

ABSTRACT

Title: STATING A CLAIM UPON WHICH RELIEF CAN BE GRANTED: EXAMINING HOW THE DEVELOPMENT OF STANDARDS OF CARE AND CHANGES IN PUBLIC POLICY SURROUNDING PUBLIC EDUCATION POTENTIALLY VALIDATE CONDITIONS FOR EDUCATIONAL MALPRACTICE

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What if a student spent his or her entire primary and secondary education in the same public school system and that school system failed to assess the student's reading, writing and mathematic capabilities, allowed the student to pass from grade to grade and advance course levels with the knowledge that the student had not achieved either its completion or the necessary skills; assigned the student to classes in which the teachers were unqualified; and allowed the student to graduate from high school although the student could not read above the eighth grade level. These are the facts of Peter W. v. San Francisco Unified School District, 60 Cal. App. 3d 817 (1976), the case that sets the context for instructional educational malpractice as explained in this study.

For over 30 years, public policy factors have hindered the courts from acknowledging an educator's legal duty towards students to provide an adequate

education. Utilizing legal negligence as the theoretical framework, the purpose of this study is to use pre-existing document data to address the question of how the development of standards of care and changes in public policy surrounding public education have evolved since the 1976 Peter W. case potentially validating a negligence cause of action claiming instructional educational malpractice.

An analytical research style of qualitative inquiry was used to identify and analyze key court cases to determine the extent to which educational malpractice has been pleaded before and rejected by the courts. From this process, public policy factors and arguments used by the courts to deny recognition of instructional educational malpractice were extracted. Literature and research in the field of education as it related to the public policy considerations identified by the courts and legal scholars was then examined to review the changes in education and the practice of teaching in public primary and secondary educational institutions. In addition to potentially identifying the legal duty of the classroom teacher, the study's findings places a spotlight on the K-20 partnership, access to higher education and the role of higher education in producing classroom teachers and ensuring the existence of an educated society.

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PUBLIC POLICY SURROUNDING PUBLIC EDUCATION POTENTIALLY
VALIDATE CONDITIONS FOR EDUCATIONAL MALPRACTICE

By

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DEDICATION

This is dedicated to all of the teachers who told me that I could.

C.E.S. 110:

Ms. Student – 1st Grade

Ms. Baker – 3rd Grade.

Mahalia Jackson Elementary School – P.S. 123:

Mr. Silvestein – 3rd Grade

Ms. Rose – 4th Grade

Ms. McCollough – 5th Grade

Ms. Robinson – 6th Grade

Adam Clayton Powell, Jr – Junior High School 43:

Mr. Balfour – 7th Grade

Ms. Keno – 8th Grade

Grace H. Dodge Vocational High School:

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Ms. Karen Eidenberg – Guidance Counselor

Mr. Ronald Coleman- Mathematics

Mr. Arthur Olson – Mathematics

Ms. Lillian Pacheco – Mathematics

Mr. Richard Blanksten – Music

Ms. Paul Epstein – English

Ms. Judith Gurian - English

Mr. Victor Gershman – Science

Ms. Kathi Goldman – Science

Ms. Sandra Unger – Social Studies

Ms. Esther Saver – Social Studies

and Ms. Patricia Ann Squire – Coordinator of Student Affairs... you were right.

This is dedicated to all of the teachers who told me that I could not.
(You know who you are.)

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Mom, yes, I am finally done with school.

Dad, while we left some things unspoken, you showed me that words are not everything. I know you are watching. I miss you... Love, 'Sport'.

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Cynthia Mustafa: Forever and a day with a passion uncontested.

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TABLE OF CONTENTS

List of Tables		x
CHAPTER I:	INTRODUCTION	1
	STATEMENT OF THE PROBLEM: EDUCATIONAL MALPRACTICE	5
	Research Question(s)	10
	Theoretical Framework(s) of the Study	10
	SIGNIFICANCE OF THE STUDY	15
	DEFINITION OF LEGAL TERMS	18
CHAPTER II:	METHODOLOGY	21
	Step 1 of Legal Method: Factual Research	23
	Step 2 of Legal Method: Identifying Applicable Law	25
	Case Law	25
	Statutory Law	25
	Eliminating Inapplicable Law: Lack of Capacity	26
	Eliminating Inapplicable Law: Irrelevance	26
	Eliminating Inapplicable Law: Principles of Federal Constitutional Law	28
	Step 3 of Legal Method: Analyzing Sources of Law	28
	Case Law Analysis	29
	Statutory Analysis	30
	Step 4 of Legal Method: Synthesizing Applicable Law	32
	Step 5 of Legal Method: Applying the Rule(s) Law	33
	STANDARDS OF ADEQUACY FOR LEGAL RESEARCH	34
CHAPTER III:	REVIEW OF THE LITERATURE	36
	NATURE OF TORT LAW AND PUBLIC POLICY	36
	THEORY OF NEGLIGENCE	40
	Duty	41
	Standard of care	47
	Causation	51
	Injury / Damage	58
	MALPRACTICE: DEFINED	62
	MEDICAL MALPRACTICE	64
	LEGAL MALPRACTICE	70
	INSTRUCTIONAL VERSUS PLACEMENT	
	EDUCATIONAL MALPRACTICE	75
	EDUCATIONAL MALPRACTICE CASE LAW	81
	Edward Donohue v. Copiague Union Free School District	84

	Hoffman v. the City of New York and the Board of Education of the City of New York	93
	D.S.W. by His Next of Friends, R.M.W. and J.K.W. v. Fairbanks North Star Borough School District.....	105
	Ross J. Hunter et al. v. Board of Education of Montgomery County, et al.	108
	EDUCATIONAL OUTCOMES & ACADEMIC ACHIEVEMENT GAP.....	115
CHAPTER IV:	ANALYSIS OF REJECTION STANDARDS.....	123
	Rejection Standard One: Lack of Judicially Workable Standard of Care	123
	The Reasonable Man Standard of Care	125
	The Professional Standard of Care	127
	Rejection Standard Two: No Certainty of Injury.....	135
	Rejection Standard Three: No Causal Link	142
	Rejection Standard Four: No Appropriate Remedy.....	153
	Rejection Standard Five: Flood of Litigation	158
	Rejection Standard Six: Improper Forum	168
	SUMMARY	176
CHAPTER V:	CHANGES IN THE FIELD OF EDUCATION	180
	PART I: Professional Teaching Standards	181
	PART II: The Increasing Value and Impact of Student Achievement Assessments and Measurement.....	201
	PART III: The Development of Research Surrounding the Impact of Educator Performance on Student Learning.....	213
	PART IV: The Role, Cost and Status of Remedial Education	221
	SUMMARY	226
CHAPTER VI:	MAKING A CASE.....	229
	Overview.....	229
	FINDINGS	231
	ANALYSIS OF FINDINGS	233
	Duty of Care.....	234
	Breach of Duty of Care Resulting in Injury.....	242
	Legal & Proximate Causation.....	249
	Supplementary Analysis: Excessive Litigation & Fraudulent Claims	258

