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EDUCATIONAL MALPRACTICE AND SPECIAL EDUCATION LAW

School attendance is an experience common to virtually every citizen of the United States. Only a few of the most severely impaired will have no contact with formal educational institutions. Education indeed may be the prime characteristic of American democratic society.[1] Although not presently recognized as a constitutionally protected right,[2] education has been described by the United States Supreme Court as a "legitimate entitlement"[3] and "a right which must be made available to all on equal terms"[4] for the good of society as well as of the individual.[5]

Members of various minority groups, however, have encountered serious problems in attempting to avail themselves of the benefits of education. Consequently, these groups have been forced to seek redress in the courts[6] and in protective legislation. An example of such legislation for the minority group collectively referred to as "the handicapped" is the Education for All Handicapped Children Act of 1975.[7] The EAHCA extends and codifies various rights of handicapped children. It explains in detail the types of handicapped children for whom the states are required to provide services,[8] the services which must be made available,[9] and the procedural safeguards to be afforded.[10] Jurisdiction of disputes is vested in federal courts without regard to the amount in controversy.[11]

Redress for infringement of educational rights also has been sought by minority groups through judicial intervention.[12] Although

1. Brown v. Board of Educ., 347 U.S. 483, 493 (1954).
2. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).
3. Goss v. Lopez, 419 U.S. 565, 574 (1975).
4. 347 U.S. at 493.
5. *Id.*
6. *E.g.*, Lau v. Nichols, 414 U.S. 563 (1974) (Chinese children unable to understand English instruction); Brown v. Board of Educ., 347 U.S. 483 (1954) (Negro children seeking an end to racially segregated public schools); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971) (per curiam), *consent agreement approved and adopted*, 343 F. Supp. 279 (E.D. Pa. 1972) (retarded children seeking equal access to education).
7. 20 U.S.C. §§ 1401-1461 (1976) [hereinafter referred to as the EAHCA].
8. *Id.* §§ 1401(1), 1401(15).
9. *Id.* § 1401(16).
10. *Id.* § 1415(b).
11. *Id.* § 1415(e)(4).
12. *E.g.*, Lau v. Nichols, 414 U.S. 563 (1974) (Chinese children unable to understand English instruction); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (alleged discriminatory school financing on basis of wealth); Brown v. Board of Educ., 347 U.S. 483 (1954)

the most frequent remedy has been injunctive relief barring the alleged discriminatory practice,[13] a few recent cases have been filed based on negligence, termed educational malpractice.[14] In malpractice claims, damages are sought from a professional practitioner as compensation for an injury alleged to be a result of the professional's failure to perform at the level reasonably to be expected of members of that profession.[15] Although most frequently seen in relation to the medical profession, malpractice claims also have dealt with other professions and with those employed in skilled trades.[16]

For the handicapped, legislative provisions such as the EAHCA may provide a basis for educational malpractice claims. In such cases, the specific violation of a statutory duty defined in the legislation or its related regulations may be proved more readily than a less well-defined general allegation of failure to meet professional standards. The availability of this form of relief can be expected to have a broad impact on the system of delivery of special education services to handicapped children.

This note first will trace briefly the development of the concept of the "right to education" and the extension of that right to handicapped persons. A discussion of cases brought on behalf of handicapped children will explore in greater detail recent judicial attempts to clarify their individual educational rights. Finally, an analysis and reconciliation of those decisions and the statutes will assist in projecting the future direction of educational malpractice litigation and in suggesting standards to govern such litigation. It will be seen in the cases discussed below[17] that the courts generally have been unwilling to recognize a cause of action based on negligence. However, since the EAHCA now provides specific statutory and regulatory requirements for the conduct of educational programs and personnel, which may serve as the standards of care, educational malpractice claims may be expected to increase dramatically.

(racial segregation); Fialkowski v. Shapp, 405 F. Supp. 946 (E.D. Pa. 1975) (multiply-handicapped children offered inappropriate educational program).

13. *E.g.*, Frederick L. v. Thomas, 419 F. Supp. 960 (E.D. Pa. 1976), *aff'd*, 557 F.2d 373 (3d Cir. 1977); Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972).

14. *See, e.g.*, Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976); Pierce v. Board of Educ., 44 Ill. App. 3d 324, 358 N.E.2d 67 (1976), *rev'd*, 69 Ill. 2d 89, 370 N.E.2d 535 (1977); Hoffman v. Board of Educ., 410 N.Y.S.2d 99 (Sup. Ct. App. Div. 1978); Donahue v. Copiague Union Free School Dist., 408 N.Y.S.2d 584 (Sup. Ct. 1977), *aff'd*, 407 N.Y.S.2d 874 (Sup. Ct. App. Div. 1978).

15. *See generally* W. PROSSER, LAW OF TORTS § 32 (4th ed. 1971) [hereinafter referred to as PROSSER].

16. *Id.*

17. *See* text accompanying notes 98-175 *infra*.

THE RIGHT TO EDUCATION

The seminal case addressing individual rights and public education is *Brown v. Board of Education*,[18] a suit attacking racially discriminatory segregation of public school children on fourteenth amendment grounds.[19] The United States Supreme Court recognized the ultimate societal value placed on education in a noteworthy passage, the gist of which has been relied on in nearly every subsequent case[20] concerning public education:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he 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.[21]

The Court concluded that the segregation of school children on the basis of race instilled in black children feelings of inferiority which impeded their motivation to learn.[22] Therefore, segregated educational facilities were held to be inherently unequal.[23]

A similar argument might be made on behalf of a handicapped child. Education is a right highly valued by society and of primary importance to the individual. Removing a child from the heterogeneous mainstream of the educational system denies the child full access to that right. However, the right recognized by the Court in *Brown* was "a right to equalized treatment *for all who qualify* for publicly supported education under their respective state statutes."[24] This decision there-

18. 347 U.S. 483 (1954).
19. U.S. CONST. amend. XIV, § 1, provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

20. *E.g.*, Milliken v. Bradley, 433 U.S. 267 (1977); Goss v. Lopez, 419 U.S. 565, 576 (1975); Arthur v. Nyquist, 573 F.2d 134 (2d. Cir.), *cert. denied*, 439 U.S. 860 (1978); Mills v. Board of Educ., 348 F. Supp. 866, 875 (D.D.C. 1972); Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967).
21. 347 U.S. at 493.
22. *Id.* at 494.
23. *Id.* at 495.
24. Haggerty & Sacks, *Education of the Handicapped: Towards a Definition of an Appropriate Education*, 50 TEMP. L.Q. 961, 963 (1977) (emphasis added) [hereinafter referred to as Haggerty & Sacks].

fore was not of immediate assistance to handicapped children because a state was still permitted to exclude any child who was considered to be unable to profit from formal education, since such children simply would not qualify for the available educational programs.[25]

The practice of excluding handicapped children was addressed in *McMillan v. Board of Education*,[26] where certain brain-damaged children were unable to attend public school because of an insufficient number of special classes for them. The parents of the excluded brain-damaged children claimed a violation of the equal protection clause of the fourteenth amendment, and the United States Court of Appeals for the Second Circuit agreed that there was a substantial basis for such a claim.[27] However, the court explained in dicta that there would be no constitutional violation if the school district simply had refused to provide any special classes for brain-damaged children, since they would not have qualified for admission to the standard classrooms.[28] It was only because some of the brain-damaged children were excluded, while others were admitted, that there was a substantial basis for a claim of a denial of equal protection.

