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I. INTRODUCTION

> Today, education is perhaps the most important function of state and local governments . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he [or she] is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.
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> *Brown v. Board of Education*[1]

> If doctors, lawyers, architects, engineers and other professionals are charged with a duty owing to the public whom they serve, it could not be said that nothing in the law precludes similar treatment of professional educators.
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> *Donohue v. Copiague Union Free School District*[2]

The United States Supreme Court, in *Brown v. Board of Education*, captures the importance of education as a primary

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1. 347 U.S. 483, 493 (1954).

2. 391 N.E.2d 1352, 1353 (1979).

value to individuals and society. Consequently, dialogue and debate about the goals of education are a "potent means of defining the present and shaping the future."[3] It is "one way that Americans make sense of their lives."[4] A debate of how best to reform education is reshaping the landscape of public education. The thrust of many reform strategies is the public's desire to hold public schools accountable for the education of society's youth. "The formulation of standards and the measurement of performance [are] intended to tidy up a messy system and to make teachers and school administrators truly accountable."[5] Nearly all states have instituted some form of an accountability mechanism. "The emergence of state-level, performance-based accountability systems is a predictable consequence of the standards and assessment movements in education."[6] W. James Popham, a recognized testing expert from UCLA, describes the installation of state-mandated testing as educational accountability's key feature.[7] In his opinion, the purpose of this testing was clear: legislators did not believe that public school educators were doing their jobs effectively. After hearing a litany of school failures, the citizenry was doubtful that its tax dollars were being well spent on the schools.[8]

Although accountability is pervasive, it remains a conundrum for public education. Policy makers want to be seen as supporting accountability and high standards for students and educators.[9] Accountability in education

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3. David Tyack & Larry Cuban, *Tinkering Toward Utopia: A Century of Public School Reform* 42 (Harvard U. Press 1995).

4. *Id.*

5. Elliot W. Eisner, *What Does It Mean to Say a School Is Doing Well?*, 82 Phi Delta Kappan 367 (2001).

6. Casey D. Cobb, *Performance-Based Accountability Systems for Public Education* 4 (N.H. Ctr. for Pub. Policy Studies Feb. 21, 2002). In addition, federal law, *No Child Left Behind*, requires that schools notify students if the school is labeled as failing so that the students may choose to attend another school.

7. For a discussion of the purposes, benefits, and arguments of high stakes testing, *see Assessment—High Stakes/Competency Testing* <www.ecs.org/html/issue .asp>.

8. W. James Popham, *Modern Educational Measurement: Practical Guidelines for Educational Leaders* (Paul A. Smith, 3d ed., Allyn & Bacon 2000).

9. "The United States is in the midst of a movement to use standards as the rallying principle for the improvement of academic achievement in the schools." Marc S. Tucker & Judy B. Codding, *Standards For Our Schools: How to Set Them, Measure Them, and Reach Them*, 40-41 (Josey-Bass Publishers 1998).

increasingly requires that if a prescribed standard is not met then a consequence must follow. For example, if the student does not measure up according to a high-stakes test, then fail the student without allowing social promotions.[10] If the school is labeled as failing, allow the students to transfer to another school,[11] fire the principal, or reconstitute/restructure the school.[12] If the school district is failing, place it into receivership. If students and schools are being held accountable, can accountability requirements for educators be far behind?[13]

When standards are formulated for teaching and learning, expectations for practice are articulated. Professionals, such as physicians and attorneys, are held individually accountable through malpractice suits when their professional actions fail to conform to accepted practices and an injury results.[14] To date, malpractice in education has failed as a theory of recovery.[15] Currently, unlike other professionals, educators are

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10. For a discussion of high-stakes testing and due process, *see* William P. Quigley, *Due Process Rights of Grade School Students Subjected to High-Stakes Testing*, 10 B.U. Pub. Int. L.J. 284 (2001).

11. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), in which students from low-income families are allowed to leave the public school for a private school and to have their choice supported through public funds.

12. *See No Child Left Behind Act*, Pub. L. No. 107-110, 15 Stat. 1425 (2002), which lists consequences for failure to make "yearly adequate progress." *See also* <www.ed.gov/News/Letters/020724.html> (accessed Dec. 26, 2002).

13. *See* Rebecca R. Glasgow, Student Author, *Can Students Sue When Schools Don't Make the Grade? The Washington Assessment of Student Learning and Educational Malpractice*, 76 Wash. L. Rev. 893, 924 (2001) (Students who fail the Washington Assessment of Student Learning test but have met all graduation requirements should be able to bring a private cause of action for educational malpractice. "The [Academic Achievement and Accountability] Statute expresses a clear school district duty to individual students while insisting on school accountability.").

14. *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.").

15. *See Ross v. Creighton U.*, 740 F.Supp. 1319, 1327 (N.D. Ill. 1990) ("Educational malpractice is a tort theory beloved of commentators, but not of courts."); *Livosi v. Hicksville Union-Free Sch. Dist.*, 693 N.Y.S.2d 617, 617-618 (N.Y.A.D. 2 Dept. 1999) ("As a matter of public policy, such a cause of action cannot be entertained by courts of this State."); and *Brown v. Compton Unified Sch. Dist.*, 80 Cal. Rptr. 2d 171, 172 (Cal. App. 2d Dist. 1998) ("Policy considerations preclude 'an actionable 'duty of care' in persons and agencies who administer the academic phases of the public educational process'" (citing *Peter W. v. S.F. Unified Sch. Dist.*, 131 Cal. Rptr. 854, 861 (Cal. App. 1st Dist. 1976)). *See further* Karen H. Calavenna, Student Author, *Educational Malpractice*, 64 U. Det. L. Rev. 717 (1987); Frank Aquila, *Educational Malpractice: A Tort En Ventre*, 38 Clev. St. L. Rev. 323 (1991); Alice J. Klein, Student

not required to perform their duties in accordance with the standard of care observed by their profession.[16] Administrative action can be taken resulting in an educator being disciplined, even dismissed, for incompetence. But a student who is injured due to an inadequate education has no legal recourse in a suit for damages.[17] However, a change may be occurring in which educators may be held liable for the performance of their professional activities. Standards have been set for students and for curriculum. Currently, standards are being developed by the National Board for Professional Teaching Standards for research, interstate compacts, and teaching.[18] It is time to revisit the issue of educational malpractice in light of systemic reform efforts and attendant drive for accountability.

While holding schools and educators accountable through standards and testing is pervasive, another educational policy movement with instructional implications may be gaining momentum nationally. In California, Arizona, Colorado, and Massachusetts, ballot initiatives designed to radically change bilingual education were placed before voters.[19] Colorado was the only state to reject the proposals.[20] The three enacted initiatives have similar teacher liability provisions in which teachers can be sued. And, in Arizona and Massachusetts,

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Author, *Educational Malpractice: Can the Judiciary Remedy the Growing Problem of Functional Illiteracy*, 13 Suffolk U. L. Rev. 27 (1979); Martha M. McCarthy, Nelda H. Cambron-McCabe, & Stephen B. Thomas, *Public School Law: Teachers' and Students' Rights* 102 (Ray Short, 4th ed., Allyn & Bacon 1998) ("no educational malpractice claim has yet been successful") and Patricia Abbott, Student Author, Sain v. Cedar Rapids Community School District*: Providing Special Protection for Student-Athletes*, 2002 BYU Educ. & L.J. 291 ("Long ago, legal scholars held a funeral service for the tort of educational malpractice.").

