Brigham Young University Education and Law Journal

Volume 2012 | Number 2 Article 3

Fall 3-2-2012

Teacher Effectiveness and Value-Added Modeling: Building a Pathway to Educational Malpractice?

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TEACHER EFFECTIVENESS AND VALUE-ADDED MODELING: BUILDING A PATHWAY TO EDUCATIONAL MALPRACTICE?

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It is well established that teacher quality makes a difference in student learning.[1]

How to improve student achievement and hold schools and teachers accountable for that achievement is a current and hotly discussed topic in education policy deliberations at both the state and national levels. The Council of Chief State School Officers in their announcement of the State Consortium on Educator Effectiveness wrote: "States are under tremendous pressure to turn dramatic changes in educator policy into improved student performance."[2]

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1. PATRICIA H. HINCHEY, NAT'L EDUC. POLICY CTR., GETTING TEACHER ASSESSMENT RIGHT: WHAT POLICYMAKERS CAN LEARN FROM RESEARCH 1 (Dec. 2010). *See also* ERIC HANUSHEK, NAT'L CTR. FOR ANALYSIS OF LONGITUDINAL DATA IN EDUC. RESEARCH (CALDER), THE ECONOMIC VALUE OF HIGHER TEACHER QUALITY 3 (Dec. 2010) ("First, teachers are very important; no other measured aspect of schools is nearly as important in determining student achievement."); Jian Wang et al., Editorial, *Quality Teaching and Teacher Education: A Kaleidoscope of Notions*, 62 J. TCHR. EDUC. 331, 331 (2011) ("It is generally assumed that quality teaching plays a major, if not the most important, role in shaping students' academic performances.").

2. COUNCIL OF CHIEF STATE SCH. OFFICERS, STATE CONSORTIUM ON EDUCATOR

While teachers have always stood at the crossroads of education, this is an unprecedented time. "Educational reformers of all stripes have focused tremendous energy on thinking of ways to identify effective teachers and in turn recruit, retain, compensate and support them."[3] However, at the same time policymakers are seeking to hold teachers individually accountable in very public ways for the achievement of their students.[4]

Schools have previously been the focus of accountability.[5] *No Child Left Behind* legislation, "which launched a new era of testing and accountability,"[6] focused on the school as the locus of accountability through establishing the category of schools in need of improvement, and reconstituting schools through transferring faculty and administrators, etc.[7] However, it did not target the effectiveness of individual teachers as a basis for remedial action. It has only been lately—possibly in response to the federal Race to the Top competition—that the focus of accountability was redirected from the effects of schools on the educational achievement of students to the effect of the teacher

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EFFECTIVENESS (SCEE) PARTNERSHIP OPPORTUNITIES 1 (2011), *available at* http://scee.groupsite.com/uploads/files/x/000/058/2c0/Business-Philanthropy%20Partnerships%202-11.pdf.

3. *New Analysis Suggests Teachers' Voices Do Not Have A Strong Influence On The Policy Agenda*, PUBLIC AGENDA, http://www.publicagenda.org/pages/new-analysis-suggests-teachers-voices-do-not-have-a-strong-influence-policy-agenda (last visited May 14, 2011) (noting research that demonstrates that student test scores play a role in teacher evaluation but that there are also other methods of assessing students' work that may be more powerful).

4. *See* Jason Song & Jason Felch, *L.A. Unified Releases School Ratings Using "Value-Added" Method*, L.A. TIMES, (April 12, 2011), *available at* http://www.latimes.com/news/local/la-me-0413-value-add-20110414,0,1675000.story; Michael Winerip, *Evaluating New York Teachers, Perhaps the Numbers Do Lie*, N.Y. TIMES (Mar. 6, 2011), *available at* http://www.nytimes.com/2011/03/07/education/07winerip.html?emc=eta1; the *New York Post's* full-page headline read "Revealed: Teacher Grades: And today the Post publishes the list. 12,170 names and their scores . . . ." (Feb. 25, 2012).

5. LARRY CUBAN, HUGGING THE MIDDLE: HOW TEACHERS TEACH IN AN ERA OF TESTING AND ACCOUNTABILITY (2009); NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983), *available at* http://reagan.procon.org/sourcefiles/a-nation-at-risk-reagan-april-1983.pdf.

6. Catherine Gewertz, *Educators and Parents Prefer Formative Assessments*, EDUC. WEEK (Feb. 22, 2012).

7. *See* No Child Left Behind, 20 U.S.C. 70 § 6301 (2002).

on student achievement.[8] However, the shift in focus from the student's failure to learn to the teacher's failure to teach may upset the previous notion that teachers were unlikely to be the subject of professional negligence suits.

A significant change may arise with this shift to holding educators accountable for the student outcomes of their instructional practice. Educators have not been subject to malpractice suits, as one commentator on professional malpractice has noted: "Unlike practitioners . . . [in] other professions, public school educators apparently have no such worry, at least with regard to providing effective instruction."[9] For professions other than education, "[t]he law has recognized professional malpractice actions when a professional demonstrates misconduct or an unreasonable lack of skill."[10] But given the pervasiveness of accountability measures and the rise of interest in assessing teacher effectiveness, a pathway to educational malpractice may give rise to a new worry for educators.[11] Consequently, the old barrier to educational malpractice may be giving way as a by-product of the new wave of accountability.[12] A new public policy favoring accountability and the advent of a statistical model that purports to identify ineffective—possibly incompetent—instruction may combine to build a path to recognizing educational malpractice as a viable remedy for students who allegedly suffered an academic injury.

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8. Jim Hull, *Building a Better Evaluation System: Full Report*, CENTER FOR PUB. EDUC. (Mar. 31, 2011), http://www.centerforpubliceducation.org/Main-Menu/Staffingstudents/Building-A-Better-Evaluation-System/Building-A-Better-Evaluation-System.html; Michael J. Strong et al., *Do We Know a Successful Teacher When We See One? Experiments in the Identification of Effective Teachers*, 62 J. TCHR EDUC. 367, 367 (2011) ("Now, with President Obama's Race to the Top, there is a focus on teacher effectiveness.").

9. Kimberly Walters-Parker, *When Students Pass, But Schools Fail: The Negligent Failure to Teach Students to Read*, EDUC. LAW CONSORTIUM 3 (2007), http://www.educationlawconsortium.org/forum/2007/papers/Walters-Patker2007.pdf.

10. Laurie S. Jamieson, *Educational Malpractice: A Lesson in Professional Accountability*, 32 B.C. L. REV. 899, 903 (1991).

11. *See, e.g.*, Erin Bohanan, *Educational Malpractice: Why We Do What We Do at Grandview from a Legal Perspective* (June 19, 2011), http://www.youtube.com/watch?v=qm2KLZDbOtc (focusing on how the school district is taking steps to avoid educational malpractice).

12. *See* Melanie Natasha Henry, *No Child Left Behind? Educational Malpractice Litigation for the 21st Century*, 92 CALIF. L. REV. 1117, 1119 (2004) (asserting that No Child Left Behind can form the basis for educational malpractice).

Promoting students' academic achievement is arguably the most important component of their jobs, but teachers contribute to their students' development in myriad ways.[13]

I. INTRODUCTION

Teachers occupy the central position in the school by providing instruction, structuring learning activities, and assessing the work of students. Succinctly stated: "Teacher quality matters. In fact, it is the most important school-related factor influencing student achievement."[14] It is particularly well established that no other measured aspect of schools is as important in determining student achievement as the effectiveness of the classroom teacher.[15] Consequently, some researchers and policymakers argue that the endpoint on accountability is "holding individual teachers (not just schools) accountable for results."[16] Douglas Reeves asserts that student test scores are perceived by many as the only "way to hold teachers accountable."[17] The nexus between teacher effectiveness and large-scale student testing is gaining acceptance by many policy makers and researchers.[18] This is a step beyond the assessments involved with credentialing

13. *See* LAURA GOE & ANDREW CROFT, NAT'L COMPREHENSIVE CTR. FOR TEACHER QUALITY, METHODS OF EVALUATING TEACHER EFFECTIVENESS 2 (Mar. 2009).

14. JENNIFER K. RICE, TEACHER QUALITY: UNDERSTANDING THE EFFECTIVENESS OF TEACHER ATTRIBUTES v (Aug. 2003), *available at* http://www.epi.org/publications/entry/books_teacher_quality_execsum_intro/#ExecSum.

15. *See*, *supra* note 1; DEMETRA KALOGRIDES ET AL., NAT'L CTR. FOR ANALYSIS OF LONGITUDINAL DATA IN EDUC. RESEARCH (CALDER), POWER PLAY? TEACHER CHARACTERISTICS AND CLASS ASSIGNMENTS 1 (Mar. 2011) ("The effect of teachers on student achievement is particularly well established.").

16. DAN GOLDHABER & MICHAEL HANSEN, NAT'L CTR. FOR ANALYSIS OF LONGITUDINAL DATA IN EDUC. RESEARCH (CALDER), ASSESSING THE POTENTIAL OF USING VALUE-ADDED ESTIMATES OF TEACHER JOB PERFORMANCE FOR MAKING TENURE DECISIONS 1 (Feb. 2010).

17. DOUGLAS B. REEVES, ACCOUNTABILITY FOR LEARNING: HOW TEACHERS AND SCHOOL LEADERS CAN TAKE CHARGE 5 (2004).

18. *See infra* notes 36-38. For challenges faced by this move to using VAM, *see* Stephanie Banchero, *Teacher Evaluations Pose Test for States*, WALL ST. J. 1 (Mar. 8, 2012) *available at* http://online.wsj.com/article/SB10001424052970203961204577267562780533458.html?mod=djemPJ_t ("Efforts to revamp public education are increasingly focused on evaluating teachers using student test scores, but school districts nationwide are only beginning to deal with the practical challenges of implementing those changes.").

teachers,[19] in terms of both policy and the development of new statistical models.

The most prevalent assessment tool purportedly translating student outcome scores to teacher effectiveness is Value-Added Modeling (VAM). VAM is the common name for several statistical treatments that seek to link or establish causality between a teacher's performance and student scores on standardized tests.[20] VAM has arguably "become the latest lightening rod in the policy and practice of educational accountability."[21] It currently is a divisive topic in the teacher-quality debate.[22]

While it seems rational that effective teachers should generate positive student outcomes, assessing teacher effectiveness using measures of student knowledge and skills is problematic. The Director of the National Education Policy Center critiques the reliance on student test scores for assessing teachers, writing: "Even after a decade of seeing the damage done by the *No Child Left Behind Act*, policymakers are still fetishizing student scores on standardized tests, using them as a crutch instead of turning to balanced, sensible solutions to teacher evaluation."[23] Aside from the validity and reliability problems associated with using assessments designed to measure student achievement,[24] VAM may have

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19. *See* Ralph D. Mawdsley & Paul Williams, *Teacher Assessment and Credentialing: The Role of the Federal Government in a State Function*, 262 EDUC. L. REP. 735 (2011), for a discussion of state level testing as part of the teacher credentialing process.

20. *See, e.g.*, Heather C. Hill, *Evaluating Value-Added Models: A Validity Argument Approach*, 28 J. POL'Y ANALYSIS & MGMT. 700 (2009).

21. DEREK BRIGGS & BEN DOMINGUE, NAT'L EDUC. POLICY CTR., DUE DILIGENCE AND THE EVALUATION OF TEACHERS: A REVIEW OF THE VALUE-ADDED ANALYSIS UNDERLYING THE EFFECTIVENESS RANKINGS OF LOS ANGELES UNIFIED SCHOOL DISTRICT TEACHERS BY THE *LOS ANGELES TIMES* 1 (Feb. 2011).

22. Stephen Sawchuk, *Wanted: Ways to Measure Most Teachers*, EDUC. WEEK (Feb. 2, 2011) ("It has generated sharp-tongued exchanges in public forums, in news stories, and on editorial pages. And it has produced enough policy briefs to fell whole forests.").