Although the dicta in *McMillan* suggested that a particular group of handicapped children might be excluded from school simply by eliminating special classes for children with their handicap, that alternative was rejected by the United States District Court for the Eastern District of Pennsylvania in *Pennsylvania Association for Retarded Children v. Pennsylvania*.[29] The plaintiffs in *P.A.R.C.* claimed that exclusion of mentally retarded children from a free public education program violated the equal protection clause of the fourteenth amendment because that constitutional provision requires access to an educational program for *all* children of school age.[30] The court accepted expert testimony which indicated that "all mentally retarded persons are capable of benefiting from a program of education and training,"[31] and that such education will contribute to achievement of a degree of self-sufficiency.[32] The testimony also indicated that although it is preferable to commence education and training at a point early in life, the

25. *Id.*
26. 430 F.2d 1145 (2d Cir. 1970).
27. The Second Circuit remanded the cause to the district court for the convening of a three-judge panel to decide the merits of the plaintiffs' claim. *Id.* at 1150.
28. *Id.* at 1149.
29. 334 F. Supp. 1257 (E.D. Pa. 1971) (per curiam), *consent agreement approved and adopted*, 343 F. Supp. 279 (E.D. Pa. 1972) [hereinafter referred to as *P.A.R.C.*].
30. 343 F. Supp. at 297.
31. 334 F. Supp. at 1259.
32. *Id.*

retarded person is nevertheless able to benefit from such learning experiences at any age.[33] The school district was enjoined from continuing to exclude the retarded children, and it entered into a consent agreement with the plaintiffs which was subsequently approved by the court.[34]

In *Mills v. Board of Education*,[35] the mandatory provision of a free and appropriate public education was expanded to include all handicapped children.[36] The United States District Court for the District of Columbia found that excluding handicapped children from school was contrary to the intent of local statutes requiring parents to see that their children attended school,[37] under threat of criminal sanction.[38] Such sanction, the court held, "presupposes that an educational opportunity will be made available to the children"[39] and that "[t]he Board of Education is required to make such opportunity available."[40] The court in *Mills* issued a lengthy order[41] which delineated elements of a constitutionally equal education for the handicapped. These elements, many of which had been previously addressed in *P.A.R.C.* and subsequently included in the EAHCA, consisted of the following: (1) a suitable education for all children, regardless of the degree or multiplicity of handicapping condition(s);[42] (2) an individualized program of evaluation and compensatory educational services;[43] (3) placement in the setting least restrictive of the child's interaction with nonhandicapped children;[44] and (4) procedural due process safeguards, relating chiefly to proper notice to the handicapped child and his parents and to a hearing prior to any proposed change of a child's educational place-

33. *Id.*
34. *Id.* at 1258-67; 343 F. Supp. at 303-16.
35. 348 F. Supp. 866 (D.D.C. 1972).
36. *Id.* at 874-75.
37. *Id.* at 874, *citing* D.C. CODE §§ 31-201, 31-203 (1973).
38. *Id., citing* D.C. CODE § 31-207 (1973).
39. *Id.*
40. *Id.*
41. *Id.* at 877-83. The district court's order reminds the reader of a statement from McRedmond v. Wilson, 533 F.2d 757 (2d Cir. 1976): "A Federal judge rearranging a State's . . . educational system is like a man feeding candy to his grandchild. He derives a great deal of personal satisfaction from it and has no responsibility for the results." *Id.* at 766 (Von Graafeiland, J., dissenting).
42. 348 F. Supp. at 878; *P.A.R.C.*, 334 F. Supp. at 1266 (referring only to mentally retarded). *See* 20 U.S.C. § 1412(2)(B) (1976).
43. 348 F. Supp. at 879; *P.A.R.C.*, 334 F. Supp. at 1266 (mentally retarded). *See* 20 U.S.C. § 1414(a)(5) (1976).
44. 348 F. Supp. at 879; *P.A.R.C.*, 334 F. Supp. at 1264 (mentally retarded). *See* 20 U.S.C. § 1412(5)(B) (1976).

ment.[45]

Although the defendant school board in *Mills* protested that lack of funds precluded it from offering programs to handicapped children, the court relied on *Goldberg v. Kelly*[46] in stating that "[c]onstitutional rights must be afforded citizens despite the greater expense involved."[47] However, the *Mills* court drew its parallel to *Goldberg* in terms of competing state interests rather than focusing on individual constitutional rights.[48] In *Goldberg*, the Court ruled in favor of the public interest in preventing erroneous termination of a welfare recipient's benefits over a competing state interest in fiscal efficiency.[49] In *Mills*, the court held that "the District of Columbia's interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources."[50] The District of Columbia was instructed to assure that available educational funds were expended equitably, so as to avoid discrimination against handicapped children.[51]

In sum, the decisions discussed above indicated that handicapped children do indeed have a right to access to educational programs, and they suggested broad outlines for these programs. However, the right was not yet firmly established, and there continued to be a need for refinement and specificity of the educational rights of handicapped children.

45. 348 F. Supp. at 879-83; *P.A.R.C.*, 334 F. Supp. at 1266 (mentally retarded). *See* 20 U.S.C. § 1415 (1976).

46. 397 U.S. 254 (1970). The Court held that welfare recipients were entitled to the continued payment of benefits unless due process safeguards such as notice and hearing were provided to the recipient prior to termination of benefits for good cause. Although the defendant contended that imposing these safeguards was too great a burden in terms of administrative costs and time, the Court nevertheless held that the state could streamline the procedures "to minimize these increased costs" and that the importance of the benefits to the recipients was too great to be outweighed by fiscal considerations. *Id.* at 266.

47. 348 F. Supp. at 876.

48. The Court in *Goldberg* found that the continued receipt of welfare benefits was a statutory entitlement, 397 U.S. at 262. The *Mills* court did not directly address the question of whether education was either an "entitlement" or a constitutionally-protected right, but it apparently relied on the latter. *See* 348 F. Supp. at 875-76. The Court reached a different conclusion the following year in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973), in which it refused to find education a fundamental interest. There continues to be a broad range of differing opinions concerning education vis-à-vis fundamental rights or interests. *See, e.g.*, Martin Luther King Jr. Elementary School Children v. Michigan Bd. of Educ., 451 F. Supp. 1324, 1327-28 (E.D. Mich. 1978) (education is not a fundamental interest); Cuyahoga County Ass'n for Retarded Children v. Essex, 411 F. Supp. 46, 50 (N.D. Ohio 1976) (education is not a fundamental right); Fialkowski v. Shapp, 405 F. Supp. 946, 958 (E.D. Pa. 1975) (minimum level of education is a constitutional right); Crawford v. Board of Educ., 17 Cal. 3d 280, 130 Cal. Rptr. 724, 551 P.2d 28 (1976) (education is a fundamental interest).

49. 397 U.S. at 266.

50. 348 F. Supp. at 876.

51. *Id.*

DEFINING THE EDUCATIONAL RIGHTS OF HANDICAPPED CHILDREN

A question not addressed by *Mills v. Board of Education*[52] is how to define equitable allocation of funds among handicapped and nonhandicapped children. If a child needs specialized services because of his handicap, one may question whether it is equitable to spend only the same amount for the education of a handicapped child, dollar for dollar, as for that of a nonhandicapped child. On the other hand, if more is spent on the education of the handicapped child, others may question whether the nonhandicapped child is being discriminated against, in violation of the equal protection clause.

One way of analyzing whether funds are being allocated in an equitable manner turns on whether equality of education is measured by "input" or "output." "Input" deals with the equal provision of relatively concrete elements, such as teacher/student ratios, course offerings, or physical plants, disregarding whether the students served have the same needs and potential.[53] "Output" deals with attempts to produce roughly equal results in the performance of students, despite dissimilar backgrounds and abilities, by providing a variety of educational resources, depending on individual needs.[54] Legislation[55] and judicial decisions[56] thus far suggest that the "output" measure has been adopted by legislative and judicial bodies, assuring handicapped children access to educational resources which differ from those available to the nonhandicapped.

Defining equality in terms of output is an expensive course to pursue. Congress, however, recognized the expense attendant upon providing special services when it enacted the EAHCA, which makes funds available for states to utilize in devising comprehensive educational programs[57] for all handicapped children from ages three to twenty-one.[58] The requirements of the EAHCA increasingly have been relied upon in continuing efforts to define the educational rights of handicapped children.

52. 348 F. Supp. 866 (D.D.C. 1972). *See* text accompanying notes 35-51 *supra*.
53. *See* Haggerty & Sacks, *supra* note 24, at 964.
54. *Id.*
55. *See, e.g.*, EAHCA, 20 U.S.C. §§ 1401-1461 (1976); Rehabilitation Act of 1973, 29 U.S.C. §§ 701-794 (1976). *See* note 61 *infra* with regard to the Rehabilitation Act.
56. *See* cases discussed in text accompanying notes 26-51 *supra* and 59-94 *infra*.
57. 20 U.S.C. § 1411 (1976).
58. *Id.* § 1412(2)(B). Services were to be available for handicapped children between ages three and eighteen by September 1, 1978, and the upper age limit is to be increased to age twenty-one by September 1, 1980.

