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# BACK TO THE FUTURE: THE IN LOCO PARENTIS DOCTRINE AND ITS IMPACT ON WHETHER K-12 SCHOOLS AND TEACHERS OWE A FIDUCIARY DUTY TO STUDENTS

JOHN E. RUMEL\*

## INTRODUCTION

The relationship between primary and secondary (“K-12”) schools, school administrators and teachers (“school personnel”) and students—and the legal obligations arising from that relationship—have never been more complex or important. In recent years, society has increasingly viewed, and courts have increasingly referred to, teachers as role models for students.<sup>1</sup> In spite of, and sometimes because of, online educational options and e-mail, as well as extracurricular activities, students spend increasing amounts of time interacting with teachers both at school and away from campus.<sup>2</sup> Studies have shown that the single most important factor in a K-12 student’s academic development is the teacher in the classroom.<sup>3</sup> And, the media invariably covers those relatively infrequent, but high profile, cases involving inappropriate personal relationships

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1. See Rebecca DeLuccia-Reinstein, *What is the Role of Teachers in Education?*, EHOW, [http://www.ehow.com/about\\_6509642\\_role-teachers-education\\_.html](http://www.ehow.com/about_6509642_role-teachers-education_.html) (last visited July 2, 2013); see also *Wright v. Kan. State Bd. of Educ.*, 268 P.3d 1231, 1238 (Kan. Ct. App. 2012) (citing *Hainline v. Bond*, 824 P.2d 959 (Kan. 1992)); *Thompson v. Dep’t of Pub. Instruction*, 541 N.W.2d 182, 189 (Wis. Ct. App. 1995) (“[A] teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values.” (quoting *Ambach v. Norwick*, 441 U.S. 68, 78-79 (1979))).

2. See, e.g., MICHAEL YOAKAM WITH NANCY FRANKLIN & RON WARREN, *DISTANCE LEARNING: A GUIDE TO SYSTEM PLANNING AND IMPLEMENTATION 8-9* (3d ed. 1999) (discussing email interaction); I. Karasavvidis et al., *Exploring the Mechanisms through which Computers Contribute to Learning*, 19 J. COMPUTER ASSISTED LEARNING 115, 115-28 (2003) (discussing in class and online instruction); Bridget K. Hamre & Robert C. Pianta, *Student—Teacher Relationships*, in *CHILDREN’S NEEDS III: DEVELOPMENT, PREVENTION, AND INTERVENTION* 59-72 (George G. Bear & Kathleen M. Minke eds., 2006) (discussing extracurricular activities).

3. JOHN A. C. HATTIE, *VISIBLE LEARNING: A SYNTHESIS OF OVER 800 META-ANALYSES RELATING TO ACHIEVEMENT* 2, 22-26 (2009).

between teachers and students.<sup>4</sup>

In the past twenty-five years, a number of courts, although divided on the issue, and even more commentators have opined that K-12 schools and school personnel owe a fiduciary obligation to the students with whom they interact. This Article addresses that issue. It proposes and concludes that, based on a proper understanding of both the law underlying the *in loco parentis* doctrine and the law relating to the creation and regulation of fiduciary relationships, K-12 schools and teachers generally should not be held to owe or violate a fiduciary duty to students when they engage in conduct undertaken as a legitimate part of the purpose for which they are employed, i.e., the education of the student or the group of students of which the student is a member. In contrast, school personnel should only be held to owe or violate a fiduciary duty when they either engage in conduct—such as sexual harassment or abuse—that is wholly outside of, but made possible by, their educational relationship, or when they take on a traditional fiduciary role, such as holding money in trust or otherwise administering funds for students.

Part I of the Article addresses the *in loco parentis* doctrine.<sup>5</sup> Specifically, it discusses the historic and current use of the *in loco parentis* doctrine in expanding the rights of K-12 schools and school personnel vis-à-vis students and limiting the individual rights of students. It further discusses the limitations contained within the doctrine concerning its application to activities and conduct outside the educational purpose. It also discusses the doctrine's effect on the breadth and/or nature of tort and constitutional liability owed by schools and school personnel to individual students. Part II of this Article discusses the case law and commentary that surrounds the creation and regulation of fiduciary duties, paying special attention to the judiciary's proclivity to use analogistic and moralistic reasoning to expand the universe of fiduciary relationships.<sup>6</sup> It also focuses on well-settled legal principles relating to the lack, generally speaking, of any fiduciary obligation owed by parents to their children and the duty of undivided loyalty that a fiduciary owes to the person to whom his or her fiduciary duty runs. Part III of the Article chronicles the split in the decisional law concerning whether K-12 schools, administrators and teachers owe a fiduciary duty to students.<sup>7</sup> Specifically, it divides the cases in each category between those relying upon the *in loco parentis* doctrine and those cases that do not. It also discusses the near-unanimity amongst scholars and commentators that K-12 schools and school personnel have a fiduciary obligation to their student charges. Part IV of the Article discusses the reasons for the current state of the case law and commentary/scholarship.<sup>8</sup> In so doing, it further discusses the jurisprudential tendency to expand the categories of fiduciary relationships based on analogistic

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4. See, e.g., *A Lingering Shame: Sexual Abuse of Students by School Employees*, EDUC. WK., <http://www.edweek.org/ew/collections/apsexabuse/index.html> (last visited July 2, 2013).

5. See *infra* Part I.

6. See *infra* Part II.

7. See *infra* Part III.

8. See *infra* Part IV.

and moralistic thinking, while simultaneously ignoring or misunderstanding the impact of the *in loco parentis* doctrine on the analysis of this important legal issue. Part V of the Article proposes and discusses in detail the above-mentioned standard emanating from a proper understanding of the *in loco parentis* doctrine and the law underlying the creation and regulation of fiduciary relationships.<sup>9</sup> As alluded to above, it concludes that school personnel do not have a fiduciary relationship with students when they are engaged in activities that further the legitimate purpose of education and only have such a relationship when they engage in *ultra vires* conduct and activities—in other words, engage in conduct and activities made possible by, but falling outside of, the purpose for which they were hired—or take on a traditional fiduciary role beyond the role of furthering their legitimate educational purpose.

## I. THE *IN LOCO PARENTIS* DOCTRINE

### A. *The School- and School Personnel-Empowering Aspect of In Loco Parentis*

*In loco parentis* literally means “in the place of a parent.”<sup>10</sup> The doctrine, according to its generally accepted common law meaning, refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. It embodies the two ideas of assuming the parental status and discharging the parental duties.<sup>11</sup>

Although applied to a variety of custodial relationships,<sup>12</sup> the *in loco parentis* doctrine has had its most significant application to the teacher-student or school administrator-student relationship in the K-12 educational setting.<sup>13</sup> Thus,

9. See *infra* Part V.

10. BLACK'S LAW DICTIONARY 803 (8th ed. 2004).

11. *Niewiadomski v. United States*, 159 F.2d 683, 686 (6th Cir. 1947), *quoted in* *Megonnell v. Infotech Solutions, Inc.*, No. 1:07-cv-02339, 2009 WL 3857451, at \*9 (M.D. Pa. Nov. 18, 2009); see also BLACK'S LAW DICTIONARY, *supra* note 10 (defining *in loco parentis* as the person or entity charged with “taking on all or some of the responsibilities of a parent”).

12. See 67A C.J.S. *Parent and Child* § 347 (2013).

13. See generally John C. Hogan & Mortimer D. Schwartz, *In Loco Parentis in the United States 1765-1985*, 8 J. LEGAL HIST. 260 (1987). As more fully discussed *infra* at note 140 and accompanying text, the *in loco parentis* doctrine currently has little to no application at the college and university level. See Jack L. Stewart, Comment, *University Liability for Student Alcohol-Related Injuries: A Reconsideration and Assessment under Oregon Law*, 27 WILLAMETTE L. REV. 829, 835-36 (1991) (discussing the demise of the *in loco parentis* doctrine in the higher education context); see also *McCauley v. Univ. of the Virgin Is.*, 618 F.3d 232, 243 (3d Cir. 2010) (“‘[P]ublic elementary and high school administrators,’ unlike their counterparts at public universities, ‘have the unique responsibility to act *in loco parentis*.’” (quoting *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008))).

Blackstone, in discussing the meaning of the doctrine at common law stated that

[the father] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then in loco parentis, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.<sup>14</sup>

In this context, modern commentators reviewing judicial decisions have found that courts have viewed the doctrine primarily as a grant of power to schools and teachers and as a limitation on the rights of students to protection from harm occurring in the school setting or caused by school personnel.<sup>15</sup> Indeed, in one of the first cases in the United States discussing the doctrine in the primary school setting, the North Carolina Supreme Court stated as follows:

One of the most sacred duties of parents, is to train up and qualify their children, for becoming useful and virtuous members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits . . . . The teacher is the substitute of the parent; . . . and in the exercise of these delegated duties, is invested with his power.<sup>16</sup>

Similarly, this grant of power to teachers and schools carried with it a concomitant restraint on the judiciary's ability to interfere with "[t]he right of the school-master to require obedience to reasonable rules and a proper submission to his authority, and to inflict corporal punishment for disobedience."<sup>17</sup> Or, as stated by the Maine Supreme Judicial Court in discussing the discretion vested in school authorities under the in loco parentis doctrine,

14. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 441 (1765); see also Hogan & Schwartz, *supra* note 13, at 260.

15. See, e.g., Susan Stuart, *In Loco Parentis in the Public Schools: Abused, Confused and in Need of Change*, 78 U. CIN. L. REV. 969, 970 (2010) (arguing the "unsuitability" of the use of the in loco parentis doctrine in public schools and stating "[f]rom its origins in U.S. public education law, the common law doctrine of in loco parentis was applied almost exclusively to student discipline. Rarely was it understood to also apply to parental-like responsibilities for the care of students."); Tyler Stoehr, Comment, *Letting the Legislature Decide: Why the Court's Use of In Loco Parentis Ought to be Praised, Not Condemned*, 2011 BYU L. REV. 1695, 1730 (disagreeing with Stuart regarding the suitability of the in loco parentis doctrine in public schools, but stating that "[i]n the case of in loco parentis, there appear to be good reasons why American courts accepted only the disciplinary side of the doctrine as traditionally understood, while rejecting the custodial side"); see also Perry A. Zirkel & Henry F. Reichner, *Is the In Loco Parentis Doctrine Dead?*, 15 J.L. & EDUC. 271, 281 (1986) (Although "the courts have accepted with relative ease the notion that in loco parentis gives rise to duties as well as rights of educators . . . , they have implemented this notion with notable difficulty . . . leaving negligence liability to remain or fall on other grounds.").

16. *State v. Pendergrass*, 19 N.C. (2 Dev. & Bat.) 365, 365–66 (1837).

17. *Sheehan v. Sturges*, 2 A. 841, 842 (Conn. 1885).

To accomplish th[e] desirable ends [of teaching self-restraint, obedience, and other civic virtues], the master of a school is necessarily invested with much discretionary power. . . . He must govern these pupils, quicken the slothful, spur the indolent, restrain the impetuous, and control the stubborn. He must make rules, give commands, and punish disobedience. What rules, what commands, and what punishments shall be imposed are necessarily largely within the discretion of the master, where none are defined by the school board.<sup>18</sup>

This power invested in schools, administrators, and teachers to control students, although limited by constitutional and tort principles,<sup>19</sup> has continued to the present day. Thus, as recently as 2012, a Connecticut trial court, quoting the above-cited, late-Nineteenth century decision of the Connecticut Supreme Court, stated that “[a] teacher stands in loco parentis toward a pupil. He must maintain discipline, and if a pupil disobeys his orders it is his duty to use reasonable means to compel compliance.”<sup>20</sup>

### *B. Internal Doctrinal Limitations of In Loco Parentis*

As quoted above, Blackstone’s classic formulation of the school- and school personnel-empowering aspect of the in loco parentis doctrine contains within it a limitation on its use in the primary and secondary school settings. Thus, one commentator, discussing the Restatement (Second) of Torts’ codification of that aspect of Blackstone’s formulation making applicability of the doctrine turn on whether the power exercised by school personnel is “necessary to answer the purposes for which he is employed,” has stated that “the *in loco parentis* authority of a school over a student is limited to the purpose of the school’s existence: the student’s education or the education of the group of which the student is a member.”<sup>21</sup> Courts, adhering to this same doctrinal limitation, have refused to

18. *Patterson v. Nutter*, 7 A. 273, 274 (Me. 1886). Thus, Justice Thomas, the sole current member of the United States Supreme Court espousing the view that the in loco parentis doctrine continues to grant schools and their administrators and teachers virtually unfettered discretion in regulating the constitutional rights of students, has tersely stated in reviewing early cases that “[t]he doctrine of in loco parentis limited the ability of schools to set rules and control their classrooms in almost no way.” *Morse v. Frederick*, 551 U.S. 393, 416 (2007) (Thomas, J., concurring).

19. *Hurlburt v. Noxon*, 565 N.Y.S.2d 683, 684 (Sup. Ct. 1990) (tort limitations); *Smith v. W. Va. State Bd. of Educ.*, 295 S.E.2d 680, 685 (W. Va. 1982) (constitutional limitations).

20. *Straiton v. New Milford Bd. of Educ.*, No. DBDCV106003255S, 2012 WL 1218160, at \*6 (Conn. Super. Ct. Mar. 13, 2012) (citing *Sheehan*, 2 A. at 841).