23. Kevin G. Welner, in *High-Quality Teacher Evaluation of "Fetishization" of Tests? New Report Offers Clear Guidance for Policymakers*, NAT'L EDUC. POL'Y CENTER 1(Dec. 7, 2010), http://nepc.colorado.edu/newsletter/2010/12/high-quality-teacher-evaluation-or-%E2%80%98fetishization%E2%80%99-tests-new-report-offers-clear-.

24. *See, e.g.*, EVA L. BAKER ET AL., ECON. POL'Y INST., PROBLEMS WITH THE USE OF STUDENT TEST SCORES TO EVALUATE TEACHERS (Aug. 29, 2010); SEAN P. CORCORAN, ANNENBERG INST. FOR SCH. REFORM, CAN TEACHERS BE EVALUATED BY THEIR

unintended consequences. VAM may open the door to the tort of educational malpractice in which a student has a cause of action for the breach of a teacher's instructional duty that affects his/her future life prospects.[25]

This commentary asks does the use of VAM, which seeks to ascribe and eventually hold teachers accountable for their students' achievement, have an unintended consequence of building a pathway to educational malpractice as a viable tort?

In 1981, a scholar—in the midst of the rise of minimal competency legislation—asserted that educational malpractice was the newest type of tort suit in education, and while educators have won all of the suits, "sooner or later one will be won by the plaintiff."[26] Ten years later, another commentator wrote: "With the growing sophistication of educators, the possibility of serious injury resulting from a lack of education, and the vulnerability of children, the time is ripe for recognition of educational malpractice."[27] Thirty years later, are we closer to recognizing the tort of educational malpractice? Quite possibly.

This commentary discusses the possibility of educational malpractice as a remedy for students whose teachers and schools fail to adequately prepare them for the future.[28] The following discussion is divided into four parts: part II provides

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STUDENTS' TEST SCORES? SHOULD THEY BE? THE USE OF VALUE-ADDED MEASURES OF TEACHER EFFECTIVENESS IN POLICY AND PRACTICE (2010).

25. *See* U.S. CENSUS BUREAU, THE BIG PAYOFF: EDUCATIONAL ATTAINMENT AND SYNTHETIC ESTIMATES OF WORK-LIFE EARNINGS (2002), *available at* http://www.census.gov/prod/2002pubs/p23-210.pdf (finding that educational attainment has historically paid economic dividends, the more education the higher the stream of earnings). "Recently, however, technological changes favoring more skilled (and educated) workers have tended to increase earnings among working adults with higher educational attainment, while, simultaneously, the decline of labor unions and a decline in the minimum wage in constant dollars have contributed to a relative drop in the wages of less educated workers." *Id.* at 3.

26. EUGENE T. CONNORS, EDUCATIONAL TORT LIABILITY AND MALPRACTICE 161 (1981).

27. Jamieson, *supra* note 10, at 965.

28. For a supporting commentary on why educational malpractice should be recognized as a means of protecting historically excluded groups, *see* Cheryl L. Wade, *When Judges Are Gatekeepers: Democracy, Morality, Status, and Empathy In Duty Decisions (Help From Ordinary Citizens)*, 80 MARQ. L. REV. 1, 10-11 (1996) ("Judges explain their refusal to recognize a duty of care that educators owe to their students by attributing a child's academic failure to her environment and cultural background.").

a foundation for understanding teacher evaluation; part III discusses VAM; part IV discusses educational malpractice[29] and asks whether the use of VAM as a tool for assessing teacher effectiveness can form the basis for educational malpractice; and part V presents the conclusion.

If we want good teaching in every classroom, good teaching must be valued.[30]

II. FOUNDATIONS FOR TEACHER EVALUATION

First, our beginning point is the acknowledgement of the critical role that teachers play in student achievement. Their decisions directly impact their students' ability to meet and exceed the educational, social, and personal learning outcomes established by the school board. While teacher effectiveness varies, current systems of evaluation do not sufficiently differentiate among teachers.[31] Evaluating teachers is a critical component in the delivery of a quality education to students. Consequently, teachers have both the right and the need to have accurate and fair feedback.[32]

The purposes of the supervision/evaluation process, we believe, include developing, improving, and maintaining teaching skills and behaviors that result in students meeting stated outcomes and goals. They also include providing a means for making critical employment decisions, such as granting tenure and identifying and resolving problems in work performance, up to and including non-retention or

29. This discussion uses, builds upon, and expands the authors' previous work. *See* Todd A. DeMitchell & Terri A. DeMitchell, *Statutes and Standards: Has the Door to Educational Malpractice Been Opened?*, 2003 BYU EDUC. & L.J. 485, which is quoted extensively without citation throughout.

30. THE NEW TEACHER PROJECT, TEACHER EVALUATION 2.0 2 (2010), http://tntp.org/files/Teacher-Evaluation-Oct10F.pdf.

31. *See* STEVEN GLAZERMAN ET AL., BROWN CTR. ON EDUC. POLICY AT BROOKINGS, EVALUATING TEACHERS: THE IMPORTANT ROLE OF VALUE-ADDED (Nov. 17, 2010); Anthony T. Milanowski et al., *Review of Teaching Performance Assessments for Use in Human Capital Management* 1 (Strategic Mgmt. of Human Capital, Working Paper, Aug. 2009), *available at* www.smhc-cpre.org/download/69/.

32. *See, Personnel Evaluation Standards*, JOINT COMM. ON STANDARDS FOR PERSONNEL EVALUATION, http://www.jcsee.org/personnel-evaluation-standards (last visited May 14, 2012) (identifying the standards for personnel evaluation as Propriety, Utility, Feasibility, and Accuracy).

dismissal. Finally, the personnel evaluation process must comport with the accepted standards or propriety, utility, feasibility, and accuracy as articulated by the Joint Committee on Standards for Educational Evaluation.[33]

Teacher evaluations serve to define the essential elements of competence.[34] They hold individuals accountable for their practice by helping them to improve. Failure to improve may lead to dismissal or contract nonrenewal. In other words, a negative evaluation might indicate that the teacher did not meet the accepted standards of practice for the teaching profession.

Building proper and effective teacher evaluations is an important policy concern.[35] Many states are turning to outside consultants and contractors to develop the assessments because teacher evaluations, such as VAM, have become so complex and logistically challenging.[36] For example, Georgia is planning to put out a request for proposals "to secure a contractor to supply value-added estimates based on its state-test data to include in new teacher-evaluation systems."[37] This raises the question that if the assessment systems are so complex that only outside experts can understand them, how can educators effectively and efficiently prepare to meet their expectations?

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33. *Id.*

34. *See, e.g.*, Milanowski et al., *supra* note 31, at 6, referencing eight important teaching competencies that support the improvement of student learning. These are:

1. Attention to Student Standards
2. Use of Formative Assessment to Guide Instruction
3. Differentiation of Instruction
4. Engaging Students
5. Use of Instructional Strategies that Develop Higher Order Thinking Skills
6. Content Knowledge and Pedagogical Content Knowledge
7. Development of Personalized Relationships with Students
8. High Expectations for Students. *Id.*

35. *See, e.g.*, *The INTASC Standards*, WRESA.ORG, http://www.wresa.org/Pbl/The%20INTASC%20Standards%20overheads.htm (last visited May 14, 2012) (listing the ten standards, which "reflect the professional consensus of what beginning teachers should know and be able to do").

36. *See* Stephen Sawchuk, *Building Systems for Evaluation Of Teachers Poses Challenges*, EDUC. WEEK (Apr. 27, 2011). *See also* Carl Campanile, *Formula Uncovers the "Value Added"*, N.Y. POST 5 (Feb. 25, 2012) (discussing the release of VAM scores in New York, "The teacher rankings released [February 24, 2012] are based on a sophisticated equation that would require an MIT degree to understand.").

37. Sawchuk, *supra* note 36, at 18.

VAM purports to measure whether the standards of practice for classroom instruction have been met by measuring student achievement and then attributing expected student gain or lack of student gain to a teacher.[38] If standards of practice are established through evaluations and the outcomes of the practice are measured through VAM assessments, then an enforceable standard of care and a method for showing causation may be created, thus leading to educational malpractice.[39]

Value-added assessment is the product of technology; it is also the product of a managerial mind-set that believes that every variable in a child's education can be identified, captured, measured, and evaluated with precision.[40]

III. VALUE-ADDED MODELING

VAM is an inclusive term for a collection of complex statistical techniques that calculate the value a teacher adds to

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38. *See* ERIC A. HANUSHEK & STEVEN G. RIVKIN, NAT'L CTR. FOR ANALYSIS OF LONGITUDINAL DATA IN ECON. RESEARCH, USING VALUE-ADDED MEASURES OF TEACHER QUALITY (May 2010), *available at* http://www.urban.org/uploadedpdf/1001371-teacher-quality.pdf; HENRY BRAUN, EDUC. TESTING SERV., VALUE-ADDED MODELING: WHAT DOES DUE DILIGENCE REQUIRE? 2 (Dec. 20, 2004), *available at* http://www.cgp.upenn.edu/pdf/Braun%20-%20VA%20Modeling%20What%20Does%20Due%20Diligence%20Req.pdf ("The logic behind the use of VAM seems unassailable: If good teaching is critical to student learning, then can't evidence of student learning (or its absence) tell us something about the quality of the teaching?").

39. *See* HOPE GRAY, CHILDLAW AND EDUC. INST. FORUM, NEW LIFE FOR EDUCATIONAL MALPRACTICE: DECADES OF POLICY REVISITED 12 (2010), *available at* http://www.luc.edu/law/academics/special/center/child/childed_forum/pdfs/2010_student_papers/Hope_Gray.pdf ("Development of a reasonable standard of care would create court enforceable standards without the typical policy problems. Educational malpractice lawsuits could be validated if universal standards are written and adopted."). *See also* Jennifer C. Parker, *Beyond Medical Malpractice: Applying the Lost Chance Doctrine to Cure Causation and Damages Concerns with Educational Malpractice Claims*, 36 U. MEM. L. REV. 373, 412 (2006) (asserting that "the loss of a chance doctrine, traditionally employed in medical malpractice cases, can be utilized in educational malpractice cases to alleviate difficulties with causation and damages"); Brian G. Gorman et al., *Psychology and Law in the Classroom: How the Use of Clinical Fads in the Classroom May Awaken the Educational Malpractice Claim*, 2011 BYU EDUC. & L.J. 29 (arguing that the use of scientifically accepted practices in the classroom can fix the reasonable duty of care concern).

40. DIANE RAVITCH, THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION 180 (2010).

the education of a student through the use of multiple years of a student's test score data.[41] They are complex statistical models "that attempt to attribute some fraction of student achievement growth over time to certain schools, teachers, or programs."[42] It purports to separate out the numerous non-educational factors, such as family background, that impact a student's achievement, thus isolating and measuring the effects of teachers and schools.[43] VAM calculations compare a teacher's contribution to student achievement with those of other teachers in the district, making VAM calculations simple "deviations from the district average."[44]

Teacher VAM scores—the difference between the expected student outcomes and their actual outcomes—are most often hierarchically, thus allowing comparisons of teachers by student outcomes without relation to normative data that provides value, therefore removing context from the equation.[45] According to proponents, VAM data will differentiate the most effective teachers from the least effective ones and identify

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41. *See* Haggai Kupermintz, *Teacher Effects and Teacher Effectiveness: A Validity Investigation of the Tennessee Value Added Assessment System*, 25 EDUC. EVALUATION & POL'Y ANALYSIS 287 (2003); Daniel F. McCaffrey et al., *Models for Value-Added Modeling of Teacher Effects*, 29 J. EDUC. & BEHAV. STAT. 67 (2004); Jimmy Scherrer, *Measuring Teaching Using Value-Added Modeling: The Imperfect Panacea*, 95 NASSP BULL. 122 (2011).