In *Hairston v. Drosick*,[59] the parents of a physically handicapped child, Trina, sued their school district for refusing to admit the child to classes unless her mother attended her special physical needs.[60] The United States District Court for the Southern District of West Virginia held that, since Trina was otherwise able to profit from the instruction in regular classes, conditioning her right to education on the attendance of her mother was a violation of the Rehabilitation Act,[61] and that her summary exclusion had not afforded her due process as guaranteed by the fourteenth amendment[62] and mandated by state regulations.[63] Although specific sections of the EAHCA were mentioned in the opinion,[64] they were cited only in connection with the Rehabilitation Act or with state regulations.[65] It appears that the court did not rely on the EAHCA in reaching its decision because the act was not yet in effect.[66] The court's citation of the EAHCA's provisions, however, emphasized Congress' intent to provide educational services to the handicapped.

Less significance was given to the EAHCA the following year by the United States District Court for the Western District of Pennsylvania in *Eberle v. Board of Education*.[67] In *Eberle*, the parents of a child with a profound hearing loss brought suit against their school district in a dispute over the special program best suited to their child's exceptional needs.[68] Despite the jurisdictional grant in the EAHCA,[69]

59. 423 F. Supp. 180 (S.D.W. Va. 1976).

60. Trina suffered from spina bifida, leaving her with bowel incontinence. This incontinence occasioned the need for attention two or three times during each school day. It apparently was the contention of the defendant school district that responsibility for this "clean-up" did not lie with them but with the child's parents.

61. The Rehabilitation Act of 1973, 29 U.S.C. §§ 701-794 (1976) [hereinafter referred to as the Rehabilitation Act], states in part that "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794 (1976). Since federal funds comprise a major segment of the financial support of state educational systems, public schools fall within the aegis of the Rehabilitation Act. *Id.*

62. *See* note 19 *supra*.

63. 423 F. Supp. at 184-85. The court explained that the state regulations were promulgated "pursuant to the mandate of federal law as contained in 20 U.S.C. § 1413(a)(13) . . . ." *Id.* at 184.

64. *See* 423 F. Supp. at 184. The court refers to 20 U.S.C. § 1413(a)(13) (now codified at 20 U.S.C. §§ 1414(a)(1)(C)(iv) and 1414(a)(7) (1976)), which mandates placement in the environment least restrictive of the handicapped child's interaction with nonhandicapped peers, and which requires procedural safeguards.

65. *See* 423 F. Supp. at 184.

66. 20 U.S.C. § 1411 (1976) sets October 1, 1977, as the effective date of the amending act, whereas the date of the opinion is January 14, 1976.

67. 444 F. Supp. 41 (W.D. Pa. 1977).

68. Prior to 1976, the handicapped child, Stephen, had attended at public expense a private school which taught the child to use his residual hearing ability. Beginning with the 1976-77 school year, defendant school district offered a program for deaf children which utilized alterna-

which was cited by the plaintiffs, the court dismissed the case for lack of jurisdiction.[70] Although the complaint was filed after the effective date of the EAHCA,[71] the court found that the questionable acts of the school district had occurred prior to that date. Therefore, "[s]ince the power base of the act is the funding of state programs, [it] cannot become binding on the states prior to the funding to which it is attached."[72] In its final remarks, the court admitted that "[t]he practical effect of this decision may be somewhat temporary,"[73] since the "regulations appear to entitle parents to a hearing each year."[74] Although the court did not question the rights of handicapped children, it found these rights to be available only as a function of a funding statute. Although the analogy was not raised by the plaintiffs in *Eberle*, it is difficult to reconcile that dismissal with the Supreme Court's ruling in *Goldberg v. Kelly*[75] that financial concerns may not be given preference over constitutional concerns.[76]

According to the United States District Court for the Eastern District of Virginia, the rights assured to handicapped children by the EAHCA were *not* limited by the effective date of the act. In *Kruse v. Campbell*,[77] that court heard a class action suit brought by handicapped children and their parents which challenged the constitutionality of a state tuition grant program for handicapped students. In cases where the public schools had no special education program available that was appropriate for a handicapped child, the child could attend a private school that offered such a program. Expenses for this private school were partially reimbursed through the public school district's tuition grant program. Some parents, such as the plaintiffs, were unable to afford those costs of private schooling which were not reimbursed by the school district. Plaintiffs therefore claimed that the grant program violated equal protection and due process, as well as the Rehabilitation Act, in that their children were denied a free appropriate

tive means of communication, particularly signing and finger spelling. Differences in effectiveness of the two types of programs have been hotly debated among educators of the deaf for many years. In the present case, Stephen's parents apparently felt that the former program was more appropriate for him and that moving him from that approach to a program utilizing "total communication" would deprive Stephen of the education most appropriate to his needs.

69. 29 U.S.C. § 1415 (1976).
70. 444 F. Supp. at 42.
71. *See* note 66 *supra*.
72. 444 F. Supp. at 44.
73. *Id.*
74. *Id.*
75. 397 U.S. 254 (1970). *See* note 46 *supra* and accompanying text.
76. *Id.* at 266.
77. 431 F. Supp. 180 (E.D. Va.), *vacated and remanded*, 434 U.S. 808 (1977).

public education. Defendants contended that the Rehabilitation Act actually was "designed to prohibit discrimination in employment and vocational training, not education,"[78] and that although the EAHCA does apply to education, it was not targeted for *full* funding until September 1, 1978 (nearly one year after its initial effective date). Therefore, the defendants in *Kruse* argued that it should not be "retrospectively applied."[79]

The *Kruse* court concluded that the intent of Congress in enacting the EAHCA was to reinforce an already-existing right: "[T]he right to education of handicapped children is a present right, one which should be implemented immediately."[80] However, the challenge to the validity of the tuition grant program was not decided on the basis of the Rehabilitation Act or of the EAHCA, but on equal protection grounds. The *Kruse* court relied on *San Antonio Independent School District v. Rodriguez*,[81] in which the United States Supreme Court suggested a hypothetical situation wherein a state imposed tuition requirements for its public schools, thereby precluding poor children from receiving an education.[82] Such a situation, according to the Court, would have compelled "judicial assistance."[83] The court in *Kruse* pointed out that the plaintiffs were in precisely the same situation as that hypothesized by the United States Supreme Court. "As a consequence, these children sustain an absolute deprivation of a meaningful opportunity to enjoy the benefits of an appropriate education, while other handicapped school children in the state receive a publicly supported and appropriate education. Such a discriminatory exclusion . . . is violative of equal protection . . . ."[84] On appeal,[85] the United States Supreme Court vacated and remanded the case, directing the district court to decide the claim on the basis of the Rehabilitation Act. This apparently reflected the general policy of deciding a case on statutory grounds, where available, rather than on constitutional grounds.[86]

78. *Id.* at 185.

79. *Id.* The reasoning here is similar to that in *Eberle*, 444 F. Supp. 41 (W.D. Pa. 1977). *See* text accompanying notes 67-76 *supra*.

80. *Id.* at 186, *citing* S. REP. NO. 94-168, 94th Cong., 1st Sess. 17 (1975), *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 1425, 1441.

81. 411 U.S. 1 (1973).

82. *Id.* at 25 n.60.

83. *Id.*

84. 431 F. Supp. at 187.

85. 434 U.S. 808 (1977).

86. *See, e.g.*, Kent v. Dulles, 357 U.S. 116 (1958); Cohens v. Virginia, 6 Wheat. 264, 441 (1821). There may have been more involved in the remanding of the *Kruse* case than the general preference for statutory grounds for lower court decisions. In citing *Rodriguez*, 411 U.S. 1 (1973), the *Kruse* court was relying on a case where the United States Supreme Court held that education

Since the Rehabilitation Act was already in effect when the complaint was filed,[87] with provisions basically the same as those in the EAHCA, there is little question that the district court's final decision will be the same when based on the statute rather than on the fourteenth amendment.