16. For example, *The Model Rules of Professional Conduct* (2002), paragraph 4, states in part, "In all professional functions a lawyer should be competent, prompt, and diligent." And Rule 1.1 of the same document states competence requires a lawyer to employ and maintain "the requisite knowledge and skill." (available at <www.abanet.org/cpr/mrpc> (last accessed Sept. 28, 2002).

17. Michael Smoker, *Results: The Key to Continuous School Improvement*, 8 (2d ed., Assn. for Supervision & Curriculum Dev. 1999) ("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.'").

18. For information on the National Board for Professional Teaching Standards, visit www.nbpts.org.

19. Mary Ann Zehr, *Voters Courted in Two States on Bilingual Education*, Educ. Week 1, 22 (Sept. 11, 2002).

20. Mary Ann Zehr, *Colo. Extends Bilingual Ed., But Mass. Voters Reject It*, Educ. Week 22, 23 (Nov. 13, 2002).

teachers can lose their jobs if they fail in carrying out the provisions of the acts. The confluence of two streams, statutory liability involving instructional practices and emerging standards of teaching practice, may now result in the viability of a tort action for educational malpractice.

This discussion is divided into three parts. First, professional malpractice will be discussed with a focus on negligence, the legal theory upon which malpractice is grounded. Malpractice in medicine, law, and education will also be examined. Secondly, *California Teachers Association v. State Board of Education*, which challenged the implementation of California Proposition 277, *English Language in Public Schools* will be examined.[21] Finally, attempts to draw a conclusion about the future of educational malpractice litigation will be made.

II. PROFESSIONAL MALPRACTICE

Professionals who engage in alleged professional misconduct or allegedly lack appropriate skill resulting in injury may be liable for malpractice. Malpractice is often distinguished from other wrongs committed by professionals in that it deals with the quality of the services rendered.[22] Professionals are held accountable through malpractice "for failure to perform in accordance with the skills that define their jobs."[23] They 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.[24]

Failure to exercise the accepted standard of care may form the basis for malpractice if the negligent delivery of the service is legal cause for an injury suffered due to the lack of an appropriate standard of care. In medicine, a surgeon may

21. 271 F.3d 1141 (9th Cir. 2001); Cal. Educ. Code Ann. § 310 *et seq.* (West 2002).

22. Ronald E. Mallen, *Recognizing and Defining Legal Malpractice*, 30 S.C. L. Rev. 203, 204-05 (1979).

23. John G. Culhane, *Reinvigorating Educational Malpractice Claims: A Representational Focus*, 67 Wash. L. Rev. 349, 371 (1992).

24. For example, a physician owes a patient: (1) [the] duty to possess the requisite knowledge and skill such as is possessed by the average member of the medical profession; (2) [the] duty to exercise ordinary and reasonable care in the application of such knowledge and skill; and (3) [the] duty to use best judgment in such application. *See* 61 Am. Jur. 2d *Physicians and Surgeons* § 311 (1981).

operate on a patient and follow all of the commonly accepted procedures for the operation and 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 the dispositive factor. In other words, a malpractice suit will not prevail if the patient dies despite the surgeon doing everything expected in the delivery of the professional service. Similarly, in legal malpractice, lawyers may not be responsible for honest errors of judgment.[25]

The success of such a suit depends on several factors. Generally, the key to such malpractice cases is whether the professional performed in accordance with the standard of care observed by members of the profession.[26] In other words, the standard of care is used to measure the competence of the professional. Malpractice is defined as

> [p]rofessional misconduct or unreasonable lack of skill. Doctors, lawyers, and accountants usually apply the term to such conduct. [It is the] failure of one rendering professional services to exercise the degree of skill and learning commonly applied under all the circumstances of 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.[27]

Malpractice actions may be brought under tort law or contract law. The trend, however, is to bring such actions under the former. With some exceptions, this is true even if the relationship between the plaintiff and the professional is established by a contract.

A tort is a civil wrong based on reasonableness and fault. Under tort law, an individual who has suffered because of the improper conduct of another may sue that person for money

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25. Mark Richard Cummsford, *Resolving Fee Disputes and Legal Malpractice Claims Using ADR*, 85 Marq. L. Rev. 975, 978 (2002).

26. *See Hall v. Hilburn*, 466 S.2d 856 (Miss. 1985) for a discussion of the parameters of the medical standard.

27. *Black's Law Dictionary* 864 (1979). *See also Bd. of Examiners 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.").

damages. The purpose of tort law is to balance a plaintiff's claim of damages due to suffered harm against a defendant's freedom of action. 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. Such social consequences are often referred to as public policy concerns. As will be discussed, public policy concerns play a significant and sometimes conflicting role in malpractice litigation.

A. Negligence

Tort actions regarding malpractice are brought under the theory of negligence if the acts of the professional that allegedly inflicted harm were not intended to cause harm. If the professional intended the allegedly harmful conduct, the malpractice action is brought under a theory of intentional torts. Since most harmful acts by professionals are unintentional, the most common theory asserted against a professional for malpractice is negligence. Therefore, this discussion will only address negligence claims.

To successfully bring an action under the theory of negligence, the following elements must be present:

> 1. A duty, or obligation, recognized by the law, requiring the individual to conform to a certain standard of conduct for the protection of others against unreasonable risks.
>
> 2. A failure on the individual's part to conform to the standard required constituting a breach of the duty.
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> 3. A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as "legal cause" or "proximate cause," and includes the notion of cause in fact (but for).
>
> 4. Actual loss or damage resulting to the interests of another.[28]

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28. W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, & David G. Owen, *Prosser and Keeton on the Law of Torts* (5th ed., West 1984).

To clearly understand the reasons why educators are not subject to malpractice suits while other professionals are, examples of judicial determinations for both physicians and attorneys will be reviewed, highlighting legal and policy issues.

1. Duty Owed

The first element required in any negligence case is the existence of a duty owed by the defendant to the complaining party. Whether a defendant owes a duty to a plaintiff is a question of whether the defendant is under a legal obligation to act or not to act for the benefit of the plaintiff. The courts readily recognize such a duty between a physician and patient for policy reasons. Patients often stake their lives on the fact that they will receive competent care when they seek medical assistance. This duty applies to all aspects of the relationship from diagnosis to treatment.

If a duty is owed, then the professional is required to conform to the legal standard of care or conduct related to that duty. Generally, the reasonable person standard applies, but if the defendant renders services in a recognized trade or profession, he or she is held at a minimum to the standard of care customarily exercised by members of that profession or trade, whether he or she actually possesses the requisite skills. If the professional does in fact have a higher degree of skill than that customarily possessed by other professionals in the same field, the professional is held to the standard of care that a reasonable person with superior knowledge or skill would exercise. Thus, the professionals are held to a higher standard than others engaged in the same profession.

A duty of care will arise between a physician and a patient if there is a contract for professional services. Therefore, if a physician and patient agree that in exchange for a fee, the physician will treat the patient, an express contract is created. In most instances, however, a physician and patient do not enter into such an agreement. Instead, a patient simply enters the physician's office and receives treatment. Under these circumstances, the courts recognize that an implied contract is created if a physician treats a patient with the expectation of compensation. This is true regardless of who pays for the treatment.[29]

29. *Id.*

Statutes may also create a duty.[30] For example, some states have required that hospitals with emergency facilities render emergency care.[31] Even without express statutes, some courts have found that licensing statutes and health regulations require that emergency care facilities treat emergency patients, thus creating a duty.[32] While compliance with a statute may be used as evidence that the defendant used due care, it may be alleged that the defendant was negligent because he or she did not do more than required by statute.[33]

Furthermore, physicians can be held liable under the theory of vicarious liability for the negligent acts of their employees if the acts occurred within the scope of employment.[34] Therefore, if a nurse negligently injures a patient while giving the patient an injection, the physician can be held liable.