	Improper Forum	260
	Appropriateness of Court Intervention	261
	CONCLUSION	265
	LIMITATIONS	268
CHAPTER VII:	IMPLICATIONS FOR HIGHER EDUCATION	273
	Affirmative Action in Higher Education:	
	College Admissions	276
	Preparing the Public School Teacher and not Educating:	
	The language in the field is teacher preparation. ...	282
	Teaching as a Profession:	
	Professional Development Schools	
	& Practical Experience	285
	Subject Area Knowledge	287
	Knowing Your Students.....	288
	RECOMMENDATIONS	291
	Bibliography	299

List of Tables

Table 1	The Five Core Propositions	188
Table 2	Table of Cases / Statutes	297

CHAPTER I

INTRODUCTION

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures of education both demonstrate our recognition of the importance of education to our democratic society. . . . Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally . . . it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.¹

The quality of American public elementary and secondary education has been in question for some time. The Supreme Court recognized the importance of education in American society, e.g. Brown v. Board of Education, as does the constitutions of most states and the District of Columbia. Increasingly, the federal legislative and executive branches are taking greater interest in the education of today's youth as evident in the passage of the 2002 bipartisan education reform bill, "No Child Left Behind." The continued debate surrounding the quality of education offered in public schools across the nation continues to raise questions. Central to these are who does the public hold accountable for the education of today's children and what expectations do they have in its delivery?

Differences in student achievement remain significant in American public education. For more than 25 years, the National Assessment of Educational Progress (NAEP) has been reporting on the progress of American students of different ages and racial-ethnic groups in grades 4, 8 and 12 by providing a picture of how student

¹ Brown v. Board of Education, 374 U.S. 483, 493 (1954).

performance in reading, writing and mathematics has changed over time. White students outperformed their Black and Hispanic classmates in reading performance at each grade level in each year. For 4th and 8th grade Black students and 12th grade Hispanic students, the average reading score increased between 1994 and 1998; however, the gap in scores between Black and White students remained about the same between 1992 and 1998 for all grades.² White students were more likely to score at the Proficient level in writing performance and less likely to score below the Basic level in writing at all three grade levels when compared to ethnic minority groups.³ Finally, White students have consistently outperformed their Black and Hispanic classmates and maintained the size of the performance gap in scores between 1990 and 1996 despite an overall improvement in mathematics scores for Black and Hispanic students. In 1990, 1992, and 1996, the average mathematic scores for White students in grades 4, 8, and 12, were higher than those for Black and Hispanic students.⁴

In terms of having an actual opportunity to achieve minimum skill levels, particularly in mathematics, Black (20.2%) and Latino (19.8%) students are less likely to be placed in algebra in eighth grade than White (26.9%) students.⁵ As a result, by the conclusion of the eighth grade, nearly half of Black and Latino students score below the

² U.S. Department of Education National Center for Education Statistics [NCES]. "NAEP 1998 Reading: A Report Card for the Nation and the States." Washington, D.C.: Author, 1999.

³ NCES. "NAEP 1998 Writing: A Report Card for the Nation and the States." Washington, DC: Author, 1999.

⁴ NCES. "NAEP 1996 Mathematics: Report Card for the Nation and the States: Findings from the National Assessment of Educational Progress." Washington, DC: Author, 1997.

⁵ NCES. 1997. NAEP 1996 Summary Data Tables - Teacher Data Tables. In, Author, <http://nces.ed.gov/NAEP/table96>. (accessed 2007).

250 level in mathematics;⁶ approximately two-thirds of Black and Latino students fall below the 300 level by high school graduation.⁷

Similar to the patterns in mathematics, Black and Latino 17 year olds read at about the same level as White 13 year olds.⁸ While more than one-third of Black and Latino high school seniors can bring together facts from simple paragraphs, stories or news articles, they cannot make inferences or reach generalizations about main ideas or author's purposes in relatively lengthy passages.⁹

The public education system tends to serve those students with greater academic needs; yet, the system fails to provide the educational opportunities necessary to increase their success. Low-income students are only about half as likely to be placed in algebra as other students. For example, in Title I schools,¹⁰ 16.1% of eighth graders take algebra compared to 26.1% of students in more affluent schools.¹¹ In addition, according to the National Education Longitudinal Study of 1988 and 1992 follow-up, about two-thirds of children who are growing up in high income families are placed in the college prep track, compared with about one-quarter of children in low-income families.¹² If the United States is unsuccessful in educating the next generation it may impede the country's

⁶ NCES. "NAEP 1994 Trends in Academic Programs." Washington, DC: Author, 1994, p. 80.

⁷ Id.

⁸ NCES. 1997. NAEP 1996 Summary Data Tables - Teacher Data Tables. In, Author, <http://nces.ed.gov/NAEP/table96>. (accessed 2007).

⁹ NCES, supra note 2.

¹⁰ Title I schools are direct beneficiaries of the first section of the Elementary and Secondary Education Act. Title I refers to programs aimed at America's most disadvantaged students. Title I Part A provides assistance to improve the teaching and learning of children in high-poverty schools to enable those children to meet challenging State academic content and performance standards. Title I reaches about 12.5 million students enrolled in both public and private schools. <http://www.nclb.gov/start/glossary/index.html#24>

¹¹ NCES, supra note 8.

¹² NCES. "National Education Longitudinal Study of 1988; Second Follow-up, 1992 In: A Profile of the American High School Senior in 1992." Washington, DC: Author, 1995; Green, Patricia J. "A Profile of the American High School Senior in 1992. National Education Longitudinal Study of 1988. A Statistical Analysis Report." 321. Washington, DC, 1995.

ability to compete in the global market as well as suffer significant opportunity costs associated with human, economic and social capital.

Research and practice have proven that poor students and minority students are capable of academic success if the educators responsible for their schooling are competent in the subject area in which they teach¹³ and if the education provided to the students is culturally and contextually appropriate.¹⁴ Teacher quality may be one of the most important determinants of school quality. Evaluating teachers' pre-service learning and certification is one way to measure their potential effectiveness because the basis of the teacher's knowledge comes from their prior education, as signified by the degrees and certifications they earn. Educators, particularly secondary school teachers, must have a thorough grounding in the subjects they teach so they can guide their students effectively through the material and respond knowledgeably to questions and comments. Unfortunately, teachers at schools with high minority enrollment (50 percent or more) or a high percentage of students eligible for free or reduced-price lunch (60 percent or more) were less likely to have master's degrees than their counterparts at schools with a low minority enrollment (5 percent or less) or a low percentage of students eligible for free or reduced-price lunch (less than 15 percent).¹⁵

¹³ Goddard, Roger D., Scott R. Sweetland, and Wayne K. Hoy. "Academic Emphasis of Urban Elementary Schools and Student Achievement in Reading and Mathematics: A Multilevel Analysis." *Educational Administration Quarterly* 36, no. 5 (2000): 683-703; Nieto, Sonia. "Lessons from Students on Creating a Chance to Dream. *Harvard Educational Review* 64, no. 4 (1994): 392-427.