Despite differing interpretations of relevant statutes and their effective dates, there appears to have been a general consensus in the *Hairston, Eberle*, and *Kruse* decisions that handicapped children, as well as nonhandicapped, enjoy the right of access to educational opportunities. In *Stuart v. Nappi*,[88] the district court's decision in favor of the plaintiff suggests that handicapped children may even have more rights, or at least qualitatively different ones, than their nonhandicapped peers. The plaintiff in *Stuart* had been classified "learning disabled" and enrolled in a special compensatory class. Although she stopped attending this class, the school authorities took no further steps, such as re-evaluation of the appropriateness of the placement, until plaintiff participated in a disturbance at the school, whereupon she was summarily expelled. The United States District Court for the District of Connecticut found that the plaintiff handicapped child was not subject to the school's disciplinary procedures providing for expulsion. The court construed the EAHCA to allow strong disciplinary measures against a handicapped child; however, expulsion would run counter to the child's right to education in the least restrictive environment.[89] Instead, the rules promulgated pursuant to the EAHCA have outlined a procedure allowing for a change in the child's placement[90] to a program better suited to the needs of a disruptive child. In mentioning its reluctance to interfere with the school's disciplinary code, the court pointed out that suspension was still an available alternative for

was not a fundamental interest. *Id.* at 35-36. A minimal level of scrutiny is utilized to examine an alleged violation of equal protection when neither a suspect class nor a fundamental interest is involved. *Id.* at 98 (Marshall, J., dissenting). In such cases, the state's conduct has invariably been found to be reasonable and nonviolative of the fourteenth amendment. *Id.* at 109 (Marshall, J., dissenting). In *Kruse*, however, the state's practice was held unconstitutional, so a strict level of scrutiny was apparently used. This would indicate the presence of a fundamental interest or a suspect class, even though the Supreme Court had not recognized education as a fundamental interest, *id.* at 35-36, nor "the poor" as a suspect class, *id.* at 29. Deciding the *Kruse* case on a statutory basis would avoid this complication of the already confusing situation in equal protection litigation and would reserve to future Supreme Court decisions the definition of fundamental interests and suspect classes, 411 U.S. at 70-123 (Marshall, J., dissenting).

87. The effective date was September 26, 1973. 29 U.S.C. § 794 (1976).

88. 443 F. Supp. 1235 (D. Conn. 1978).

89. *Id.* at 1242-43. *See* 20 U.S.C. § 1412(5)(B) (1976).

90. 45 C.F.R. § 121a.552 (1977). The regulation allows a change in the child's placement when his behavior significantly impairs the education of others.

short-term relief,[91] as well as a possible change in the child's placement to a closely structured program for a more long-term effect.[92] Nevertheless, the court in *Stuart* concluded that the procedural due process safeguards of the EAHCA,[93] including notice and the opportunity for a hearing prior to a change in placement, must be observed.[94]

MALPRACTICE: THE NEXT STEP IN SPECIAL EDUCATION LITIGATION

It appears that the constitutional safeguards of due process and equal protection are now interpreted to assure handicapped children access to educational opportunities which are at least equal to those of nonhandicapped children. Furthermore, insofar as handicapped children are able to benefit from the provisions of the Rehabilitation Act[95] and the EAHCA,[96] they may even have rights beyond those afforded nonhandicapped children, in accordance with the "output" measure adopted by Congress in these acts.[97] It may therefore be logical to expect that if one of these "extra" rights is violated, a handicapped child may be able to seek an additional remedy.

In *Howard S. v. Friendswood Independent School District*,[98] the United States District Court for the Southern District of Texas suggested that such an additional remedy might be available. In this case, the court considered the plight of a child, Douglas, who suffered minimal brain damage, learning disability, and emotional disturbance. Douglas participated in special education classes until he entered high school; however, his behavior deteriorated when the high school treated him as a discipline problem rather than as a handicapped child. When Douglas' problems required psychiatric hospitalization and subsequent private school placement, the school district officially dropped him from the rolls and refused to consider itself responsible for Douglas' education. On the basis of the Rehabilitation Act, the EAHCA, and the fifth and fourteenth amendments, the court ordered the school district to evaluate Douglas' educational needs immediately, to develop

91. 443 F. Supp. at 1243.
92. *Id.*
93. 20 U.S.C. § 1415(b)(1)(C) (1976), provides, in pertinent part:

> The procedures required by this section shall include, but shall not be limited to . . . written prior notice to the parents or guardian of the child whenever such agency or unit . . . proposes to initiate or change . . . the identification, evaluation, or educational placement of the child.

94. 443 F. Supp. at 1243.
95. 29 U.S.C. §§ 701-794 (1976).
96. 20 U.S.C. §§ 1401-1461 (1976).
97. *See* text accompanying notes 53-56 *supra*.
98. 454 F. Supp. 634 (S.D. Tex. 1978).

an individual educational program for him, to provide for the educational services needed by Douglas, and to pay the accrued costs of his private education.[99] The court found that Douglas' parents had scrupulously observed their responsibilities in seeking resolution of their differences with the school district over the child's educational placement. The school district, in the court's estimation, had been less than observant of its responsibilities, and the court suggested that a handicapped child in Douglas' situation might well seek damages in addition to injunctive relief. The court stated:

> This Court has concluded that the Board of Trustees of [Friendswood Independent School District] has received extremely poor advice concerning its legal obligations and the possible liability of *individual administrators* and Trustees . . . . [T]he attention of the Board of Trustees is respectfully directed to the possibility of *personal liability* being imposed upon school board members *for failure to comply with their legal obligations* . . . .[100]

The allusion by the court to the possibility of personal liability in an action against school officials or employees points toward educational malpractice litigation.[101] In bringing a suit of this kind, it appears that there are three appropriate bases available to define the standard of care expected of school personnel:[102] (1) failure to perform the duties expected of an educational professional;[103] (2) failure to exercise the degree of care expected of an educational professional in the discharge of his or her responsibilities;[104] and (3) violation of a statutory standard which delineates behavior required of an educational professional.[105] The third of these bases would be the most spe-

99. *Id.* at 636, 641-43.

100. *Id.* at 638 (emphasis added). Although it should be noted that these statements are dicta, they suggest that the Board may have a malpractice claim against its legal counsel.

101. *See* text accompanying notes 15-16 *supra*.

102. Although teachers are referred to as examples, the same principles would apply to any professional employed in the public schools, such as school psychologists, school social workers, or principals, as well as to the school district board responsible for the professionals' activities.

103. *See, e.g.*, Pierce v. Board of Educ., 44 Ill. App. 3d 324, 358 N.E.2d 67 (1976), *rev'd*, 69 Ill. 2d 89, 370 N.E.2d 535 (1977). School personnel have been described as being *in loco parentis* in relation to students during the child's school attendance. This implies that the school has assumed parental obligations and is charged with certain duties, including education. A position *in loco parentis* is generally considered to be a fiduciary relationship, and school personnel would therefore be expected to place a high value on the child's best interests concerning education. *See generally* 59 AM. JUR. 2d, *Parent and Child*, § 88 (1971).

104. *See, e.g.*, Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976). *See also* text accompanying notes 15-16 *supra*, discussing the level of expertise expected from a professional. In the medical profession, a specialist is held to a higher standard of expertise than a non-specialist, when working in the particular area of specialty. *See* PROSSER, *supra* note 15. This could imply that a special education teacher is under a greater duty than is a teacher in the standard program.

105. Failure to comply with a duty implied by statute may evidence negligence per se where the statute was intended to protect the class of persons represented by the plaintiff, and violation

cific and therefore the most susceptible to clear definition as the standard of care, as well as to proof of its breach as the proximate cause of damage. The first two bases do not discriminate among the many factors which impinge on the educational process. A child's innate potential obviously affects her achievement. The learning materials provided by the school limit the topics that are addressed and the extent to which they are pursued. The teacher's background and training determine, albeit unconsciously, the approach to the tasks of teaching. A child's self-expectations and her perceptions of the expectations placed on her by parents, teachers, and other children modify her rate of learning. The myriad factors affecting learning "may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified."[106] Therefore, it would be easier to identify a teacher's failure to observe specific, statutorily-prescribed behavior than to attempt to isolate that teacher's general conduct, from all other factors affecting learning, as the proximate cause of a child's failure.