21. Stephen R. Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U.P.A.L. REV. 373, 379, 382 (1969) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*453). See *id.* at 381 (“One who is charged only with the education or some other part of the training of a child has the privilege of using force or confinement to discipline the child only in so far as the privilege is necessary for the education or other part of the training which is committed or delegated to the actor.” (quoting RESTATEMENT

absolve school personnel from liability in a number of cases. Those cases have included personal injury and/or civil rights cases involving non-emergency medical treatment<sup>22</sup> and excessive or abusive corporal punishment.<sup>23</sup> These cases also include instances where school administrators went well beyond legitimate educational purposes—and, hence, their delegated *in loco parentis* power—in operating a cafeteria and school supply store and requiring students to boycott a competitor.<sup>24</sup>

### C. *Student-Protective Aspect of In Loco Parentis*

As previously alluded to, the other—albeit less forceful—principle embodied in the *in loco parentis* doctrine entails K-12 schools and school personnel discharging the parental duty of supervising or protecting students.<sup>25</sup> Thus, courts have recognized that schools, administrators and teachers, based on their *in loco parentis* status, must supervise and/or protect students from foreseeable harm to both their physical and emotional well-being.<sup>26</sup> The duty to protect students, however, has traditionally been cabined by, at most, negligence principles. Rather than impose upon school supervisory personnel a heightened duty of care concerning their responsibility toward students, courts have made clear that the duty stemming from the *in loco parentis* doctrine to supervise and/or protect requires schools, administrators, and teachers to act reasonably under the circumstances.<sup>27</sup> In this regard, several courts, paying homage to the genesis of the *in loco parentis* doctrine, have defined that duty as how a reasonable parent of the student would have acted under the circumstances giving rise to the alleged

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(SECOND) OF TORTS, § 152 (1965)); *id.* at 382-83 (“One who is in charge of the training or education of a group of children is privileged to apply such force or impose such confinement upon one or more of them as is reasonably necessary to secure observance of the discipline necessary for the education and training of the children as a group.” (quoting RESTATEMENT (SECOND) OF TORTS § 154 (1965))); *see also* Paul O. Proehl, *Tort Liability of Teachers*, 12 VAND. L. REV. 723, 727 & n.24 (1958-59) (discussing teacher authority as limited to circumstances under a teacher’s control and related to the purposes of education).

22. *Guerrieri v. Tyson*, 24 A.2d 468, 469 (Pa. Super. Ct. 1942).

23. *Smith*, 295 S.E.2d at 685-87.

24. *Hailey v. Brooks*, 191 S.W. 781, 783 (Tex. Civ. App. 1916).

25. *See supra* note 15 and commentary discussed therein.

26. *Castaldo v. Stone*, 192 F. Supp. 2d 1124, 1144 (D. Colo. 2001); *Doe Parents No. 1 v. Dep’t of Educ.*, 58 P.3d 545, 585 (Haw. 2002). For a discussion concerning whether courts have recognized that schools and school personnel have only a duty to supervise, rather than to protect, students under the *in loco parentis* doctrine, *see Stuart supra* note 15, at 992 n.106.

27. *Thompson v. Rochester Cmty. Sch.*, No. 269738, 2006 WL 3040137, at \*10 n.5 (Mich. Ct. App. Oct. 26, 2006) (citing *Gaincott v. Davis*, 275 N.W. 229 (Mich. 1937)); *Brooks v. Logan*, 903 P.2d 73, 79 (Idaho 1995), *superseded by statute*, IDAHO CODE ANN. § 33-512B (1996), *as recognized in* *Stoddart v. Pocatello Sch. Dist. #25*, 239 P.3d 784 (Idaho 2010); *Eisel v. Bd. of Educ.*, 597 A.2d 447, 451-52 (Md. 1991); *Phyllis v. Super. Ct.*, 228 Cal. Rptr. 776, 778 (Ct. App. 1986); *Downs v. Conway Sch. Dist.*, 328 F. Supp. 338, 348 (E.D. Ark. 1971).

harm to the student.<sup>28</sup> A minority of courts, based on the *in loco parentis* doctrine, have required even less from schools and teachers: those courts have held that schools and teachers are only liable when the school personnel's willful and wanton conduct causes the student's injury.<sup>29</sup>

Whether the duty of care requires avoiding negligence or avoiding willful and wanton conduct, courts have made clear that the situs of the child's injury may be important. Thus, courts have held that schools and school personnel must satisfy the applicable, *in loco parentis*-derived, standard of care when injury to a student occurs on school grounds<sup>30</sup> or during supervised educational activities, such as field trips, which occur off school grounds.<sup>31</sup> Conversely, courts have held that schools do not have an *in loco parentis*-derived duty where the harm to a student occurs off school grounds and involves teacher conduct, such as sexual liaisons with a student, outside of the teacher's job responsibilities.<sup>32</sup>

Consistent with the secondary nature of the duty owed to students under the *in loco parentis* doctrine, the United States Supreme Court has made clear that the duty of schools and teachers to protect students is not of constitutional magnitude.<sup>33</sup> The Court, however, has relied on the student-protective aspect of the *in loco parentis* doctrine in reaching its decisions in student search and seizure and student speech cases.<sup>34</sup> Significantly, in each of those decisions, the Court used the student-protective aspect of the doctrine to justify *limitations* on the

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28. *W. Shield Investigations & Sec. Consultants v. Super. Ct.*, 98 Cal. Rptr. 2d 612, 626 (App. 2000); *Garcia v. City of N.Y.*, 646 N.Y.S.2d 508, 510-11 (App. Div. 1996).

29. *Martin v. Plude*, No. CV91 028393S, 1994 WL 116337, at \*3 (Conn. Super. Ct. Mar. 17, 1994); *Kobylanski v. Chi. Bd. of Educ.*, 347 N.E.2d 705, 709 (Ill. 1976); *Doe v. Lawrence Hall Youth Servs.*, 966 N.E.2d 52, 62 (Ill. App. Ct. 2012).

30. *Castaldo*, 192 F. Supp. 2d at 1144.

31. *Stiff v. E. Ill. Area of Special Educ.*, 621 N.E.2d 218, 222 (Ill. App. Ct. 1993).

32. *See, e.g., Hallberg v. State*, 649 So. 2d 1355, 1358 (Fla. 1994).

33. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995) (“[W]e do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional duty to protect . . . .” (internal quotation marks omitted) (quoting *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989))).

34. *See, e.g., Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 831 (2002) (“Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults.”); *Vernonia Sch. Dist.*, 515 U.S. at 662 (“In the present case, moreover, the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction.”); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (“The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent’s would undermine the school’s basic educational mission.”). For a discussion of the Tenth Circuit’s decision in *Earls*, and the Supreme Court’s decisions in *Vernonia* and *Fraser*, 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, 23-24 & n.31.



constitutional rights of individual students.<sup>35</sup> Thus, in *Vernonia School District 47J v. Acton*<sup>36</sup> and *Board of Education v. Earls*,<sup>37</sup> the Court upheld random drug and alcohol testing of student-athletes and student participants in extracurricular school activities, respectively, as against Fourth Amendment challenges.<sup>38</sup> Additionally, in *Bethel School District No. 403 v. Fraser*,<sup>39</sup> the Court upheld the suspension of a student for engaging in vulgar, sexually-suggestive speech during a school assembly as against a First Amendment challenge.<sup>40</sup> Notably, in the portion of the *Vernonia* decision discussing the duty *owed* by schools to provide a safe environment for students and to protect them from harm, the Court supported that proposition by citing to its decisions—several of which relied on the *in loco parentis* doctrine—discussing the right of school boards, school administrators and teachers to *control* students or *limit* their rights.<sup>41</sup>

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35. *Earls*, 536 U.S. at 828-38; *Vernonia*, 515 U.S. at 654-66; *Fraser*, 478 U.S. at 681-86. For a discussion critical of both Demitchell's formulation of the duty to protect based on Blackstone and the Supreme Court's *in loco parentis* jurisprudence treating the duty to protect as a collective or third party, as opposed to an individual, right, see Stuart, *supra* note 15, at 992 n.106, 994.

36. 515 U.S. at 646.

37. 536 U.S. at 822.

38. *Vernonia*, 515 U.S. at 664-65; *Earls*, 536 U.S. at 825, 828.

39. 478 U.S. at 675

40. *Id.* at 685-86.

41. In upholding the right of a school district to drug test student-athletes, the *Vernonia* Court stated, “[W]e have acknowledged that for many purposes ‘school authorities ac[t] *in loco parentis*,’ with the power and indeed the duty to ‘inculcate the habits and manners of civility.’” *Vernonia*, 515 U.S. at 655 (second alteration in original) (citation omitted) (quoting *Fraser*, 478 U.S. at 681, 684). “Thus, while children assuredly do not ‘shed their constitutional rights . . . at the schoolhouse gate,’ the nature of those rights is what is appropriate for children in school.” *Id.* at 655-56 (alteration in original) (citation omitted) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)). The *Vernonia* Court also referenced *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988). *Id.* at 656 (holding that “public school authorities may censor school-sponsored publications, so long as the censorship is ‘reasonably related to legitimate pedagogical concerns’”); *Fraser*, 478 U.S. at 683 (“[I]t is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.”); *Ingraham ex rel. Ingraham v. Wright*, 430 U.S. 651, 682 (1977) (“Imposing additional administrative safeguards [upon corporal punishment] . . . would . . . entail a significant intrusion into an area of primary educational responsibility[.]”); *Goss v. Lopez*, 419 U.S. 565, 581-82 (1975) (holding that “due process for a student challenging disciplinary suspension requires only that the teacher ‘informally discuss the alleged misconduct with the student minutes after it has occurred’”).

## II. FIDUCIARY DUTY

### *A. Definition, General Principles, and Jurisprudential Tendencies*

The term “fiduciary” has its origins in equity jurisprudence.<sup>42</sup> It has been defined as “[a] person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candor.”<sup>43</sup> Traditionally, courts have found a fiduciary duty to exist in relationships involving financial or economic dealings where one party puts his or her trust in and/or relies on the expertise of another, such as in business partnerships,<sup>44</sup> and trustee-beneficiary<sup>45</sup> and investment advisor-client<sup>46</sup> relationships. Indeed, it was in the “coadventurer”/partnership context where Justice Cardozo, then Chief Judge of New York’s highest court, penned his oft-quoted words about the nature of fiduciary relationships:

Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.<sup>47</sup>

However, “a ‘fiduciary or confidential relationship’ is not limited to relationships with a financial duty involved.”<sup>48</sup> Thus, one state high court has stated that “fiduciary duty” is

[a] very broad term embracing both technical fiduciary relations and those informal relations which exist wherever one man trusts in or relies upon another. One founded on trust or confidence reposed by one person

42. L.S. Sealy, *Fiduciary Relationships*, 1962 CAMBRIDGE L.J. 69, 69-70.

43. BLACK’S LAW DICTIONARY, *supra* note 10, at 658.

44. *See, e.g.*, *Klotz v. Klotz*, 117 S.E.2d 650, 656 (Va. 1961) (“The relationship of partners is of a fiduciary character and imposes upon them the obligation to exercise good faith and integrity in their dealings with one another in the partnership affairs.”).

45. *See, e.g.*, *Fuller Family Holdings, L.L.C. v. N. Trust Co.*, 863 N.E.2d 743, 754 (Ill. App. Ct. 2007) (“A trustee owes a fiduciary duty to a trust’s beneficiaries and is obligated to carry out the trust according to its terms and to act with the highest degrees of fidelity and utmost good faith.”).

46. *See, e.g.*, *People ex rel. Cuomo v. Merkin*, No. 450879/09, 2010 WL 936208, at \*10 (N.Y. Sup. Ct. Feb. 8, 2010) (“[I]nvestment advisors . . . owe fiduciary duties to their clients, particularly where the investment advisor has broad discretion to manage the client’s investments.”).

47. *Meinhard v. Salmon*, 164 N.E. 545, 546-47 (N.Y. 1928).

48. *In re Estate of Karmey*, No. 223270, 2002 WL 207572, at \*5 (Mich. Ct. App. Feb. 8, 2002) (per curiam), *rev’d on other grounds*, 658 N.W.2d 796 (Mich. 2003).

in the integrity and fidelity of another. A “fiduciary relation” arises whenever confidence is reposed on one side, and domination and influence result on the other; the relation can be legal, social, domestic, or merely personal. Such relationship exists when there is a reposing of faith, confidence and trust, and the placing of reliance by one upon the judgment and advice of the other.<sup>49</sup>

Notwithstanding the broad definition of fiduciary duty utilized by some courts, other courts have been less willing to read the term so expansively. Those other courts have made clear that “[t]he mere placing of a trust in another person does not create a fiduciary relationship.”<sup>50</sup> Likewise, courts and commentators, in refusing to place their imprimatur on relationships that litigants have characterized as fiduciary, have stated that

“[f]iduciary” is a vague term, and it has been pressed into service for a number of ends. . . . [T]he term “fiduciary” is so vague that plaintiffs have been able to claim that fiduciary obligations have been breached when in fact the particular defendant was not a fiduciary *stricto sensu* [i.e., in the strict sense] . . . .<sup>51</sup>

Although disagreeing about the jurisprudential underpinnings of fiduciary obligations,<sup>52</sup> several commentators have noted that cases announcing the existence of fiduciary obligations are “laden with moralizing language”<sup>53</sup> such as that employed by Cardozo in *Meinhard*. One commentator has further argued that the courts’ use of moralistic rhetoric has been a mechanism to control behavior, has obscured the limits of fiduciary obligations, and has been caused

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49. *Kurth v. Van Horn*, 380 N.W.2d 693, 695-96 (Iowa 1986) (alteration in original) (quoting BLACK’S LAW DICTIONARY 564 (5th ed. 1979)).

50. *Zumbrun v. Univ. of S. Cal.*, 101 Cal. Rptr. 499, 506 (Cal. Ct. App. 1972); *see also* *Woods v. Pub. Logistics, Inc.*, No. G042821, 2011 WL 1907525, at \*13 (Cal. Ct. App. May 18, 2011); *Wimmer v. Greenleaf Arms, Inc.*, No. 101285/11, 2011 WL 6187127, at \*4-5 (N.Y. Sup. Ct. Nov. 22, 2011).

51. *See* *United States v. Milovanovic*, 678 F.3d 713, 729 (9th Cir. 2012) (Clifton, J., concurring); *Carlson v. Warren*, 878 N.E.2d 844, 851 n.3 (Ind. Ct. App. 2007); *Marmelstein v. Kehillat New Hempstead*, 841 N.Y.S.2d 493, 496 (App. Div. 2007); *Doyle v. Turner*, 90 F. Supp. 2d 311, 333 (S.D.N.Y. 2000), *aff’d sub nom.*, *Hughley v. Local 1199, Drug, Hosp. & Health Care Emps. Union*, 231 F.3d 889 (2d Cir. 2000); *see also* D.W.M. WATERS, *THE CONSTRUCTIVE TRUST: THE CASE FOR A NEW APPROACH IN ENGLISH LAW* 4 (1964), *quoted in* BLACK’S LAW DICTIONARY 702 (9th ed. 2009).