¹⁴ McCool, Audrey C. "Improving the Admission and Retention of Hispanic Students - a Dilemma for Higher Education." *College Student Journal* 8, no. 1 (1984): 28-36; Fine, Michelle. *Framing Dropouts: Notes on the Politics of the Urban Public High School*: State University of New York Press, 1991; Grossman, Herbert. *Educating Hispanic Students: Implications for Instruction, Classroom Management, Counseling and Assessment*. 2nd ed. Springfield, Il, 1995.

¹⁵ NCES. 2000. The Condition of Education 2000. In, U.S. Dept of Education, <http://nces.ed.gov/pubs2000/2000062.pdf>. (accessed 2007).

The proposed study identifies the continued failure of the public school system to close the achievement gap or bring low-income / minority students to basic minimum competency upon high school completion as instructional educational malpractice.

STATEMENT OF THE PROBLEM: EDUCATIONAL MALPRACTICE

Doctors use sound research before treating patients. Teachers and schools must apply just as much care.¹⁶

Educational malpractice has not yet been defined by a court, perhaps because to do so would imply legal recognition. For the purpose of this study, educational malpractice involves the inadequate instruction of public elementary and secondary school students that is measured by substandard scores on state sanctioned examinations yet the student is passing local assessments; moreover, the student shows no indication of being able to demonstrate the basic essential skills of grade level reading, writing and arithmetic.¹⁷ Instructional educational malpractice is being used in this study to differentiate from placement educational malpractice, which refers to students with learning disabilities who are not appropriately provided reasonable accommodations according to the Rehabilitation Act of 1973.¹⁸

What if a student spent his/her entire primary and secondary education in the same school system, and successfully graduated but that school system failed to assess his reading, writing and mathematic capabilities, assigned him to classes above his reading ability; allowed him to pass from grade to grade and advance course levels with the knowledge that he had not achieved either its completion or the necessary skills;

¹⁶ No Child Left Behind Act of 2001 Powerpoint presentation available online: <http://www.ed.gov/nclb/overview/intro/presentation/edlife-slide023.html>.

¹⁷ Glasgow, Rebecca R. "Notes & Comments: Can Students Sue When Schools Don't Make the Grade? The Washington Assessment of Student Learning and Educational Malpractice." *Washington Law Review* 76 (2001): 893-925; Standler, Ronald B. 2000. Educational Malpractice in the USA. In, <http://www.rbs2.com/edumal.htm>. (accessed 2008).

¹⁸ *Section 504 of the Rehabilitation Act of 1973*. 29 U.S.C.A. § 794.

assigned him to classes in which the instructors were unqualified; and allowed him to graduate from high school although he could not read above the eighth grade level. These are the facts of the Peter W. v. San Francisco Unified School District¹⁹ case which sets the context for educational malpractice as explained in this study.

Peter W. v. San Francisco Unified School District,²⁰ [hereinafter Peter W.], is the first reported case of what is now known as instructional educational malpractice – a phrase never once used in the case.²¹ The Peter W. case raised the question of “whether a person who claims to have been inadequately educated, while a student in a public school system, may state a cause of action in tort against the public authorities who operate and administer the system”.²² The suit was filed against the San Francisco Unified School District, its superintendent of schools, its governing board, and the individual board members on behalf of Peter W., an eighteen-year-old male who had recently graduated from the public high school.

Peter W. was a student in the San Francisco Public Schools for twelve years – his entire academic career.²³ Peter W. charged that during his twelve years of school the teachers and administrators “failed to provide him with adequate instruction, guidance, counseling and/or supervision in the basic academic skills such as reading and writing.”²⁴ Peter W. argued that as a student in the public schools he had a right to expect the school district to exercise its authority, responsibility and ability to provide an adequate instructional program.²⁵

¹⁹ Peter W. v. San Francisco Unified School District, 60 Cal. App. 3d 814, 131 Cal Rptr. 854 (1976).

²⁰ Id.

²¹ Donohue v. Copiague, 408 N.Y.S. 2d 584 (1977).

²² Peter W., 60 Cal. App. 3d at 817.

²³ Id.

²⁴ Id. at at 818.

²⁵ Id.

Peter W. claimed the school system had failed to use reasonable care in the discharge of its duties to provide him with adequate instruction in basic academic skills, and failed to exercise a degree of professional skill required of an “ordinary prudent” educator.²⁶ Peter W. listed five acts in which he claimed the school system “negligently and carelessly” failed in its attempts to provide him with an appropriate education: the school system failed to apprehend his reading disabilities; assigned him to classes in which he was not able to read the books and materials; allowed him to pass from grade to grade and course level to course level with knowledge that he had not achieved either its completion or the necessary skills; assigned him to classes in which the instructors were unqualified; and allowed him to graduate from high school although he could not read above the eighth grade level.²⁷

Peter W. also claimed that as a result of the wrongs he suffered in school, he suffered a loss of earning capacity by his limited ability to read and write. He testifies that he was unqualified for any employment other than labor that would require little or no ability to read or write.²⁸ Peter W. asked the court to award him special damages to cover the cost of compensatory tutoring allegedly required by reason of the named negligent act of the school system.²⁹

Peter W. based his claim for damages on a cause of action in negligence. He claimed the school was not protected from tort liability by the doctrine of governmental immunity.³⁰ Peter W. also claimed that under California law the school district was vicariously liable for any tort act or conduct of its employees which would give rise to a

²⁶ Id.
²⁷ Id.
²⁸ Id. at 819.
²⁹ Id.
³⁰ Id.

cause of action against them personally.³¹ The Court ruled that Peter W. did not prove either of these claims to its satisfaction. In the opinion of the Court, Peter W. did not meet the allegations requisite to a cause of action for negligence. The requisite allegations are as follows: facts showing a duty of care in the defendant, negligence constituting a breach of the duty, and injury to the plaintiff as a proximate result.³² The Court questioned whether there existed a “duty of care” owed to Peter W. by the school system. Peter W. claimed he was owed a duty of care by the fact that he was a student in the public schools charged with the task of properly educating the students it served. Peter W. claimed there exists a special relationship between students and teachers which supports his claim that the teachers had a “duty of care” to exercise reasonable competence in their teaching and evaluation of students.³³ The Court stated the case law in California only established that public school authorities have a duty to exercise reasonable care for the physical safety of the students under their supervision.³⁴ The Court did not state there was a “special” relationship between teacher and student, and that teachers were expected to have a duty to care about the quality of their teaching. But, in this case, the legalistic meaning of “duty of care” was not applicable to award damages against a public school system.³⁵