The second and third bases for the duty of care, those of failure to exercise the degree of care expected of an educational professional in the discharge of responsibilities, and violation of a statutory standard, were utilized by the plaintiff in *Peter W. v. San Francisco Unified School District*.[107] In this case, a high school graduate brought a tort action against his former school district. The plaintiff alleged negligence in seven counts that encompassed failure to provide adequate instruction and failure to exercise the requisite degree of care expected from professional educators in discharging their responsibilities. The existence of the duty of care allegedly had three bases:[108] (1) voluntary assumption of duty; (2) quasi-fiduciary relationship between student and teacher; and (3) community custom. The plaintiff also alleged breach of a mandatory duty owed him.[109] General damages were sought,

of the statute occasioned the type of harm against which the statute was intended to protect. PROSSER, *supra* note 15, at § 36.

106. Donohue v. Copiague Union Free School Dist., 407 N.Y.S.2d 874, 878 (1978), *citing* Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 824, 131 Cal. Rptr. 854, 861 (1976) (footnote omitted).

107. 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).

108. *Id.* at 820-21, 131 Cal. Rptr. at 858.

109. *Id.* at 827, 131 Cal. Rptr. at 862. The plaintiff based his claims regarding mandatory duty on: (1) CAL. EDUC. CODE § 10759 (West 1973) (keeping parents advised of their child's educational progress); (2) CAL. CONST. art. 9 (instructing students in basic skills); (3) CAL. EDUC. CODE § 8574 (West 1973), now codified at CAL. EDUC. CODE § 51225 (West 1978) (requiring demonstration of basic skills proficiencies as a condition for high school graduation); (4) CAL. EDUC. CODE §§ 1053, 8002 (West 1973), now codified at CAL. EDUC. CODE §§ 35292, 72236, 51041 (West 1978) (evaluation by governing board of district's educational program); (5) CAL. EDUC. CODE § 8505

based on the plaintiff's inability to find employment, as were special damages for the cost of the remedial tutoring which was subsequently required.

The California Appellate Court's major consideration was the definition of the appropriate duty of care. The court in *Peter W.* made clear that the "judicial recognition of such duty in the defendant . . . is initially to be dictated or precluded by considerations of public policy."[110] Negligence liability in California was based on a statute[111] which expressed the principle that "[a]ll persons are required to use ordinary care to prevent others being injured as the result of their conduct,"[112] but that departures from this principle were to be made when indicated by public policy. Among the policy considerations cited by the court were:

> [T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.[113]

Finally, according to the *Peter W.* court, even where these factors are found to support a new area of tort liability, the alleged breach must be amenable to assessment within the existing judicial framework.[114] The court held that "educational malfeasance" was not so amenable because no commonly accepted rule of educational methodology existed and because the results of instruction were subject to influence by factors beyond the control of teachers and administrators.[115] The court concluded that public schools are already overburdened by social and financial problems and that imposing liability for educational malpractice would be unreasonable in terms of costs to society in public time and money.[116] With regard to the claim of breach of a

(West 1973), now codified at CAL. EDUC. CODE § 51204 (West 1978) (designing the public school course of instruction according to the needs of the students).

110. 60 Cal. App. 3d at 822, 131 Cal. Rptr. at 859.

111. CAL. CIV. CODE § 1714 (West 1973).

112. 60 Cal. App. 3d at 823, 131 Cal. Rptr. at 859 (*citing* Rowland v. Christian, 69 Cal. 2d 108, 112, 70 Cal. Rptr. 97, 100, 443 P.2d 561, 564 (1968)).

113. *Id.*, 131 Cal. Rptr. at 859-60 (*citing* Rowland v. Christian, 69 Cal. 2d 108, 112-13, 70 Cal. Rptr. 97, 100, 443 P.2d 561, 564 (1968)).

114. 60 Cal. App. 3d at 824, 131 Cal. Rptr. at 860.

115. *Id.* at 824, 131 Cal. Rptr. at 860-61. *See also* discussion in text following note 105 *supra*.

116. The court stated:

> Few of our institutions, if any, have aroused the controversies, or incurred the public dissatisfaction, which have attended the operation of the public schools during the last

mandatory statutory duty,[117] the court stated simply that the statutes relied upon, which related to reporting student progress to parents, requiring basic proficiencies before graduation, and providing and evaluating an appropriate curriculum, were not designed to protect students against the risk of injury, but instead to attain optimal educational results.[118] The lower court's dismissal for failure to state a cause of action was therefore affirmed.[119]

The facts in *Donohue v. Copiague Union Free School District*[120] were similar to those in *Peter W.*, and the *Donohue* court relied heavily on the earlier opinion in reaching its decision that no cause of action had been stated. However, the court in *Donohue* did point out that in some instances a cause of action for educational malpractice would be valid: "[A]ll 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."[121] The reference to a teacher's failure to perform duties suggests that where those duties can be clearly identified and separated from relative dependence on factors beyond the teacher's control, it would be possible to hold the teacher liable for failure to perform them. This process of identification and separation should be possible where a duty is clearly delineated in a statute. However, the plaintiff in *Donohue* was unsuccessful in asserting the violation of a statutory duty. In the court's view, the legislation relied upon[122] simply expressed the intent of the legislature to create a system of free public schools and thereby "to confer the benefits of a free education upon what would otherwise be an uneducated public,"[123] not to confer a cause of action on an individual student.[124]

Problems with proximate causation also were noted by the court in

> few decades. Rightly or wrongly, but widely, they are charged with outright failure in the achievement of their educational objectives; according to some critics, they bear responsibility for many of the social and moral problems of our society at large. Their public plight in these respects is attested in the daily media, in bitter governing board elections, in wholesale rejections of school bond proposals, and in survey upon survey. 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.

60 Cal. App. 3d at 825, 131 Cal. Rptr. at 861.

117. *See* note 109 *supra*.

118. 60 Cal. App. 3d at 826, 131 Cal. Rptr. at 862.

119. *Id.* at 828, 131 Cal. Rptr. at 863.

120. 407 N.Y.S.2d 874 (Sup. Ct. App. Div. 1978).

121. *Id.* at 878.

122. N.Y. EDUC. LAW §§ 3201-3243 (McKinney 1970 and Supp. 1978-79). This legislation refers to compulsory education and precludes exclusion from or assignment to specific schools on the basis of race, creed, color, or national origin.

123. 407 N.Y.S.2d at 880.

124. *Id.*

Donohue. The court stated that "failure to learn does not bespeak a failure to teach."[125] Thus, the court did not feel it possible to judge from a student's level of performance whether a teacher failed to instruct that student appropriately. The court concluded that "[educational personnel] may not be sued for damages by an individual student for an alleged failure to reach certain educational objectives."[126]

With regard to the alleged violation of a statutory standard, the dissent in *Donohue*[127] referred to a statute[128] which was in effect during the time the plaintiff was attending high school classes. This statute required that "under-achievers" be evaluated and possibly placed in special education classes. Although the plaintiff fell within the definition of under-achiever, he was not evaluated. The dissent concluded that "the plaintiff has, therefore, shown the existence of a mandatory statutory duty flowing from the defendant to him personally and has alleged the breach thereof by the defendant. To dismiss the complaint ". . . would merely serve to sanction misfeasance in the educational system."[129] Justice Suozzi further pointed out in his dissent that fears of "a flood of litigation"[130] were probably unjustified, considering the history of cases following the abolition of sovereign immunity, where a similar "flood" had been feared but had not materialized.[131] He stated, "there is no reason to differentiate between educational malpractice on the one hand, and other forms of negligence and malpractice litigation . . . ."[132] The majority responded to this position, however, by placing the onus on the plaintiff. Since the plaintiff and his parents were aware of his lack of progress, the majority held, they should have requested the evaluation and insisted that it be conducted.[133]

The dissent in *Donohue* also approached the problem regarding proximate cause differently than had the majority. The majority would determine as a matter of *law* whether the statute was designed to protect the class of which the plaintiff was a member from an injury the statute was designed to prevent. However, Justice Suozzi stated in his dissenting opinion that "[w]hether the failure of the plaintiff to achieve

125. *Id.* at 881.
126. *Id.* at 878.
127. *Id.* at 881 (Suozzi, J., dissenting).
128. N.Y. EDUC. LAW § 4404 (McKinney Supp. 1978-79).
129. 407 N.Y.S.2d at 884 (Suozzi, J., dissenting).
130. *Id.* at 883.
131. *Id.*
132. *Id.*
133. *Id.* at 880-81.