52. *See* Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U.L. REV. 1039, 1039 n.1 (2011) (collecting scholarly authorities).

53. Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 440 (1993); *accord* Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 891 (“Judicial opinions applying the fiduciary constraint are also distinctive, among private law cases, in that they frequently and explicitly use the language of moral obligation to justify their outcomes.”).

by both imprecision in the legal standard and an inability of courts to define those limitations.<sup>54</sup> Several commentators have taken the view that judicial reliance on metaphorical and analogistic thinking, rather than on context-based or situation-specific analysis, has hindered, rather than helped, courts in appropriately determining whether particular relationships constitute fiduciary relationships or not.<sup>55</sup>

*B. Principles of Fiduciary Duty Particularly Relevant to the K-12 Teacher-Student Relationship*

Irrespective of the breadth of one's definitional view concerning the term "fiduciary," and in light of in loco parentis principles discussed previously, several well-settled legal principles inform the analysis of whether K-12 schools and school personnel owe fiduciary obligations to students. First, it has long been settled that "there may be [a] fiduciary relationship for one purpose and not for another."<sup>56</sup> In addition, although parents may be considered fiduciaries to their children in the context of paying child support or administering trust funds,<sup>57</sup> the

54. J.A.C. Hetherington, *Defining the Scope of Controlling Shareholders' Fiduciary Responsibilities*, 22 WAKE FOREST L. REV. 9, 11 (1987) ("By obscuring the limits of fiduciary obligations under moralistic rhetoric and by verbally chastising those who are found to have violated the standard, or come close to doing so, the courts seek to maintain the standard by discouraging marginal behavior which might or might not violate it. It is the imprecision of the standard and the fact that there are limitations on its scope which cannot be acknowledged in the judicial formulations that lead the courts to employ excessive rhetorical force in promulgating fiduciary doctrine. . . . Ambiguity breeds vehemence. Further, the knowledge that fiduciary principles cannot be precisely and minutely enforced leads to the use of strong language as a control mechanism.").

55. DeMott, *supra* note 53, at 879-80, 923-24; *see also* Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 805 (1983). DeMott, although recognizing that judicial reliance on metaphorical reasoning when analyzing whether a fiduciary relationship exists is both "powerful" and "inevitable," concludes,

Fiduciary obligation . . . continuing tie to Equity's legacy make it unusually context-bound as a legal obligation. . . . Determining whether fiduciary obligation applies in a particular context and what requirements inhere in the imposition of fiduciary obligation demands recognition of this situation-specificity.

Although . . . careful analysis can resolve many questions about fiduciary obligation, the difficulty of that undertaking should not be underestimated. Shortcuts in legal reasoning through metaphoric and unanalytic appeals to contract law serve only to muddle the analysis. Only a move from metaphor to analysis can resolve these recurrent questions of fiduciary obligation.

DeMott, *supra* note 53, at 891, 923-24.

56. *Polaroid Corp. v. Horner*, 197 F. Supp. 950, 956 (D.D.C. 1961) (quoting *Gedge v. Cromwell*, 19 App. D.C. 192, 198 (D.C. 1902)).

57. *In re Paxson Trust I*, 893 A.2d 99, 118-22 (Pa. Super. Ct. 2006) (holding that the Paxsons could not dispose of the premises in which they had interest as life tenants because they were, first

parent-child relationship alone is typically insufficient to create a fiduciary relationship.<sup>58</sup> Further, with certain exceptions in the corporate and partnership arenas, judicial recognition of a fiduciary relationship places a higher duty of care on a fiduciary than does the reasonable person standard under negligence principles.<sup>59</sup> Moreover, a fiduciary has a “duty of undivided loyalty” to the person with whom he or she has a fiduciary relationship.<sup>60</sup> In this latter regard, a fiduciary must avoid or, at the very least, disclose conflicts of interests.<sup>61</sup> Also, while bad faith conduct may constitute a breach of the duty of loyalty owed by a fiduciary,<sup>62</sup> good faith intentions, except in the corporate or partnership management context, will not absolve otherwise improper conduct.<sup>63</sup> Thus, as stated by one court, “[g]ood faith does not provide a defense to a claim of a breach of these fiduciary duties; ‘a pure heart and an empty head are not

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and foremost, trustees and had a fiduciary obligation to act in the best interests of their children with respect to the premises); *Boyd v. Boyd*, 545 S.W.2d 520, 524 (Tex. Civ. App. 1976) (holding the mother had a fiduciary duty to use child support payments “for support”).

58. *Eagerton v. Fleming*, 700 P.2d 1389, 1391-92 (Ariz. Ct. App. 1985); *Cooper v. Cavallaro*, 481 A.2d 101, 104 (Conn. App. Ct. 1984); *La Salle Nat’l Bank v. 53rd-Ellis Currency Exch., Inc.*, 618 N.E.2d 1103, 1112 (Ill. App. Ct. 1993); *In re Koch*, 849 P.2d 977, 999-1000 (Kan. Ct. App. 1993); *Economopoulos v. Kolaitis*, 528 S.E.2d 714, 718 (Va. 2000).

59. *See, e.g.*, *Marks v. Chicoine*, No. C 06-06806 SI, 2007 WL 1056779, at \*7 (N.D. Cal. Apr. 6, 2007) (stating that the “defendant . . . owes plaintiff a fiduciary duty, an even higher responsibility than that required under a negligence claim”); *Kwiatkowski v. Bear, Stearns & Co.*, No. 96 Civ. 4798(VM), 2000 WL 640625, at \*3 (S.D.N.Y. May 18, 2000) (“[T]he standard of conduct and the duty of care demanded of fiduciaries are set higher than that of ordinary care which governs negligence.”); *Ford v. Brooks*, No. 11 AP-664, 2012 WL 760741, at \*2 (Ohio Ct. App. Mar. 8, 2012) (“A claim for breach of fiduciary duty is basically a negligence claim requiring a higher standard of care.”); *Mafriqe v. United States*, 893 F. Supp. 691, 702 (S.D. Tex. 1995) (noting that “a breach of a fiduciary duty or of a duty of utmost good faith . . . impose[s] higher standards . . . than the duty of reasonable care associated with negligence law”). *But cf.* IDAHO CODE ANN. § 53-3-404(c) (2012) (Under the Revised Uniform Partnership Act, “[a] partner’s duty of care to the partnership and the other partners in the conduct . . . of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.”); *Rosenthal v. Rosenthal*, 543 A.2d 348, 352-53 (Me. 1988) (noting that under the business judgment rule, corporate officers—although fiduciaries—owe a duty of good faith, rather than a duty of reasonable care, in managing corporate affairs).

60. *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386-87 (2d Cir. 1976); *Prob. Ct. ex rel. Lawton v. Bank of America, N.A.*, 813 F. Supp. 2d 277, 301 (D.R.I. 2011); *Wolf v. Super. Ct.*, 130 Cal. Rptr. 2d 860, 864 (Cal. Ct. App. 2003).

61. *In re Brook Valley VII*, 496 F.3d 892, 900-01 (8th Cir. 2007); *Lifespan Corp. v. New Eng. Med. Ctr., Inc.*, No. 06-cv-421-JNL, 2011 WL 2134286, at \*23 (D.R.I. May 24, 2011); *IBEW Local 98 Pension Fund v. Cent. Vt. Pub. Serv. Corp.*, No. 11-cv-222, 2012 WL 928402, at \*13 (D. Vt. Mar. 19, 2012).

62. *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 369-70 (Del. 2006).

63. *Ertel v. O’Brien*, 852 S.W.2d 17, 22 (Tex. App. 1993).

enough.”<sup>64</sup> And, courts have invariably found the existence and breach of a fiduciary duty where a person in a position of authority in a relationship of trust and confidence—such as an attorney-client, physician-patient or group home supervisor-ward relationship—exploits his or her authoritative position by engaging in sexual relations with the more vulnerable person in the relationship.<sup>65</sup>

### III. CASES AND SCHOLARSHIP/COMMENTARY DISCUSSING WHETHER K-12 SCHOOLS AND SCHOOL PERSONNEL OWE A FIDUCIARY DUTY TO STUDENTS

#### A. *The Case Law*

Notwithstanding the longstanding judicial treatment of the *in loco parentis* doctrine as granting rights to school supervisory personnel and only secondarily and minimally protecting the rights of students, a surprising split has developed in the case law over the past twenty-five years concerning whether schools and school supervisory personnel owe a fiduciary duty to primary and secondary students.<sup>66</sup> This Article will now chronicle that judicial split. It will first discuss the cases refusing to recognize a fiduciary relationship between teachers and students in the K-12 setting. It will next discuss the cases acknowledging the possibility of (or, at least, not definitively rejecting) a fiduciary relationship in that setting, but finding no such relationship on the facts or allegations of the specific case before the court. Finally, this Article will discuss the cases that recognize the existence of a fiduciary relationship and likewise find such a relationship on the facts or allegations of the case before the court. Within each discussion, the Article will first examine cases relying on or referring to the *in loco parentis* doctrine before considering cases that reach the same conclusion without mentioning the doctrine.

#### 1. *Cases Categorically Refusing to Recognize the Existence of a Fiduciary Relationship Between K-12 Schools and School Supervisory Personnel and Students.*—

a. *In loco parentis* cases.—In *Franchi v. New Hampton School*,<sup>67</sup> the mother of a student, who had been discharged from a private boarding school for reasons

64. *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 (4th Cir. 2007) (quoting *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983)).

65. *Doe v. Harbor Schs., Inc.*, 843 N.E.2d 1058, 1064-65 (Mass. 2006) (group home supervisor-ward relationship); *Hoopes v. Hammargren*, 725 P.2d 238, 242-43 (Nev. 1986) (physician-patient relationship); *Allen Cnty. Bar Ass’n v. Bartels*, 924 N.E.2d 833, 835 (Ohio 2010) (attorney-client relationship).

66. One appellate panel, in discussing (but without resolving the issue of) the existence of a fiduciary relationship between a public school and a middle and high school student in a sexual abuse case involving the possible tolling of the statute of limitations, “note[d] that whether a public school has a fiduciary duty to a middle or high school student is contested by the parties and not settled law.” *Dymit v. Indep. Sch. Dist. #717*, No. A04-471, 2004 WL 2857375, at \*5 n.1 (Minn. Ct. App. Dec. 14, 2004).

67. 656 F. Supp. 2d 252 (D.N.H. 2009) (internal citation omitted).

related to an alleged eating disorder, sued the school under various theories, including a claim for breach of fiduciary duty.<sup>68</sup>

The district court dismissed Franchi's breach of fiduciary duty claim, stating as follows:

NHS argues that no fiduciary relationship existed between it and [the student] as a matter of law. Franchi's argument to the contrary is based on the New Hampshire Supreme Court's decision in *Schneider v. Plymouth State College*, that "[i]n the context of sexual harassment by faculty members, the relationship between a post-secondary institution and its students is a fiduciary one." This case, however, involves neither a post-secondary institution nor sexual harassment by faculty members. This court predicts that the New Hampshire Supreme Court would not expand the obligations imposed by *Schneider* beyond its context and into the circumstances here.

....

As a matter of law, then, the nature of the duty owed from NHS—a secondary school—to [the student] was a duty of care arising out of its in loco parentis status . . . rather than a fiduciary duty arising from any "unique relationship" as in *Schneider*.

....

In line with these authorities, this court rules that, even if the allegations of Franchi's amended complaint suggest that she placed "a special trust or reliance" in NHS on [the student]'s behalf, that was insufficient to give rise to a fiduciary duty. Though NHS, like any other secondary school, owes its students a duty to use reasonable care to protect them, this court predicts that the New Hampshire Supreme Court would not extend its holding in *Schneider* to elevate that duty to a fiduciary one under the circumstances alleged here. NHS's motion to dismiss Franchi's claim for breach of fiduciary duty is granted.<sup>69</sup>

In *Doe v. Greenville County School District*,<sup>70</sup> the parents of a fourteen-year-old student brought claims (among others) for breach of fiduciary duty and breach of an assumed duty in loco parentis against a school district after a substitute

68. *Id.* at 255-56.

69. *Id.* at 261-65 (second alteration in original) (citation omitted); see also *Brodeur v. Claremont Sch. Dist.*, 626 F. Supp. 2d 195, 219 n.24 (D.N.H. 2009) (strongly suggesting, but not deciding, that because the New Hampshire Supreme Court had held that the relationship between a secondary school and student is "a special relationship" based on the in loco parentis doctrine "that gives rise to a duty enforceable in negligence," "New Hampshire [law] does not appear to treat the relationship between a public secondary school and its students as fiduciary in nature").

70. 651 S.E.2d 305 (S.C. 2007).

teacher hired by the school district had been convicted of having sexual relations with their minor daughter.<sup>71</sup> After the trial court dismissed these two claims and several others, the South Carolina Supreme Court affirmed, holding that

In the instant case, the trial court found that Mr. and Mrs. Doe's claims for breach of fiduciary duty and breach of an assumed duty *in loco parentis* were based only on their claim of negligent supervision. The trial court further found that these causes of action were alleged as an attempt to heighten any duty owed by the School District in this situation.

We agree with the trial court's analysis of these causes of action. The Legislature has clearly provided that the School District may be liable for negligent supervision of a student only if that duty was executed in a grossly negligent manner. Mr. and Mrs. Doe have not alleged any facts under which this Court could find another duty owed by the School District other than the duty of supervision as outlined by the Tort Claims Act.

Accordingly, we hold that the trial court did not err in dismissing the causes of action for breach of fiduciary duty and breach of an assumed duty *in loco parentis*.<sup>72</sup>

*b. Non-in loco parentis cases.*—In *Thomas v. Board of Education of Brandywine School District*,<sup>73</sup> the parents of an elementary school student filed an action on the student's behalf against a school district's board of education, its board members, and superintendent, alleging that school administrators failed to take appropriate steps to prevent a teacher from sexually abusing the student.<sup>74</sup> The court granted summary judgment in favor of the school district defendants on the parents' breach of fiduciary duty claim, holding as follows:

Finally, Plaintiff also alleges a novel theory of liability based on the "special relationship" between public school administrators and their students. Specifically, Plaintiff contends that the School District Defendants "owed fiduciary duties" to the District's students, including Plaintiff, duties which the School District Defendants "grossly breached." Both parties concede that this is an issue of first impression in Delaware.