42. CENTER FOR EDUCATION, GETTING VALUE OUT OF VALUE-ADDED: REPORT OF A WORKSHOP 4 (2010).

43. Dale Ballou et al., *Controlling for Student Background in Value-Added Assessment of Teachers*, 29 J. EDUC. & BEHAV. STAT. 37, 38 (2004) ("Because the value-added method measures gain form a student's own starting point, it implicitly controls for socio-economic status and other background factors to the extent that their influence on the post-test is already reflected in the pre-test score.").

44. *Id.* at 40. *See also* Yoav Gonen, *"18%" of Teachers Get an F*, N.Y. POST (July 22, 2011), http://www.nypost.com/p/news/local/of_teachers_get_an_bud6BqF1yJ1nlrg9Oji4SO#ixzz1SrKpsGTR (showcasing the application of VAM in New York City, wherein a study of 20 schools and 500 teachers found that 18 % of the teachers were considered ineffective, 7% highly effective, with the remaining 75% distributed between the categories of effective or developing).

45. *See* Linda Darling-Hammond et al., *Evaluating Teacher Evaluation*, 93 PHI DELTA KAPPAN, Mar. 2012, at 8 (discussing the assumption that "measured achievement gains for a specific teacher's students reflect that teacher's 'effectiveness.' This attribution, however, assumes that student learning is measured well by a given test, is influenced by the teacher alone, and is independent form the growth of classmates and other aspects of the classroom context.").

those in the middle.[46]

There is an implicit assumption that if VAM measures effectiveness, especially when used in comparison with other teachers, the impact of the teachers' effectiveness on students would persist. In other words, "teacher effects are a fixed construct that is independent of the context of teaching . . . and stable across time."[47] The successful use of VAM, Corcoran argues, "requires a high level of confidence in the attribution of achievement gains to specific teachers."[48]

Proponents of VAM assert that the score captures the effectiveness of an individual teacher's instruction of her/his students as measured by standardized test scores.[49] Furthermore, some argue that while VAM is not perfect, it is better than the current system of evaluation.[50] An underlying theme of VAM is that you cannot improve what you cannot measure.

Opponents of the use of VAM push back against the assumptions that underlie the model and question the reliance on these calculations to "evaluate, reward, and remove the teachers."[51] Another argument asserted by the opponents of the high stakes use of VAM is that it will distort the educational process: "In education, this might take the form of teachers lobbying their principals to be assigned the 'right' students who will yield predictably high value added scores."[52]

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46. *Id.* at 9-13.

47. Xiaoxia Newton et al., *Value-Added Modeling of Teacher Effectiveness: An Exploration of Stability across Models and Contexts*, 18 EDUC. POL'Y ANALYSIS ARCHIVES, no. 23, 2010, at 1, 18.

48. CORCORAN, *supra* note 24, at 18.

49. *See, supra* note 38. *See also* Sawchuk, *supra* note 22, at 15 ("Value-added measures rely on state standardized tests to generate the individual teacher estimates and are typically available only in reading and mathematics in grades 4-8.").

50. *See, e.g.*, Hull, *supra* note 8.

51. BAKER ET AL., *supra* note 24, at 1.

52. Jesse Rothstein, *Teacher Quality in Educational Production: Tracking, Decay, and Student Achievement*, 125 Q. J. ECON. 175, 211 (2010), *available at* http://www.economics.harvard.edu/faculty/staiger/files/rothstein%2Bteacher%2Beffects%2Bqje2010.pdf. An example of the distortion of the educational process in response to high stakes is found in the Governor's investigative report of cheating in Atlanta schools in response to No Child Left Behind testing requirements. Some Atlanta teachers and principals altered student test scores in order to boost their scores and to give the illusion of transforming struggling schools. The report stated, "[t]housands of schoolchildren were harmed by widespread cheating in the Atlanta Public School

VAM, which does not take into account student characteristics, may "create disincentives for teachers to want to work with those students with the greatest needs."[53] The current use of high stakes testing under No Child Left Behind encourages the curricular concept of "sprint and cover" as opposed to deep learning; there is no reason to believe that VAM will change this.[54] Even proponents of VAM raise cautionary flags of accuracy and fairness about its use in high stakes personnel decisions.[55]

If doctors, lawyers, architects, engineers and other professionals are charged with a duty owing to the public whom they serve, it could be said that nothing in the law precludes similar treatment of professional educators.[56]

IV. EDUCATIONAL MALPRACTICE: A TORT OF NEGLIGENCE

A tort is a civil wrong for which the courts will provide a remedy for the injury suffered, usually in the form of damages assessed against the defendant. "The purpose of the law of torts is to adjust these losses, and to afford compensation for injuries sustained by one person as the result of the conduct of another."[57] A tort is based on reasonableness and fault. Keeton characterizes "negligence [as] a failure to do what the

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System. . . . Many of the accolades, and much of the praise, received by [Atlanta Public Schools] over the last decade were ill-gotten." Christina A. Samuels, *Report Details "Culture of Cheating" in Atlanta Schools*, EDUC. WEEK (July 8, 2011). The cheating involved 44 schools and at least 178 teachers. Governor Nathan Deal said, "A culture of fear, intimidation and retaliation existed in the district, which led to a conspiracy of silence. . . . There will be consequences." Kim Severson, *Systematic Cheating Is Found in Atlanta's School System*, N.Y. TIMES (July 5, 2011), http://www.nytimes.com/2011/07/06/education/06atlanta.html?-r=1&n1=todaysheadlines&eml=tha23.

53. Newton et al., *supra* note 47, at 18.

54. Kelly Gallagher, *Why I Will Not Teach to the Test: It's Time to Focus on In-Depth Learning, Not Shallow Answers*, EDUC. WEEK (Nov. 12, 2010) ("I want my students to grow up to be problem-solvers, not test-takers.").

55. HANUSHEK, *supra* note 38, at 4 ("The bigger issues with value-added estimates of teacher effectiveness concern their use in personnel compensation, employment, promotion, or assignment decisions.").

56. Donohue v. Copiague Union Free Sch. Dist., 418 N.Y.S.2d 375, 377 (N.Y. 1979).

57. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 6 (5th ed. 1984) (internal citation omitted).

reasonable person would do 'under the same or similar circumstances.'"[58] Examples of tort lawsuits brought against schools include an explosion in a high school science laboratory,[59] practicing racing dives into a shallow pool,[60] and being injured by a lacrosse stick wielded by a student in a physical education class.[61]

Tort law seeks to balance a plaintiff's claim to protection from damages against a defendant's freedom of action. Even when plaintiffs prevail, the court does not always make them whole. For example, immunity is one of the defenses to a tort. Immunity is derived from the ancient idea that "the King can do no wrong."[62] In *Russell v. The Men of Devon*, a wagon owner sued the men of Devon County who were responsible for maintaining the roads when his wagon broke down as a result of a bridge being in disrepair.[63] Finding for the defendant, Lord Ashhurst and his fellow judges wrote in pertinent part: "But there is another general principle of law which is more applicable to this case, that it is better that an individual should sustain an injury than that the public should suffer an inconvenience."[64]

Often the potential social consequences of a particular judicial determination will be examined when deciding a case. Thus, in tort litigation, it is possible that even if it is appropriate to provide compensation to a specific plaintiff, the plaintiff will be denied compensation if it is determined that there may be negative social consequences associated with such a decision. For example, in a decision regarding the imposition of strict liability for sexual abuse under Title IX, the Fifth Circuit Court of Appeals wrote: "As horrible a crime as child abuse is, we do not live in a risk-free society; it contorts 'public policy' to suggest that communities should be held financially

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58. *Id.* at 175.

59. Nash v. Port Wash. Union Free Sch. Dist., 922 N.Y.S.2d 408 (N.Y. App. Div. 2011).

60. Kahn v. E. Side Union High Sch. Dist., 117 Cal.Rptr.2d 356 (Cal. Ct. App. 2002), *rev'd* 75 P.3d 30 (Cal. 2003).

61. Larchick v. Diocese of Great Falls-Billings, 208 P.3d 836 (Mont. 2009).

62. *See* E. Blythe Stason, *Governmental Tort Liability Symposium*, 29 N.Y.U. L. REV. 1321, 1321 (1954).

63. 2 T.R. 667, 100 Eng. Rep. 359 (1778).

64. *Id.* at 673.

responsible in this manner (strict liability) for such criminal acts of teachers."[65] These social consequences are sometimes referred to as public policy concerns, often associated with the opening the floodgates of litigation argument.[66] As Lord Ashhurst wrote, sometimes the courts prefer an individual harm to a societal inconvenience. As will be discussed below, public policy concerns play a significant and sometimes conflicting role in educational malpractice litigation.[67]

The most common tort in school litigation is negligence.[68] This tort is characterized by conduct that falls below an acceptable standard of care and results in an injury: usually determined by a failure to act with the caution a reasonable person would in the same or similar circumstances. It is conduct that causes an unintentional harm. As individuals, we can be held legally accountable for our actions or failure to act under certain circumstances. The same is true for school districts.[69] For example, school districts and educators have

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65. Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393, 399 (5th Cir. 1996).

66. *See* Kimberly Jade Norwood, *Adult Complicity in the Dis-Education of the Black Male High School Athlete & Societal Failures to Remedy His Plight*, 34 T. MARSHALL L. REV. 21, 56 (2008) (stating that several reasons have been asserted why malpractice litigation has failed, including the following policy consideration: "concerns that the schools will be overrun with litigation by dissatisfied students and parents at every step of the education process, overburdening the already overtaxed school systems, administrators and budgets."); Laurie S. Jamieson, *supra* note 10, at 901 (discussing the early educational malpractice claims: "The final two categories of public policy considerations were economic and administrative concerns, which encompassed the possibility of a flood of new claims, and the litigation's fiscal impact on the community.").

67. *See* DeMitchell & DeMitchell, *supra* note 29, at 506-07. "Currently, public policy dictates that educational malpractice not be recognized as a tort. But public policy does change." *Id.* at 506; McGovern v. Nassau Cnty. Dep't of Soc. Serv., 876 N.Y.S.2d 141, 142 (N.Y. App. Div. 2009) ("These allegations sound in educational malpractice, which has not been recognized as a cause of action in [New York] because public policy precludes judicial interference with the professional judgment of educators and with educational policies and practices.").

68. *See* Peter J. Maher et al., *Governmental and Official Immunity for School Districts and Their Employees: Alive and Well?*, 19 KAN. J.L. & PUB. POL'Y 234, 235 (2010) ("Negligence litigation is central to K-12 education litigation."); MICHAEL IMBER & TYLL VAN GEEL, EDUCATION LAW 450 (2d ed. 2000) ("The single most common type of litigation in education is students suing school districts and educators because they were injured at school.").

69. *See* Suzanne E. Eckes et al., *Trends in Court Opinions Involving Negligence in K-12 Schools: Considerations for Teachers and Administrators*, 275 ED. LAW REP. 505 (2012) ("Specifically, school districts can be found vicariously liable, even if they did not contribute to the negligence, for negligent acts or a failure to act by their

been sued for torts of negligence alleging a failure to adequately supervise students on the school grounds,[70] failure to warn and instruct students about the use of methanol around a flame,[71] and failure to instruct a field hockey player to wear the required mouth protector.[72]

However, not all injuries to students result in a finding of liability. School districts are not an insurer of safety for school children.[73] Sometimes injuries to students occur which do not result in legal liability for a school district.[74] For example, in *Knighter v. William Floyd Union Free School District*, a student playing dodge ball in a physical education class stepped backwards and tripped over another student's foot resulting in an injury.[75] The plaintiff student sued for a breach of adequate supervision. The court, finding for the school district, concluded that the "incident occurred so quickly that even the most intense supervision could not have averted the accident."[76]

Malpractice is a tort for which courts may provide a remedy for the damages suffered at the hands of another. Malpractice is usually equated with the quality of service that a professional renders. Professionals are expected to utilize a standard of care recognized by their profession as appropriate, based on the training received, and the commonly held set of

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teachers during the course or scope of their employment.").