Physicians are obligated to provide a standard of care to their patients typically based on professional norms.[35] The standard of care or the duty owed by the physician to the patient is grounded in the customary practices of the medical profession. The customary practice is normally described as the customary practice in the same community, or one similar.[36] The standard, however, is not unitary or monolithic. There is a respectable minority rule that "serves as an accommodation for the exercise of clinical judgment."[37] Regarding this rule, a Pennsylvania court stated, "Where competent medical authority is divided, a physician will not be

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30. However, in *Helling v. Carey*, 519 P.2d 981 (Wash. 1974), the court found that compliance with a statute did not exculpate the defendant. In this case, an ophthalmologist did not regularly screen patients who were under forty for glaucoma since professional standards at the time did not require screening at that age. The defendant, who was treated by the physician and under forty, contracted glaucoma resulting in visual impairment. The court allowed the plaintiff to recover holding that the ease and safety of the pressure test, coupled with the seriousness of the disease, made it negligent not to administer the test.

31. Cal. Health & S. C. Ann. §1317 (West 2002).

32. *Guerrero v. Cooper Queen Hosp.*, 537 P.2d 1329 (Ariz. 1975).

33. *See e.g. Christou v. Arlington Park-Wash. Race Track Corp.*, 432 N.E.2d 920 (Ill. App. 1st Dist. 1982).

34. Prosser, *supra* n. 28.

35. James F. Blumstein, *The Legal Liability Regime: How Well is It Doing in Assuring Quality, Accounting for Costs, and Coping With an Evolving Reality In the Health Care Marketplace?*, 11 Ann. Health L. 125, 130 (2002).

36. *Id.* at 131 (citing Allen H. McClold, *The Care Required of Medical Practitioners*, 12 Vand. L. Rev. 549 (1959)).

37. *Id.* at 133.

held responsible if in the exercise of his judgment he followed a course of treatment advocated by a considerable number of recognized and respected professionals in his given area of expertise."[38] The respectable minority rule does not encompass idiosyncratic behavior but it does provide room for competing views within a scientifically-based profession. Within the gold standard of professional practice exists acceptable multiple approaches for meeting the duty owed.

The courts readily find that attorneys, like physicians, have a duty to render competent professional services. In the case of attorneys, this duty primarily arises due to a contract for services. The most significant errors alleged in legal malpractice involve conflicts of interest.[39] Usually, based on an implied contract, an attorney will render services with the expectation of payment without an express agreement. Occasionally, an attorney will enter into an express contract concerning fees. Such a contract usually does not expressly provide that particular services will be rendered or particular results obtained. However, despite the expressed contract only concerning fees, an implied duty is still created that the attorney will exercise the skill and care ordinarily exercised by attorneys in performance of contractual obligations.[40]

An attorney who represents and advises a client impliedly creates a duty that the attorney possesses the necessary skill to handle the matters that may result.[41] Failure to possess the necessary skills or knowledge or to exercise the standard of care will result in liability. [42] For example, in *Smith v. Lewis*, an attorney who did not specialize in the area of family law represented a woman in a divorce case. Before advising her of her rights, the defendant attorney failed to research the issue of the community property nature of her husband's military pension. The courts found this omission to be malpractice.[43] Certain actions are also considered on their face to lack reasonable care, such as missing a timeline which results in

38. *Jones v. Chidester*, 610 A.2d 964, 969 (Pa. 1992).

39. Susan Saab Fortney & Jett Hanna, *Legal Malpractice and Professional Responsibility: Fortifying a Law Firm's Ethical Infrastructure: Avoiding Legal Malpractice Claims Based on Conflicts of Interest*, 33 St. Mary's L.J. 669, 671 (2002).

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

41. *Citizens' Loan Fund & Saving Assn. v. Friedley*, 23 N.E. 1075 (Ind. 1890).

42. *See e.g. Campbell v. Magana*, 8 Cal. Rptr. 32 (Cal. App. 1960); *George v. Caton*, 600 P.2d 822 (N.M. App. 1979).

43. 531 P.2d 589 (Idaho 1974).

the loss of a claim[44] or settling a case contrary to the express instructions of the client.[45] They are therefore breaches of duty.

The above examples illustrate that courts readily find a duty of care has arisen when the case involves professionals such as physicians and lawyers. Similarly, courts have found that educators owe a duty to their students.[46]

Students are compelled to attend school. This compulsion helps to form the common law duty as well as statutory duty, supported by case law, to anticipate foreseeable dangers and take necessary precautions to protect students. Educators owe students a duty to "exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances. The duty owed derives from the simple fact that a school, in assuming physical custody and control over its students, effectively takes the place of parents and guardians."[47] And, mandatory schooling forces parents to rely on schools to protect their children during school activities.[48] For example, a school was sued for negligence when a fourteen-year-old student fell while climbing a balcony so that he could jump from it into the swimming pool. The Texas court of appeals concluded, "a school has the duty to reasonably care for the well-being and safety of its students."[49]

In the 1976 landmark case, *Peter W. v. San Francisco Unified School District,* the issue of educational malpractice was first adjudicated and the stage was set for all subsequent educational malpractice actions when recovery was denied.[50] In this case, a high school graduate brought suit against the school district, the superintendent, and the governing board to recover for alleged negligence in instruction and intentional misrepresentation of the student's progress. The plaintiff

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44. *Cotton v. Travaline,* 432 A.2d 122 (N.J. Super. A.D. 1981).

45. *Rogers v. Robson,* 407 N.E.2d 47 (Ill. 1980).

46. *For example see* Todd A. DeMitchell, *Education Law Into Practice: The Educator and Tort Liability: An Inservice Outline of a Duty Owed,* 154 Educ. L. Rep. 417 (2001).

47. *See e.g. Mirand v. N.Y.C.,* 614 N.Y.S.2d 372, 375 (N.Y. App. Div. 1994) (citation omitted). For a discussion of *in loco parentis see* Todd A. DeMitchell, *The Duty to Protect: Blackstone's Doctrine of In Loco Parentis: A Lens for Viewing the Sexual Abuse of Students,* 2002 BYU Educ. & L.J. 17.

48. *Wyke v. Polk County Sch. Bd.,* 129 F.3d 560 (11th Cir. 1997). In New Hampshire, public school students are legally entitled to a safe and healthy educational environment. *See State v. Jacob Drake,* 662 A.2d 265 (N.H. 1995).

49. *U. Prep. Sch. v. Huitt,* 941 S.W.2d 177, 180 (Tex. App. 1996).

50. 60 Cal. App. 3d 814 (Cal. App. 1976).

claimed that these actions resulted in the deprivation of basic academic skills. In other words, he asserted that he had not been adequately educated.

The plaintiff was an eighteen-year-old male who had recently graduated after having been enrolled in the school district for approximately twelve years. He claimed that, although he had graduated from high school, he possessed only a fifth grade reading ability.

The plaintiff alleged in part that the four requisite elements for bringing an action in tort were present in his case. In his complaint, the plaintiff alleged that the school district (including agents and employees) had a duty to provide him with an adequate education and that the school district breached that duty. In addition, the plaintiff alleged that the breach was in fact the proximate cause of his inability to read at grade level, therefore injuring him.