Little more need be said about Plaintiff's breach of fiduciary duty claim beyond the undisputed fact that Plaintiff can cite to no authority for recognizing this theory under Delaware law. . . . Plaintiff provides no

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71. *Id.* at 306.

72. *Id.* at 309-10 (citation omitted).

73. 759 F. Supp. 2d 477 (D. Del. 2010).

74. *Id.* at 481.



basis for predicting that the Delaware Supreme Court would accept Plaintiff's invitation to be the first state to recognize a fiduciary relationship between a public school district and its students.

....

Here, Plaintiff does not allege that there is a "confidential" relationship of any sort, nor does Plaintiff allege that there is a special relationship of dependency between him and the School District Defendants. While there may be, as Plaintiff contends, cases from other states that recognize a "special relationship" between public schools and their students, none of these cases explicitly identify a fiduciary relationship, nor state that a student may pursue civil litigation for breach of such a fiduciary relationship.

The Court concludes that Delaware law does not recognize a fiduciary relationship between a public school district and its students. Consequently, the Court will grant summary judgment to the School District Defendants on Plaintiff's claim for breach of fiduciary duty.<sup>75</sup>

Likewise, in *Key v. Coryell*,<sup>76</sup> the mother of a special needs student brought suit, individually and on behalf of the student, against a Catholic school, its current and former principal, two teachers, several other individuals, and the Catholic Diocese.<sup>77</sup> In her complaint, the mother alleged that the school did not meet the student's needs and, because of his alleged behavioral problems, forced him to withdraw from the school in violation of, among other legal duties, a fiduciary duty owed to the student.<sup>78</sup> The Arkansas Court of Appeals affirmed the trial court's dismissal of the entire complaint, holding with respect to the breach of fiduciary claim:

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75. *Id.* at 503-04; *see also* C.A. v. William S. Hart Union High Sch. Dist., 117 Cal. Rptr. 3d 283, 292 (Cal. Ct. App. 2010) (where student alleged that school district and school personnel, by not preventing or by participating in sexual relations with the student, engaged in constructive fraud which, under California law, requires proof of a fiduciary or confidential relationship, and where the Court of Appeal stated that the student did "not cite, and we have not found, any authority stating that a fiduciary relationship exists between a school district and an individual student," the Court refused to recognize the existence of a fiduciary relationship in the K-12 school and school personnel-student relationship), *rev'd on other grounds*, 270 P.3d 699 (Cal. 2012); John R. v. Oakland Unified Sch. Dist., 240 Cal. Rptr. 319, 325 (Ct. App. 1987) (In a sexual abuse case involving delayed discovery/fraudulent concealment issues, another California Court of Appeal panel stated that "[t]eachers, while not fiduciaries, are professionals who occupy a special relationship with adolescent students invoking higher obligations."), *aff'd in part, rev'd in part*, 769 P.2d 948 (Cal. 1989).

76. 185 S.W.3d 98 (Ark. Ct. App. 2004).

77. *Id.* at 101.

78. *Id.* at 101-02.

Appellant further argues, without citation to any supporting authority, that the relationship of a student with special needs and an educator who represents that he or a school can meet those needs and provide an education appropriate for the student's age and grade level is of a fiduciary nature. We are aware of no case in Arkansas that supports appellant's argument. . . . In *Cherepski v. Walker*, the supreme court held that a defendant priest did not owe a fiduciary duty to a parishioner. We cannot say that appellees owed appellant and Taylor any greater duty than a priest owes a parishioner. . . .<sup>79</sup>

In *Eng v. Hargrave*,<sup>80</sup> one of the more recent judicial decisions discussing the issue, a federal district court dismissed, with prejudice, a complaint involving a claim by the plaintiff against his student in an unspecified endeavor relating to the martial arts.<sup>81</sup> In so doing, the district court stated that "a teacher ordinarily does not owe his student a fiduciary duty, and a student presumably owes his teacher even less."<sup>82</sup>

2. *Cases Recognizing the Possibility of (or, at Least, Not Definitively Rejecting) a Fiduciary Relationship Between K-12 Schools and School Supervisory Personnel and Students, but Not Finding Such Relationship on the Allegations or Facts Before It.*—

a. *In loco parentis cases.*—In *Bass ex rel. Bass v. Miss Porter's School*,<sup>83</sup> a student who had been expelled from a private high school for dishonesty and alcohol use, after requesting medical leave relating to harassment she had suffered at school, brought suit against the school and the head of the school.<sup>84</sup> In her complaint, the student alleged that the defendants' expulsion decision and their conduct leading up to it, among other legal theories, breached a fiduciary duty owed to the student.<sup>85</sup> The district court disagreed, finding and concluding

79. *Id.* at 106 (citation omitted); *see also* *J.W. v. Johnston Cnty. Bd. of Educ.*, No. 5:11-cv-707-D, 2012 WL 4425439, at \*15 (E.D.N.C. Sept. 24, 2012) (because North Carolina law did not recognize a fiduciary relationship between school board or school administrators and middle school students, North Carolina federal district court dismissed breach of fiduciary duty claim brought by middle school special education student); *Cook v. Kudlacz*, 974 N.E.2d 706, 724 (Ohio Ct. App. 2012) (because "no case . . . provides that a coach would definitely have a fiduciary relationship with [a] player," court affirmed trial court's grant of summary judgment against high school tennis team member and her mother on their breach of fiduciary duty claim against private religious school and school personnel).

80. No. C 10-01776 RS, 2012 WL 116560 (N.D. Cal. Jan. 13, 2012).

81. *Id.* at \*1.

82. *Id.* at \*2; *see also* *Zimmerman v. Poly Prep Country Day Sch.*, 888 F. Supp. 2d 317, 335 n.5 (E.D.N.Y. 2012) (in a case alleging sexual abuse at a private school, the court stated that "[t]hrough the plaintiffs denominate their claim as one for breach of fiduciary duty, New York courts do not describe the duty of a school to its students as such").

83. 738 F. Supp. 2d 307 (D. Conn. 2010).

84. *Id.* at 310-11, 327-28.

85. *Id.* at 330.

as follows:

Plaintiff argues that “the context of the present case” shows there to be a question for the jury as to the existence of a fiduciary duty: “Tatum was a minor child in a boarding school, which was expected to provide care, supervision, and protection at all times, to meet students’ physical and emotional needs.” Neither these facts, nor the remainder of the record, demonstrate or suggest that Porter’s owed Tatum a fiduciary duty. The facts do not show that “that [Porter’s] undertook to act primarily for the benefit of [Tatum].” . . . Even if Plaintiff could establish a relationship of unique trust or confidence in one or more of the specific adults who supervised her—her dormitory mother, academic advisors, or teachers—these individuals are not defendants, and the record shows Windsor, the only individual defendant, not to have had substantial contact with Plaintiff prior to the incidents at issue in this suit, and therefore not to support any conclusion that the Windsor–Tatum relationship was characterized by such trust or confidence.

Because the record, taken in the light most favorable to Plaintiff, does not show that either of the named Defendants owed any fiduciary duty to Plaintiff, Defendants are entitled to summary judgment on Count 9.<sup>86</sup>

In *L.C. v. Central Pennsylvania Youth Ballet*,<sup>87</sup> the parents of a private school student brought a multi-count complaint against the school, one of its faculty members, and the parents of another student stemming from an alleged sexual assault against their son.<sup>88</sup> Among other claims, the parents of the student suffering the assault alleged that the school had breached contractual obligations that it owed to them under a student handbook.<sup>89</sup> Although the district court dismissed the breach of contract claim, it opined that the school may have breached a fiduciary duty:

At this juncture, we note that “school districts are charged with the responsibility of supervising children under their control during the time that they are at school under the doctrine of *in loco parentis* to protect children.” Accordingly, since L.C. was a student at CPYB, we believe that CPYB may have incurred a *fiduciary* duty to protect L.C. from harm. However, Plaintiffs have failed to lodge a claim for breach of *fiduciary* duty, electing instead to pursue a claim for breach of alleged *contractual* duty. As stated above, Plaintiffs have failed to adequately aver that CPYB was *contractually* obligated to ensure the welfare of its students. Accordingly, Plaintiffs have failed to state a claim upon which relief can

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86. *Id.* at 330-31 (first and second alterations in original) (citations omitted).

87. No. 1:09-cv-2076, 2010 WL 2650640 (M.D. Pa. July 2, 2010).

88. *Id.* at \*1-2.

89. *Id.* at \*4.

be granted.<sup>90</sup>

*b. Non-in loco parentis cases.*—In *Stotts v. Eveleth*,<sup>91</sup> an eighteen-year-old high school student brought an action against a school district and a junior high school teacher alleging, among other claims, that the teacher breached a fiduciary duty when they engaged in a consensual sexual relationship.<sup>92</sup> The Iowa Supreme Court affirmed the lower court’s grant of summary judgment in favor of the teacher, holding as follows:

Stotts also contends that a fiduciary relationship existed between Eveleth and her, and for that reason Eveleth owed Stotts a duty to refrain from sexual contact with her. That duty, she argues, is based on a teacher’s general duty to act in the best interest of a student. Stotts asserts that Eveleth abused his position as a teacher and the trust she as a student placed in him by taking sexual advantage of her. Therefore, Stotts concludes, the district court erred in finding (1) that a fiduciary duty does not automatically exist between a teacher and student and (2) as a matter of law no such duty existed between Eveleth and her.

....

Because the circumstances giving rise to a fiduciary duty are so diverse, whether such a duty exists depends on the facts and circumstances of each case.

Here, it is uncontroverted that Eveleth was not Stotts’s teacher and never had been. In addition, Stotts generated no genuine issue of material fact on whether she reposed faith, confidence, and trust in Eveleth; that she relied on his judgment and advice; or that he dominated and influenced her. The uncontroverted facts are that the relationship was simply one of a sexual nature between two consenting adults. We therefore agree with the district court that as a matter of law no fiduciary duty existed.<sup>93</sup>

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90. *Id.* at \*5 n.11; *see also* *Bernie v. Catholic Diocese*, 821 N.W.2d 232, 242 (S.D. 2012) (affirming grant of summary judgment in favor of a Catholic Diocese where boarding school students “failed to establish the existence of an in loco parentis or fiduciary relationship” with the Diocese).

91. 688 N.W.2d 803 (Iowa 2004).

92. *Id.* at 805-06.

93. *Id.* at 811 (citation omitted). Although the Iowa Supreme Court concluded that the teacher’s conduct did not constitute a breach of fiduciary duty, the teacher’s conduct, which involved sexual relations with a current student, almost certainly violated Iowa’s Code of Professional Conduct and Ethics for educators because the teacher engaged in “acts or behavior” that constituted “[c]ommitting or soliciting any sexual or otherwise indecent act with a student or any minor” and “[s]oliciting, encouraging, or consummating a romantic or otherwise inappropriate relationship with a student.” IOWA BD. OF EDUC. EXAMINERS, CODE OF PROFESSIONAL CONDUCT

Likewise, in *Walsh v. Krantz*,<sup>94</sup> a father filed a law suit on behalf of his middle school student sons against a school district and a number of school employees alleging, among other claims, breach of fiduciary based on the school employees having made recommendations to the father concerning one son's evaluation for learning disabilities and the other son's assignment to a lower grade level in math, which recommendations the father rejected.<sup>95</sup> The district court dismissed the breach of fiduciary duty claim, holding,

Assuming, *arguendo*, that a fiduciary relationship exists between defendants and each of Walsh's sons, the breach of fiduciary duty claims nonetheless fail.

. . . The amended complaint alleges that Weinberg and Heisey breached a fiduciary duty by ordering the Special Education Office to deliver a request for evaluation of C.R.W. to Walsh each year that C.R.W. is in the Dallastown Area schools and that Stone and Anderson breached a fiduciary duty by attempting to assign S.J.W. to a lower grade level in math and refusing to discuss the matter with Walsh. The court finds that such conduct is not a breach of any fiduciary duty. Notably, the alleged conduct involved *recommendations* by defendants that Walsh could, and in fact did, refuse. As the amended complaint and brief in opposition reveal, C.R.W. and S.J.W. experienced no actual change in their educational status at school. Walsh's mere disagreement with the educational recommendations and practices, without more, does not transform them into breaches of a fiduciary duty.<sup>96</sup>

The court of appeals affirmed, adopting the reasoning of the district court.<sup>97</sup>

Lastly, the United States Supreme Court has not directly addressed the issue of whether K-12 teachers owe a fiduciary duty to students. In *Gebser v. Lago Vista Independent School District*,<sup>98</sup> the Court, in a 5-4 decision, held that

AND ETHICS, ch. 25, §§ 282-25.3(1)e.(3) and (4); *see also* Nkemakolam *ex rel.* K.N. v. St. John's Military Sch., 890 F. Supp. 2d 1260, 1263-64 (D. Kan. 2012) (refusing to allow parents of private school students to amend complaint to add cause of action for breach of fiduciary duty against school president where parents failed to sufficiently allege facts under exception to teacher immunity statute); Menachem S. v. L.A. Unified Sch. Dist., No. B183336, 2006 WL 1381656, at \*11 (Cal. Ct. App. May 22, 2006) (holding that a mother and her son, a student in a private religious school, had failed to plead facts suggesting a breach of fiduciary duty by the school district and a public school teacher for not protecting the student from sexual abuse by another teacher employed by the private school).

94. No. 1:07-cv-0616, 2008 WL 3981492 (M.D. Pa. Aug. 22, 2008), *aff'd*, 386 Fed. Appx. 334 (3d Cir. 2010).

95. *Id.* at \*1-2.

96. *Id.* at \*7 (footnotes omitted) (citation omitted).

97. *Walsh*, 386 Fed. Appx. at 341.