70. *See, e.g.*, Walley v. Bivins, 917 N.Y.S.2d 461 (N.Y. App. Div. 2011); Vonungren v. Morris Cent. Sch. Dist., 658 N.Y.S.2d 760 (N.Y. App. Div. 1997); Doxtader v. Middle Country Cent. Sch. Dist. at Centereach, 916 N.Y.S.2d 215 (N.Y. App. Div. 2011). *But see* Moffat v. N. Colonie Cent. Sch. Dist., 917 N.Y.S. 2d 754 (N.Y. App. Div. 2011) (holding that the school district could not have foreseen a fight between two students, thus the school did not provide inadequate supervision).

71. Bush v. Oscada Area Sch., 250 N.W.2d 759 (Mich. App. Ct. 1977), *rev'd* 275 N.W.2d 268 (Mich. 1979).

72. Baker v. Briarcliff Sch. Dist., 613 N.Y.S.2d 660 (N.Y. App. Div. 1994).

73. *See* KEETON ET AL., *supra* note 57, at 385 ("[W]here the duty does exist, the obligation is not an absolute one to insure the plaintiff's safety, but requires only that the defendant exercise reasonable care."); Maldonado v. Tuckahoe Union Free Sch. Dist., 817 N.Y.S.2d 376, 377 (N.Y. App. Div. 2006).

74. *See, e.g.*, Donohue v. Copiague Union Sch. Dist., 418 N.Y.S.2d 375, 379 (N.Y. 1979) (Wachtler, J., concurring) ("It is a basic principle that the law does not provide a remedy for every injury.").

75. 857 N.Y.S.2d 726 (N.Y. App. Div. 2008).

76. *Id.* at 727.

practices associated with the service rendered.[77] "Failure to exercise the accepted standard of care may form the basis for malpractice if the negligent delivery of the service is the legal cause for an injury."[78]

To successfully bring an action under the theory of negligence, including malpractice,[79] the following prima facie elements must be established: (1) existence of a legal duty owed by the defendant to the plaintiff; (2) a breach of the legal duty by the defendant; (3) causation between the defendant's acts, or failure to act, and the plaintiff's injuries suffered; and (4) damages suffered by the plaintiff.[80]

The courts have long and consistently recognized a school's duty to protect students in their care from physical injury on school grounds and under school supervision.[81] While school districts have a duty to take reasonable steps to protect students from a foreseeable physical harm, there is no corresponding duty to educate students according to educational malpractice suits.[82] In other learned professions, such as medicine, when a complaint is filed against a physician for allegedly rendering incompetent service to a patient that causes an injury, the physician's actions are scrutinized to determine whether they were consistent with the duty owed to the patient, and the patient is generally compensated for damages suffered due to proven professional malpractice for failure to act as a reasonable physician would.[83] However, if a

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77. *See* KEETON ET AL., *supra* note 57, at 185.

78. DeMitchell & DeMitchell, *supra* note 29, at 489.

79. *See* Michael J. Polelle, *Who's on First, and What's a Professional?*, 33 U.S.F. L. REV. 205, 206 (1999). ("Judicial intervention in the specific professions of medicine and law has largely molded the malpractice law applied to all professionals.").

80. KEETON ET AL., *supra* note 57, at 164-65.

81. Judith H. Berliner Cohen, *The ABC's of Duty: Educational Malpractice and the Functionally Illiterate Student*, 8 GOLDEN GATE U. L. REV. 293, 299 (1978). *See also* Dunn v. Unified Sch. Dist., 40 P.3d 315, 328 (Kan. Ct. App. 2002) ("There is no question that a school has a duty to provide a suitable environment conducive to the general health, safety, and welfare of each student.").

82. *But see* B.M. v. State, 649 P.2d 425 (Mont. 1982) (holding that the school owed a duty of reasonable care in the testing and placement of special education students); Sain v. Cedar Rapids Cmty. Sch. Dist., 626 N.W.2d 115 (Iowa 2001) (holding that school counselors have a duty to use reasonable care in providing information to students).

83. *See, e.g.*, Fletcher v. Medical Univ. of S. Carolina, 702 S.E.2d 372, 374 (S.C. Ct. App. 2010) (quoting Jones v. Doe, 372 S.C. 53, 61 (S.C. Ct. App. 2006)) (holding "A

student receiving a public education is not adequately educated the injured student has no remedy because historically the courts have uniformly refused to recognize educational malpractice as a cause of action.[84]

A. The Emergence of Educational Malpractice?

Professionals who engage in alleged professional misconduct or who allegedly lack appropriate skill resulting in injury may be liable for malpractice. Malpractice law has been characterized as having two equal objectives: "compensating injured persons and deterring . . . negligence."[85] Keeton note that the earliest appearance of professional negligence "was in the liability of those who professed to be competent in certain 'public' callings."[86]

Malpractice is often distinguished from other wrongs committed by professionals in that it deals with the quality of

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Plaintiff alleging medical malpractice action the plaintiff must establish (1) 'the generally recognized practices and procedures which would be exercised by competent practitioners in a defendant doctor's field of medicine under the same or similar circumstances,' and (2) a departure by the defendant 'from the recognized and generally accepted standards, practices and procedures . . . .'").

84. *See* Ross v. Creighton Univ., 740 F. Supp. 1319, 1327 (N.D. Ill. 1990) ("Educational malpractice is a tort theory beloved of commentators, but not of courts."), *rev'd* in part on other grounds 957 F.2d 410 (7th Cir. 1992); Livolsi v. Hicksville Union-Free Sch. Dist., 693 N.Y.S.2d 617, 617-18 (N.Y. App. Div. 1999) ("As a matter of public policy, such a cause of action cannot be entertained by the courts of this State."); Brown v. Compton Unified Scb. Dist., 68 Cal. App. 4th 114, 117 (Cal Ct. App. 1998) ("Policy considerations preclude 'an actionable 'duty of care' in persons and agencies who administer the academic phases of the public educational process. . . .'"); Zinter v. Univ. of Minn., 799 N.W.2d 243, 247 (Minn. Ct. App. 2011) (quoting Alsides v. Brown Inst., Ltd., 592 N.W.2d 468, 473 (Minn. Ct. App. 1999)) (noting that "educational malpractice is 'a claim not recognized in Minnesota law.'"). *See also* Karen H. Calavenna, Comment, *Educational Malpractice*, 64 U. DET. L. REV. 717 (1987); Frank D. Aquila, *Educational Malpractice: A Tort En Ventre*, 39 CLEV. ST. L. REV. 323 (1991); Alice J. Klein, Note, *Educational Malpractice: Can the Judiciary Remedy the Growing Problem of Functional Illiteracy*, 13 SUFFOLK U. L. REV. 27 (1979); Patricia Abbott, Note, Sain v. Cedar Rapids Community School District*: Providing Special Protection for Student-Athletes?*, 2002 BYU EDUC. & L.J. 291, 291 ("Long ago, legal scholars held a funeral service for the tort of educational malpractice.").

85. Clark C. Havighurst, *Practice Guidelines as Legal Standards Governing Physician Liability*, 54 L. & CONTEMP. PROBLEMS 87, 95 (1991).

86. KEETON ET AL., *supra* note 57, at 161 ("A carrier, an innkeeper, a blacksmith, or a surgeon, was regarded as holding oneself out to the public as one in whom confidence might be reposed, and hence as assuming an obligation to give proper service, for the breach of which, by any negligent conduct, he might be liable.").

the services rendered.[87] Professionals are held accountable through malpractice "for failure to perform in accordance with the skills that define their jobs."[88] Professionals are expected to utilize a standard of care recognized by their profession as appropriate, based on the training received and the commonly held set of practices associated with the service rendered.[89] Failure to exercise the accepted standard of care may form the basis for malpractice if the negligent delivery of the service is the legal cause for an injury suffered due to the lack of an appropriate standard of care.

Malpractice is defined as:

> Professional misconduct or unreasonable lack of skill. This term is usually applied to such conduct by doctors, lawyers, and accountants. [It is the f]ailure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss or damage to the recipient of those services or to those entitled to rely upon them. It is any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct.[90]

A surgeon may operate on a patient and follow all of the commonly accepted procedures for the operation and yet the patient may die. The death of the patient is not the measure of malpractice; the delivery of the standard of care concerning the operation is instead dispositive. In other words, a malpractice suit will not prevail if the patient dies in spite of the surgeon doing everything expected in the fulfillment of the professional service rendered. However, if the surgeon used non-sterilized instruments in a hospital setting this would most likely be

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87. Ronald E. Mallen, *Recognizing and Defining Legal Malpractice*, 30 S.C. L. REV. 203 (1979).

88. John G. Culhane, *Reinvigorating Educational Malpractice Claims: A Representational Focus*, 67 WASH. L. REV. 349, 371 (1992).

89. 61 AM. JUR. 2D *Physicians, Surgeons, and Other Healers* § 189 (2011).

90. BLACK'S LAW DICTIONARY 864 (5th ed.1979). *See also* Bd. of Exam'rs of Veterinary Med. v. Mohr, 485 P.2d 235, 239 (Okla. 1971) ("any professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties; . . . objectionable, or wrong practice; . . . practice contrary to rules.") (internal citation omitted).

found to not constitute adherence to the generally accepted practices of a surgeon. In legal malpractice, lawyers may not be held liable for honest errors of judgment.[91] Similarly, in an educational malpractice suit in New York, the state Supreme Court Appellate Division stated: "The failure to learn does not bespeak a failure to teach."[92] In all three situations—medicine, law, and education—the outcome of the service does not necessarily determine whether malpractice occurred. "The standard is one of conduct, rather than consequences."[93] The standard of care provides the measure for analyzing the conduct of the professional.

While malpractice suits are suits for negligence using the same four-part test of duty, breach, causation, and injury, there are differences between malpractice and negligence cases. Generally the key is whether the professional performed in accordance with the standard of care observed by members of the profession.[94] In other words, the standard of care is used to measure the competence of the professional.[95] For example, "[t]here is a substratal difference in medical malpractice claims . . . compared to garden-variety defendants in negligence cases."[96] Where common knowledge may apply in negligence cases, it may be insufficient in malpractice cases, which may require the testimony of expert witnesses.[97] The basic rule states that "a physician is under a duty to use that degree of care and skill which is expected of a reasonably competent practitioner in the same class to which he belongs, acting in the

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91. Mark Richard Cummisford, *Resolving Fee Disputes and Legal Malpractice Claims Using ADR*, 85 MARQ. L. REV. 975, 978 (2002).

92. Donohue v. Copiague Union Free Sch. Dist., 407 N.Y.S.2d 874, 881 (N.Y. App. Div. 1978).

93. KEETON ET AL., *supra* note 57, at 170.

94. *See* Hall v. Hilbun, 466 So. 2d 856 (Miss. 1985) for a discussion of the parameters of the medical standard.

95. KEETON ET AL., *supra* note 57, at 189 ("[G]ood medical practice" is that which "is customary and usual in the profession.").

96. Joseph H. King, *The Common Knowledge Exception to the Expert Testimony Requirement for Establishing the Standard of Care in Medical Malpractice*, 59 ALA. L. REV. 51 (2007) (arguing "[t]he facile simplicity of the common knowledge rule masks very real competing concerns." *Id.* at 54).

97. *See* KEETON ET AL., *supra* note 57, at 188. ("Since juries composed of laymen are normally incompetent to pass judgment on questions of medical science or technique, it has been held in the majority of malpractice cases that there can be no finding of negligence in the absence of expert testimony to support it.").

same or similar circumstances."[98]

1. Education malpractice cases

Negligence and malpractice cases are generally relegated to state courts. The 1976 landmark case *Peter W. v. San Francisco Unified School District*[99] first adjudicated the issue of educational malpractice. The California appellate court wrote:

> The novel—and troublesome—question on this appeal is whether a person who claims to have been inadequately educated, while a student in a public school system, may state a cause of action in tort against the public authorities who operate and administer the system. We hold that he may not.[100]

This case set the stage for all subsequent educational malpractice actions by denying recovery to the student plaintiff.