At the outset, the court's opinion acknowledged that the parties did not debate the adequacy of the plaintiff's claim with respect to negligent acts, proximate cause, and injury, therefore clearly recognizing most of the required elements in a tort suit. The court, however, had very serious reservations regarding the elements of standard of care, causation and injury that resulted in a determination that educators owed no duty of care to students despite the fact that such a duty is readily recognized in suits against other professionals.

The plaintiff offered three theories to support his contention that a duty of care existed: 1) an assumption of the function of instruction of students imposes the duty to exercise reasonable care in its discharge; 2) a special relationship between students and teachers that supports the teachers' duty to exercise reasonable care; and 3) the duty of teachers to exercise reasonable care in instruction and supervision of students in California as set forth in judicial decisions.

The court admitted the facts impose upon the defendant a duty of care within the common meaning of the term. However, the court also dismissed each of the theories raised by the plaintiff for want of relevant authority establishing that the enrollment of the plaintiff in defendants' schools creates a legal duty which will sustain liability for negligence of its breach. The court did acknowledge that the concept of a duty of care as currently recognized is not immutable, but cautioned that certain principles must be considered controlling. The

most pertinent principle expounded by the court for purposes of this issue was that "judicial recognition of such duty in the defendant, with the consequence of his liability in negligence for its breach, is initially to be dictated or precluded by considerations of public policy."[51]

Despite the constraints placed on expanding the concept of duty, the court acknowledged that the California Supreme Court has opened or sanctioned new areas of tort liability when the wrongs and the injuries involved were both comprehensible and assessable within the existing legal framework. However, the court in *Peter W.* was unwilling to extend the concept of a duty of due care to the facts presented in this case due to a belief that there is no recognizable standard of care, cause, or injury in education:

> 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 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.[52]

Based on the above reasoning, the court found that a duty of due care should not be created because of the multiple factors involved in education 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 other concerns that help explain its reluctance to allow a cause of action for educational malpractice that extended beyond the four elements required for a negligence case. In closing its opinion the court explained:

To hold them to an actionable 'duty of care,' in the

51. *Id.* at 822.

52. *Id.* at 824.

> 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. Upon consideration of the role imposed upon the public schools by law and the limitations imposed upon them by their publicly supported budgets, and of the just-cited 'consequences to the community of imposing [upon them] a duty to exercise care with resulting liability for breach,' we find no such 'duty' in . . . plaintiff's complaint.[53]

Thus, the plaintiff's action failed because the court refused to find that a California school district owed a duty of care while instructing students. According to California law, educators must adequately supervise students, but according to *Peter W.* they do not have a duty to adequately educate them.[54]

Three years after the case of *Peter W.* was heard in California, a similar action was brought by a high school student in New York. In *Donohue v. Copiague Union Free School District*, the plaintiff alleged that he had attended Copiague Senior High School from 1972 to 1976 and graduated without the rudimentary ability to read and write.[55] The plaintiff sought five million dollars in damages.

The first of two causes of action asserted by the plaintiff was educational malpractice while the second was the negligent breach of a constitutionally imposed duty to educate under New York law. The court rejected the second claim with very little discussion but the educational malpractice allegation was analyzed in depth. The court found that such a cause of action was indeed plausible and stated that "the imagination need not be overly taxed to envision allegations of a legal duty of care flowing from educators . . .."[56]

However, after making that determination, the court opined that such claims should not be entertained for public policy

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53. *Id.* at 825.

54. Cal. Educ. Code Ann. § 44807 (West 2002).

55. 391 N.E.2d 1352 (N.Y. 1979)

56. *Id.* at 1353.

reasons. The court found 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 that courts should not interfere with the decision making of that entity absent a gross violation of public policy. The court did not elaborate on what type of violation might be considered gross, but clearly a lack of due care while instructing students was not considered a gross violation of public policy. Specifically, the court held that

> [t]o 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 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 Constitution and statute in school administrative agencies.[57]

Whereas the court in *Peter W.* found that no duty 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. However, the court in *Donohue* chose to insulate educators from liability as a matter of public policy by deferring to the judgment of the professionals. Interestingly, in medical and legal malpractice cases, the courts defer to the profession only to establish a standard of care, not to insulate the professionals from accountability. Thus, the courts believe that educators should not be held accountable for the services they render for both legal and policy reasons.

2. Breach of Duty

Mere dissatisfaction with the services rendered, however, 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 involving the establishment of the degree of care owed and proof that the defendant did not meet the requisite standard.

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57. *Id.* at 1354 (citations omitted).

The degree of care owed by the professional must be established at trial. Proof of the requisite standard of care is generally 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.[58] This is true unless the requisite level of care is apparent to a lay juror. The standard of care for physicians is defined very generally since the courts recognize that medicine is not a precise science. Therefore, critically analyzing the facts of each situation becomes the focal point in litigation.

For physicians, the standard of care that is owed to a patient can be established by state statute or by professional standards. Whether a violation of a standard 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, the omission by the physician, and established modes of practice. 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 not held liable for mistakes in judgment where the proper action is open to debate.[59]

Conversely, no standard of care has been found in education. In *Peter W.*, the court stated that classroom methodology affords no acceptable standard of care. 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.

In *Hoffman v. Board of Education*, a case involving a special education student, similar concerns were expressed regarding the lack of a standard of care.[60] In this case, the court voiced concern that whenever a student failed to progress, it could be argued that he or she would have

58. *Swanson v. Chatterton*, 160 N.W.2d 662 (Minn. 1968).

59. *See Creasey v. Hogan*, 637 P.2d 114 (Or. 1981); *Becker v. Hidalgo*, 556 P.2d 35 (N.M. 1976).

60. 400 N.E.2d 317 (N.Y. 1979).

progressed if another form of instruction or assessment had been used.

Contrary conclusions have been reached, 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 could be measured would present an insurmountable obstacle. In addition, a dissenting opinion in *Hunter v. Board of Education,* though not binding, concluded that since educators receive special training and are state certified, they possess special skills and knowledge and should use customary care.[61] Therefore, due to conflicting viewpoints, it is possible that a court could find that a standard of care exists in education that could 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 adequately educate.

3. Causation

Proof that a duty of care exists, coupled with a showing that the defendant breached that duty, does not necessarily mean a plaintiff will recover. The plaintiff must prove he or she was injured and the injury sustained was actually and proximately caused by the defendant's negligence.

A physician cannot be held liable, even if negligent, if the negligent actions did not 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 the medication contributed to the patient's death.[62] Furthermore, the defendant'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 it must be proven that but for the fact that the physician prescribed the decongestant, the patient would not have died.

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61. 439 A.2d 582 (Md. 1982).

62. *Fall v. White,* 449 N.E.2d 635 (Ind.App. 1983).

With respect to attorneys, the issues of causation and ascertaining damages can be complicated and often these issues are intertwined. 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, thus precipitating a legal malpractice claim against the tardy attorney. While such an error 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, it must first be determined that but for the attorney's negligent actions, the plaintiff would not have been injured. The plaintiff must then show injury.

For example, in such a case as 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 damaged.[63] This aspect of determining causation and damages is called a trial within a trial. The justification is that, in order to truly know what a client lost, the original case must be tried in full.