. . . was caused by the negligence of the school system, . . . or was the product of forces outside the teaching process, is really a question of *proof* to be resolved at a trial."[134]

It is unlikely that a plaintiff will be able to demonstrate that a school district employee failed to exercise the degree of care expected of an educational professional in carrying out his or her responsibilities, so far as educational malpractice is concerned. Demonstrating that the employee failed to observe a statutory requirement is more likely to meet with success. Both the Rehabilitation Act and the EAHCA, as well as state statutes[135] and regulations,[136] list specific behaviors expected of various educational personnel and may provide a statutory standard of care.

In *Pierce v. Board of Education*[137] the plaintiffs alleged that the defendant school district had violated a statutory duty[138] to evaluate the plaintiff handicapped child, Kerry, and to provide special education services. Kerry had been diagnosed by several privately-retained physicians as suffering from a specific learning disability. Despite being informed of these diagnostic findings, the school district failed for three years prior to the filing of the complaint to provide the requested services. As a result of this failure, Kerry allegedly "sustained severe and permanent emotional and psychic injury requiring hospitalization and medical treatment for his injuries."[139] The Illinois Appellate Court reversed a lower court dismissal of the complaint for failure to state a cause of action. However, the appellate decision was not based on a finding that the school district had failed in its statutory duty, but rather in its duty to care for the plaintiff, which duty arose because of the defendant's position of *in loco parentis*.[140]

On appeal,[141] the Illinois Supreme Court ignored the *in loco paren-*

134. *Id.* at 883 (emphasis added).

135. *E.g.*, ILL. REV. STAT. ch. 122, §§ 14-1.01 to 14-9.01 (1977).

136. *E.g.*, *Illinois Rules and Regulations to Govern the Administration and Operation of Special Education* (Feb. 1, 1979), art. IX § 9.02(4) (annual screening by teachers for referral of children); § 9.09(3)(i)(1) (evaluation by a certified school psychologist for certain children) [hereinafter referred to as *Illinois Rules*].

137. 44 Ill. App. 3d 324, 358 N.E.2d 67 (1976), *rev'd*, 69 Ill. 2d 89, 370 N.E.2d 535 (1977).

138. ILL. REV. STAT. ch. 122, § 14-8.01 (1977). The statute requires that the Superintendent of Public Instruction issue rules and regulations governing special education, requires individual case studies for children as a basis for determining eligibility for special education, sets parameters for dates of special education placement, and calls for informing parents concerning their child's special needs.

139. 44 Ill. App. 3d at 325, 358 N.E.2d at 68.

140. *Id.*

141. 69 Ill. 2d 89, 370 N.E.2d 535 (1977).

tis argument but did consider the statute[142] relied on by the plaintiff. The statute, the court held, did not establish a duty upon the local school district to place individual students. Instead, the court found that such duty of placement rested with the State Board of Education.[143] Although the local district is initially responsible for evaluation and placement of children in special education settings, if it fails to do so, the parent or guardian should pursue a series of reviews which ultimately reach the State Superintendent of Public Instruction. The final decision thus is a function of that office.[144] Since the plaintiff had not pursued the required series of administrative reviews, the case was dismissed.[145]

It appears that although the plaintiff in *Pierce* chose the more readily demonstrable basis for the standard of care, that of violation of a statutory duty, the court was constrained by public policy considerations.[146] There seems to be no other explanation of why the court would relieve a school district of the consequences of failing to observe its statutory duties by placing the onus for policing the school district on the student and his parents. This is an especially heavy burden, since it is unlikely that many parents would be aware of the district's responsibilities unless they were informed of them by the district itself.[147] Further, while the statute relied on by the court provides for oversight of special education by the State Board of Education, this is purely an administrative function. Reviews at intermediate levels and ultimately at the state level could order the desired change in placement.[148] However, securing this change by exhaustion of administrative remedies would not obtain redress for the damages sought through

142. ILL. REV. STAT. ch. 122, § 14-4.01 (1977). *See* note 138 *supra.*

143. 69 Ill. 2d at 93, 370 N.E.2d at 536-37 (relying on ILL. REV. STAT. ch. 122, § 14-8.01 (1977)).

144. 69 Ill. 2d at 94, 370 N.E.2d at 537.

145. *Id.*

146. The majority in Donohue v. Copiague Union Free School Dist., 407 N.Y.S.2d 874 (Sup. Ct. App. Div. 1978), had similarly been constrained by public policy considerations. *See* text accompanying notes 120-34 *supra.*

147. In Illinois, school districts are required to inform parents of the appeal procedure. *See Illinois Rules, supra* note 136, art. IX, § 9.01(2)(b), providing in pertinent part:

> Each local district shall develop and implement procedures for creating public awareness of special education programs and for advising the public of the rights of exceptional children . . . . Procedures developed by the district . . . shall include, but need not be limited to: . . . An annual dissemination of information to the community served by the school district regarding . . . the rights of exceptional children.

The "rights of exceptional children" would include the right to appeal regarding placement. However, the court neither referred to this responsibility nor investigated whether the duty had been honored by the district, prior to shifting responsibility to Kerry's parents.

148. *Illinois Rules, supra* note 136, art. X, §§ 10.10, 10.21.

a negligence action.[149] The difference is comparable to that between a suit for damages and one for injunctive relief. Under the reasoning of the *Pierce* court, it would be impossible to obtain redress for injuries. In addition, the court failed to observe that the responsibility for special education, as viewed by the Illinois Office of Education, lies with the local district as the "primary agent" for special services.[150] As "primary agent," the local district is expected to observe educational regulations, and it is therefore reasonable to expect the local district, not the state office, to be held accountable for its observance or lack of observance of these regulations.

In sum, the court in *Peter W.*, the majority in *Donohue*, and the Illinois Supreme Court in *Pierce* dismissed complaints because of an extreme reluctance to recognize a standard of care which could form the basis for a claim of educational malpractice. Further, insofar as they excused the school districts' actions by placing a burden to exhaust administrative remedies on the plaintiffs, the courts have indulged in a quasi-contributory negligence decision. Weighing the school districts' inaction against the plaintiffs' inaction is not appropriate at the pretrial stage,[151] particularly where there are damages claimed which cannot be redressed through the administrative remedy process. As educational malpractice claims continue to be pursued, courts probably will abandon such transparent attempts to shield school districts and educational personnel, and will recognize the right of handicapped children to claim redress for harm suffered thereby.

Indeed, in *Hoffman v. Board of Education*,[152] the plaintiff won damages in the amount of $500,000[153] in an educational malpractice

149. *See* Loughran v. Flanders, No. H77-649 (D. Conn. Apr. 18, 1979), where the court found that exhaustion would be futile insofar as damages are claimed. *Id.*, slip op. at 4-5.

150. "The local school district shall be considered the primary agent for the delivery of special education services to exceptional children." *Illinois Rules*, *supra* note 136, art. II, § 2.03(1).

151. This is similar to Justice Suozzi's position in *Donohue* with regard to proximate cause. *See* discussion in text accompanying note 134 *supra*.

152. 410 N.Y.S.2d 99 (Sup. Ct. App. Div. 1978). The plaintiff, Danny, was placed in classes for the retarded in 1957, during his kindergarten year, on the basis of the results of a psychological examination conducted by a psychologist employed by the school district. In his report, the psychologist stated that the child's severe speech and language problems may have affected the scored intelligence level, and he recommended that the child's "intelligence should be re-evaluated within a two-year period so that a more accurate estimation of his abilities can be made." *Id.* at 102. There was no formal reassessment of Danny's intelligence until 1969, and during the intervening years, he attended public school programs for the retarded. The evaluation conducted in 1969, when Danny was eighteen years of age, found that he possessed intellectual skills within the normal, or average, range but academic skills far below this range. He was unable to adjust to social expectations such as finding and retaining employment, and he suffered emotional reactions requiring psychiatric care. Suit was brought when Danny was twenty-six.