The opinion of the Court states it is the responsibility of the Court and only the Court to determine if duty of care exists between two parties where a negligence tort action is in question. The most important statement in this opinion puts a restricting condition on the concept of liability and duty of care, “. . . most important in the present case, is that judicial recognition of such duty in the defendant, with the consequence of

³¹ Id.
³² Id. at 820.
³³ Id. at 820.
³⁴ Id. at 821.
³⁵ Id.

his liability in negligence for its breach, is initially to be dictated or precluded by considerations of public policy”.³⁶ The Court cited two cases as the basis for the use of public policy considerations to preclude the action for tort liability: Raymond v. Paradise Unified School District, 218 Cal. App. 2d 1, 31 Cal. Rptr. 847 (1963) and Rowland v. Christian, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P. 2d 561 (1968). The Courts in these cases used similar language in defining various public policy considerations as exceptional factors, which might alone warrant nonliability for negligence.³⁷ In addition, the courts are hesitant to acknowledge the tort of instructional educational malpractice because of the historical lack of public or professional consensus about what works in the classroom, thus, no way to effectively evaluate the performance of primary and secondary education school teachers.

A New Landscape for Considering Educational Malpractice

Since Peter W. significant changes have taken place regarding American public elementary and secondary education. The standards movement has become a defining force in education reform. Public consensus has changed on the role of teachers in the classroom and research has demonstrated that something can be done in the classroom to increase student achievement. What has not changed is that the allegations of Peter W. continue to be voiced in lower socio-economic and minority school districts and poor and ethnic minorities continue to graduate from high school with inadequate comprehension of basic grade level reading, writing and mathematic skills.

³⁶ Id. at 822.

³⁷ Id.

Research Question(s)

The purpose of this study is to address the research question of how the development of standards of care and changes in public policy surrounding public education have changed since the 1976 Peter W. case potentially validating a negligence cause of action claiming instructional educational malpractice. The following research questions guided this study:

1. What legal duty of care, if any, do educators have toward students in providing competent instruction?
2. If there is a legal duty of care on the educator toward the student, (a) did the educator breach that duty to the extent that the student suffered actual harm / injury and (b) can the student demonstrate the existence of that injury?
3. Was the educator's conduct the legal and proximate cause of the injury suffered by the student?
4. If the student is able to present a valid claim of instructional educational malpractice, what would be the appropriate remedy?

THEORETICAL FRAMEWORK(S) OF THE STUDY

The legal theory of negligence under the law of torts will serve as the theoretical framework for examining standards of care and changes in public policy. The legal nature of the research question sets the context for the study and thus the concept of negligence provides the most appropriate framework because the study is examining the underlying legal relationship between educators and students. In addition, the legal theory of negligence provides the level of scrutiny necessary to identify the rule of law that governs activities in human society by identifying a specific person's rights and duties towards another.³⁸

³⁸ Carter, Lief H. *Reason in Law*. 2nd ed: Little, Brown and Company, 1984; Channels, Noreen L. *Social Science Methods in the Legal Process*: Rowman & Allanheld, 1985.

The law grants to each individual certain personal rights with regard to conduct that others must respect. The law also imposes corresponding duties and responsibilities on each individual to respect the rights of others. If one fails to respect these rights and damages another, a tort has been committed and the offending party may be held liable.³⁹ Broadly speaking, a tort is a civil wrong, other than a breach of contract, for which the court will provide a remedy in the form of an action for damages.⁴⁰ Liability must be based on conduct that is socially unreasonable. The tort-feasor is usually held liable for acting with an intention that the law treats as unjustified, or acting in a way that departs from a reasonable standard of care.⁴¹ A person is subject to liability if the character of the conduct makes him liable for another's injuries only if two additional conditions exist. First, that conduct must be a recognized legal cause of liability. Second, there must be no defense applicable to the claim made by the injured party;⁴² for example, government officials from foreign countries (diplomats) who commit torts are afforded exemption from normal procedures of the American justice system, i.e., diplomatic immunity.⁴³ Thus diplomatic personnel may be subject to liability, but the liability may never accrue.

Within the law of torts, the cause of action that was used as the basis of this study was that of negligence. The concept of negligence presupposes some uniform standard of conduct.⁴⁴ Negligence is a departure from a standard of conduct demanded by the

³⁹ Alexander, Kern, and M. David Alexander. *American Public School Law*. 6th ed: Cengage Learning, 2004.

⁴⁰ Prosser, William L., W. P. Keeton, D. B. Dobbs, R.E. Keeton, and D.G. Owen, eds. *Prosser & Keeton on Torts*. 5th ed. St. Paul, MN: West Group, 1984.

⁴¹ Id.

⁴² "Restatement (Second) of Torts." 1965, § 5 at 9-10.

⁴³ As defined by the second college edition of The American Heritage Dictionary, diplomatic immunity is "exemption from ordinary processes of law afforded to diplomatic personnel in a foreign country. Pg.399.

⁴⁴ Prosser, supra note 40, at 173

community for the protection of others against unreasonable risk.⁴⁵ This standard is generally defined as that of the reasonable, ordinary, and prudent person under the same or similar circumstances.⁴⁶ Although the reasonable man is a fictitious person, the chief advantage of this standard is that it enables the triers of fact to look to a community standard rather than an individual one.⁴⁷ In legal phraseology, negligence is more nearly synonymous with carelessness than with any other word and signifies primarily the want of care, caution, attention, skill or discretion in the performance of an act.⁴⁸

Traditionally, courts have refused to recognize instructional ‘educational malpractice’ as a legitimate negligence cause of action. A finding of negligence turns upon four elements: (1) duty to care, (2) breach of that duty, (3) proximate and direct causation, and (4) actual injury.

A duty is an obligation to conform to a particular standard of conduct toward another.⁴⁹ The precedent followed by today’s courts is that there can be no recovery in negligence unless there is a legally imposed duty of care upon the defendant.⁵⁰ For an educator to be held liable in a suit alleging negligent teaching, the plaintiff, i.e., student, would first have to successfully prove that the educator had a legal duty to provide competent instruction.⁵¹ The essential question is whether the student’s interests are

⁴⁵ “Restatement (Second) of Torts.” 1965, § 283 at 12.

⁴⁶ Prosser, *supra* note 40, at 174-175.

⁴⁷ “Restatement (Second) of Torts.” 1965, § 283 at 13.