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

However, the court in *Donohue* acknowledged that while proving causation might be difficult and sometimes impossible, it assumes too much to conclude that causation could never be established. A dissenting opinion in *Hoffman* concluded that the failure by school officials to follow a recommendation for reevaluation of the plaintiff that resulted in his misplacement into a CRMD class ("Class of Children of Retarded Mental

63. *See Pete v. Henderson*, 269 P.2d 78 (Cal. App. 1st Dist. 1954); *Pusey v. Reid*, 258 A.2d 460 (Del. Super. 1969).

Development") was readily identifiable as the proximate cause of the plaintiff's injury. Again, the courts do not rule out the possibility of establishing causation in educational malpractice cases.

4. Injury

Even if the elements of negligence are established at trial, it will not ensure compensation for the defendant. The plaintiff must have actually suffered an injury as a result of the negligent act. Therefore, 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 which are unsuccessful and result in the birth of a healthy baby. The courts are unwilling to regard the birth of a healthy baby as an injury.[64] However, a court will provide a remedy to an injured patient if it is shown that the physician acted in a negligent manner.

With respect to educators, the courts have been divided about whether injury can be established in education 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. And in *Hunter*, the court reiterated that if a tort of educational malpractice was recognized, money damages would be a poor remedy, thus suggesting that a limitation of damages would be appropriate.

The issue of damages for an injury suffered by a student has been determined by a Texas federal district court in a Title IX sexual abuse case which held that a school district was liable for the sexual abuse of a student perpetrated by a school employee under the concept of strict liability.[65] The court limited damage awards to situations putting money into direct services for children. The court found three appropriate remedies: 1) the expenses for medical treatment; 2) the expenses for mental health treatment; and 3) the expenses for special education. These three elements of damage were "designed to award money to pay for services that are best able

64. *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).

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

to heal the child physically, emotionally, and intellectually."[66] The three areas are designed to maximize healing so that the child can realize his or her full potential. The damages are limited in part because of the court's concern that financially-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."[67] Options other than money damages typically assessed in medical malpractice would likely also be available in educational malpractice cases.

However, once again, 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, Schmoker 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.'"[68] If there is a payoff for being educated, the lack of an education must be a detriment to one's chances for success.

5. Defenses

If a patient has contributed to his or her injuries or has assumed some sort of risk, damages will either not be awarded or be reduced. The courts have held that the creation of a physician-patient relationship requires that the duty established be reciprocal. Thus, the patient is required to use the care a person would ordinarily use in similar circumstances and, if he or she does not, then the patient cannot hold the physician liable for harm. Specifically, a patient is required to provide adequate information to the physician, follow the instructions given by the physician, and submit to the treatment the physician orders. If failure to do so enhances the

66. *Leija*, 887 F. Supp. at 956.

67. *Id* at 955 (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.").

68. Michael Schmoker, *Results: The Key to Continuous School Improvement* 8 (2d ed., Assn. for Supervision & Curriculum Dev. 1999) (citations omitted).

injury, the patient will not be able to recover damages for his contribution to the injury.

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 failing to seek further medical attention when her condition worsened.[69] 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.[70]

Since educational malpractice is not a recognized cause of action, the issue of defenses has not been addressed in the case law. However, discussion of factors regarding causation, such as motivation and home life discussed previously, could be raised as a defense since they are external factors beyond the control of the educator. The classic defense of contributory negligence on the part of the plaintiff would be available in an educational malpractice suit as it is in medical malpractice. It is clear that a physician will not be held liable for damages if a diabetic will not take her insulin even though it was prescribed and the ramifications for not taking the medication were discussed. This defense could be raised if the student failed to follow the instructions of the teacher such as not turning in assignments, turning in partially completed assignments, failing to pay attention in class. Therefore, a student would arguably be required to take reasonable responsibility for his or her own learning.

Patients die and clients go to jail—the outcome of the rendering of professional services is not always positive. Courts recognize that part of being a professional includes making judgment calls that may not always guarantee a positive result. Generally, the issue is whether 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.

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

70. *Roers v. Engebretson*, 479 N.W.2d 422 (Minn. 1992).

B. Policy Issues Related to Educational Malpractice

In addition to legal issues, policy issues also play a critical role in the decision not to recognize educational malpractice as a cause of action. As stated previously, policy issues can completely close off a legal analysis such as when policy considerations preclude the recognition of a duty. Currently, public policy dictates that educational malpractice not be recognized as a tort. But public policy does change. For example, only three states (California, Washington, and New Jersey) currently recognize the tort of wrongful life, which occurs when a plaintiff child alleges that the defendant caused his/her existence but not necessarily the impairment. The acceptance of a wrongful life tort creates a policy in which physicians have a new duty to protect children from existing.[71] In most jurisdictions, cases alleging wrongful life are dismissed for failure to state a claim.[72] While a bar to wrongful life suits exists as a policy matter in forty-seven states, that bar was lifted in three states and may well be lifted in the others.[73] As in a wrongful life suit, policy considerations are ever changing and therefore, a look at educational public policy is essential.

For years, school districts were immune from tort liability, regardless of the circumstances surrounding the claim against the district. This was based on a common law principle that the government could not be sued without its consent. The policy reasons that were given for protecting school districts were: 1) school districts only have the powers granted by the legislature, and, if the legislature did not give the school districts the power to be sued, they could not be sued; 2) since the public would receive no benefit from allowing successful suits, payment of damages from school district funds would be an illegal expenditure of public funds; 3) allowing suits would open the floodgates and place a financial burden on school districts; 4) the concept of respondeat superior that allows an employer to be sued for the actions of his or her employees does not apply to school districts; and 5) immunity cannot be abolished by the judiciary, only by the legislature.[74]

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71. Rhinehart, *supra n.* 64, at 152.

72. *Alquijay v. St. Luke's-Roosevelt Hosp. Ctr.*, 473 N.E.2d 244, 246 (N.Y. 1984) (plaintiffs failed to allege an injury cognizable at law).

73. *Id.* at 245-246 (rejecting plaintiff's public policy argument).

74. Kern Alexander & M. David Alexander, *The Law of Schools, Students, and*

However, a change in attitude regarding the appropriateness of governmental immunity with regard to school districts resulted in a change in both policy and law. In *Molitor v. Kaneland Community Unit District No. 302*, the court found that a school district could be held liable in a tort action.[75] In this case, a student was injured in a school bus accident. In overturning existing policy that granted immunity, the court stated that it was almost incredible that the concept of governmental immunity could exempt governmental entities from liability for their tortious acts, which resulted in a burden to an individual.

Public policy does change with changing times and changing needs, interests, and values. While policy considerations have served as a bar to educational malpractice suits, California, where the first educational malpractice suit was argued, may have breached the policy argument by holding educators personally liable for their instructional decisions.

III. *CALIFORNIA TEACHERS ASSOCIATION V. STATE BOARD OF EDUCATION*

On June 2, 1998, California voters approved ballot Proposition 227 entitled "English Language in Public Schools."[76] It amended the California Education Code

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Teachers in a Nutshell (West Publg. Co. 1993).