98. 524 U.S. 274 (1998).

students do not possess a private right of action to sue school districts and teachers for sexual harassment under Title IX, absent actual notice or deliberate indifference of the harassment by school officials.<sup>99</sup> Four Justices, in an opinion written by Justice Stevens, disagreed.<sup>100</sup> The dissenters, without using the term “fiduciary,” but very much describing “fiduciary-like” circumstances, believed that a private right of action should be available to students, stating as follows:

This case presents a paradigmatic example of a tort that was made possible, that was effected, and that was repeated over a prolonged period because of the powerful influence that Waldrop had over Gebser by reason of the authority that his employer, the school district, had delegated to him. As a secondary school teacher, Waldrop exercised even greater authority and control over his students than employers and supervisors exercise over their employees. His gross misuse of that authority allowed him to abuse his young student’s trust.<sup>101</sup>

3. *Cases Recognizing a Fiduciary Relationship Between K-12 Schools and School Personnel and Students.*—

a. *In loco parentis cases.*—In *McMahon v. Randolph-Macon Academy*,<sup>102</sup> McMahon was a boarding school student at Randolph–Macon Academy who claimed “that a staff member developed a sexual relationship with her and that this conduct, among other things, violated a fiduciary duty which the school owed to her.”<sup>103</sup> McMahon brought suit on this theory, and defendants filed a demurrer seeking dismissal of the claim.<sup>104</sup> The trial court allowed McMahon to proceed on her breach of fiduciary duty claim, stating as follows:

[T]he defendants rely upon *Abrams v. Mary Washington College* for the proposition that “there is no *in loco parentis* relationship or any other fiduciary relationship between senior college officials and every student attending that institution.” This court believes that a different rule applies to a boarding school which takes minors into its custody.

....

The significance of imposing fiduciary duties upon an agent is that it restricts the permissible range of the agent’s actions and requires that the agent act solely in the interests of his principal.<sup>105</sup>

The court noted that courts have previously found the existence of fiduciary

99. *Id.* at 277.

100. *Id.* at 293-306 (Stevens, J., joined by Souter, Ginsburg and Breyer, JJ., dissenting).

101. *Id.* at 299.

102. No. 97-11, 1997 WL 33616521 (Va. Cir. Ct. June 16, 1997).

103. *Id.* at \*1.

104. *Id.*

105. *Id.* (citations omitted) (citing *Greenwood Assoc. v. Crestar Bank*, 448 S.E.2d 399 (Va. 1994); *Hooper v. Musolino*, 364 S.E.2d 207 (Va. 1988)).

rights and duties in relationships such as between a banker and customer during foreclosure proceedings and between business partners.<sup>106</sup> As such, the court believed that “the relationship between a boarding school and its minor student has the same dignity under the law as the relationship between a bank and its customers and that between partners”<sup>107</sup> and concluded as follows:

Applying these principles to the present case it would appear that in its dealings with its students that a boarding school for minors does act *in loco parentis* and that where a choice exists between the interests of a staff member and the best interests of a student that the school must choose to act in the student’s best interests . . . . As noted by the court during the oral argument and by the defendants in their memorandum, it would appear that the breach of fiduciary duty action is subsumed with the negligence counts of the motion for judgment, so the practical effect of this ruling remains to be demonstrated.<sup>108</sup>

Also, in *In re the Arbitration Between Howell Public Schools and Howell Education Association*,<sup>109</sup> a teacher grieved a school board’s decision to suspend her for one year based on alleged unethical conduct for her having received compensation (per student commissions and chaperone fees) from a travel company for having booked a trip with it to Washington, D. C. for her middle school students. The arbitrator denied the grievance, opining as follows concerning the school district’s contention that the teacher breached a fiduciary obligation owed to her students:

The grievant has challenged the employer’s claim that she had a fiduciary relationship to the students as she acted in the dual role of teacher and tour director. However, the grievant herself testified that when she was in charge of the children on a trip she stood in the place of the student’s parents. Beyond that there is a special relationship of trust between a teacher and a pupil. The teacher’s role is one of *in loco parentis*. In this status the teacher is bound to take reasonable care of the students in his/her custody. This responsibility creates a fiduciary duty,

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106. *Id.* at \*2.

107. *Id.*

108. *Id.* Although the trial court believed that plaintiff’s breach of fiduciary duty claim would be subsumed by her negligence claim, as discussed previously, proof of a breach of fiduciary duty claim would impose a higher duty on a defendant than would proof of a negligence claim. *See supra* note 59 and accompanying text; *see also* *Daly v. Derrick*, 281 Cal. Rptr. 709, 717-18 (Cal. Ct. App. 1991) (holding that “[a] teacher, who stands in *in loco parentis* has a fiduciary or confidential relationship to his or her students and assumes a corresponding duty of disclosure” (internal citation omitted)); *Nelson v. Turner*, 256 S.W.3d 37, 41 (Ky. Ct. App. 2008) (holding, in a case regarding a teacher’s negligent supervision and failure to report an elementary school girl’s sexual assault, that “[a] special, fiduciary quasi-parental relationship is created as a practical matter under such circumstances”).

109. 1991 WL 692932 (Arb.) (1991) (Brown, Arb.).

that is[,] there is a relationship of trust which can be relied upon by the students. A teacher who takes financial advantage of this relationship may be guilty of unethical conduct. The standards of the teaching profession would be violated if this role of trust is abused.<sup>110</sup>

And, in *State v. Evans*,<sup>111</sup> at a re-sentencing hearing for a public high school teacher convicted of trafficking in cocaine, the trial judge stated as a basis for sentencing the teacher to consecutive, rather than concurrent, terms that “[y]our [sic] were in a fiduciary relationship with the public, serving in loco parentis for all of Clyde High School.”<sup>112</sup> The appellate court affirmed, finding and concluding that the trial court’s reasoning based on the in loco parentis doctrine supported its sentencing decision.<sup>113</sup>

b. *Non-in loco parentis cases.*—In *Doe v. Terwilliger*,<sup>114</sup> a student brought a breach of fiduciary duty claim against her high school coaches, Terwilliger and Ford, stemming from sexual contact between the student and Terwilliger that occurred while she was a student-athlete.<sup>115</sup> The Judge Trial Referee denied Terwilliger’s motion to strike, ruling as follows:

It is well established that “[a] fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interest of the other . . . . The superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him.”

....

In the present case, the plaintiff alleges the following: “Terwilliger was a coach (and is) employed by the Guilford Public Schools during all relevant times . . . . Terwilliger was plaintiff’s coach, mentor, and/or confidant for several years . . . . Between the late fall of 2005 and the spring of 2006, defendant Gary Terwilliger committed numerous acts of harmful and/or offensive touching on the person of plaintiff Jane Doe, a then minor.” The complaint goes on to allege several other incidents of harmful and offensive touching and harassment by the defendant. Count six specifically alleges: Terwilliger, as plaintiff’s public school coach, mentor and confidant, a position of trust and confidence and superiority by defendant . . . and was in a fiduciary relationship with plaintiff . . . . Terwilliger breached his fiduciary duty owed to plaintiff Jane Doe when he willfully and repeatedly engaged in harmful and offensive conduct

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110. *Id.* (citation omitted).

111. No. S-00-016, 2000 WL 1643515 (Ohio Ct. App. Nov. 3, 2000).

112. *Id.* at \*1.

113. *Id.* at \*3.

114. No. CV095024692S, 2010 WL 2926168 (Conn. Super. Ct. June 8, 2010).

115. *Id.* at \*1.



against the plaintiff . . . .

Given the plaintiffs allegations in this case, the court is satisfied that she has plead sufficient facts to allege the existence of a fiduciary relationship between herself and the defendant and as a result, denies the defendant's motion. The court is persuaded by the Supreme Court's disinclination to confine the fiduciary duty doctrine to a precise definition and its willingness to allow for case-by-case analysis in new situations.

The court is further persuaded by the fact that Connecticut courts, addressing the existence of a fiduciary relationship, attach significance to whether the plaintiff was a minor and additionally, draw a line between a typical student-teacher relationship and those relationships that include "something more," namely acts of fraud, misconduct or misappropriation on behalf of the superior party. Given the collaborative nature of the relationship between a public school coach and a student-athlete, and that the minor plaintiff has alleged that the defendant, her "mentor and confidant," engaged in several acts of sexual misconduct and harassment, the court is convinced that more factual development is warranted in this case.<sup>116</sup>

In *Vicky M. v. Northeastern Educational Intermediate Unit 19*,<sup>117</sup> the parents of an autistic student filed a fourteen-count complaint against a school district, an educational intermediate unit, various supervisory employees and officials, and a special education teacher who allegedly used aversive techniques and restraints on autistic students.<sup>118</sup> In addition to claims under special education law and the United States Constitution, the parents alleged a claim for breach of fiduciary duty against the student's special education teacher under Pennsylvania law.<sup>119</sup> The district court denied the defendants' motion to dismiss as it pertained to the breach of fiduciary duty claim, holding that

[u]nder Pennsylvania law, "[t]he general test for determining the existence of . . . a [fiduciary] relationship is whether it is clear that the parties did not deal on equal terms." Indeed, a fiduciary relationship "is not confined to any specific association of the parties." Rather, a fiduciary relationship will be found to exist "when the circumstances make it certain the parties do not deal on equal terms, but, on the one side

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116. *Id.* at \*1, \*4 (alterations in original) (citation omitted). Less than two months later, another judge of the same court, relying on the same reasoning discussed above, denied a motion to strike the student's claim for breach of fiduciary duty against the other coach, Ford, who had allegedly facilitated the student's contact with Terwilliger. *Doe v. Terwilliger*, No. CV095024692, 2010 WL 3327861, at \*1-2 (Conn. Super. Ct. July 29, 2010).

117. 486 F. Supp. 2d 437 (M.D. Pa. 2007).

118. *Id.* at 445-47.

119. *Id.* at 446, 451.

there is an overmastering influence, or, on the other, weakness, dependence, or trust, justifiably reposed; in both an unfair advantage is possible." . . . Failure to act in the other's interest results in breach of the duty imposed by the fiduciary relationship.

Certainly, Defendant Wzorek, as the special education teacher in charge of the instruction of Minor-Plaintiff AJM, a child with autism, was in an overmastering position in this relationship, and was trusted and depended upon by AJM to exercise sound judgment in handling his care and instruction. Consequently, when viewed in the light most favorable to the Plaintiffs, Defendant Wzorek's motion to dismiss this Count must be denied.<sup>120</sup>

Finally, in *Rocci v. Ecole Secondaire MacDonald-Cartier*,<sup>121</sup> a teacher brought a defamation action against a teacher-chaperone and the school, alleging that the chaperone's letter to the teacher's principal, which criticized the teacher's supervisory conduct of students on a school trip, was defamatory.<sup>122</sup> The New Jersey Supreme Court affirmed the trial court's grant of summary judgment on the teacher's defamation claim based, in part, on the teacher's characterization of her duty to students as fiduciary in nature.<sup>123</sup> According to the court,

[i]n her supplemental brief, plaintiff acknowledges that defendant's letter implicates a matter of public concern. More specifically, she states that her "role was one as a fiduciary charged with the care of her students. On its face, the letter appears to concern itself with the students [sic] well being." In view of that fiduciary role and the public interest, we believe that there must be free discourse, commentary, and criticism regarding a teacher's professionalism and behavior during a school-sponsored event. That principle, which is at the heart of this case, tips the scale in favor of requiring plaintiff to allege more than mere embarrassment to survive summary judgment. Hence, although a private figure, plaintiff is required to allege and prove pecuniary or reputational harm.<sup>124</sup>

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120. *Id.* at 458-59 (first, second, and third alterations in original) (citations omitted). For additional decisions in cases brought by other plaintiffs against the same defendants where the court denied motions to dismiss claims for breach of fiduciary duty on identical grounds, see *Joseph M. v. Ne. Educ. Intermediate Unit 19*, 516 F. Supp. 2d 424, 442-43 (M.D. Pa. 2007); *Sanford D. v. Ne. Educ. Intermediate Unit 19*, No. 3:06-CV-019042007, WL 1450310, at \*15-16 (M.D. Pa. May 15, 2007); *Kimberly F. v. Ne. Educ. Intermediate Unit 19*, No. 3:06-CV-01902, 2007 WL 1450364, at \*15-16 (M.D. Pa. May 15, 2007). Also, for a decision by the same court denying defendant Wzorek's motion for summary judgment on the breach of fiduciary duty claim, see *Vicky M. v. Ne. Educ. Intermediate Unit*, 689 F. Supp. 2d 721, 739-40 (M.D. Pa. 2009).

121. 755 A.2d 583 (N.J. 2000).

122. *Id.* at 584-85.

123. *Id.* at 587.

124. *Id.* (alteration in original).

### B. Scholarship/Commentary

1. *Scholarship/Commentary Indirectly Discussing the K-12 Fiduciary Relationship Issue.*—The split in judicial opinion concerning whether or not a fiduciary relationship exists between K-12 schools and school personnel and their students has not been replicated in the scholarship addressing the issue. Instead, the vast majority of commentators, although invariably addressing the fiduciary relationship issue only indirectly and in broader discussions concerning sexual abuse or sexual harassment, have assumed or opined that primary and secondary school teachers are fiduciaries to their student charges—primarily because of the power that teachers hold, the trust placed in them by society, parents and students, and the vulnerability of students.<sup>125</sup> Certainly, some of those commentators have hedged their bets, characterizing the K-12 teacher-student relationship as “fiduciary-like”<sup>126</sup> or “fiduciary-type”<sup>127</sup> or “resembl[ing] a fiduciary relationship.”<sup>128</sup> Other commentators, however—again, in discussing broader issues and not analyzing the fiduciary relationship issue in detail—have been far less equivocal: those commentators have stated that “[t]eachers are fiduciaries who hold the trust, intellectual development, and academic advancement of their students in their hands,”<sup>129</sup> that “the role of a teacher is that of a fiduciary, and . . . leaders of our children . . .”<sup>130</sup> and that, “in the context of sexual victimization, fiduciaries include employers, clergy, *teachers*, youth leaders, professors, attorneys and other professionals.”<sup>131</sup>

2. *Scholarship/Commentary Directly Discussing the K-12 Fiduciary Relationship Issue.*—Those scholars who have directly addressed the issue are far fewer, but have likewise urged or concluded that K-12 teachers owe a fiduciary

125. See, e.g., Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 *FORDHAM L. REV.* 407, 483 (1999); Stefanie H. Roth, *Sex Discrimination 101: Developing a Title IX Analysis for Sexual Harassment in Education*, 23 *J.L. & EDUC.* 459, 509-10 (1994); Carrie N. Baker, *Sexual Extortion: Criminalizing Quid Pro Quo Sexual Harassment*, 13 *LAW & INEQ.* 213, 242 n.203 (1994); Neera Rellan Stacy, Note, *Seeking a Superior Institutional Liability Standard Under Title IX for Teacher-Student Sexual Harassment*, 71 *N.Y.U.L. REV.* 1338, 1342, 1372 (1996); Kimberly A. Lake, Casenote, *First Amendment—Freedom of Speech—Where Alleged Defamatory Speech Implicates a Matter of Public Interest, Reputational or Pecuniary Harm May Not Be Presumed Absent a Showing of Actual Malice – Rocci v. Ecole Secondaire MacDonald-Cartier*, 755 *A.2d* 583 (*N.J.* 2000), 11 *SETON HALL CONST. L.J.* 887, 911 (2001); Gregory M. Posner-Weber, *Sexual Abuse by Professionals: A Legal Guide*, 69-*NOV WIS. LAW.* 59, 60 (1996) (reviewing STEVEN B. BISBING ET AL., *SEXUAL ABUSE BY PROFESSIONALS: A LEGAL GUIDE* (1995)).