⁴⁸ Sherman, Thomas G., and Amasa A. Redfield. *A Treatise on the Law of Negligence*. 2nd ed: New York: Baker, Voorhis & Company, 1870, § 2 at 4.

⁴⁹ Prosser, *supra* note 40, at 356.

⁵⁰ *Palsgraf v. Long Island Railroad Company* 248 N.Y. 339, 162 N.E. 99, 1928).

⁵¹ Tracy, Destin Shann. "Educational Negligence: A Students' Cause of Action for Incompetent Academic Instruction." *North Carolina Law Review* 58 (1980): 561-97; Woods, Nancy L. "Educational Malfeasance: A New Cause of Action for Failure to Educate?" *Tulsa Law Journal* 14 (1978): 383-409; Blackburn, Joan. "Educational Malpractice: When Can Johnny Sue?" *Fordham Urban Law Journal* 7 (1978): 117-44; Elson, John. "A Common Law Remedy for the Harms Caused by Incompetent or Careless Teaching." *Northwestern University Law Review* 73, no. 4 (1978): 641-771.

entitled to legal protection against the educator's conduct.⁵² The proposed study presupposes that students' interests are so entitled.

The second major element of a cause of action based on negligence is a failure on the defendant's part to conform to the standard required: a breach of the duty.⁵³ The standard of conduct which the community demands must be an external and objective one, applied equally to all, but sufficiently flexible to allow for the risk to be apparent to the actor within the circumstances under which he must act.⁵⁴ In an attempt to develop a standard the courts have created the "reasonable man of ordinary prudence" who as Prosser notes "is fictitious and has never existed on land or sea." The qualities and attributes of the reasonable person differ in suits dealing with ordinary negligence and those dealing with professional negligence.

Professionals are required to exercise both reasonable care in what they do and to possess a standard minimum of special knowledge and ability.⁵⁵ Most legal scholars and educational commentators support holding educators to the higher professional standard because teachers hold themselves out as having special knowledge that required specific training to acquire.⁵⁶ Some argue, however, that the abstract quality of education, the lack of consensus of the primary goals of education, and conflicting theories of learning make the establishment of a workable standard difficult if not impossible.⁵⁷

⁵²

Id.

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Prosser, supra note 40, at 164.

⁵⁴

Prosser, supra note 40, at 173-174.

⁵⁵

Prosser, supra note 40, at 185.

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"Comment: Educational Malpractice." University of Pennsylvania Law Review 124 (1976): 755-805, 804; Loscalzo, Theresa E. "Liability for Malpractice in Education." Journal of Law & Education 14, no. 4 (1985): 595-607; Elson, supra note 51, at 700; Tracy, supra note 51, at 573.

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Funston, Richard. "Educational Malpractice: A Cause of Action in Search of a Theory." San Diego Law Review 18 (1981): 743, 780; Tracy, supra note 51, at 575; Calavenna, Karen H. "Educational Malpractice." University of Detroit Law Review 64 (1987): 717-832, 727.

The third major element necessary to a cause of action in negligence is the establishment of a connection between the conduct of the defendant and the injury to the plaintiff.⁵⁸ Causation is based on several legal concepts, but relevant legal concepts discussed are “causation in fact” and “proximate cause”.⁵⁹ In order that a negligent actor shall be liable for another’s harm, it is necessary not only that the actor’s conduct be negligent toward the other, but also that the negligence of the actor be a legal cause of the other’s harm.⁶⁰ Causation in fact is based on a search for what factually caused the injury.

To establish proximate cause this question must be answered: Was the defendant under a duty to protect the plaintiff against the event that did in fact occur?⁶¹ This returns to the issue of whether there exists some relationship between the defendant [educator] and plaintiff [student] such that there is a legally recognized obligation of conduct for the plaintiff’s [student’s] benefit.⁶²

The final element necessary for a cause of action based in the theory of negligence is that of actual loss or damage to the interests of another.⁶³ A court will not rule on a controversy unless some judicially manageable remedy can compensate the plaintiff.⁶⁴ Terms that are used interchangeably with loss and damage are “injury” and “harm”. As in the case of causation, legal scholars and the courts are divided in their assessment of how easy or difficult the actual definition and measurement of educational injuries might be.

⁵⁸ Prosser, *supra* note 40.

⁵⁹ Prosser, *supra* note 40.

⁶⁰ “Restatement (Second) of Torts.” 1965, § 430 at 426.

⁶¹ Alexander, *supra* note 39, at 689; “Restatement (Second) of Torts.” 1965, § 430 at 426. Stated differently it has been noted “To establish proximate cause there must first be a duty or obligation on the part of the actor to maintain in a *reasonable standard of conduct*.” (emphasis added).

⁶² Prosser, *supra* note 40.

⁶³ Prosser, *supra* note 40; See generally 74 AM. JUR. 2D, *Torts* § 7 at 625-626.

⁶⁴ “Restatement (Second) of Torts.” 1965, § 903 (defining compensatory damages).

The first two elements, duty and breach, tend to be the most influential factors because the plaintiff must first show that the defendant had a legal duty to use care, and second, the defendant breached such duty and created an unreasonable risk of harm. In instructional educational malpractice, the courts have been unable to resolve the first element of negligence or place a legal duty of care on educators [teachers, schools, school districts and / or superintendents] towards students; however, the current landscape for evaluating the Peter W. fact pattern has changed. At the federal and state level as well as within the teaching profession, there have been significant policy changes over the past 32 years that warrant reconsideration of the instructional educational malpractice cause of action.

SIGNIFICANCE OF THE STUDY

Legal researchers cannot predict with certainty how a court will decide a dispute. Legal reasoning can do no more than identify some of the possible results, suggest the arguments that may lead a court to reach each of these possible results, and perhaps provide some indication of the relative probability that each possible result will occur. With this in mind, a need prevails for attorneys, educators and consumers to understand clearly the results and future ramifications of the educational malpractice area of litigation. Of utmost significance is that in our current climate of affirmative action there is a real threat to college access and ultimately employment opportunity for ill-prepared students, particularly underrepresented minority students, graduating from negligent high schools. In Gratz et al. v. Bollinger et al., the Supreme Court found that “the manner in which the University [of Michigan] considers the race of applicants in its undergraduate admissions policies violates [the Equal Protection Clause of the Fourteenth Amendment,

Title VI of the Civil Rights Act of 1964].”⁶⁵ If higher education is going to turn to more traditional academic measures as the primary factors for consideration it means that how prepared students are throughout the educational process becomes even more significant. Particularly for minority populations who demonstrate the academic gaps in achievement and are in schools that are under-funded with teachers who are less prepared.