153. The plaintiffs had been awarded $750,000 by the jury in the New York Supreme Court,

suit decided by the same court which had ruled on *Donohue* only three months earlier. In *Hoffman*, the alleged wrong was the incorrect placement of the child rather than a lack of placement, as in *Donohue*.[154] Following his placement in classes for the retarded, Danny Hoffman was not retested until twelve years later, despite a recommendation in the psychological report that his "intelligence should be re-evaluated within a two-year period . . . ."[155] This failure to re-evaluate Danny was contended to be negligent on the part of the school district, as was his original incorrect placement, resulting in emotional and vocational damages to the plaintiff.

The defendant school district argued that "re-evaluation" was an ongoing process on the part of Danny's teachers, and that since his academic performance continued to be poor, there had been no reason for him to be retested. However, the court held that since it was Danny's *intelligence* that was to be re-evaluated, retesting was necessarily implied.[156] It distinguished this result from that in *Donohue* on the basis that the latter was a case of nonfeasance, rather than misfeasance as in *Hoffman*,[157] where the defendant failed to follow its own recommendation to re-evaluate.

The difference between nonfeasance and misfeasance raised by the court as a basis for an educational malpractice claim is difficult to understand. Justice Martuscello, in his dissent in *Hoffman*,[158] acknowledged that it was conceivable that a case of educational malpractice could be established for an act of misfeasance.[159] However, he felt that there was merit in the defendant's contention that there was continuing evaluation of Danny by his teachers, and he therefore would have dismissed the complaint.[160] Dissenting Justice Damiani, who wrote the majority opinion in *Donohue*, would have recognized no difference between nonfeasance and misfeasance.[161] However, he insisted that the principles of stare decisis required the court to follow its earlier decision in *Donohue* that a duty does not exist upon which an educational malpractice claim may be asserted.[162]

but the appellate division of that court reduced the amount to $500,000 while affirming the prior holding. 410 N.Y.S.2d at 111.

154. *Id.* at 102.
155. *Id.*
156. *Id.* at 107.
157. *Id.* at 110.
158. *Id.* at 111 (Martuscello, J., dissenting).
159. *Id.* at 113.
160. *Id.* at 117.
161. *Id.* at 118 (Damiani, J., dissenting).
162. *Id.* at 118-19.

The *Peter W., Donohue, Pierce* and *Hoffman* cases were all decided by state courts relying on state statutes, rather than on the EAHCA. In *Loughran v. Flanders*,[163] however, the United States District Court for the District of Connecticut dismissed a complaint based on the EAHCA. Plaintiffs, a student and his parents, sought one million dollars in damages, alleging emotional trauma due to the local school board's negligence in failing to provide an appropriate special education program for the student. The court in *Loughran* found that the EAHCA does not contain an implied cause of action for damages.[164] Section 1415(e)(2) of the EAHCA[165] was interpreted to constitute a grant of only limited jurisdiction, that of reviewing claims of error in evaluation or placement or of denial of procedural safeguards.[166] The district court therefore decided that the standards set forth for determining whether a private damage remedy is implicit in a statute not expressly providing one, as set forth in the United States Supreme Court's decision in *Cort v. Ash*,[167] should be applied. The court in *Loughran* found that these standards were not satisfied and therefore dismissed the claim.

There are several problems with the court's analysis in the *Loughran* case. In *Cort*, the United States Supreme Court discussed several situations in which a private cause of action may be implied. One such situation exists where a private suit for declaratory relief is authorized;[168] in such a situation, a private suit for damages may be implied without application of further standards. The EAHCA recognizes a

163. No. H77-649 (D. Conn. Apr. 18, 1979).

164. *Id.*, slip op. at 2.

165. 20 U.S.C. § 1415(e)(2) (1976) states in pertinent part:

> Any party aggrieved by the findings and decision made . . . shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

166. No. H77-649, slip op. at 6 (D. Conn. Apr. 18, 1979).

167. 422 U.S. 66 (1975). The four standards, as phrased in *Loughran*, are:

> (1) whether the plaintiff is one of a class for whose especial benefit the statute was enacted, (2) whether there is any legislative intent either explicit or implicit to create or deny such a remedy, (3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy, (4) whether the cause of action is one traditionally relegated to state law in an area basically the concern of the states so that it would be inappropriate to infer a cause of action based solely on federal law.

No. H77-649, slip op. at 6-7 (D. Conn. Apr. 18, 1979).

168. The Court referred to J.I. Case Co. v. Borak, 377 U.S. 426 (1964): "[T]here was at least a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone." 422 U.S. at 79. "[A] private suit for declaratory relief was authorized." *Id.* at 79 n.11.

private cause of action for declaratory and/or injunctive relief for plaintiffs who continue to be aggrieved after pursuing hearings within the educational system.[169] Therefore, a private suit for damages under the EAHCA should be recognized without recourse to the other standards for an implied cause of action.

Second, although the court found no legislative intent to allow a private cause of action for damages under the EAHCA,[170] Congress stated in section 1415(e)(2) that "[a]ny party aggrieved by the findings and decision made . . . shall have the right to bring a civil action . . . . [T]he court shall . . . grant such relief as the court determines is appropriate."[171] Damages could certainly fall within the range of appropriate relief, indicating an expectation that a private claim for damages may be filed.

Third, the court expressed concern that allowing educational malpractice suits would be detrimental to the special education services which the EAHCA was designed to encourage,[172] in that administrators would refuse to institute programs for fear of liability in the event of failure. However, since the act requires that special education services be provided, administrators cannot lawfully refuse such services. Further, liability attaches when there has been injury, and it is difficult to believe that qualified personnel will institute or continue programs which are injurious to children. If they do so, then it is only proper that an educational malpractice claim be allowed.

Finally, the court in *Loughran* stated that "[t]he claim for damages necessarily hinges upon questions of methodology and educational priorities, issues not appropriate for resolution by this Court . . . ."[173] In fact, the claim made in this case was that in failing to provide an appropriate educational program for the student,[174] the school district caused emotional trauma to him and his parents. Emotional trauma is a damage which has been measured by judges and juries for many years, and does not require specialized educational expertise. Where the injury claimed is based upon an alleged violation of a statutory standard, the court need only decide whether that standard was met. Even should

169. *See* 20 U.S.C. § 1415(e)(2) (1976), *supra* note 165.
170. No. 77-649, slip op. at 8-10 (D. Conn. Apr. 18, 1979).
171. 20 U.S.C. § 1415(e)(2) (1976).
172. No. 77-649, slip op. at 10 (D. Conn. Apr. 18, 1979).
173. *Id.* at 12.
174. Since the plaintiffs and defendant school district agreed upon an educational program for the student subsequent to the filing of the complaint, and since the defendants did not contend that the student had been appropriately served at all times, it may be inferred that they did indeed fail to provide an appropriate program prior to their agreement with the student and his parents.

some educational expertise be required, such expertise is as readily available to the court as is the highly specialized and technical information required in adjudicating many medical malpractice claims.

It appears, therefore, that courts will soon begin to recognize valid educational malpractice claims. Although most claims are brought against school districts,[175] employees of the districts could also be sued. Exceptional care will be demanded in order to protect and advance the rights of individual handicapped children while guarding educational personnel against the harassment of frequent liability actions.