126. Gergen, *supra* note 125.

127. Stacy, *supra* note 125, at 1342, 1372.

128. Baker, *supra* note 125, at 242 n.203.

129. Roth, *supra* note 125, at 509-10.

130. Lake, *supra* note 125, at 911.

131. Posner-Weber, *supra* note 125, at 60 (emphasis added).

duty to students—although they differ as to whether the duty is ethical and/or moral, as opposed to legal.<sup>132</sup> Thus, one scholar has focused on the teacher's fiduciary role as ethical and moral, stating as follows:

This article proposes that the relationship between teacher and student is fiduciary. It develops the thesis that a primary or secondary school teacher has especially high duties to the student: obligations, resembling those of a guardian, a trustee, an executor, and an attorney, of fidelity, zealous devotion to the well-being of the other party, and full disclosure. This article does not endorse this approach for the positive law. It is not here proposed that teachers be held legally liable for violations of those obligations. The topic of this article, rather, is ethics. The teacher, it is here proposed, is morally a fiduciary.<sup>133</sup>

Two other scholars, in the most comprehensive article on the teacher-student fiduciary relationship issue yet written, have assumed, both historically and currently, that fiduciary relationships existed, and will exist, between teachers and students in certain circumstances.<sup>134</sup> Those scholars have noted the shortcomings of applying “[t]raditional [d]octrinal [a]pproaches” such as the duty of care and loyalty in resolving fiduciary duty cases in the education setting.<sup>135</sup> Focusing primarily on college and university case law and issues, these scholars have developed the following “underlying organizing principles”<sup>136</sup> in determining when a fiduciary relationship exists between a teacher and student, the nature of the fiduciary duty involved, and the existence and magnitude of any breach of that duty:

[I]n determining the likelihood of legal liability for an alleged breach of fiduciary duty, one should engage in three inter-related enquiries. (1) The first enquiry involves considering and analyzing a set of factors and indicia to determine whether a fiduciary relationship between two parties exists and, more importantly, the magnitude of duty that arises within that particular relationship and context. Such an enquiry helps determine whether a fiduciary in a particular situation owes a relatively high or relatively low degree of duty. (2) The second enquiry involves analyzing a related set of factors and indicia that will help determine the height or

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132. See, e.g., Scott FitzGibbon, *Educational Justice and the Recognition of Marriage*, 2011 BYU EDUC. & L.J. 263, 274-76; Brett G. Scharffs & John W. Welch, *An Analytic Framework for Understanding and Evaluating the Fiduciary Duty of Educators*, 2005 BYU EDUC. & L.J. 159, 163-65; Commentators in Canada likewise view the K-12 teacher-student relationship as fiduciary in nature. See, e.g., Jim Davies, *Sexual Abuse of Children by Teachers: A Canadian Perspective on Direct and Vicarious Employer Liability*, 11 EDUC. & L.J. 131 (2001-2002); G. V. La Forest, *Off-Duty Conduct and the Fiduciary Obligations of Teachers*, 8 EDUC. & L. J. 119 (1997).

133. FitzGibbon, *supra* note 132, at 263.

134. Scharffs & Welch, *supra* note 132, at 159-64.

135. *Id.* at 165-66.

136. *Id.* at 166.

degree of the fiduciary's behavior. (3) The third step is to measure the amplitude of the fiduciary's performance to determine the extent to which that conduct exceeded or fell short of the required level of performance. If there has been a shortfall or breach of duty, this enquiry then determines the amount or type of appropriate remedies. This step also considers how easy or difficult it would have been for the fiduciary to fulfill his or her duty, whether there are any special reasons why a court should not get involved in second guessing the fiduciary or substituting its judgment for that of the fiduciary, and whether there is an available remedy that would be appropriate in rectifying or at least ameliorating the effects of the breach of duty.

This approach to analyzing fiduciary duties is helpful in several ways. It inherently recognizes that all fiduciary duties are not created equal, and that all breaches will not be regarded as equally harmful. For example, by conducting this type of analysis we learn that courts are most likely to find liability in cases involving duties of a high magnitude coupled with breaches of a high magnitude and where there is an available appropriate remedy. Conversely, if a low-degree duty is coupled with a low-degree breach and there is no remedy that seems appropriate for the situation, courts are unlikely to impose legal liability. Cases involving a high degree of duty and a low degree breach, or cases involving a low degree duty and a serious breach prove to be the most difficult situations in which to predict outcomes; but even in such cases, the approach outlined below allows lawyers, judges, and litigants to identify and produce all the evidence systematically relevant to a sound resolution of the case. In all cases, this approach identifies specific, quantifiable elements that allow judges, lawyers, and administrators to marshal the evidence and make reasonable judgments in calculating the magnitude of duty owed and the degree of violation of duty that may have occurred.<sup>137</sup>

Specifically, the authors identified the factors alluded to above as follows:

As is the case in each unique context, some of the factors that contribute to an analysis of the magnitude of duties and the magnitude of breaches are of particular significance in the educational setting. For example, in assessing magnitude of duties and breaches in the educational context, the following considerations are often important: the degree of actual power or control entrusted to the fiduciary, the age and vulnerability of the beneficiary, the experience and sophistication of both the fiduciary and the beneficiary, the formality in the creation of the agreement between the fiduciary and beneficiary, the history and duration of the relationship, the degree and cause of reliance in a relationship, the divergence of interests between the fiduciary and beneficiary, and the

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137. *Id.* at 167-68 (footnotes omitted).

specificity of duty, among others.<sup>138</sup>

Applying this analytical framework and these factors to four areas—evaluation and grading, research relationships, patents and inventions, and sexual harassment—where courts have attempted to determine whether teachers or educational institutions are liable for breach of fiduciary duties to students, the authors conclude that courts should find and have found breaches of a fiduciary duty in several circumstances.<sup>139</sup> A chart summarizing their analysis and conclusions shows the following:

<u>Educational Area</u>	<u>Magnitude of Duty</u>	<u>Magnitude of Breach</u>	<u>Breach of Fiduciary Duty</u>
Evaluation/Grading	Relatively Low	Relatively Low	No
Research Relationships	Relatively High	Relatively High	Yes
Patents and Inventions	Relatively High	Relatively High	Yes
Sexual Harassment	High	High	Yes

Given the nature of the four educational areas selected, it is not surprising that the authors focused their analysis on decisions and issues in the higher education setting. Indeed, of the four areas selected, only sexual harassment (and sexual abuse) and, to a far lesser extent, grading and evaluation present themselves in the K-12 setting. And, given the *in loco parentis* doctrine's current inapplicability to higher education,<sup>140</sup> it is likewise not surprising that the authors did not discuss, let alone analyze, the effect of that doctrine on the existence of teacher-student fiduciary relations.

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138. *Id.* at 168-69.

139. *Id.* at 161, 219-29.

140. See *supra* note 13 and cases and commentary discussed therein; see also *Buttny v. Smiley*, 281 F. Supp. 280, 286 (D. Colo. 1968) (noting “that the doctrine of ‘In Loco Parentis’ is no longer tenable in a university community”); *Univ. of Md. E. Shore v. Rhaney*, 858 A.2d 497, 499 n.2 (Md. Ct. Spec. App. 2004) (“Most jurisdictions have rejected the proposition that a college owes an *in loco parentis* obligation to its students.” (citing *Nero v. Kan. State Univ.*, 861 P.2d 768 (Kan. 1993))). Commentators have also almost uniformly proclaimed the *in loco parentis* relationship defunct at the college and university level. See, e.g., WILLIAM A. KAPLIN, *THE LAW OF HIGHER EDUCATION* 5-7 (2d ed. 1985) (outlining factors leading to the demise of the *in loco parentis* doctrine in higher education); Zirkel & Reichner, *supra* note 15, at 282 (noting that in “the college context . . . *in loco parentis* . . . has undergone a clear rise and complete demise in [American] courts”).

IV. WHY A PORTION OF THE CASE LAW HOLDS AND NEARLY ALL OF THE  
SCHOLARSHIP/COMMENTARY OPINES THAT K-12 TEACHERS  
ARE FIDUCIARIES TO STUDENTS

Several reasons can explain the split in the case law and the near-unanimity in the commentary and scholarship concerning whether K-12 teachers should owe fiduciary duties to their students.

*A. Analogistic and Moralistic Reasoning and the Teacher's Professional Role*

First and foremost, the judicial and scholarly inclination to recognize K-12 teachers as fiduciaries to their students stems from the characterization of teachers as fiduciaries when doctrinal analysis—including, in particular, doctrinal analysis under the *in loco parentis* doctrine—might not lead to that result. More and more frequently, teachers are identified as role models.<sup>141</sup> Indeed, depending on school boards' (and judges' and juries') views concerning teacher conduct—both on- and off-duty—and its nexus to a teacher's qualifications and fitness to teach, a teacher's job may depend on whether his or her conduct satisfies role model criteria.<sup>142</sup> And, the education community has rightly attempted to professionalize teachers—by adopting and enforcing Codes of Professional Conduct<sup>143</sup> and continuing education requirements<sup>144</sup> and by seeking increases in teacher salaries and other forms of compensation.<sup>145</sup>

*B. Student Vulnerability and Need for Protection*

Students, of course, are on the other side of the equation. At the K-12 level and, particularly, in the primary and middle school grades, students constitute the quintessential vulnerable population. Judges, commentators and society in general rightly expect teachers to protect students from harm and exploitation to the extent teachers have the power to do so. At the very least, teachers are expected to not cause students harm, to not exploit students—physically or emotionally—and to certainly avoid doing so in the sexually abusive and/or sexually harassing manner that makes up the allegations in so many of the K-12 teacher-student fiduciary duty cases discussed above.<sup>146</sup>

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141. See *supra* note 1 and accompanying text.

142. See, e.g., *Walhart v. Bd. of Dirs. of Edgewood-Colesburg Cmty. Sch. Dist.*, 694 N.W.2d 740, 748 (Iowa 2005).

143. See, e.g., IDAHO STATE DEP'T OF EDUC., CODE OF ETHICS FOR IDAHO PROFESSIONAL EDUCATORS (2009), available at <http://www.sde.idah>.

144. See, e.g., Thomas B. Corcoran, *Helping Teachers Teach Well: Transforming Professional Development*, CPRE POLICY BRIEFS (June 1995), available at <http://www2.ed.gov/pubs/CPRE/t61/index.html>.

145. See, e.g., *Take Action to Honor and Reward Teachers*, AM. TEACHER, <http://www.theteachersalaryproject.org/outreach.php> (last visited July 6, 2013).

146. Of the nearly twenty-five cases surveyed and discussed in Part III.A. of this Article, more than half involved allegations of teacher-on-student sexual relations or harassment.

*C. The K-12 Teacher-Student Relationship and the Uncertainty  
Stemming from Analogy*

The confluence of these three factors—increased professionalism expectations placed upon teachers, the vulnerability of K-12 students, and the morally-laden fact patterns of a substantial number of the reported decisions—has led to analogistic, non-doctrinal reasoning on the part of judges. In turn, that reasoning has led to the conclusion that primary and secondary school teachers are fiduciaries to their student charges and/or deciding breach of fiduciary duty claims against those same teachers. Thus, in *Evans*, both the trial judge and appellate court, in re-sentencing and in reviewing the re-sentencing of a public school teacher for drug trafficking, were able to justify a harsher sentence by blithely stating that the teacher, under the *in loco parentis* doctrine, was a fiduciary to the public (not just the students) served by the high school where the teacher taught.<sup>147</sup>

Similarly, in *Rocci*, the teacher's own acknowledgment that her "role was one as a fiduciary charged with the care of her students" in supervising students on a field trip went well beyond the duties required of teachers under the *in loco parentis* doctrine.<sup>148</sup> And, in the two cases where courts expressly used analogistic thinking, they came to diametrically-opposite results. Thus, in *McMahon*, a case involving an alleged sexual relationship between a boarding school staff member and a student, the court, relying on the *in loco parentis* doctrine and analogizing that "the relationship between a boarding school and its minor student has the same dignity under the law as the relationship between a bank and its customers and that between partners," held that the student had stated a claim for breach of fiduciary duty against the school.<sup>149</sup>

Conversely, in *Key*, where the mother of a special needs student brought suit on behalf of herself and the student against a Catholic school, its administrators and teachers who allegedly caused the student to withdraw from the school by failing to meet the student's needs under the law, the appellate court, not relying on or mentioning the *in loco parentis* doctrine, analogized the facts to prior case law holding that priests do not owe a fiduciary duty to parishioners and affirmed the lower court's holding that the school and its personnel did not owe a fiduciary duty to the student.<sup>150</sup>

147. *State v. Evans*, No. S-00-016, 2000 WL 1643515, at \*1 (Ohio Ct. App. Nov. 3, 2000); see also discussion *supra* notes 111-13 and accompanying text.

148. *Rocci v. Ecole Secondaire MacDonald-Cartier*, 755 A.2d 583, 587 (N.J. 2000); see also discussion *supra* notes 121-24 and accompanying text.

149. *McMahon v. Randolph-Macon Acad.*, No. 97-11, 1997 WL 33616521, at \*2 (Va. Cir. Ct. June 16, 1997); see also discussion *supra* notes 102-08 and accompanying text.