Although no cause of action has been legally recognized to date, attorneys must be able to give preventative legal advisement to educational clients in order to avoid a successful suit. Also, an awareness of the present judicial standards for rejection of this cause of action and an understanding of arguments that could potentially overcome the existing standards would enable school board attorneys to prepare defenses against similarly situated plaintiffs as Peter W.

School boards may favorably react to the results of this study by re-evaluating their current standards, procedures and practices. Their instruction of preventative measures will both strengthen the present instructional system and clarify for teachers proper standards and procedures to which they must reasonably adhere, thus enhancing optimal teaching and providing freedom from negligence liability. Such precautions could save needless dollars spent on costly litigation and excessive liability insurance premiums.

As a result of becoming aware of legally recognized teaching standards, educators and the institutions of higher learning that prepare them to educate could respond with incorporating the improved methods and procedures for teaching students. It may also cause some prospective teachers to reassess their reasons for entering a profession that may expose them to scrutiny under a legal duty to provide adequate education.

⁶⁵ *Gratz V. Bollinger*, 539 U.S. 244 (2003).

If educators and attorneys react positively to this study, their actions may be reflected by an improved national literacy rate, which in turn may increase productivity for all public consumers.

DEFINITION OF LEGAL TERMS

The following legal terms are defined hereinafter to clarify the meaning and scope of key words and phrases that are used in the study. The definitions have been extracted from Black's Law Dictionary.⁶⁶

Harm – The existence of loss or detriment in fact of any kind to a person resulting from any cause (p. 718).

Injury – Any wrong or damage done to another, either in his person, rights, reputation, or property (p. 785/6).

Legal duty – That which the law requires to be done or forborne to a determinate person or the public at large, correlative to a vested and coextensive right in such person or the public, and the breach of which constitutes negligence. An obligation recognized by law that requires an actor to conform to a certain standard of conduct for the protection of others against unreasonable risk (p. 893).

Liability – condition which creates a duty to perform an act immediately or in the future; every kind of legal obligation, responsibility, or duty; the state of one who is bound in law and justice to do something which may be enforced by action (p. 914).

Malpractice – Professional misconduct or unreasonable lack of skill. Failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss or damage to the recipient of those services or to those entitled to rely upon them (p. 959).

Misfeasance – The improper performance of some act which a person may lawfully do (p. 1000).

⁶⁶ Black, Henry Campbell. *Black's Law Dictionary*. 6th ed: West Publishing Co, 1990.

Nonfeasance – Nonperformance of some act which person is obligated or has responsibility to perform (p. 1054).

Respondeat superior – A Principle is liable for the wrongful acts of his agent, i.e., a school district/principal is responsible for the wrongful acts of the teacher (p. 1311/2).

Sovereign immunity – A judicial doctrine which precludes bringing suit against the government without its consent; it bars holding the government or its political subdivisions liable for the torts of its officers or agents unless such immunity is expressly waived by statute or by necessary inference from legislative enactment (p. 1396).

Standard of care – That degree of care which a reasonably prudent person should exercise in same or similar circumstances; in medical, legal, etc., malpractice cases a standard of care is applied to measure the competence of the professional. The traditional standard for doctors is that s/he exercise the “average degree of skill, care and diligence exercised by members of the same profession, practicing in the same or a similar locality in light of the present state of medical and surgical science” (p. 1404/5).

Stare decisis – To abide by, or adhere to, decided cases; doctrine is one of policy, grounded on theory that security and certainty require that accepted and established legal principle, under which rights may accrue, be recognized and followed, though later found to be not legally sound, but whether previous holding of court shall be adhered to, modified, or overruled is within court’s discretion under circumstances of case before it. The doctrine is not ordinarily departed from where decision is of long-standing and rights have been acquired under it, unless considerations of public policy demand it (p. 1406).

Tort – a violation of a duty imposed by general law or otherwise upon all persons occupying the relation to each other which is involved in a given transaction. There must

always be a violation of some duty owing to plaintiff, and generally such duty must arise by operation of law and not by mere agreement of the parties (p. 1489).

CHAPTER II

METHODOLOGY

Chapter II describes the methodology utilized to address the research question of how the development of standards of care in public education instruction and changes in public policy surrounding public education substantiate a legally recognizable duty to care on educators towards students.

The legal method is an analytical research style of qualitative inquiry that requires rigorous document research and logical inductive, deductive, and analogous analysis.⁶⁷ Similar to other qualitative methodologies, particularly case study methodology, the legal research method sheds light on a phenomenon, provides an in-depth assessment of a case and studies a phenomenon in its natural context.⁶⁸ In this study, the phenomenon is instructional educational malpractice and the case being assessed is the underlying legal relationship between educators and students in public primary and secondary educational institutions. As such, the legal method is being used to not only collect, synthesize and analyze legal data regarding which factors courts consider in establishing a legal duty to care but, in effect, address the broad phenomenon of instructional educational malpractice; and, while no fieldwork is being done as typical of case study

⁶⁷ McMillian, James H., and Sally Shumacher. *Research in Education: A Conceptual Introduction*. 2nd ed, 1989; Carter, Lief H. *Reason in Law*. 2nd ed: Little, Brown and Company, 1984; Channels, Noreen L. *Social Science Methods in the Legal Process*: Rowman & Allanheld, 1985.

⁶⁸ Yin, Robert K. *Case Study Research: Design and Methods*. Rev. ed. Newbury Park, CA: Sage, 1989; Sherman, Robert R., and Rodman B. Webb. "Qualitative Research in Education: A Focus." In *Qualitative Research in Education: Focus and Methods*, edited by R. R. Sherman and R. B. Webb. London: Routledge Falmer, 2001.

methodology,⁶⁹ the goal of the legal method is to shed light on the phenomenon of instructional educational malpractice and educator-student legal relationships catering to the professional methodological understanding of members of the judiciary who have the final word on legal relationships and instructional educational malpractice as a new area of tort law. The Peter W. case examined in Chapter I is used as a point of reference or a particular instance of the phenomenon of instructional educational malpractice and the problem of establishing a legal duty to care on educators towards students.

The legal method is the research methodology being used to conduct this study because of the legal nature of the research questions. First, the judiciary is the only branch of government that can legitimate a legal relationship between persons. Second, the broad question of instructional educational malpractice and its viability as a legitimate cause of action is a matter for courts to determine under the law of tort as with every other area of malpractice law; and finally, the collection, synthesis and analysis of case law and statutory law is best accomplished through a legal lens that is not readily available in other forms of qualitative research.

Legal methodology is an established system of qualitative research traditionally practiced by members of the Bar. Canon 6 of the American Bar Association's Code of Professional Responsibility underscores the importance of the legal methodology by requiring understanding of both the principles of law and how to find the law.⁷⁰ Legal scholars vary in their description of legal research methodology but all agree that

⁶⁹ Id.