75. 163 N.E.2d 89 (Ill. 1959)

76. For a discussion of Proposition 227, *see* Thomas F. Felton, Student Author, *Sink or Swim? The State of Bilingual Education in the Wake of California Proposition 227*, 48 Cath. U. L. Rev. 843-880 (1998); Amy S. Zabetakis, Student Author, *Proposition 227: Death for Bilingual Education*, 13 Geo. Immigr. L.J. 105-128 (1998); Scott Ellis Ferrin, *Reasserting Language Rights of Native American Students in the Face of Proposition 227 and Other Language-Based Referenda*, 28 J. L. & Educ., 1 (1999); and Joseph A. Santosuosso, Student Author, *When in California . . . In Defense of the Abolishment of Bilingual Education*, 33 New Eng. L. Rev. 837-879 (1999). For a discussion of Proposition 227 from a research perspective, *see Special Issue on the Implementation of California's Proposition 227 (1998-2000)*, Bilingual Research J. (2000).

The preamble to the legislation states in part:

> The People of California find and declare as follows:
> (a) Whereas, the English language is the national public language of the United States of America and of the State of California, is spoken by the vast majority of California residents, and is also the leading world language for science, technology, and international business, thereby being the language of economic opportunity; and

replacing bilingual programs with immersion programs, in which students are required to learn English and other subjects by speaking with a teacher who teaches primarily in English.[77] The unintended consequences of this initiative may have opened the door to educational malpractice in California.[78]

Proposition 227 changed the way English Language Learners (ELL) are educated in California.[79] Bilingual education, long a staple in California, was replaced with English immersion classes as the automatic placement for ELLs unless parents or guardians give informed consent for their child to participate in a bilingual problem.[80] Unlike bilingual classrooms where any mixture of language is acceptable, English immersion classrooms require that "nearly all classroom instruction [be] in English."[81] The Proposition sought to ensure that "all children in California public schools shall be taught English as rapidly and effectively as possible."[82] In order to accomplish this goal, the Proposition requires students "be taught English by being taught in English."[83] Students are guaranteed the right to be provided instruction in

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(b) Whereas, immigrant parents are eager to have their children acquire a good knowledge of English, thereby allowing them to fully participate in the American Dream of economic and social advancement; and . . .

77. An equal protection claim regarding Proposition 227 was rejected in *Valeria v. Davis*, 307 F.3d 1036 (9th Cir. 2002).

78. For arguments supporting educational malpractice, *see* Johnny C. Parker, *Educational Malpractice: A Tort is Born*, 39 Clev. St. L. Rev. 301 (1991); Terrence C. Collingsworth, *Applying Negligence Doctrine to the Teaching Profession*, 11 J.L. & Educ. 479 (1982); Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 Tex. L. Rev. 777 (1985). For the opposite view that educational malpractice is not a viable cause of action, *see* Joan Blackburn, Student Author, *Educational Malpractice: When Can Johnny Sue?* 7 Fordham Urb. L.J. 117 (1978); Richard Furnston, *Educational Malpractice: A Cause of Action in Search of a Theory*, 18 S.D. L. Rev. 743 (1981); Karin H. Calavenna, Student Author, *Educational Malpractice*, 64 U. Det. L. Rev. 717 (1987).

79. The term English Language Learner has replaced the former terms of limited-English and non-English speaker. ELL describes a student whose first language is not English and who is beginning to learn English or have some proficiency in English. The argument for the use of ELL is that it reframes the problem from a language deficiency to a specific educational need. *See e.g.* Mark W. LaCelle-Peterson & Charlene Rivera, *Is It Real for All Kids? A Framework for Equitable Assessment Policies for English Language Learners*, 64 Harv. Educ. Rev. 55 (1994).

80. Cal. Educ. Code Ann. § 310 (West 2002).

81. Cal. Educ. Code Ann. § 306(d) (West 2002).

82. Cal. Educ. Code Ann. § 300(f) (West 2002).

83. Cal. Educ. Code Ann. § 305 (West 2002)

"English language classrooms."[84] An English language classroom is defined in the statute as one in which the instruction given is "overwhelmingly" in English.[85]

Because teacher speech is the dominant mode of instruction, the requirement to conduct that speech overwhelmingly in English impacts the delivery of instruction in the classroom. To what extent does this right of the student to instruction in English impact the responsibility owed to the student?

Statutory control over the public school curriculum has long been accepted as part of the plenary power of the legislative branch of state government. The assignment of a statutory right to students is also consistent with the long held property right of students.[86] What is unique about Proposition 227 is the cause of action available to students. The statute enacted by Proposition 227 reads in pertinent part:

> If a California school child has been denied the option of an English language instructional curriculum in public school, the child's parent or legal guardian *shall have legal standing to sue for enforcement of the provisions of this statute*, and if successful shall be awarded normal and customary attorney's fees and actual damages, but not punitive damages or consequential damages. Any school board member or other elected official or public school teacher or administrator who willfully and repeatedly refuses to implement the terms of this statute by providing such an English language educational option at an available public school to a California school child may be held personally liable for fees and actual damages by the child's parents or legal guardian.[87]

In other words, educators owe a statutory duty to provide students with a standard of practice that "nearly all classroom instruction is in English."[88] Failure to provide the specified standard of instructional care provides a legal cause of action to sue for the harm caused by a lack of professional care. As asked previously, has the door to educational malpractice,

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84. *Id.*

85. Cal. Educ. Code Ann. § 306(b) (West 2002).

86. *See e.g. Goss v. Lopez*, 419 U.S. 565 (1975).

87. Cal. Educ. Code Ann. § 320 (West 2002) (emphasis added).

88. Cal. Educ. Code Ann. § 306(d) (West 2002).

which has been shut for decades, been opened a crack by the passage of Proposition 227 and its right to sue?

Suit was brought in federal district court seeking to enjoin enforcement of the proposition in *California Teachers Association v. Davis.*[89] The suit only challenged the provision that gives parents a private cause of action against teachers and school administrators who violate the law. The plaintiffs alleged that the provision in question (section 320) was unconstitutional.[90]

A. California Teachers Association v. Davis*: The District Court*

The plaintiffs' main contention in *California Teachers* was that Proposition 227 violates protected speech.[91] The Proposition must therefore comply with the stringent vagueness and due process standards.[92] In the alternative, if the Proposition does not implicate the First Amendment right to free speech, "then the statute's language must be sufficiently clear so that it will not chill protected speech."[93]

The plaintiffs asserted that they were unsure as to what behavior will subject them to liability. They argued that the Proposition is not specific enough to allow them to know how much use of a foreign language will violate the Proposition. One of the teachers expressed concern that Spanish used in disciplinary situations and in instructions regarding earthquake safety procedures could subject her to liability.[94] Similarly, another plaintiff teacher contended liability could result from speaking to another teacher's students in situations involving playground supervision and safety.[95] A third plaintiff teacher claimed that the Proposition would limit her discussion of bilingual options with parents.[96]

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89. 64 F. Supp. 2d 945 (C.D. Cal. 1999).

90. *Id.* The plaintiffs were the California Teachers Association, Association of Mexican American Educators, California Association for Asian-Pacific Bilingual Education, National Association for Bilingual Education, Association of California School Administrators, and teachers Irella Perez, Norma Steiner, Kristin Worthman, and Emily Palacio.

91. *Id.* at 952.

92. *Id.*

93. *Id.*

94. *Id.* at 949 (citing Steiner Decl. ¶ 3).

95. *Id.* (citing Perez Decl. ¶ 3).

96. *Id.* (citing Worthman Decl. ¶ 3).