150. *Key v. Coryell*, 185 S.W.3d 98, 101, 106 (Ark. Ct. App. 2004); see also discussion *supra* notes 76-79 and accompanying text.



#### D. Return to Doctrine

As discussed more fully below, a return to doctrinal underpinnings—specifically, a return to a proper understanding and application of the *in loco parentis* doctrine and law of fiduciary duty relevant to the K-12 teacher-student context—should enable courts to avoid (or, at the very least, augment) the analogistic and moralistic reasoning that has led to a split in the case law. Equally important, greater reliance on doctrinal thinking will better enable courts to properly determine whether and when K-12 teachers have a fiduciary relationship with students. That doctrinal-based proposal as to whether and/or when K-12 schools and school personnel owe a fiduciary duty to students and a discussion linking that proposal to well-settled principles of *in loco parentis* and fiduciary law follows.<sup>151</sup>

#### V. THE PROPOSED STANDARD AND EXCEPTIONS

Applying well-settled principles from the *in loco parentis* doctrine and the law creating and regulating fiduciary relationships, this Article proposes the following standard regarding whether, and/or when; K-12 schools and school personnel, including teachers and administrators, owe a fiduciary duty to students:

- (1) As a general rule, K-12 schools and school personnel should not be held to owe a fiduciary duty to students. Specifically, no fiduciary duty should exist when school personnel engage in conduct undertaken as a legitimate part of the purpose for which they are employed. Primary and secondary school administrators and teachers are employed for the purpose of the student's education or the education of the group of which the student is a member; and

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151. To be sure, doctrinal or rules-based analysis *and* analogistic reasoning are fundamental to legal analysis and are not mutually exclusive. See Wilson Huhn, *The Stages of Legal Reasoning: Formalism, Analogy, and Realism*, 48 VILL. L. REV. 305, 305-06, 359-61 (2003). In this regard, the decision to recognize or not recognize a fiduciary relationship between K-12 teachers and students, guided by duty of care principles derived from the *in loco parentis* doctrine, requires analogistic thinking in the sense that a decision-maker should and must evaluate the comparative factual and legal circumstances informing that relationship when deciding whether to recognize a fiduciary relationship in one set of circumstances, but not in another. Indeed, this Article's conclusion that a fiduciary relationship should exist between a K-12 teacher and a student when the teacher engages in *ultra vires* acts relies on *both* a negative implication from the application of the *in loco parentis* doctrine to circumstances where a teacher engages in conduct stemming from the purposes for which he or she is employed *and* on analogizing to other fiduciary relationships. The point, ultimately, is one of emphasis. Reliance on analogistic (and moralistic) thinking to the exclusion or at the expense of *in loco parentis* (and fiduciary duty) doctrinal principles when analyzing the question of whether K-12 schools and school personnel owe students a fiduciary duty would be shortsighted—particularly where the *in loco parentis* doctrine has had such a long pedigree and analogistic reasoning has led to less-than-consistent judicial decision making.

- (2) K-12 schools and school personnel should only be held to owe a fiduciary duty to students under two general circumstances: when they either (a) engage in conduct, such as sexual harassment or abuse, wholly outside the purpose of, but made possible by, that educational relationship or (b) take on traditional fiduciary role such as holding money in trust or otherwise administering funds for students.

*A. The General Rule: K-12 Schools and School Personnel Do Not Owe a Fiduciary Duty to Students When Administrators and Teachers Engage in Conduct for the Purposes for Which They Were Hired, i.e., the Education of Students*

1. *The In Loco Parentis-Derived Standard of Care is Lower than a Fiduciary Duty.*—As discussed previously, the in loco parentis doctrine generally enhances the authority of K-12 schools and school personnel over students or, stated conversely, limits the rights of individual students.<sup>152</sup> Although the in loco parentis doctrine has a student-protective aspect, the standard of care for administrators and teachers under the doctrine favors school and school personnel: as a matter of tort law, schools and school personnel will be liable to students only when they act unreasonably, i.e., negligently, or, even more forgiving, when they engage in willful and wanton conduct.<sup>153</sup> In contrast, as also discussed previously, a fiduciary duty is a higher and more exacting standard of care than the reasonableness standard under negligence principles.<sup>154</sup> Thus, courts, such as in *Franchi* and *Thomas*, which have expressly or implicitly acted consistent with the in loco parentis doctrine by refusing to impose a higher, fiduciary duty on K-12 schools and school personnel vis-à-vis students,<sup>155</sup> have acted in a doctrinally-sound manner. Conversely, courts, such as in *Terwilliger* and *McMahon*, which have suggested or held that K-12 schools and school personnel owe a fiduciary duty to students—either without reference to the in loco parentis doctrine or, worse, in reliance on the doctrine<sup>156</sup>—have strayed from or, in the latter instance, misapprehended fundamental principles of in loco parentis.

2. *Parents and Guardians, i.e., the Source of In Loco Parentis Authority, Are Not Generally Fiduciaries to Their Children.*—Although not directly addressed by the cases and scholarship discussed above, parents and guardians, i.e., the

152. See *supra* notes 15-20 and accompanying text.

153. See *supra* notes 25-29 and accompanying text.

154. See *supra* text accompanying note 59.

155. See *Franchi v. New Hampton Sch.*, 656 F. Supp. 2d 252, 264-65 (D.N.H. 2009); *Thomas v. Bd. of Educ.*, 759 F. Supp. 2d 477, 503-04 (D. Del. 2010); see also *supra* text accompanying notes 67-69, 73-75.

156. See, e.g., *Doe v. Terwilliger*, No. CV095024692, 2010 WL 3327861, at \*1-2 (Conn. Super. Ct. July 29, 2010); *McMahon v. Randolph-Macon Acad.*, No. 97-11, 1997 WL 33616521, at \*1-2 (Va. Cir. Ct. June 16, 1997); see also *supra* text accompanying notes 102-08, 114-16.

individuals from whom K-12 schools and school personnel receive their delegated in loco parentis authority, do not generally owe a fiduciary duty to their children.<sup>157</sup> Thus, again, any suggestion that, as general matter, K-12 schools and school personnel owe a fiduciary duty to students fails to take into account the source of and limitations on the delegated authority exercised by schools and school personnel under the in loco parentis doctrine.

3. *The In Loco Parentis-Derived Standard of Care, and Not a Higher Fiduciary Duty, Is Applicable Where Teachers Engage in Conduct Undertaken for the Educational Purposes for Which They Are Employed.*—As pointed out previously, the in loco parentis doctrine, by focusing on the fact that school districts employ teachers for the purpose of educating students, contains within it both the breadth of and limitations on its applicability in the K-12 teacher-student context.<sup>158</sup> Specifically, courts have defined the duties arising from a teacher's employment as follows:

The basic duties which arise from the teacher-student relationship are a duty to supervise, a duty to exercise good judgment, and a duty to instruct as to correct procedures, particularly, not but exclusively, when potentially hazardous conditions or instrumentalities are present, and these basic duties must co-exist with the whole purpose for the teacher-student relationship, viz. education.<sup>159</sup>

Thus, as long as school personnel engage in conduct undertaken as a legitimate part of the educational purpose for which they are employed—and, more particularly, engage in conduct consistent with their job duties of supervising and instructing students—the duty of care standard derived from the in loco parentis doctrine should apply. In turn, under in loco parentis, a negligence (or willfulness) standard, rather than the more exacting fiduciary duty standard, should govern the K-12 teacher-student relationship. As discussed below, only when a teacher engages in conduct beyond the purposes for which he or she is employed—in other words, engages in *ultra vires*<sup>160</sup> acts such as sexual harassment or sexual abuse—(or acts as a traditional fiduciary by holding money or property in trust for a student) should the K-12 teacher owe a fiduciary obligation to students.<sup>161</sup>

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157. See *supra* notes 57-58 and accompanying text.

158. See *supra* notes 21-24 and accompanying text.

159. Walsh v. Krantz, No. 1:07-CV-0616, 2008 WL 3981492, at \*7 (M.D. Pa. Aug. 22, 2008) (citing Vicky M. v. Ne. Educ. Intermediate Unit 19, 486 F. Supp. 2d 437, 458 (M.D. Pa. 2007)), *aff'd*, 386 Fed. Appx. 334 (3d Cir. 2010).

160. "Ultra vires" means literally "beyond the powers of" in Latin and has been defined as "[u]nauthorized; beyond the scope of power allowed or granted by a corporate charter or by law." BLACK'S LAW DICTIONARY, *supra* note 10, at 1559.

161. As discussed previously, this differentiation of roles is consistent with well-settled principles of fiduciary law recognizing that an individual or entity may owe a fiduciary duty to another person for one purpose, but not to the same person for another purpose. See *supra* text accompanying note 56. More important, this distinction not only comports with the internal

4. *Recognition of a Fiduciary Duty May Conflict with the Duty of Undivided Loyalty and Conflict of Interest Principles.*—Recognition of a fiduciary relationship between K-12 schools and school personnel and their students would run contrary to both the duty of undivided loyalty owed by fiduciaries to their beneficiaries, partners and the like and the prohibition on conflicts of interest which governs fiduciaries' conduct.<sup>162</sup> Teachers, in the course of performing their teaching duties, have many “constituents” or “clients”—individual students, to be sure, but also groups of students in the classroom and in the building in which they work, parents, school administrators, and school boards. Indeed, one commentator has explained why K-12 teachers should not have a fiduciary duty to students as a matter of positive law (as opposed to ethical or moral compunction) as follows:

The law's omission to subject teachers to fiduciary duties can be explained in part by institutional considerations. Most teachers are civil servants, subject to supervision by school administrators, school boards, and other elected officials. Teachers are also, to some extent, subject to supervision by parents. Perhaps these supplementary sources of direction and control are sufficient to remedy the incapacity and lack of experience of the students.<sup>163</sup>

The above-quoted language suggests that courts should not hold teachers to be fiduciaries because student vulnerability can be compensated for by other educational stakeholders. However, at least one court has looked at some of those institutional considerations and reached the same conclusion by alluding to the divided loyalties and/or conflicts of interest they may cause:

The facts do not show that “that [the school] undertook to act primarily for the benefit of [the student].” To the contrary, the Head of School's Welcome Letter in the Student Handbook sets a tone that suggests that the paramount interest of all members of the Porter's community should be *Porter's*, and *not* the students. Windsor's letter states that “[w]hat makes our community successful is the personal dedication of each individual to fulfilling her own dreams and desires and to *working*

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limitations set forth in the in loco parentis doctrine itself, but is also consistent with the broader in loco parentis doctrine's focus on the situs of teacher-student interaction and possible student injury. In this regard, a teacher will invariably engage in conduct consistent with the education purposes for which he or she was hired either on school grounds or on an authorized school activity, such as a field trip or extracurricular athletic or academic event, away from school grounds. Under these circumstances, in loco parentis-derived liability for tortious conduct would be under a negligence (or willful and wanton) standard, not the higher duty of care owed by a fiduciary. Conversely, a teacher is more likely to engage in *ultra vires* conduct—such as engaging in sexual relations with a student—away from school grounds. Under these latter circumstances, in loco parentis has no application and the higher, fiduciary duty standard of care should apply.

162. See *supra* notes 60-61 and accompanying text.

163. FitzGibbon, *supra* note 132, at 268.

*wholeheartedly for the good of Porter's.*"<sup>164</sup>

In this day and age, with increasingly larger class sizes and inclusionary models for teaching students of all abilities in the same classroom, it is hard to imagine a teacher, while engaging in conduct designed to fulfill the educational purposes for which he or she is employed, fulfilling a duty of loyalty to every individual student. Indeed, in contrast to the classroom teaching scenario, the paradigmatic examples of fiduciary relationships, such as the attorney-client or trustee-beneficiary relationships, typically involve one-on-one relationships or relationships where only a small number of individuals are entitled to the benefits and protections of the relationship. Certainly, there are many instances where teachers, performing their job duties, have no conflict of interest as between and amongst students and other constituencies, including the school itself. Delivering instruction to groups of regular education students and supervising students on school grounds should, generally speaking, not raise any such issues. However, attempting to deliver instruction to, and provide appropriate supervision and discipline of, both regular education and special education students in the same classroom setting inherently tests the limits of a teacher's ability to fulfill a duty of loyalty to any one student. In so doing, the teacher must struggle with teaching and regulating the conduct of students with wildly differing intellectual, not to mention emotional, physical, and social abilities.

5. *Recognition of a Fiduciary Duty Is Not Necessary to Fill a Remedial Gap.*—Lastly, a refusal to recognize liability for breach of fiduciary duty when K-12 teachers engage in conduct designed to fulfill the educational purposes for which they are employed would not meaningfully reduce or limit the remedies to which a student would be entitled. Remedies for breach of fiduciary duty often replicate the damages for breach of contract,<sup>165</sup> which typically are insignificant in the public school setting because of the lack of consideration changing hands between students or their parents/guardians and schools, and would also include tort remedies.<sup>166</sup> As discussed above, however, state law tort remedies are available to students, either individually or through their parents or guardians, when schools and school personnel fail to satisfy their duty to supervise students or when they otherwise act negligently or willfully and wantonly.<sup>167</sup> Likewise, federal civil rights remedies are available to students when schools or school personnel violate their rights under Section 1983.<sup>168</sup> And, federal remedies under Section 504 of the Rehabilitation Act and the Individuals with Disabilities in

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164. *Bass ex rel. Bass v. Miss Porter's School*, 738 F. Supp. 2d 307, 331 (D. Conn. 2010) (third alteration in original) (citation omitted).

165. *Hartford Fin. Servs. Grp., Inc. v. Carl J. Meil, Jr., Inc.*, No. WDQ-10-2720, 2011 WL 1743177, at \*6 (D. Md. May 5, 2011); *Fin. Servs. Vehicle Trust v. Saad*, 900 N.Y.S.2d 353, 354 (N.Y. App. Div. 2010).

166. *Gen. Bus. Machs. v. Nat'l Semiconductor Datachecker/DTS*, 664 F. Supp. 1422, 1425 (D. Utah 1987); *Multimedia Techs., Inc. v. Wilding*, 586 S.E.2d 74, 78 (Ga. Ct. App. 2003).