⁷⁰ Canon 6 of the Code of Professional Responsibility states that lawyers are to know "these plain and elementary principles of law which are commonly known by well-informed attorneys, and to discover the additional rules which, although not commonly known, may readily be found by standard research techniques." American Bar Association. ABA Model Code of Professional Responsibility. In, <http://www.abanet.org/cpr/mrpc/mcpr.pdf>. (accessed 2008).

regardless of the number of steps outlined or the mechanics of the methodology, the substantive elements of research in the legal discipline are indisputable.⁷¹ Thus, while not every legal researcher would be equally cognizant of using all the techniques described below in exact detail, the legal research methodology as represented in this chapter depicts the fundamental non-linear nature of the legal method in a step-by-step process.

Legal methodology is the systematic process of identifying the rule of law that governs activities in human society by identifying a specific person's rights and duties towards another.⁷² The methodology lends itself to a step-by-step approach that involves researching the available facts; identifying the applicable sources of law; analyzing these sources of law; synthesizing the applicable rules of law; and applying the rules to the facts.⁷³

Step 1 of Legal Method: Factual Research

A recurring step in legal methodology is to research the facts to which the law must be applied. Factual research as well as legal research is a data collection method reminiscent of traditional qualitative educational research methodology. There is constant interplay between factual research and the other steps of legal methodology because basic facts only provide the researcher with an opportunity to identify applicable general sources of law. These general sources, in turn, reveal additional facts needed to determine the applicability of the more specific rules defining, applying, or limiting the general rule. As a result, the researcher alternates between legal and factual research until

⁷¹ See, e.g., Cohen, Morris L., Robert C. Berring, and Kent C. Olson. *Finding the Law*, 1989; Hudgins, H. C. Jr., and Richard S. Vacca. *Law and Education: Contemporary Issues and Court Decisions*. 2nd ed, 1985; McMillian, James H., and Sally Shumacher. *Research in Education: A Conceptual Introduction*. 2nd ed, 1989; Wren, Christopher G., and Jill Robinson Wren. *The Legal Research Manual: A Game Plan for Legal Research and Analysis*. 2nd ed: Legal Education Publishing, 1999.

⁷² Carter, *supra* note 67; Channels, *supra* note 67.

⁷³ Cohen, *supra* note 71.

all of the plausibly applicable rules have been identified. Initial legal and factual research is illustrated in Chapters 1 and 3 in the description and analysis of the early educational malpractice cases.

Factual research was conducted by investigating law review articles and other scholarly works. The investigation also included court opinions, federal and state statutes and education agency regulations particularly because of their legally binding nature whereas law review articles and other scholarly works are merely descriptive and/or analytical.

Primary and secondary sources of authority including printed opinions of instructional educational malpractice cases, regulations promulgated by the United States Department of Education and state department of education statutes as well as policies / guidelines related to the development of standards of care and changes in public policy regarding public primary and secondary education were located in a number of ways.⁷⁴ Computer searches of databases such as FindLaw, LexisNexis Academic Universe and the United States Department of Education's web site were conducted using descriptive word and topic search strategies. Other legal and nonlegal periodical sources will be searched through databases available on ERIC, Academic Search (Ebsco) and other academic databases available on the University of Maryland University Library's server. The American Law Reports (A.L.R.) series and legal encyclopedias such as Corpus Juris Secundum and American Jurisprudence will be consulted for additional commentary and annotations on selected decisions and topics.

⁷⁴ These sources with very few exceptions are legally binding rather than merely descriptive and analytical. See, e.g., Cohen, Morris L., Robert C. Berring, and Kent C. Olson. *Finding the Law*, 1989.

Step 2 of Legal Method: Identifying Applicable Law

The next step of the legal method is a form of data collection and analysis intrinsic to legal methodology and involves identifying the law that is potentially applicable to the study.⁷⁵ Step 2 of legal methodology is a daunting task for the legal researcher because the American judicial system is composed of a range of case law and statutory law that could be relevant to the study; thus, in addition to ascertaining whether the appropriate law to be applied is case law and/or statutory law, the legal researcher must then determine if the appropriate law is material to the issue at hand.

Case Law

A judicial body for the purpose of resolving a particular question(s) and setting precedent for potential, analogous questions produces case law, otherwise known as common law. Found in the written opinion of court decisions, case law may be changed with adequate rationalization by a member of the judiciary either overruling a case or manipulating the rule of law set out in a case. Case law cannot be encapsulated by a distinct, authoritative and uncontentious formulation; thus, the application of case law is considerably more flexible than the application of statutory law.

Statutory Law

The term statutory law, technically referred to as enacted law, incorporates constitutions, statutes, treaties, executive orders, and administrative regulations. Statutory law is usually put into operation by a legislature or other designated body and has power over all individuals subject to the control of the government. Unlike case law, statutory law is conveyed in precise language that is set until adapted by the governing body that

⁷⁵ Cohen, supra note 71.

executed the law; thus, while statutory text cannot be manipulated it is subject to judicial interpretation.

The structure of the American legal system, however, reveals three ways to identify a law immaterial to a given situation. The legal researcher eliminates inapplicable law by applying these three criteria: (1) lack of capacity, (2) irrelevant law or (3) principles of federal constitutional law.

Eliminating Inapplicable Law: Lack of Capacity

First, no single government has the authority to preside over all persons or dealings. For that reason, an early question to be addressed is which government law – federal or state -- applies to the question at hand.⁷⁶ Federal and state laws are generally not mutually exclusive. Except in circumstances where federal law and state law diverge – in which case, federal law controls – both federal and state law apply. The exception, known as the preemption doctrine, is discussed later under principles of federal constitutional law.

Eliminating Inapplicable Law: Irrelevance

Once the issue of whether federal and/or state government law addresses the question was acknowledged, the researcher then identifies those statutes or cases that do not deal with the research topic in attempts to eliminate inapplicable law. Recognizing rules of law pertinent to a specific situation means being aware of those rules of law with factual predicates that aptly illustrate the situation.⁷⁷ “If A, then B,” is the general

⁷⁶ If state law applies, further analysis must determine *which* state law applies. For example, suppose that Adam, who is standing in state A, commits a wrongful act against Zach, who is standing in state B. Zach now wishes to sue Adam for the wrongful act. In a case involving negligence, some courts apply the law of the state where the wrongful act occurred – in this case state A. Other courts apply the law of the state where the injury occurred – in this case state B.

⁷⁷ See, e.g., Wren, Christopher G., and Jill Robinson Wren. *The Legal Research Manual: A Game Plan for Legal Research and Analysis*. 2nd ed: Legal Education Publishing, 1999. Every law ever decided

structure of rules of law. In other words, if certain facts transpire (factual predicate) then a certain result comes to pass (legal consequence). If essential elements of the law are not met, then the law will not apply. Determining whether or not the law is applicable is more likely than not an involved process and is the focus of discussion in the last step of the legal methodology. However, at this stage – step 2 – of the legal method, the legal researcher is focused more on the connection between the factual predicate and elements of plausibly applicable rules of law.

