer to "evidenced-based practices'" or "emerging best practices," which are generally terms of art that may or may not be based on peer-reviewed research. Therefore, we decline to change Sec. 300.320(a)(4) in the manner suggested by the commenters.[91]

The intent of the IDEIA is unwavering in support of scientifically supported practices. Clear evidence of this is found in the interpretation of U.S. Department of Education regulations for IDEIA which clearly refuse to tolerate scientifically rejected practices through any wiggle room afforded by diluted backdoor language that equates "evidenced-based practices" and "emerging best practices" with peer-reviewed research.

Consistent with the duty of care, the statute broadly states that, "An effective educational system serving students with disabilities should . . . provide for appropriate and effective strategies and methods."[92] The term "should" is arguably mandatory rather than mere precatory language in this instance since the statute goes on to set specific requirements regarding the use of scientifically based practices.[93] To this end, the law requires preservice and professional development training to include "the use of scientifically based instructional practices, to the maximum extent possible.[94]

The IDEIA also provides for technical assistance to make systemic changes in policy, procedure, and practice based on scientifically based findings.[95] For example, in the event a state needs

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90. *Id.* at 46,664 ("A few commenters recommended revising § 300.320(a)(4) to require special education and related services, and supplementary aids and services to be based on peer-reviewed research, evidenced-based practices, and emerging best practices.").

91. *Id.* at 46,665.

92. IDEIA, 20 U.S.C. § 1450(4).

93. *See, e.g., id.* at § 1450(7).

94. *Id.* at § 1400(5)(E).

95. *Id.* at § 1463(b)(5).

assistance for two consecutive years, the Secretary of Education will actually enforce compliance with the new empirical standards by providing "assistance in identifying and implementing professional development, instructional strategies, and methods of instruction that are based on scientifically based research."[96] Finally, the IDEIA mandates that IEP reports are based on peer reviewed research.[97] The IEP addresses academic goals, educational practices, in addition to supplemental aids and services used with the child in school.[98] There is nothing in the IDEA that tolerates the use of scientifically rejected practices. The flexibility provided is purposeful in IDEIA,—as yet unsupported practices may be used in good faith even though they have yet to meet evaluation by the assessment community. Thus, the language is carefully crafted and necessary to protect all of the instructional practices identified by Simpson et al. except for the "Not Recommended" category.[99] The U.S. Department of Education likewise addressed the rationale leading to the duty of care functioning on a continuum with an explanation of the phrase, "to the extent practicable." "The phrase, 'to the extent practicable,' as used in this context, generally means that services and supports should be based on peer-reviewed research to the extent that it is possible, given the availability of peer-reviewed research."[100] The high standard set for scientifically based standards in education is likewise reflected in the definition provided for "scientifically-based research" in the Department of Education's regulations.[101] Scientifically based research—

> (a) Means research that involves the application of rigorous, systematic, and objective procedures to obtain reliable and valid knowledge relevant to education activities and programs; and
>
> (b) Includes research that—
>
> (1) Employs systematic, empirical methods that draw on observation or experiment;

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96. *Id.* at § 1416(e)(1)(A)(ii).

97. *Id.* at § 1414(d)(1)(A)(i)(IV) ("[A] [quarterly] statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child.").

98. *Id.* at § 1414(d).

99. *See* Simpson et al., *supra* note 18.

100. Statement of Special Education and Related Services, *supra* note 89, at 46,665.

101. *Id.* at 46,576.

(2) Involves rigorous data analyses that are adequate to test the stated hypotheses and justify the general conclusions drawn;

(3) Relies on measurements or observational methods that provide reliable and valid data across evaluators and observers, across multiple measurements and observations, and across studies by the same or different investigators;

(4) Is evaluated using experimental or quasi-experimental designs in which individuals, entities, programs, or activities are assigned to different conditions and with appropriate controls to evaluate the effects of the condition of interest, with a preference for random-assignment experiments, or other designs to the extent that those designs contain within-condition or across-condition controls;

(5) Ensures that experimental studies are presented in sufficient detail and clarity to allow for replication or, at a minimum, offer the opportunity to build systematically on their findings; and

(6) Has been accepted by a peer-reviewed journal or approved by a panel of independent experts through a comparably rigorous, objective, and scientific review.[102]

A. The Educator's Duty of Care and the Frye Standard

The courts are well poised to apply existing legal standards to the new duty of care in education because of NCLB, IDEIA, and the growing accountability movement. The courts' experience with the *Frye* standard[103] provides a well-worn path for the introduction of the new duty of care in education, which is essentially the same rule in reverse. *Frye* requires that the scientific principle in question must be "generally accepted" in its field before it can be admitted into court as evidence.[104] In contrast, the question in integrity of education malpractice claims is whether or not the educational practice in question is for want of a better term, "generally rejected."

Under the new duty of care in education, an educator must refrain from using scientifically rejected practices in the

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102. *Id.*

103. Frye v. U.S., 293 F. 1013, 1014 (D.C. Cir. 1923) (established standard for determining the admissibility of scientific evidence).

104. *Id.*

classroom. Federal statutes fix a reasonable duty of care against the use of scientifically rejected practices, i.e., practices that have been subjected to empirical testing within the relevant assessment community and subsequently rejected. The fundamental analysis before the court, however, is the same for both educational malpractice and *Frye* since they both measure the scientific standing of a practice or principle. The task of finding a consensus based on empirical findings of the relevant assessment community is central to *Frye* and the educational tort.

IV. CONCLUSION

In sum, the educational malpractice theory has matured along with the field of education. It is clear that the unique compatibility of the law under the *Frye* standard, in addition to public policy and the welfare of school children, all converge toward the recognition of the integrity of education claim. It is also evident that the recognition of the integrity of education tort theory will most likely have a chilling effect on education. The chill, however, will likely be limited to behavior risking a conscious indifference to the rights, safety, or welfare of students.