167. See *supra* notes 26-29 and accompanying text.

168. See, e.g., *C.B. v. Sonora Sch. Dist.*, 819 F. Supp. 2d 1032, 1052 (E.D. Cal. 2011).

Education Act will be available to special education students when schools fail to comply with the mandates of special education law.<sup>169</sup> Thus, the ability to recover damages for breach of fiduciary duty when teachers do not fulfill the purposes for which they are employed adds little to the remedies otherwise available to students under those circumstances.<sup>170</sup>

*B. Exceptions to the General Rule: K-12 Schools and School Personnel Should Owe a Fiduciary Duty to Students When Administrators and Teachers Engage in Conduct Made Possible by, but Beyond, the Educational Purposes for Which They Are Employed or When They Act as Traditional Fiduciaries*

1. *K-12 School Personnel Should Owe a Fiduciary Duty to Students for Ultra Vires Acts Resulting from their Educational Relationship.*—This Article’s determination that the in loco parentis doctrine and relevant principles of fiduciary duty compel the conclusion that K-12 schools and school personnel do not owe a fiduciary duty to students when administrators and teachers engage in conduct undertaken as a legitimate part of the educational purposes for which they are employed does not necessarily mean that a fiduciary duty exists when administrators and teachers engage in *ultra vires* acts. At most, that determination suggests by negative implication that either the converse is true or that it would be consistent with the in loco parentis doctrine to hold K-12 school personnel to a higher, fiduciary duty standard when they engage in conduct with students that was made possible by, but was beyond, the legitimate educational purposes for which they were hired. The key, then, is to evaluate the nature of the K-12 teacher-student relationship to determine whether there are additional factors—both doctrinal and analogistic—that support the imposition of a fiduciary duty on teachers for their *ultra vires* acts. As discussed below, both by negative implication from application of in loco parentis principles to circumstances where teachers engage in conduct in furtherance of legitimate educational purposes and assessment of the K-12 teacher-student relationship lead

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169. *E.S. v. Konocti Unified Sch. Dist.*, No. 1:10-cv-02245–NJV, 2010 WL 4780257, at \*6 (N.D. Cal. Nov. 16, 2010); *Breanne C. v. S. York Cnty. Sch. Dist.*, 732 F. Supp. 2d 474, 483 (M.D. Pa. 2010).

170. Courts have almost universally refused to recognize tort claims for educational malpractice brought by or on behalf of students against educational institutions, including K-12 schools, seeking to challenge the quality or sufficiency of the services provided by school employees, the course of instruction, and overall education provided. *See, e.g.*, *Waugh v. Morgan Stanley & Co.*, 966 N.W.2d 540, 549–54 (Ill. App. Ct. 2012) (collecting cases). Because claims for educational malpractice are not available to students and/or their parents or guardians, courts have rejected educational malpractice claims when they have been recast as breach of fiduciary duty claims. *See, e.g.*, *Houston v. Mile High Adventist Acad.*, 846 F. Supp. 1449, 1456, 1459 (D. Colo. 1994); *Ogindo v. DeFleur*, No. 07-CV-1322, 2008 WL 5105153, at \*8 (N.D.N.Y. Oct. 16, 2008) (“New York’s policy of precluding educational malpractice claims may not be circumvented by couching the claim in terms of some other cause of action.” (citing *Alligood v. Cnty. of Erie*, 749 N.Y.S.2d 349 (N.Y. App. Div. 2002))).

to the conclusion that teachers are fiduciaries to students when their education relationship leads to *ultra vires* conduct.<sup>171</sup>

*a. Recognition of a fiduciary duty for ultra vires conduct is consistent (or, at least, not inconsistent) with application of the in loco parentis doctrine.*—As discussed above, the *in loco parentis* doctrine is self-limiting: by its terms, it applies only when K-12 school personnel engage in conduct designed to fulfill the educational purposes for which they are employed.<sup>172</sup> Thus, *in loco parentis*—and more important, its limitations on the tort liability of school personnel to negligent or even wanton and willful conduct directed toward students—has no application where teachers engage in conduct wholly inconsistent with their educational mission. Teacher conduct involving sexual abuse or harassment directed toward students clearly falls into this *ultra vires* category. Indeed, such conduct violates ethical canons of the teaching profession,<sup>173</sup> and can lead to discharge from employment,<sup>174</sup> civil liability,<sup>175</sup> or criminal sanctions.<sup>176</sup> For these reasons, nothing in the *in loco parentis* doctrine itself limits the extension of fiduciary obligations to the K-12 teacher-student relationship when teachers engage in *ultra vires* conduct affecting students.

*b. The relationship of trust and confidence created by the K-12 teacher-student educational relationship, as well as the teacher's superior authority and the student's vulnerability in that relationship, mandate recognition of a fiduciary duty for ultra vires teacher conduct.*—As discussed previously, where a person in a position of authority in a relationship of trust and confidence exploits that position and relationship by engaging in sexual relations with the more vulnerable person in the relationship, courts will invariably find a breach of fiduciary duty.<sup>177</sup>

171. The doctrine of negative implication is a canon of construction whereby a court determines the meaning of a statute or legal doctrine by analyzing items or circumstances specifically addressed therein and then determines that items or circumstances omitted, or not specifically addressed by the statute or doctrine, are not covered by that provision. *See, e.g.*, *United States v. Vonn*, 535 U.S. 55, 65 (2002). The negative implication doctrine is only a guide, is not an infallible indicator of meaning, and can be overcome by contrary indications of intent or coverage. *Id.*; *see also* John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 179. The doctrine, however, has been utilized by the United States Supreme Court on numerous occasions to determine the meaning of federal statutes and constitutional provisions, most notably in the Court's Dormant Commerce Clause jurisprudence. KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 174-77 (16th ed. 2007).

172. *See supra* notes 21-24 and accompanying text.

173. *See, e.g.*, *IDAHO STATE DEP'T OF EDUC.*, *supra* note 143, Principle II, at 9.

174. *See, e.g.*, *Bethel Park Sch. Dist. v. Bethel Park Fed'n of Teachers, Local 1607*, 55 A.3d 154, 158-60 (Pa. Commw. Ct. 2012); *Crosby v. Holt*, 320 S.W.3d 805, 808 (Tenn. Ct. App. 2009).

175. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998); *Kinman v. Omaha Pub. Sch. Dist.*, 171 F.3d 607, 611 (8th Cir. 1999); *Chancellor v. Pottsgrove Sch. Dist.*, 501 F. Supp. 2d 695, 709-10, 714 (E.D. Pa. 2007).

176. *See, e.g.*, *State v. Berrio*, 690 S.E.2d 559 (Table), No. COA09-608, 2010 WL 157566, at \*2 (N.C. Ct. App. Jan. 19, 2010).

177. *See supra* note 65 and accompanying text.

An obvious disparity of power exists between K-12 teachers and their students because of the nature of their relationship. Based on that relationship, trust typically emanates from the student to the teacher. And, the existent vulnerability of those same students increases when they are alone with teachers and/or are outside of the classroom setting. For these reasons, the K-12 teacher-student relationship provides an ideal setting for those few opportunistic teachers and administrators who wish to exploit their students. To quote Justice Stevens from his dissent in *Gebser*, a teacher's *ultra vires* conduct is "made possible . . . by reason of the authority that his employer, the school district, had delegated to him."<sup>178</sup>

Moreover, *ultra vires* conduct by teachers involving exploitative sexual conduct with students falls far more squarely within the classic definition of a breach of fiduciary duty than a teacher who might have shortcomings in the classroom instructional setting. Indeed, as alluded to above, the one-on-one context that typically characterizes teacher-student liaisons is consistent with the more common examples of fiduciary relationships. And, given the opprobrium appropriately directed toward such conduct, sexual abuse and harassment of students by K-12 teachers is the one area where the moralistic tendency of judges and commentators to create and regulate what they deem to be a fiduciary relationship is particularly well taken.

For these reasons, K-12 teachers and administrators should be held to be fiduciaries to students when engaging in conduct facilitated by, but beyond, the educational purposes for which they are employed.

2. *K-12 School Personnel Should Owe a Fiduciary Duty to Students When They Perform Traditional Fiduciary Roles Resulting From Their Educational Relationship.*—As discussed previously, even parents, who typically do not have a fiduciary relationship with their children, will owe a fiduciary duty to their children when they (the parents) go beyond their usual parental role and serve as trustees of funds for their children or fail to pay child support.<sup>179</sup> Likewise, teachers who go beyond their role and purpose as a teacher and hold funds for students should have a fiduciary duty to students as to that aspect of their relationship. For example, in *In re the Arbitration Between Howell Public Schools and Howell Education Association*, where a teacher took financial advantage of students by receiving a kickback in the form of per student commissions and a chaperone fee from a travel company on an out-of-town field trip on which she acted both as a teacher and tour director, the arbitrator correctly ruled that the teacher had breached a fiduciary duty that she owed to the students.<sup>180</sup> Thus, as a second exception to the general rule, K-12 teachers who

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178. 524 U.S. at 299 (Stevens, J., joined by Souter, Ginsburg and Breyer, JJ., dissenting), discussed *supra* at notes 98-101 and accompanying text.

179. See *supra* note 57 and accompanying text.

180. See discussion *supra* at notes 109-10 and accompanying text. In *Howell Public Schools*, the arbitrator held that the teacher's fiduciary duty stemmed from the in loco parentis responsibilities that the teacher owed to the students. 1991 WL 692932 (Arb.) (1991) (Brown, Arb.). However, under the analytical approach discussed above, a teacher's duty under the in loco



act as traditional fiduciaries (beyond their teaching role) should likewise be held to owe a fiduciary obligation to their students.<sup>181</sup>

3. *Recognition of a Fiduciary Duty under these Circumstances Will Fill a Remedial Gap.*—In contrast to the lack of any significant remedial utility for recognizing breach of fiduciary duty claims when teachers fail to fulfill the educational purposes for which they are employed, recognition of a breach of fiduciary duty claim when teachers act in an *ultra vires* manner or as a traditional fiduciary may add to the remedies available to students and their parents.

Certainly, as to *ultra vires* acts, including sexual relations with minor students, students and their parents or guardians may recover tort remedies under various theories, including battery and intentional infliction of emotional distress.<sup>182</sup> However, recognition of a breach of fiduciary duty claim in cases involving sexual assault or sexual harassment would enhance the remedies available to student victims—primarily because the legal standards governing existing claims for sexual abuse or harassment against public entities, including schools, under common law respondeat superior, constitutional, and federal statutory theories, such as Title IX, impose significant barriers to recovery.<sup>183</sup>

Likewise, as to conduct by teachers involving the performance of traditional fiduciary duties—such as the administration of funds—recognition of breach of fiduciary claims will make tort remedies available, including non-economic damages and, in cases of outrageous or despicable conduct, punitive damages.<sup>184</sup>

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parentis doctrine does not translate to a higher, i.e., fiduciary, duty of care when the teacher is engaged in conduct undertaken for the educational purposes for which he or she is employed. Rather, a fiduciary duty will only arise where in loco parentis has no application, i.e., where a teacher engages in conduct beyond the educational purpose for which he or she is employed or acts as a traditional fiduciary long-recognized outside the K-12 educational context. In *Howell Public Schools*, the teacher's conduct arguably fell into both categories, although her relationship with her students looked to be more that of a traditional fiduciary than an *ultra vires* actor. *Id.* In either event, considerations unrelated to the in loco parentis doctrine should have driven the arbitrator's decision that the teacher owed a fiduciary obligation to her students.

181. Recognition of a fiduciary duty when a teacher engages in *ultra vires* conduct or acts as a traditional fiduciary is consistent with longstanding principles of fiduciary duty holding that good faith is not a defense to a breach of fiduciary duty claim. See discussion *supra* at notes 62-64 and accompanying text. As to *ultra vires* acts—particularly where a teacher's conduct involves sexual abuse or harassment of a student—given the deplorable nature of such conduct, the possibility that the teacher acted in good faith will be remote, if not nonexistent. Likewise, where a teacher acts as a traditional fiduciary, but mishandles student funds or property, the expertise required of the teacher under those circumstances mandates more than an empty head and a good heart. Thus, under either of the two exceptions to the general rule, a teacher's purported or actual good faith should not be a defense.

182. See, e.g., *Doe v. Fournier*, 851 F. Supp. 2d 207, 225-27 (D. Mass. 2012).

183. Demitchell, *supra* note 34, at 20, 28-51.

184. *Dury v. Ireland, Stapleton, Pryor & Pascoe, P.C.*, No. 08-cv-01285-LTB-MEH, 2009 WL 2139856, at \*6 (D. Colo. 2009) (recognizing the availability of non-economic damages); *Gen. Bus. Machs. v. Nat'l Semiconductor Datachecker/DTS*, 664 F. Supp. 1422, 1426 (D. Utah 1987)

By so doing, courts will enhance a student's remedies beyond the compensatory and economic damages typically available for breach of contract.<sup>185</sup>

#### CONCLUSION

Under the *in loco parentis* doctrine and well-settled principles underlying the creation and regulation of fiduciary relationships, K-12 schools and school personnel should not be considered fiduciaries to their students when they render the educational services called for by their employment. Rather, they should only have a fiduciary duty to their students when they engage in conduct completely beyond, but made possible by, their educational mission—or when they act as traditional fiduciaries. By focusing on the doctrinal principles underlying *in loco parentis* and fiduciary duty, courts and commentators, although appropriately insisting on high standards of behavior for administrators and teachers vis-à-vis students, will avoid or augment the moralistic and analogistic thinking that has caused some authorities to expand fiduciary relationships in the K-12 setting beyond their doctrinal roots and likewise fail to recognize a fiduciary relationship, and the breach thereof, where it would be appropriate to do so. In so doing, courts and commentators will more accurately and appropriately define and regulate student-teacher relationships in the K-12 setting.

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(requiring a showing of willful, malicious, or reckless indifference for the award of punitive damages). At least one jurisdiction has legislatively prohibited recovery of punitive damages against public entities for tort claims. *See, e.g.*, IDAHO CODE ANN. § 6-918 (2013) (“Governmental entities and their employees shall not be liable for punitive damages on any claim allowed under the provisions of this act.”).

185. *See, e.g., In re Montagne*, 425 B. R. 111, 123 (Bankr. D. Vt. 2009) (finding “non-economic damages [for] emotional distress, anxiety,” and the like generally are not recoverable on a claim for breach of contract).