In this case, a high school graduate brought suit against the San Francisco Unified School District and the superintendent and governing board to recover for alleged negligence in instruction and intentional misrepresentation of the student's progress. The plaintiff student claimed that these actions resulted in depriving him of basic academic skills.[101] In other words, he asserted that he was injured because the school breached its duty to properly educate him through proper instruction.[102] The court, finding for the defendant school district, stated:

> Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might—and commonly does—have his own emphatic views on the subject. The "injury" claimed here is plaintiff's inability to read and

98. James O. Pearson, *Modern Status of "Locality Rule" in Malpractice Against Physician Who is Not a Specialist*, 99 A.L.R. 3D 1133, 1139 (1980).

99. 131 Cal. Rptr. 854 (Cal. Ct. App. 1976).

100. *Id.* at 855.

101. *Id.* at 856.

102. *Id.* at 858.

> write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental: they may be present but not perceived, recognized but not identified.[103]

Based on the above reasoning, the court found that a duty of care could not be created because of the multiple factors involved in education that are beyond the control of the educator, and because of an assumption on the part of the court that there is no recognized methodology with regard to education. However, the court expressed policy concerns that help explain its reluctance to allow a cause of action for educational malpractice extending beyond the four elements required for a negligence case:

> To hold them to an actionable "duty of care," in the discharge of their academic functions, would expose them to the tort claims—real or imagined—of disaffected students and parents in countless numbers. They are already beset by social and financial problems which have gone to major litigation, but for which no permanent solution has yet appeared. The ultimate consequences, in terms of public time and money, would burden them—and society—beyond calculation.[104]

Accordingly, relief for educational malpractice was denied to the student plaintiff. While educators can be held liable for infringing upon students' rights and for negligence that causes students physical harm, educators, under *Peter W.*, do not have a legal responsibility to educate students. In other words, educators can be sued for providing inadequate supervision, but not for providing inadequate instruction.

Three years after the case of *Peter W.* was heard in California, a high school student in New York brought a similar action. In *Donohue v. Copiague Union Free School District*,[105] the plaintiff attended Copiague Senior High School but graduated without the rudimentary ability to read and

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103. *Id.* at 860-61.

104. *Id.* at 861 (internal citations omitted).

105. 391 N.E.2d 1352 (N.Y. 1979).

write. The plaintiff in this case sought five million dollars in compensatory damages.[106]

The plaintiff asserted two causes of action. The first was educational malpractice and the second was the negligent breach of a constitutionally imposed duty to educate under New York law.[107]

The New York intermediate appellate court rejected the second claim with very little discussion.[108] However, the first cause of action, alleging educational malpractice, was analyzed in depth. The court found that such a cause of action was indeed plausible and that "a complaint sounding in 'educational malpractice' may be formally pleaded."[109] Furthermore, the court stated, "the imagination need not be overly taxed to envision allegations of a legal duty of care flowing from educators, if viewed as professionals, to their students."[110]

However, after determining that a cause of action in educational malpractice was indeed possible, the court opined that, following the precedent of *Peter W.*, such claims should not be entertained for public policy reasons.[111] The court found that the control and management of educational affairs in the state of New York was vested in the Board of Regents and the Commissioner of Education and the courts should not interfere with their decision making absent a gross violation of public policy.[112] The court did not, however, elaborate on what type of violation might be considered a gross violation, but clearly a lack of due care while instructing students was not considered a gross violation of public policy. Specifically, the court held that:

> To entertain a cause of action for "educational malpractice" would require the courts not merely to make judgments as to the validity of broad educational policies—a course we have unalteringly eschewed in the past—but, more importantly, to sit in review of the day-to-day implementation of these

106. *Id.* at 1353.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 1354.
112. *Id.*

> policies. Recognition in the courts of this cause of action would constitute blatant interference with the responsibility for the administration of the public school system lodged by [the New York] Constitution and statute in school administrative agencies.[113]

Whereas the court in *Peter W.* found that no duty of care exists in the educational setting and therefore an action in malpractice is not possible, the *Donohue* court found that the four elements of a tort do exist in educational malpractice cases.[114] However, the court in *Donohue* chose to insulate educators from liability as a matter of public policy.[115] Thus, both courts held that educators should not be held accountable under malpractice for the services they render for policy reasons. Similarly, the Maryland Court of Appeals agreed substantially with *Peter W.* and *Donohue* that "an award of money damages . . . represents a singularly inappropriate remedy for asserted errors in the educational process."[116]

The *Peter W.* court in California and the *Donohue* court in New York found "the lack of agreed-upon standards for teaching practice and public policy concerns regarding financial responsibility formed the basis for the failure of lawsuits for educational malpractice."[117] As educational policies and practices change, the legal arguments of *Peter W.* and its progeny may shift, as well. For example, while *Peter W.* questioned whether the educational profession required, or even articulated, a duty of care,[118] more recently implemented VAM measures of a teacher's contribution to student achievement, purporting to establish a causal effect between

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113. *Id.*

114. *Id.* ("The fact that a complaint alleging 'educational malpractice' might on the pleadings state a cause of action within traditional notions of tort law does not, however, require that it be sustained.").

115. *Id.* ("The heart of the matter is whether, assuming that such a cause of action may be stated, the courts should, as a matter of public policy, entertain such claims. We believe they should not.").

116. Hunter v. Bd. of Educ., 439 A.2d 582, 585 (Md. 1982).

117. Terri A. DeMitchell & Todd A. DeMitchell, *A Crack in the Educational Malpractice Wall*, 64 SCH. ADMIN. 34 (2007).

118. Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854, 861 (Cal. Ct. App. 1976) ("We find in this situation no conceivable 'workability of a rule of care' against which the defendants' alleged conduct may be measured . . . .").

teacher action and student outcome,[119] may establish the duty. Therefore, has VAM provided a means in which the school district can forecast how much growth a student should make with a specific teacher? Such a trend might make a tort of educational malpractice viable. The following analysis will present the basic arguments that form the basis for a malpractice action, borrowing, in part, form examples of medical and legal malpractice.

a. Duty owed.

The defendant (teacher/school) must owe a duty to the plaintiff (student) in order to sustain a tort of negligence. Because "there is no duty to go to the assistance of a person in difficulty or peril,"[120] the question is whether or not the defendant is under a legal obligation to "conform to a certain standard of conduct, for the protection of others against unreasonable risks."[121] As a general rule, a person has no affirmative duty to aid or protect another.[122]

It is well settled that teachers, under tort theory, owe a duty to their students.[123] This duty is grounded in the *in loco parentis* doctrine in which the school/teacher takes custody of the child/student to provide the child with the protection normally provided by the parents or guardians.[124] The Washington Court of Appeals applied the doctrine of *in loco parentis* in the following manner:

> The usual relationship between student and school is that the child must attend school and obey school rules. Students

119. DANIEL F. MCCAFFREY ET AL., EVALUATING VALUE-ADDED MODELS FOR TEACHER ACCOUNTABILITY 10 (2003).

120. KEETON ET AL., *supra* note 57, at 378 (arguing that there is a difference between misfeasance and nonfeasance. *Id.* at 373-82.).

121. *Id.* at 164.

122. *See* Pace v. State, 195 Md. App. 32, 52 (Md. Ct. Spec. App. 2010) (asserting that the National School Lunch Program does not establish a special relationship with the plaintiff student that would give rise to a duty requiring the exercise of "a greater degree of care for students with food allergies").

123. *See, e.g.*, KEETON ET AL., *supra* note 57, at 383.

124. RESTATEMENT (SECOND) OF TORTS § 320 cmt. b (1965) ("[A] child while in school is deprived of the protection of his parents or guardians. Therefore, the actor who takes custody of a prisoner or of a child is properly required to give him the protection which the custody or the manner in which it is taken has deprived him.").

> under the control and protection of the school are thus not able to protect themselves. The protective custody of teachers is substituted for that of the parents.[125]

Factors relevant in determining whether a duty exists include the foreseeability of injury, the likelihood of injury, the magnitude of the burden on the defendant, and the possible seriousness of the injury.[126] One of the duties that educators owe to their students is proper instruction. "Proper instructions are necessary to reduce the risk of injury when a student undertakes an activity."[127] The requirement under a negligence standard that a teacher must provide adequate instructions in light of foreseeable harm may be extended to malpractice. If the profession has developed a standard of instructional practice that all reasonable teachers should deliver to their students, then a failure to provide the usual and customary instruction may provide a basis for malpractice.

The duty owed in malpractice cases is typically determined by the expectations of the profession. For example, in *Blair v. Eblen* the court wrote:

> [A physician is] under a duty to use that degree of care and skill which is expected of a reasonably competent practitioner in the same class to which he belongs, acting in the same or similar circumstances. . . . [T]he evidence may include the elements of locality, availability of facilities, specialization or general practice, proximity of specialists and special facilities as well as other relevant considerations.[128]

In legal malpractice, the general rule is that a lawyer is liable for the failure to possess the requisite skill or for the failure to exercise the standard of care necessary for his or her client's cause.[129] It is expected that an attorney will exercise the skill and care ordinarily exercised by attorneys in performance of contractual obligations.[130] It has been found

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125. Travis v. Bohannon, 115 P.3d 342, 346 (Wash. Ct. App. 2005) (internal citations omitted).

126. *See* Diaz v. Krob, 636 N.E.2d 1231 (Ill. App. Ct. 1994).

127. TODD A. DEMITCHELL, NEGLIGENCE: WHAT PRINCIPALS NEEDS TO KNOW ABOUT AVOIDING LIABILITY 30 (2006).

128. 461 S.W.2d 370, 373 (Ky. 1970).

129. Campbell v. Magana, 8 Cal. Rptr. 32 (Cal. Dist. Ct. App. 1960).

130. Basic Food Indus., Inc. v. Grant, 310 N.W.2d 26 (Mich. Ct. App. 1981).

that an attorney who represents and advises a client implicitly represents that he or she possesses the necessary skill to handle the matters that may result.[131] Thus, liability can also result if a lawyer takes a case that is beyond his or her capabilities or for the failure to know or to learn the law applicable to his or her client's case.

For example, in *Smith v. Lewis*,[132] an attorney who did not specialize in the area of family law represented a woman in a divorce case. Before advising her client of her rights, the attorney failed to research the issue of the community property nature of her client's husband's military pension. "[A]n attorney is expected to perform sufficient research to enable him to make an informed and intelligent judgment on behalf of his client."[133] The California Supreme Court found this failure to constitute malpractice.[134]

As discussed above, physicians and attorneys are held to the standard of their profession in the discharge of their duty. If there is no duty of care that holds a teacher to a standard of professional instructional practice, as there is in medical and legal practice, a tort of educational malpractice will fail. In *Peter W.* and *Donohue,* the plaintiff students were unsuccessful in large part because no duty of instructional care, as defined by a standard of practice, was recognized by the court. This finding of a lack of a core professional duty owed to students was supported by a California federal district court in *Swany v. San Ramon Valley Unified School District*.[135] The court cited to *Peter W.* as authority in an issue of whether a student would be allowed to take part in the graduation ceremony even though the student did not turn in the required assignment on time. The court held that California teachers do not owe a special duty to their students and only need act as "an ordinary, prudent, or reasonable person would exercise under the same or similar circumstances".[136] For educational

131. Citizens' Loan Fund & Saving Ass'n v. Friedley, 23 N.E. 1075 (Ind. 1890).

132. 530 P.2d 589 (Cal. 1975), *overruled in part by* In Re Marriage of Brown, 15 Cal. 3d 838 (Cal. 1976).

133. *Id.* at 596.

134. *Id.* at 599-600.

135. 720 F. Supp. 764 (N.D. Cal. 1989).