Senior District Judge Rafeedie quickly dispatched the defendants' Eleventh Amendment assertion of sovereign immunity. Next, the judge turned to the plaintiffs' argument that the Proposition implicates First Amendment Rights and thus must meet the stringent standards of vagueness and due process. If the statute implicates free speech, then the statute's language "must be sufficiently clear so that it will not chill protected speech."[97]

What free speech rights, if any, do educators, as employees, enjoy in their classrooms? In the instance of teacher speech in the classroom, the issue is cast as the relationship of the state as employer and not as sovereign. An individual, when acting as an employee of the state, has less free speech rights than when the individual's relationship is one in which the state is sovereign. The court opined that the beginning point of this analysis is a balancing test weighing the rights of the teacher against the need for the efficient operation of the service provided by government.

The court laid a foundation of two principles upon which to build its analysis. First, the court held that a classroom is not a public forum; therefore, "school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community."[98] The public school classroom is a closed forum because it is reserved for the exclusive use of government—the teaching of the adopted curriculum. Second, "[t]eachers do not have a First Amendment right to determine what curriculum will be taught in the classroom."[99] This is particularly true when a teacher's

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97. *Id.* at 952.

98. *Id.* at 953 (citing *Hazelwood Sch. Dist. v. Kuhmeier*, 484 U.S. 260 (1988)). The *Hazelwood* standard of legitimate pedagogical concern was originally applied to student speech but has been used in controversies involving teachers' and professors' speech as curriculum. For a discussion of the *Hazelwood* standard as applied to educators, *see e.g.* Todd A. DeMitchell, *Miles v. Denver Public Schools: Teacher Autonomy, An Endangered Concept?*, Intl. J. Educ. Reform 298 (1992).

99. *Cal. Teachers Assn.*, 64 F.Supp. at 953. *Peloza v. Capistrano Unified Sch. Dist.*, 787 F. Supp. 1412 (C.D. Cal. 1992) (prohibiting the teaching of creationism and requiring the teaching evolution does not violate the First Amendment); *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993) (prohibiting presentations on abortions did not abridge free speech); *Boring v. Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998) (in a dispute over a play, the Fourth Circuit, in an *en banc* decision, held that school administrators, not teachers, have control over the curriculum); *Searcy v. Harris*, 888 F.2d 1314 (11th Cir. 1989), school administration has a legitimate pedagogical concern in determining the school's curriculum.

choice of curriculum is in contravention of specific board policies. Thus the district court determined that teachers do not have a constitutional right to select the curriculum.

Moving from curriculum where teachers do not enjoy a constitutional right to overrule the administrative decisions as to what shall be taught, the court next reviewed whether teachers have a right to select their instructional methods. Borrowing from higher education where professors have a more articulated right to academic freedom, the court stated:

> When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.[100]

As discussed above, classroom instruction is characterized by speech and teachers monopolize that speech. Instruction is the curriculum and instruction is, in large measure, teacher speech. Therefore, it can be argued that the school board's ability to effectively control the curriculum is largely measured by its ability to control teacher speech. Referring obliquely to established precedent, the district court held that the state can regulate in-class speech as long as its decision relates to a legitimate pedagogical concern (the *Hazelwood* standard[101]) and "that teachers do not have a First Amendment right to be free of regulations which tell them to follow a method of instruction or a curriculum."[102]

The court concluded that the plain language of the statute limits the requirements of the statute to teaching and instruction. "The Proposition does not completely prohibit languages other than English. The Proposition does not mention or refer to any prohibition of languages other than English used in disciplining students, emergency training, social interactions, tutoring, parent-teacher conferences, or any of the other situations listed by the Plaintiffs."[103] While finding that teachers do not have a constitutional right to select their instructional methods or their language for instructional

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100. *Cal. Teachers Assn.*, 64 F.Supp. at 953 (citing *Rosenberger v. Rector & Visitors of U. of Va.*, 515 U.S. 819, 833 (1995)).

101. *See supra n.* 98.

102. *Cal. Teachers Assn.*, 64 F.Supp. at 954.

103. *Id.*

purposes, the Proposition only limits their classroom instruction, not all interactions with students.

B. Vagueness

Another argument advanced by the plaintiffs was the contention that the statute was vague because it fails to provide adequate notice as to what conduct is prohibited and what conduct will potentially expose them to liability. A basic principle of due process is violated if a legislative enactment does not clearly define its prohibitions. A statute is void for vagueness if it fails to give people of ordinary intelligence adequate notice of the conduct it proscribes or if it incites arbitrary and discriminatory enforcement.[104]

The court asserted that the provisions of the Proposition are sufficiently clear. The relevant provisions involve only classroom instruction, and "teachers do not have significant First Amendment rights inside the classroom."[105] Therefore, a more stringent standard of review is not necessary because of the reduced right to free speech. However, even if a more stringent analysis were employed because the Proposition chills speech outside the classroom, the judge argued that the statute would also survive this more stringent vagueness analysis. On its face, the statute only pertains to classroom instruction. Even if the statute is less clear about the amount of English required in the classroom, "it cannot be said to chill speech outside the classroom" where it is not applicable.[106]

C. Due Process Challenge

Central to this discussion is the court's analysis of the plaintiff's due process challenge. The plaintiffs contended that the Proposition violates due process because 1) it does not specify intent to override the common law immunity for educational malpractice; 2) it is silent on the standard for

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104. *See Schwartzmiller v. Gardner*, 752 F.2d 1341 (9th Cir. 1984). The vagueness standard serves three main purposes: (1) to avoid punishing people for behavior they could not have known was illegal; (2) to avoid subjective enforcement of laws by governmental officers, judges and juries; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms. *See also NAACP v. Button*, 371 U.S. 415, 432-33 (1963).

105. *Cal. Teachers Assn.*, 64 F. Supp. 2d at 956.

106. *Id.*

measuring damages; and 3) it lacks procedural safeguards against arbitrary and bad-faith lawsuits.[107]

Addressing these three claims, the district court acknowledged that, in regards to educational malpractice, under common law "school authorities did not owe students any duty of care in the process of their academic education."[108] The plaintiffs advanced the argument that due process is violated because the Proposition did not use clear and unambiguous terms to effect a significant departure from California's common law rule that does not allow a tort for educational malpractice. The court found that the question was one of state law and not a question of Constitutional due process. "Instead, the question of how far the Proposition goes in abrogating the common law is a question of statutory interpretation, which is a matter of state law not properly before the Court."[109] Thus, the issue of whether Proposition 227 has opened the door for educational malpractice was not resolved.

The second claim was that due process was violated because no standard was provided for assessing damages. Punitive damages are not available under the statute, only a claim for actual damages is available. Due process only requires that the damages not be awarded arbitrarily—it does not require the statute authorizing them to spell out in detail what constitutes actual damages.

The district court judge asserted that the plaintiffs cited no support for their third claim that the Proposition must have procedural safeguards. "The statute leaves teachers in the same position as that of all other potential litigants who are free to defend themselves against non-meritorious suits."[110] Teachers and school administrators do not have a right to have special safeguards.

The district court granted summary judgment in favor of the defendants on all claims. The plaintiffs appealed the vagueness challenge only.

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107. *Id.* at 956-57.

108. *Id.* The court referred to *Peter W.*, 60 Cal. App. 3d 814.

109. *Cal. Teachers Assn.*, 64 F.Supp. at 956-57.

110. *Id.* at 957.