THE FUTURE OF EDUCATIONAL MALPRACTICE IN SPECIAL EDUCATION

Based on cases to date, there are two caveats that potential plaintiffs should observe in educational malpractice actions. First, plaintiffs should be diligent in learning about the duties of the public schools toward students and in pursuing available alternatives for special educational resources and placement through administrative procedures. Second, plaintiffs should base their causes of action on a violation of a statutory duty whenever possible, such as the EAHCA or state statutes designed to implement the federal law. State departments of education also issue regulations and procedures, which have the force of law, to implement such statutes.[176] In order to claim a violation of a statutory duty as evidence of negligence, the plaintiff must demonstrate that the statute was intended to protect the class of persons represented by the plaintiff and that failure to perform the duty occasioned the type of harm against which the statute was intended to protect.[177]

An example of such an enactment might be a requirement that when a child is referred for evaluation for possible special education needs, the evaluation and the subsequent conference to develop an educational plan for the child must be completed within sixty school days of the referral date.[178] The persons protected by the regulation are the poorly-achieving students; the time limit is designed to avoid long periods in a standard program where the students are unable to realize their full learning potential. The harm resulting from failure to comply is that children fail to progress academically and fall further and fur-

175. The school district would have a "deeper pocket" than the individual professional, leading to the possibility of a larger award which is more likely to be collected.

176. *E.g.*, *Illinois Rules, supra* note 136.

177. *See* note 105 *supra*.

178. *See, e.g.*, *Illinois Rules, supra* note 136, art. IX, § 9.20.

ther behind. This may generate negative emotional reactions,[179] as well as future lack of employable skills, situations which the regulation was intended to avoid. The school district might be sued for failing to assure that the sixty-day limit was observed, or a school psychologist for failing to conduct the evaluation within the required time.

The large number of statutory requirements and regulations in the area of special education suggests that this is a particularly fertile area for future litigation. When the number of potential plaintiffs[180] is considered in conjunction with these requirements, the number of possible lawsuits increases exponentially. For example, the definition of a learning disabled child in the EAHCA states that such children "have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations."[181] If "imperfect ability" in an area denotes below-average performance, then half of all school children could claim at least the right to an evaluation, since theoretically half the population would score below the fiftieth percentile.

Reflection on these numerous possibilites suggests why the law of torts has been described as "a battleground of social theory."[182] Allowing the public schools to become ungoverned participants in this battleground will evoke responses detrimental to society which may well outweigh in importance the individual wrongs for which redress is sought in specific lawsuits. The accountability involved in the possibility of legal liability could work to improve, to a degree, the negative results of excessive bureaucracy in school situations. However, this would apply chiefly to suits against school districts. Suits against individuals employed by those school districts, on the other hand, could interfere with effective educational programs. Members of the educational profession can hardly be expected to function optimally under the Damoclean sword of the ungoverned threat of litigation. It is the

179. *See* Caspari, *A Psychodynamic View of the Therapeutic Opportunities of Special Education*, in ORIENTATIONS IN SPECIAL EDUCATION 123 (K. Wedell ed. 1975).

180. The Bureau of Education for the Handicapped estimates that eight million children in the United States need special education services, and that only about half of these are being served. S. REP. NO. 94-168, 94th Cong., 1st Sess. 11 (1975) *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 1425, 1432. The estimate of the number of children in need of such services is usually about ten percent of the school population. *See* Keogh, *Social and Ethical Assumptions About Special Education*, in ORIENTATIONS IN SPECIAL EDUCATION 7 (K. Wedell ed. 1975); S. KIRK, EDUCATING EXCEPTIONAL CHILDREN 24 (1962). These estimates indicate that providing special education services is a major item in a school district's budget.

181. 20 U.S.C. § 1401(15) (1976).

182. PROSSER, *supra* note 15, § 3, at 14-15.

students who suffer most when their teachers function less than optimally. Further, at its extreme, if the threat is frequent and strong, older members may be prompted to leave the profession while fewer young people may be attracted to it, since it is unlikely that salaries in public school settings could be increased to a sufficiently attractive level to compensate for the threat.[183] Should these tendencies bring about a shortage of personnel, universities could be forced to lower admissions criteria and standards for teacher training programs in order to induce more individuals to enter the field. The result would be a poorer caliber of education professionals. Such a result would impact on the schoolchildren, who would receive poorer instruction and academic training, as well as on society, for those children would enter society less well prepared to assume the responsibilities of citizenship. Also, as the number of claims increases, the cost of professional liability insurance increases. Where school districts are required to indemnify their employees,[184] the increase in insurance premiums would necessitate increased financial support for schools or a reduction in monies devoted to direct student services. Again, the same detrimental effects on children and society would ensue. The whole of society therefore suffers if the balance between societal needs and those of individual members is disturbed through litigation or judicial interference.

On the other hand, a student's individual rights are too precious to be derogated by granting no remedy for deprivation of those rights. A tax supported social institution such as the public school system should not be allowed to operate in a totally unfettered fashion, free to devote its resources in the most financially expedient manner, with little regard for its responsibilities. Allowing the assertion of meritorious claims will prompt educational personnel to function more effectively and will operate as a balance between the competing interests of the school system and those of the children it serves.

The judiciary will have to observe scrupulous care in opening the way to educational malpractice claims, in order to allow valid claims while preventing the public waste and negative societal effects which attend groundless or frivolous litigation. It is suggested that special ed-

183. One possible reason why the threat of medical malpractice actions may not have decreased the number of applicants to medical schools is that such a threat is offset by the higher level of income which graduates of those schools can expect to earn. A graduate of a teacher training institution, however, cannot expect financial compensation approaching that of a doctor of medicine.

184. *See, e.g.*, ILL. REV. STAT. ch. 122, § 10-20.20 (1977).

ucation malpractice claims should be permitted where the following minimum criteria have been met:

> (1) Available administrative remedies have been exhausted.[185] Although this should not preclude the possibility of a negligence action, it will ensure that proper placement has been effected so that damages do not continue to accrue.
> (2) The duty of care is readily apparent and clearly defined. While a lucid statutory requirement would satisfy this standard, professional expectations would seldom do so, since these are vague and for the most part undefined, unless the violation appears to be particularly flagrant or wanton.[186]
> (3) The alleged breach is a definite act or failure to act. Nonfeasance with regard to a mandatory duty would satisfy this standard better than an allegation of misfeasance in performing a professional responsibility. For example, failure to complete an evaluation of a child within sixty school days is easily established,[187] whereas demonstrating that a spelling program was poorly planned is unlikely to be successful.
> (4) The damages resulting from the alleged breach are clearly demonstrated and carefully documented. Where this documentation is questionable, the action for damages should be dismissed.

Finally, where a case has advanced to trial and a decision in favor of the plaintiff has been reached, financial awards should be carefully scrutinized.[188] The plaintiff should be reimbursed for clearly documented damages, but it must be borne in mind that awards levied against a school district affect public funds derived from taxpayers either directly or indirectly, such as through increased liability insurance premiums. In either case, the overall financial resources remaining available for educating all the students in the system will be reduced.

CONCLUSION

Handicapped children have been granted not only access to education equal to that of their nonhandicapped peers, but also safeguards which go beyond those for children attending the standard program. These safeguards, when violated or poorly observed, may provide the basis for a personal damage action, an educational malpractice suit, by a handicapped child or his parents. The availability of such lawsuits

185. *See* 45 C.F.R. §§ 121a.506-121a.510 (1977). At present, there are only two steps in the appeal process—an impartial due process hearing and an appeal to the state office. Should the disputed special services be provided at this point, it is still possible that documentable damages have been suffered prior to the hearings.

186. *E.g.*, Hoffman v. Board of Educ., 410 N.Y.S.2d 99 (Sup. Ct. App. Div. 1978).

187. *See* note 178 *supra* and accompanying text.

188. *E.g.*, Hoffman v. Board of Educ., 410 N.Y.S.2d 99 (Sup. Ct. App. Div. 1978) (appellate court reduced the amount of damages awarded at trial from $750,000 to $500,000).

can serve as a check on the impersonal, unbridled bureaucracy of school systems. Nonetheless, the unconditional use of such lawsuits could provoke an imbalance between the individual and the system which would be detrimental to other schoolchildren and the community at large.

Therefore, safeguards to control the litigation of educational malpractice suits must be imposed. Observation of such safeguards should facilitate the orderly conduct of the educational process, so that the individual's need for protection is balanced by the overall good to society. The result will be to improve education for all children, not only the handicapped, and thereby enhance society as a whole.

FAYE M. COULTAS