136. *Id.* at 781.

malpractice to move beyond the educator's duty owed to students as measured by that of an ordinary and reasonable person, the professional duty must move beyond acts in response to foreseeable physical harm to academic acts which require "a higher professional standard of conduct."[137] This hurdle was fatal in *Peter W.* but may not be so high in the second decade of the next century. Instructional processes and procedures need a degree of standardization recognized and adhered to by educators so as to fashion a standard of instructional care for students.[138]

In the thirty-six years since *Peter W.*, the academic duty expected of teachers has become better articulated and more broadly based. Evaluation standards, such as those developed by the widely recognized teacher evaluation expert, Charlotte Danielson, have articulated standards for teacher professional practice. Danielson's framework for practice has four domains: (1) Planning and Preparation, (2) The Classroom Environment, (3) Instruction, and (4) Professional Responsibilities.[139] Standards of practice are being articulated[140] and evaluations developed on the basis of the standard of care that educators are expected to use as a condition of employment.[141]

For example, in 2011, the National Education Association developed a policy statement that opened the door to using student outcomes in teacher evaluations.[142] Furthermore, as one law professor—speaking to the current accountability

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137. Jamieson, *supra* note 10, at 914.

138. *Id.* at 914-15 (citing Richard Funston, *Educational Malpractice: A Cause in Search of Action in Search of a Theory*, 18 SAN DIEGO L. REV. 743, 774 (1981) ("No standardization of educational process, thus no professional standard of care.")).

139. *Promoting Teacher Effectiveness and Professional Learning: The Framework for Teaching*, DANIELSON GROUP (2011), http://www.danielsongroup.org/article.aspx?page=frameworkforteaching. Charlotte Danielson is an internationally recognized expert in the area of teacher effectiveness.

140. *See, e.g.*, COUNCIL OF CHIEF STATE SCH. OFFICERS, INTASC MODEL CORE TEACHING STANDARDS: A RESOURCE FOR STATE DIALOGUE (April 2011), http://www.ccsso.org/Documents/2011/InTASC_Model_Core_Teaching_Standards_2011.pdf (Four standards: The Learners and Learning, Content Knowledge, Instructional Practice, and Professional Responsibility).

141. *See, e.g.*, N.H. DEP'T OF EDUC., NEW HAMPSHIRE TASK FORCE ON EFFECTIVE TEACHING (Oct. 2011), *available at* http://www.education.nh.gov/teaching/documents/phase1report.pdf.

142. Stephen Sawchuk, *NEA Proposes Making a Shift on Evaluation*, EDUC. WEEK (May 18, 2011).

movement—asserted regarding the *Peter W.* bar to defining a duty of care: "Given the current emphasis on accountability in education, that assertion [that there is no established standard of care for the delivery classroom instruction] no longer deserves the deference it has been given."[143] Judge Davidson may have been prescient in his 1982 dissent in *Hunter v. Board of Education* when he stated:

> As professionals, [teachers] owe a professional duty of care to children who receive their services and a standard of care based upon customary conduct is appropriate. There can be no question that negligent conduct on the part of a public educator may damage a child by inflicting psychological damage and emotional distress. Moreover, from the fact that public educators purport to teach it follows that some causal relationship may exist between the conduct of a teacher and the failure of a child to learn. Thus, it should be possible to maintain a viable tort action against such professionals for educational malpractice.[144]

Given the policy push for accountability in education, and the greater definition of effective teaching practices, Judge Davidson's dissent may become the majority opinion at some point. Evaluations based on VAM, teacher preparation, and research on best practices articulated by research and professional associations may combine to overcome the restriction of *Peter W.* and establish that teachers owe their students a duty to provide a standard of instruction.

b. Breach of duty.

Professional malpractice requires more than mere dissatisfaction with the services rendered; dissatisfaction is not enough for a successful claim against a professional even if a duty is established. There must be a breach of the duty of care, which involves the establishment of the degree of care owed and proof that the defendant did not meet the requisite standard.

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143. Walters-Parker, *supra* note 9, at 21 (citing the International Reading Association for developing standards of professional knowledge).

144. Hunter v. Bd. of Educ., 439 A.2d 582, 589 (Md. 1982) (Davidson, J., dissenting).

A breach of duty occurs when the defendant's conduct falls below that required by the standard of care owed to the plaintiff. According to Keeton, "In negligence cases, once a duty is found, the duty, in theory at least, always requires the same standard of conduct, that of a reasonable person under the same or similar circumstances."[145]

Typically, the breach of duty analysis is the application of the facts to the duty owed using the reasonable person standard to judge whether the standard was met. This "objective standard that requires teachers to provide the same level of care as a reasonably prudent professional of similar education and experience."[146] A teacher's failure to provide the required instruction that a reasonable teacher would provide under the same or similar circumstances theoretically establishes a breach in torts of negligence.

The degree of care owed by a professional must be established at trial and "is a legal rule."[147] Generally, proof of the requisite standard of care in malpractice cases is determined by the testimony of expert witnesses knowledgeable about established and acceptable standards and, in the case of a physician, knowledgeable about the medical condition in question.[148] This is true unless the requisite level of care is apparent to a lay juror. However, the standard of care for physicians is defined very generally because the courts recognize that medicine is not a precise science. Consequently, critically analyzing the facts of each situation becomes the focal point in litigation. "It is often said that negligence must be proved, and never will be presumed."[149]

Looking to the medical profession for guidance reveals that

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145. KEETON ET AL., *supra* note 57, at 236.

146. ALLAN G. OSBORNE, JR. & CHARLES J. RUSSO, THE LEGAL RIGHTS AND RESPONSIBILITIES OF TEACHERS: ISSUES OF EMPLOYMENT AND INSTRUCTION 280 (2011).

147. KEETON ET AL., *supra* note 57, at 236.

148. Swanson v. Chatterton, 160 N.W.2d 662 (Minn. 1968). *See also* Backus v. Kaleida Health, 937 N.Y.S.2d 773 (N.Y. App. Div. 2012) (accepting the testimony of experts that an operation to harvest a kidney (donor nephrectomy) should normally take 2 to 3 hours whereas this one took 6 hours).

149. Stephen Wolf, *Symposium on Race and the Law: Student Note: Race Ipsa: Vote Dilution, Racial Gerrymandering, and the Presumption of Racial Discrimination*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 225, 239 (1997).

standards of care owed to a patient can be established by state statute or by professional standards. Whether a violation of a standard of practice conclusively establishes a breach of the standard of care is open to debate. In determining whether a physician has breached the requisite standard of care, several factors are examined. These factors include the state of professional knowledge at the time of the act or omission by the physician and established modes of practice.[150] The professional knowledge requirement recognizes that medical service is a progressive science, and therefore, treatment rendered must be evaluated in light of the knowledge at the time in question. In addition, physicians are generally not held liable for mistakes in judgment where the proper action is not settled and open to debate.[151]

While courts medical malpractice cases have defined standards of accepted care, in the seminal educational malpractice case, *Peter W.*, the court stated that classroom methodology affords no acceptable standard of care.[152] To support its findings, the court pointed to conflicting theories regarding how and what to teach students, but did not cite references for its conclusions. The court also did not acknowledge the "respectable minority" rule used in medical malpractice to account for differing practices and professional judgments. If there is no duty there can be no breach.

Soon after entering kindergarten in the New York City school system, Daniel Hoffman was placed in a class for

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150. *See* Michael Frakes, *The Impact of Medical Liability Standards on Regional Variations in Physician Behavior: Evidence from the Adoption of National-Standards Rules* 2 (Aug. 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1432559 (asserting that courts had historically used the "locality" rule to ascertain what practices were in use in the locality where the physician practices, but since the 1960's and 1970's the local standards rule has been replaced with a national standards of care).

151. *See* Creasey v. Hogan, 637 P.2d 114 (Or. 1981); Becker v. Hidalgo, 556 P.2d 35 (N.M. 1976). For the application of this concept to legal malpractice, *see* Nash v. Hendricks, 250 S.W.3d 541, 547 (Ark. 2007) (asserting, "An attorney is not liable to a client when, acting in good faith, he or she makes mere errors of judgment." Furthermore, as a matter of law an attorney is liable for a "mistaken opinion on a point of law that has not been settled by a court of the highest jurisdiction and on which reasonable attorneys may differ.").

152. Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854 (Cal. Ct. App. 1976).

Children with Retarded Mental Development.[153] Testing, relying on verbal responses, showed that he had an intelligence quotient (IQ) of 74 even though he suffered from a "severe speech defect" that limited his ability to communicate verbally.[154] When he was tested 12 years later his full scale IQ was 94 indicating that he was not retarded.[155] The school district had failed to retest him in the intervening years even though the original clinical psychologist who tested Daniel recommended re-evaluation within two years to get a more accurate estimation of his cognitive abilities.[156]

Suit was brought against the school district, although not expressly alleging educational malpractice. At the trial, the jury awarded the plaintiff damages in the amount of $750,000.[157] The Appellate Division reduced the award to $500,000 and characterized defendants' failure to retest plaintiff as an affirmative act of negligence.[158]

The plaintiff appealed and the Court of Appeals reversed.[159] Citing to *Donohue*, the court similarly held that courts should not interfere with the professional judgment of school officials.[160] The court argued that to allow the suit to proceed would require the judicial fact-finder to "substitute its judgment for professional judgment of the board of education" which would result in second-guessing and would "open the door to an examination of the propriety of each" decision.[161] This the court would not do, arguing that the "court system is not the proper forum to test the validity" of educational decisions.[162]

Contrary conclusions have been asserted, however. In *Donohue,* even though the court found that no duty of care exists, the court declared that it did not think that the creation of a standard of care with which an educator's performance

153. Hoffman v. Bd. of Educ., 400 N.E.2d 317, 318 (N.Y. 1979).
154. *Id.*
155. *Id.* at 319.
156. *Id.* at 318-19.
157. *Id.* at 319.
158. *Id.*
159. *Id.*
160. *Id.* at 320.
161. *Id.*
162. *Id.*

could be measured would present an insurmountable obstacle.[163] In addition, the dissenting opinion in *Hunter v. Board of Education of Montgomery County*[164] concluded that since educators receive special training and are state certified, they possess special skills and knowledge and should use customary care. Therefore, due to conflicting viewpoints, it is possible a court could find a standard of care exists in education, which could therefore be breached.

Clearly, violations of standards of practice are routinely established in cases involving incompetency. It can be reasonably argued that the processes and procedures used to determine incompetency could be applied in some fashion to ascertain if there has been a breach of the duty to provide adequate instructions. Similar to medical malpractice, allegations of incompetence are usually supported by expert testimony.[165]

The use of VAM by school authorities would most likely bolster any breach of duty argument. VAM would purport to establish whether the teacher added value to a student's learning. A low VAM score could be used by the plaintiff's attorney to try to establish that the teacher failed to meet the duty of providing adequate instruction. The argument would likely assert: the plaintiff student failed to learn, the teacher had a duty to provide a recognized standard of care through appropriate instruction, and the VAM scores demonstrate that the teacher was responsible for the poor instruction. The next phase of the tort suit asks whether the defendant's breach of the duty owed was the cause of the injury.

c. Causation.

Proof that a duty of care exists, coupled with a showing that a defendant breached that duty, does not necessarily mean that a plaintiff will recover for the injury. The plaintiff must prove

163. Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d. 1352, 1353 (N.Y. 1979).

164. 439 A.2d 582, 589 (Md. 1982) (Davidson, J., dissenting).

165. *See* KERN ALEXANDER & M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 676 (5th ed. 2001) ("The courts have liberally allowed the opinions of principals, curriculum supervisors and other supervisory personnel to stand as expert testimony.").

that he or she was injured and that the injury sustained was actually and proximately caused by the defendant's negligence. What is required is a form of proof in "which reasonable persons may conclude that, upon the whole, it is more likely that the event was caused by negligence than that it was not."[166]

A physician cannot be held liable, even if negligent, if the negligent actions did not in fact cause the injury plaintiff claims to have suffered. For example, a physician who negligently prescribed a decongestant for a patient with heart disease could not be held liable for the patient's subsequent heart attack without proof that the medication contributed to the patient's death.[167] Furthermore, the physician's negligence must be the proximate cause of the plaintiff's injuries. In other words, the injury must be a foreseeable result of the physician's action or inaction. Or, put another way, it must be proved that "but for" the fact that the physician prescribed the decongestant, the patient would not have died.