D. The Appeal[111]

On appeal, the plaintiffs contended that Proposition 227 was unconstitutionally vague in two respects.[112] First, they asserted that it failed to define clearly when teachers are required to speak in English. They argued that the mandate to provide an "'English language educational option' is unfathomable, leaving them guessing under which circumstances the language restrictions of Proposition 227 apply."[113] Second, they contended that Proposition 227 failed to define clearly how much non-English instruction will subject them to personal liability. The plaintiffs argued that the terms "nearly all" and "overwhelmingly" are imprecise words and fail to provide adequate notice.[114]

Acknowledging that the Supreme Court has not squarely addressed the issue of what, if any, level of in-class speech by teachers should be afforded First Amendment protection, the court of appeals assumed *arguendo* that Proposition 227 covers instructional speech and thus receives some First Amendment protection. Agreeing with the district court, the appellate court found the *Hazelwood* standard of legitimate pedagogical concern to apply.[115] The court allowed the plaintiffs to

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111. *Cal. Teachers Assn. v. St. Bd. of Educ.*, 271 F.3d 1141 (9th Cir. 2001).

112. *Id.* at 1150. The Court of Appeals noted three primary reasons why vague statutes are objectionable. "First, they trap the innocent by not providing fair warning. Second, they impermissibly delegate basic policy matters to lower level officials for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, when vague statutes involve sensitive areas of First Amendment freedoms, they operate to inhibit the exercise of those freedoms."

113. *Id.* at 1146.

114. *Id.*

115. *Id.* at 1149. The court identified three different tests used to analyze the free speech rights of teachers. *Hazelwood, supra* n. 98, is one test. The second is a balancing test. The threshold question is whether the speech of an employee is on a matter of public concern in *Connick v. Myers*, 461 U.S. 138 (1983). The next part of the matter of public concern analysis for educators balances the interest of the employee with the interest of the state in promoting the efficiency of the public service it performs through its employees. *See Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). If it is determined that the speech is on a matter of public concern in the second step, the plaintiff must demonstrate that such protected activity was a substantial or motivating factor in the adverse employment decision. If steps one and two are established, the employer may show that the employment action would have been taken even in the absence of the protected conduct. *See Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). In 1994, the United States Supreme Court, in a non-education case, modified this traditional analysis. *See Waters v. Churchill*, 511 U.S. 661 (1994). Arguably the modification occurs in the balancing portion of the first step. According to the High Court, deference should be given to the good-faith belief of the employer that the

challenge the statute on its face as opposed to as applied because of the assumption that, under *Hazelwood*, Proposition 227 clearly implicates free speech. This decision to assume that under *Hazelwood* the plaintiffs enjoy some First Amendment protection necessitated the application of the more stringent heightened scrutiny analysis for vagueness.[116]

The plaintiffs argued that the statute is vague because when they are required to speak in English is varied, undefined, and inconsistent. The court confined its review to the language of instruction. It found that the terms "'instruction' and 'curriculum' are words of common understanding 'to which no teacher is a stranger.'"[117] The court acknowledged that there would be situations at the margin where it would be unclear whether a teacher is providing instruction and presenting the curriculum. However, the touchstone of facial vagueness challenges is whether a substantial amount of legitimate speech will be chilled, not whether some amount will be chilled.

Furthermore, the court also considered the context in which the statute operates. In this instance, the court found that the context is curriculum presentation. Under *Hazelwood*, a restriction on teacher speech need only be reasonably related to a legitimate pedagogical concern. Normally, First Amendment rights "give way to the state's pedagogical interests."[118] The court found that the state's pedagogical interests are "paramount in this context" and the plaintiffs' enjoy only minimal First Amendment rights (assuming they enjoy any protection at all). Accordingly, the court of appeals concluded that Section 320 of Proposition 227 is not unconstitutionally vague on its face, affirming the judgment of the district court.[119]

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employee's speech is disruptive. The third test developed from *Rust v. Sullivan*, 500 U.S. 173 (1991) and *Rosenberger v. Rectors & Visitors of U. Va.*, 515 U.S. 819 (1995) when the government is the speaker. When government is the speaker and it conveys a particular message through a person, that person receives no First Amendment protection.

116. *Cal. Teachers Assn.*, 271 F.3d at 1150. ("When First Amendment freedoms are at stake, courts apply the vagueness analysis more strictly, requiring statutes to provide a greater degree of specificity and clarity than would be necessary under ordinary due process principles. The reason for this rule is that 'First Amendment freedoms need breathing space to survive.'") (citations omitted).

117. *Id.* at 1151.

118. *Id.* at 1154.

119. *Id.* at 1155. The majority noted that its holding did not precluded an educator

The dissent argued that teachers do not have fair notice of when and how much English is required in order to avoid personal liability. Enforcement of the statute is left to the "whims" of individual parents, which invites ad hoc enforcement. The dissent characterized the parental enforcement provision of Proposition 227 as "legalistic ambush."[120] The dissent concluded, citing *Ward v. Hickey*, a First Circuit public school academic freedom case: "If teachers must fear retaliation for every utterance, they will fear teaching."[121]

IV. FUTURE OF EDUCATIONAL MALPRACTICE

To date, educators have not been held legally accountable for the professional services they render. Two streams may combine to overcome the steadfast objections of the courts to recognize educational malpractice as a viable tort for negligence. First, the standard of care that educators owe to students may be established. Second, a statutory duty has been created that may break the wall protecting educators from malpractice suits.

The duty analysis in *Peter W.* concluded that, as educators, we do not have standards of practice that guide our teaching. However, most professional associations have defined in various terms of vagueness what a teacher should do as a demonstration of best practices. David Dill writes of the time following *Peter W.* that "[o]ne distinguishing characteristic of the education reform movement of the 1980s is the assumption that a knowledge base for the teaching profession now can be defined—a knowledge base that can be used in designing future teacher education programs."[122] Books such as *Qualities of Effective Teachers*, discussing a research-based framework for quality teaching, have become commonplace in the educational lexicon.[123] And research examining best practices

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form bringing a vagueness challenge on an as-applied basis.

120. *Id.* at 1159 (citations omitted).

121. *Id.* at 1159-1160 (citing *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993)).

122. David D. Dill & Associates, *What Teachers Need To Know: The Knowledge, Skills, and Values Essential to Good Teaching* xiii (1st ed., Josey-Bass Publishers 1990).

123. James H. Stronge, *Qualities of Effective Teachers* (Assn. for Supervision & Curriculum Dev. 2002).

in teaching is discussed in books as well as scholarly compendiums.[124]

Parker identifies another aspect of how a duty to teach is formed. He writes, "[S]ome state legislatures have also created Professional Teaching Practices Commissions that are responsible for developing through the teaching profession, criteria of professional practice, including ethical and professional performance."[125] Arguably, there is a body of professional knowledge gained through research and collective professional wisdom that is accepted by the various professional organizations defining what instructional duty is owed to students.

To date, educators have not been held legally responsible like other professionals for services rendered to the public. Proposition 227 may have altered that landscape by providing a statutory duty owed to students, thus overcoming the rationale of *Peter W.* Educators, like other professionals, could be subject to malpractice liability when their professional conduct—instructional practice or speech—falls below an accepted level and causes harm. Proposition 227, which grants a right of individual recovery for violations of a statutorily defined duty, may well have overcome the policy argument used in *Peter W.*

Accountability measures are sweeping the nation. A policy of educational malpractice grounded in accountability and supported by the right of private recovery of Proposition 227 may reverse the history of court aversion to the tort.

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124. *See* M.L. Wittrock, *Handbook of Research on Teaching* (3d ed., 1986).

125. Johnny C. Parker, *Educational Malpractice: A Tort is Born*, 39 Clev. St. L. Rev. 301, 317-318 (1991).