With respect to attorneys, the issues of causation and ascertaining damages can be complicated. One of the most common claims against an attorney is the failure to comply with time requirements. Such an error on the part of an attorney can result in the loss of the legal action by the plaintiff. Although on its face an error such as failing to file an action within the time limitations seemingly should be considered malpractice, it may not be. The requisite element of causation must be present. Therefore, first it must be determined that "but for" the defendant's negligent actions, the plaintiff would not have been injured. Then the plaintiff must show injury.

For example, in a case involving the failure to comply with timelines, the plaintiff must prove that had the case moved forward he or she would have been successful on the merits. In other words, the original case must be considered in full and it must be found that the plaintiff would have been successful, before the plaintiff can be considered to have been injured.[168]

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166. KEETON ET AL., *supra* note 57, at 242.

167. Fall v. White, 449 N.E.2d 628 (Ind. Ct. App.1983).

168. *See* Pete v. Henderson, 269 P.2d 78 (Cal. Dist. Ct. App. 1954); Pusey v. Reid, 258 A.2d 460 (Del. Super. Ct. 1969), *overruled on other grounds by* Starun v. All Am.

Establishing causation has also been a major stumbling block in education cases. In *Peter W.*, the court stated that the achievement or failure of a student in literacy development is influenced by numerous factors beyond the education received, thus making causation difficult to establish.[169] These factors include physical, neurological, emotional, cultural, and environmental factors.[170] The *Donohue* court, in a concurring opinion, supplemented this list with the following factors: student attitude, motivation, temperament, past experiences, and home environment.[171]

However, the court in *Donohue* acknowledged that while proving causation might be difficult, even impossible in some instances, it assumes too much to conclude that causation could never be established.[172] In addition, the dissenting opinion in *Hoffman* concluded that the failure by school officials to follow a recommendation for reevaluation of the plaintiff, which resulted in his misplacement in a "class for Children with Retarded Mental Development," was readily identifiable as the proximate cause of the plaintiff's injury.[173]

Therefore, courts do not rule out the possibility of establishing causation in educational malpractice cases. Jennifer Parker asserts that the use of the "lost chance" doctrine can be applied to educational malpractice suits.[174] Lost chance occurs when the defendant reduces or eliminates a "plaintiff's chance of achieving a more favorable outcome."[175] Preexisting conditions in medical malpractice is the most common use of this doctrine. Parker concludes that the lost chance doctrine applies to educational malpractice cases where a defendant "destroys or reduces a victim's prospects for

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Eng'g Co., 350 A.2d 765 (Del. 1975).

169. Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854 (Cal. Ct. App. 1976).

170. *Id.* at 861.

171. Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1355 (N.Y. 1979) (Wachtler, J., concurring).

172. *Id.* at 1353-54.

173. Hoffman v. Bd. of Educ., 400 N.E.2d 317, 318 (N.Y. 1979) (Meyer, J., dissenting).

174. Parker, *supra* note 39, at 378.

175. *Id.*

achieving a more favorable outcome."[176] In such cases, "the plaintiff should be compensated for that lost prospect."[177]

VAM may provide the causation element necessary for malpractice cases that the court in *Peter W.* found lacking in certainty.[178] Through the use of statistics based on student standardized test scores, VAM purports to establish a relationship between a teacher's instruction and a student's educational attainment as measured by a standardized test.[179] Thus, VAM may be the missing link between a duty that is being established through the tight coupling of teaching standards and a demonstration that a breach of that duty caused an injury to the plaintiff student.

d. Injury.

Even if all of the preceding elements of negligence are established at trial, this will not ensure that the defendant will be compensated. "Injury is not presumed; the plaintiff must show actual injury or harm."[180] Accordingly, even a physician who commits a negligent act will not be held liable if the patient is not injured. For example, the courts have refused to award damages to women who seek abortions but go on to give birth to a healthy child; the courts are unwilling to regard the birth of a healthy infant as an injury.[181] However, a court will provide a remedy to an injured patient if it is shown that the physician acted in a negligent manner.[182]

With respect to educators, the courts have been divided over whether or not injury can be established in education

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176. *Id.* at 412.

177. *Id.*

178. Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854, 860-61 (Cal. Ct. App. 1976).

179. *See* Goldhaber & HANSEN, *supra* note 16 (referring to VAM: "We find statistically significant relationships between teachers' value-added effectiveness measures and the subsequent achievement of students in their classes." *Id.* at 3.).

180. DEMITCHELL, *supra* note 127, at 39.

181. Nanke v. Napier, 346 N.W.2d 520 (Iowa 1984). However, twenty-two states recognize a cause of action for wrongful birth. *See* Kelly E. Rhinehart, *The Debate Over Wrongful Birth and Wrongful Life*, 26 LAW & PSYCHOL. REV. 141, 142 (2002).

182. *See, e.g.*, Costa v. Boyd, 836 So. 2d 1265 (La. Ct. App. 2003) (holding that a physician was 100% percent liable for his failure to timely order a blood test which would have detected chronic renal failure).

cases. The court in *Peter W.* contended that there was no certainty that the plaintiff suffered any injury within the legal definition of negligence despite negligent acts by the defendants.[183] In *Hunter*, the court reiterated the concern that there is an inherent uncertainty in determining damages.[184] However, the court in *Hunter* opined that if a tort of educational malpractice was recognized, money damages would be a poor remedy, thus suggesting a limitation on damages would be appropriate.[185]

While courts in educational malpractice suits have questioned whether monetary damage awards are appropriate, a federal district court fashioned a remedy for a student injury that did not involve monetary damages.[186] Although overturned at the appellate level, it may be instructive in this discussion.

A Texas federal court held in an issue of damages for a sexual abuse injury suffered in violation of Title IX that a school district was liable for the sexual abuse of a student perpetrated by a school employee under the concept of strict liability.[187] The court limited damage awards to direct services to children. The court found three appropriate direct services: (1) the expenses for medical treatment, (2) the expenses for mental health treatment, and (3) the expenses for special education. These three elements of damages were "designed to award money to pay for services that [were] best able to heal the child physically, emotionally and intellectually."[188] The three areas were designed to maximize healing so that the child can realize his or her full potential. The damages were limited in part because of the court's concern that financially

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

184. 439 A.2d 582, 585 (Md. 1982).

185. *Id.* at 586 ("Money damages, on the other hand, are a poor, and only tenuously related, substitute for a proper education."). *See also* D.S.W. v. Fairbanks N. Star Borough Sch. Dist., 628 P.2d 554, 556 (Alaska 1981) ("In particular we think that the remedy of money damages is inappropriate as a remedy for one who has been a victim of errors made during his or her education.").

186. Leija v. Canutillo Indep. Sch. Dist., 887 F. Supp. 947 (W.D. Tex. 1995), *rev'd*, 101 F.3d 393 (5th Cir. 1996).

187. *Id.*

188. *Id.* at 956.

strapped school districts would reject critically needed federal funds due to potential litigation: "These funds must not be rejected because they carry with them the potential of a disastrous damage award, no matter how remote the potential is."[189] Options other than money damages typically assessed in medical malpractice would likely be available in educational malpractice cases. For example, additional educational services including tutoring may be used in malpractice awards.

However, once again, as stated above, the dissent in *Hunter* points out the feasibility of an action in educational malpractice by stating that there can be no question that a negligent educator may damage a child. Similarly, Mike Schmoker, an educational researcher, signaled the significant and enduring effect education has on students. He wrote: "A report on education and the economy indicates that 'educational attainment is the single most important determinant of a person's success in the labor market. . . . In the 50 years it has been tracked, the payoff to schooling has never been higher.'"[190]

These findings are undiminished: "Higher levels of educational attainment are associated with higher earnings."[191] If there is a payoff for being educated, the lack of an education must be a detriment to one's chances for success. The impact of an individual's education on unemployment in the recent difficult years has been a subject of analysis. For example, the Bureau of Labor Statistics' analysis of unemployment in 2011 found that those individuals who had only a high school diploma had an unemployment rate of 9.4 percent, while those with a bachelor's degree had an unemployment rate of 4.9 percent, and those with a master's degree had a rate of 3.6 percent.[192] The title of the website

189. *Id.* The policy argument of the district court was that "the risk of harm is better placed on a school district than on a young student." *Id.* at 955.

190. MIKE SCHMOKER, RESULTS: THE KEY TO CONTINUOUS SCHOOL IMPROVEMENT 8 (1996) (internal citation omitted).

191. STEPHANIE EWERT, WHAT'S IT WORTH: FIELD OF TRAINING AND ECONOMIC STATUS IN 2009 6 (Feb. 2012), *available at* http://www.census.gov/prod/2012pubs/p70-129.pdf.

192. U.S. Dep't of Labor, *Education Pays . . .*, BUREAU OF LAB. STAT. (Mar. 23 2012), http://www.bls.gov/emp/ep_chart_001.htm (reporting the median weekly earnings in 2011 as $797; with individuals earning less than a high school diploma

page captures the importance of an education: *Education Pays . . .: Education Pays in Higher Earnings and Lower Unemployment Rates.*[193] Therefore, in an educational malpractice suit it can be reasonably argued that a student who is not adequately educated will have a diminished chance of pursuing higher education, increasing their stream of life-time earnings, and guarding against unemployment.

VAM helps to establish causation for teacher instruction and student learning. A failure to learn to read at a meaningful level can hardly be argued to not be an injury to the prospects of a student's future prospects: "Reading is a foundational skill for personal care and fulfillment, continued learning, civic participation, and economic opportunity."[194]

e. Defenses.

Contributory negligence[195] is a likely defense in a suit for educational malpractice.[196] "Contributory negligence occurs when the plaintiff's actions or omissions are negligent and contribute to his or her own injury by falling below the standard expected for his or her own protection."[197] The *Restatement (Second) of Torts* defines contributory negligence as "[c]onduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the

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making $451, those with a high school diploma making $638, those with a bachelor's degree making $1,053, and those with a master's degree making $1,263).

193. *Id.*

194. Walters-Parker, *supra* note 9, at 29.

195. KEETON ET AL. assert that it is unfortunate that the term is called negligence, believing that "'Contributory Fault' would be a more descriptive term." *Supra* note 56, at 453.

196. Most states have adopted a comparative negligence approach in response to the traditional view of contributory negligence. Previously if the plaintiff contributed to his or her injury it would be a total bar to recovery. This seemed harsh. *Contributory and Comparative Negligence*, FINDLAW, http://injury.findlaw.com/personal-injury/personal-injury-law/negligence/contributory-comparative-negligence.html (last visited May 15, 2012). KEETON ET AL., *supra* note 57, listed three types of comparative negligence: pure, modified, and slight-gross. *Id.* at 471-74. For a list of the States' use of contributory negligence and comparative negligence, *see*, *Contributory Negligence/Comparative Fault Chart*, MATTHIESEN, WICKERT & LEHRER, S.C., ATTORNEYS AT LAW, http://www.mwl-law.com/PracticeAreas/Contributory-Neglegence.asp (last visited May 15, 2012).

197. DEMITCHELL, *supra* note 127, at 50.

negligence of the defendant in bringing about the plaintiff's harm."[198] In other words, the plaintiff has violated the duty of his or her "own care and prudence."[199]

For example, in an action against a physician for the improper diagnosis of appendicitis, the court held the plaintiff contributorily negligent for failing to disclose pertinent information to the physician and for failing to seek further medical attention when her condition worsened.[200] In another case, a patient was determined to be contributorily negligent when her physician told her to return in six months after a lump was found in her breast and she waited fifteen months, resulting in a loss of survival expectancy.[201] In an education case, a high school senior who was an accomplished swimmer and diver, under contributory negligence, was solely responsible for her injuries when she attempted to execute a shallow dive.[202]

Since educational malpractice is not recognized as a cause of action, the issue of defenses has not been addressed in the case law. However, discussion of factors such as student motivation, previous learning, school factors, poverty or wealth, and home life could be raised as defenses since these are external factors beyond the control of the educator. The classic defense of contributory negligence, the requirement for the plaintiff to act reasonably, would be available in an educational malpractice suit as it is in medical malpractice. For example, it is clear that a physician would not be held liable for damages if a diabetic would not take her insulin even though it was prescribed and the ramifications for not taking the medication were discussed. A similar defense could be raised when the student failed to follow the instructions of a teacher, by failing to turn in completed assignments, accumulating tardies and absences, and/or failing to pay attention in class. Therefore, a student would arguably be required to take reasonable responsibility for his or her own learning.

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198. RESTATEMENT (SECOND) OF TORTS § 463 (1965).

199. KEETON ET AL., *supra* note 57, at 452.

200. Carreker v. Harper, 396 S.E.2d 587 (Ga. Ct. App. 1990).

201. Roers v. Engebretson, 479 N.W.2d 422 (Minn. Ct. App. 1992).

202. Aronson v. Horace Mann-Barnard Sch., 637 N.Y.S.2d 410 (N.Y. App. Div. 1996).

Learning is active and not passive. Students must be engaged in their own learning. Neither educators nor parents can educate an unwilling or disengaged child; the student/plaintiff must take an active part in his/her education. The reasonable student cooperates and takes part in the educational program designed for her/his benefit. Therefore, the plaintiff student in an educational malpractice suit must come to the court with "clean hands," having actively and reasonably followed the instructional directives of the teacher. Failure to act as reasonable and prudent student will likely jeopardize the malpractice case.

Patients die and clients go to jail. The outcome of the rendering of professional services is not always positive. "[C]ourts recognize that part of being a professional includes making judgment calls that may not always guarantee a positive result."[203] The issue, generally, is whether or not the professional rendered the expected service. Following the examples from medicine and law, the issue would not be whether the student learned, but whether the educator rendered the instruction that would be expected of a professional educator.

Dialogue and debate about the goals of education are a "potent means of defining the present and shaping the future"; it is "one way that Americans make sense of their lives."[204]

V. CONCLUSION

Teachers are central to promoting the academic achievement of students; arguably it is "the most important component of their jobs."[205] Consequently: "Who teaches

203. DeMitchell & DeMitchell, *supra* note 29, at 505.

204. DAVID TYACK & LARRY CUBAN, TINKERING TOWARD UTOPIA: A CENTURY OF PUBLIC SCHOOL REFORM 42 (1995) (Internal citation omitted).

205. GOE & CROFT, *supra* note 13, at 2. *See* HINCHEY, *supra* note 1, at 4 (discussing the extent of a teacher's professional practice: "Teacher performance can be thought of as those things a teacher does, both inside and outside of the classroom. . . . Teacher performance thus includes such instructional basics as how well a teacher plans learning activities, maintains a positive classroom environment, communicates with students, and provides productive feedback. It also includes activities outside the classroom, such as advising student groups, taking part in committees and other school-wide work, and communicating with parents.").

matters,"[206] and what they do is consequential for students. The Supreme Court noted this important connection writing:

> [A] teacher serves as a role model for [his/her] students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy.[207]

Malpractice holds professionals accountable for the exercise of their judgment when rendering a professional service. But historically, as discussed above, the courts have not held teachers legally responsible for their failure to properly educate students by recognizing educational malpractice. However, the admonishment of the New York Supreme Court, Appellate Division in *Donohue* denying relief under educational malpractice bears restating:

> This determination does not mean that educators are not ethically and legally responsible for providing a meaningful public education for the youth of our State. Quite the contrary, all teachers and other officials of our schools bear an important public trust and may be held to answer for the failure to faithfully perform their duties. It does mean, however, that they may not be sued for damages by an individual student for an alleged failure to reach certain educational objectives.[208]

While the courts have not supported educational malpractice suits, two policy streams,[209] accountability and VAM, may be combining to move educational malpractice from the legal dustbin of failed causes of action to a viable tort. The first stream is the various and growing state and federal statutory accountability mechanisms.[210] "[S]tate and federal

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206. SUSAN MOORE JOHNSON, TEACHERS AT WORK: ACHIEVING SUCCESS IN OUR SCHOOLS, xiii (1990).

207. Ambach v. Norwick, 441 U.S. 68, 78-79 (1979).

208. 107 N.Y.S.2d 874, 879 (N.Y. App. Div. 1978).

209. JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 172-73 (2d ed. 1995).

210. DeMitchell & DeMitchell, *supra* note 29, at 486-88. *See also* No Child Left

legislation making school districts accountable for ensuring student mastery of state standards may increase school districts' potential liability."[211] In addition, the Council of Chief State School Officers through the Interstate Teacher Assessment and Support Consortium articulated national standards for teachers.[212] A consensus on teaching standards is emerging.

The second policy stream, VAM, has recently emerged as part of accountability and educational research and may strengthen the plaintiff student's argument to diminish or overturn the precedent of *Peter W.* VAM, a "collection of complex statistical techniques that use multiple years of students' test score data to estimate the effects of individual schools or teachers" is potentially a game changer for accountability measures.[213] Thus, a pathway to educational malpractice may be being built through articulated standards, increased accountability, and now value-added measures of teacher effectiveness. One commentator asserts that a student "plaintiff who establishes that she has not achieved a basic level of literacy and alleges negligent instruction is to blame should have access to the legal system."[214] The courts already hold other professions responsible for the breach of their duties, which causes an injury. Why not education?

The courts have consistently been reluctant to advance a cause of action for educational malpractice, because of the long-standing deference to educational decision-making as well as for policy reasons as articulated in the two major educational malpractice cases of *Peter W.* and *Donohue.* This article does not advocate for a recognized cause of action for educational malpractice. Instead, it analyzes the changing policy environment and the development of the educational profession and notes that they may combine to build a pathway to

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Behind (20 U.S.C. 70 § 6301 (2002)) and Race to the Top federal legislation (American Recovery and Reinvestment Act of 2009, Public Law 111-5, 123 Stat. 115).

211. STEPHEN B. THOMAS ET AL., PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS 94 (6th ed. 2009).

212. *See* COUNCIL OF CHIEF STATE SCH. OFFICERS, *supra* note 138.

213. DANIEL F. MCCAFFREY ET AL., EVALUATING VALUE-ADDED MODELS FOR TEACHER ACCOUNTABILITY xi (2003), *available at* http://www.rand.org/content/dam/rand/pubs/monographs/2004/RAND_MG158.pdf.

214. Walters-Parker, *supra* note 9, at 16.

malpractice. Furthermore, it urges great caution for those who would seek to walk this path.

In some ways the reluctance of judges to move the law to recognize educational malpractice is consistent with a general approach of deference the Bench has adopted. The judiciary tends to tread lightly in public education. For example, the Supreme Court advised the courts to use caution when considering questions of educational practice and policy.[215] However, the Supreme Court stated that while judges should "show great respect" for genuine academic decisions, they may override those decisions when there is "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."[216]

"Using VAMs for individual teacher evaluation is based on the belief that measured achievement gains for a specific teacher's students reflect that teacher's 'effectiveness.'"[217] It may only, at best, reveal how a teacher's students are doing in comparison to other teachers' students. It may provide comparisons of VAM scores by rank ordering teachers. But, VAM tells us little about what a teacher is doing well, not doing well, or not doing at all. It provides no data on how a teacher can improve or what specific instructional practice needs to be improved. Therefore, its use in teacher formative evaluations is of very limited value. There are legitimate concerns about the limitations of VAM as a tool for making high stakes personnel decisions let alone being used for educational malpractice suits.[218]

VAM purportedly identifies the weak/ineffective instructional performance of individual teachers. This appears

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215. Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982) (Cognizant that judges lack on-the-ground expertise and experience of school administrators, however, we have cautioned courts in various contexts to resist "substitut[ing] their own notions of sound educational policy for those of the school authorities."); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) ("[The Supreme Court's] oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.").

216. Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985).

217. Darling-Hammond et al., *supra* note 45, at 8.

218. *See* HENRY I. BRAUN, USING STUDENT PROGRESS TO EVALUATE TEACHERS: A PRIMER ON VALUE-ADDED MODELS 15 (2005) ("VAM results should not serve as the sole or principal basis for making consequential decisions about teachers.").

to address the tort concern about individual causation: "Clearly the act of one particular teacher in the school system cannot cause a student to graduate from school as a functional illiterate."[219] However, VAM is not that clear cut in establishing a cause for an instructional harm suffered. For example, Professor Kupermintz asserts, "a weak teacher in relatively weak school system may obtain a more favorable evaluation in comparison with a similarly weak teacher in a strong system."[220] In other words, it is not just the teacher's teaching ability that determines the VAM score, the quality of the teachers with whom the teacher is being compared influences the score. A weak teacher in a low-performing school system will be assessed differently if she or he were teaching in a high performing system.

It is also important to note that if a tort of educational malpractice did survive the high hurdles erected by *Peter W.*, the educator and the school district would still be able to access the defenses to a tort claim. Contributory negligence on the part of the student could certainly be asserted and questions could be raised about the validity and reliability of VAM's methods for assessing breach of duty.

A viable tort of negligence for educational malpractice will have a significant impact on educators and schools, as well as on the delivery of educational services to students. While educational malpractice based on VAM distort the educational process is a valid and important question to pose, it is unclear, but likely, that the pervasiveness of practicing defensive medicine in response to medical malpractice would be transposed to education with the advent of educational malpractice.

Defensive practices by teachers would likely include such actions as teaching to the test, advocating for the more easily taught students to be placed in their classrooms,[221] avoiding

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219. Kimberly A. Wilkins, *Educational Malpractice: A Cause of Action in Need of a Cause of Action*, 22 VAL. U. L. REV. 427, 458 (1988).

220. Kupermintz, *supra* note 41, at 290.

221. *See, e.g.*, Rothstein, *supra* note 52, at 211 ("My results indicate that policies based on these VAMs will reward or punish teachers who do not deserve it and fail to reward or punish teachers who do. The literature on pay-for-performance suggests some consequences of this result. First, and most clearly, the stakes attached to VAM-based measures should be relatively small. . . . [H]igh-stakes compensation will create

working with students who may have the greatest needs,[222] and the narrowing of the taught curriculum.[223] Furthermore, because teachers are ranked and compared with other teachers within the school, a reduction in collaboration between teachers who may see other teachers as competitors may result from the use of VAM. Will notions of effective teaching, which is broader than the ability to raise student test scores in math and the language arts, be changed for the worse or will it usher in a new era of accountability and focus on student outcomes? These potential responses to the imposition of educational malpractice do not speak ill of educators; it speaks to their human responses to a legal requirement in which they may believe that they have increased responsibility but reduced autonomy and authority to appropriately and adequately respond to their newly defined duty.

Any potential advocates for using VAM as a lever for educational malpractice should heed these potential and unanticipated consequences. While focusing on the legitimacy of accountability of student outcomes through malpractice litigation, the legal remedy may need to come with a warning label of potential side effects. The duty to provide appropriate instruction to all students is critical and not up for debate. Schools are created for students and for society. The means by which professional educators are held liable in a court of law for malpractice must be based on procedures that are valid, reliable, and comport with the usual and customary practices of the profession.

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incentives for workers to direct excess effort to the unproductive component of the performance measure. In education, this might take the form of teachers lobbying their principals to be assigned the 'right' students who will yield predictably high value added scores.") (internal citations omitted).

222. *See, e.g.*, Newton et al., *supra* note 47, at 18 (VAM may "create disincentives for teachers to want to work with those students with the greatest needs.").

223. BAKER ET AL., *supra* note 24, at 16 ("Narrowing the curriculum to increase time on what is tested is another consequence of high-stakes uses of value-added measures for evaluating teachers.").