Laws generate privileges or responsibilities in furtherance of public policy; thus, Legislative intention defines the underlying policy of statutory law and judicial interpretation and justification conveys the underlying policy of case law. The nature of the American legal system is that one party is a proponent of a policy and the other adversary is an opponent of a policy. Policy can neither favor nor oppose the creation or restriction of rights and duties in every situation because the right or duty would either become absolute with no exceptions or limitations or the right or duty would disappear entirely; thus the importance of the elements of the rule of law.

The elements of the rule of law purposely outline the circumstances that will allow privileges and/or responsibilities of an underlying policy to exist; however, to promote fairness and efficiency,⁷⁸ rules of law are more often than not expressed in very broad language. As such, there are times when the elements of the rule may look as if they do not apply. In order to further the underlying policy, particularly for case law, the court will resolve the situation by adapting the rule of law to conform to the underlying

or promulgated does not need to be researched. The legal profession has various research techniques that weed out law irrelevant to the issue at hand.

⁷⁸ Not only would it be inefficient to adopt narrow rules to address the nuances of every situation but legislatures and courts would run the risk that similar situations might not be treated in a fair manner.

policy, look to precedent and apply the rule of law by analogy, or generate another rule of law to regulate the situation. When all is said and done, the role of the legal researcher is to identify statutory and case rules of law that could conceivably illustrate the pertinent facts of the study.

Eliminating Inapplicable Law: Principles of Federal Constitutional Law

Principles of federal constitutional law also assist in identifying inapplicable rules of law. According to the Supremacy Clause of the United States Constitution, the federal constitution trumps all other laws be it federal or state.⁷⁹ Along the same lines, state constitutional law trumps other state law. As briefly mentioned earlier in the chapter, the preemption doctrine expressly identifies federal law as controlling in instances where state law clearly conflicts with federal law. The legislative supremacy doctrine mandates that courts apply available statutory law over case law; however, checks and balances – otherwise identified as the doctrine of judicial review – allows courts to interpret statutory law and apply it in ways not necessarily intended by the executing legislative body.⁸⁰ Courts decide the constitutionality of all federal and state laws. The doctrine of judicial review thus permits a court to refuse to apply a statute if judicial interpretation renders the statute unconstitutional.

Step 3 of Legal Method: Analyzing Sources of Law

The third step of legal methodology is to analyze the statutes and cases ascertained in step two in order to identify the laws and policies applicable to the study.⁸¹

⁷⁹ U.S. const. art. vi, § 2.

⁸⁰ From time to time a legislative body ratifies statutory law in order to invalidate a prior court decision believed to apply an earlier version of the statute incorrectly.

⁸¹ Cohen, supra note 71.

While both case law and statutory law analysis are crucial elements of most legal research, statutory analysis is of utmost importance to this study because

“the most abundant source of law affecting public schools is found in the statutes enacted by state legislatures, which have vast power in [the area of public education]. The courts consistently say that the power of the state legislatures over the public school systems of the respective states is plenary. This, of course, is true only in a relative sense. ... [a] state legislature is always subject to the limitations of federal law and of the state constitution in its actions as they apply to education,”⁸²

Case Law Analysis

Case law analysis is a straightforward process that lays out to the legal researcher the facts of the case, the procedural history, the question(s) presented for adjudication, the rule of law, and the court’s rationale.⁸³

Court decisions usually begin with a description of the facts, which is a sequence of events that the court has considered in making its ruling. The legal researcher determines which facts are essential by first recognizing the law and policies the judge used to resolve the dispute.

The procedural history is a description of the events that occurred over the course of litigation and reveals lower court decisions to which parties to the suit are appealing. The significance of the lower court’s decision is that it establishes the standard of review appellate level courts must apply in making its decision and, in effect, the consequences of the decision future cases.

⁸² Reutter, E. Edmund, Jr. *The Law of Public Education*. 3rd ed: The Foundation Press, Inc., 1985, pg. 7.

⁸³ Application of the law to the significant facts of the case is also a component of case law analysis but I will hold off on discussing the application of the law to the facts under case law analysis in this early step of the legal methodology because a more in-depth discussion of applying the rule of law to the facts will take place in Step 5 of the legal methodology.

In addition, the judge’s disposition is also a component of case law analysis but will not be addressed because although the disposition is critical to the parties of the case, it is of relatively little interest to a researcher analyzing the case for purposes of identifying applicable law.

Next, case law analysis involves the researcher identifying the question(s) presented for decision. The question(s) presented asks whether some decision made in the trial or lower appellate court was erroneous. The remainder of the judicial opinion is devoted to answering the question(s) by first stating the rules of law.

Rules of law govern the reported case as well as similar cases. Making out the rule of law in a judicial opinion can be an intricate task because the court does not always articulate the rule of law in an obvious, succinct manner. The job of the legal researcher, therefore, is to identify the elements of the rule of law that are distributed all over the judicial opinion and construct a rule of law that illustrates the decision reached by the court while at the same time beneficial, if possible, to his/her position. Applying the rule of law to the factual predicates will be discussed in step 5 of the legal methodology utilized for the current study.

Case law analysis concludes with the court's holding. The holding is the decision regarding the questions presented to the court for resolution. Similar to the problems (and solutions) in identifying the rules of law, the holding, if not clearly stated with a phrase such as "we hold," can be just as difficult to piece together.

Statutory Analysis

Unlike case law analysis, statutory analysis for the purpose of identifying the applicable rule of law is simple because the statute itself is the rule of law. However, identifying the policies underlying the statute can prove to be difficult. The policies underlying a statute are those that the legislature sought to promote when it enacted the law. Legal methodology allows the researcher to argue that a particular policy underlies a statute, even though there is no external evidence that that policy was consciously in the

minds of those involved in the enactment of the statute, in three ways⁸⁴: the plain meaning rule, the purpose approach, and the Golden Rule.

Plain Meaning Rule: Utilizing the plain meaning rule, the letter of the law, that is, the words chosen by the legislature, is followed verbatim. When the statute's meaning is plain, for example, when statutory terminology is explicitly defined within the statute, other methods of interpretation are unnecessary. Interpreting statutes utilizing the plain meaning rule requires that the exact text of the statute first be read carefully to determine what conduct is prohibited, permitted or required.⁸⁵ Overall structure of sections are then analyzed for use of specific words such as "or" indicating only one section need be followed, "and" indicating all connected parts must be fulfilled, "may" indicating permission, and "shall" indicating requirement that all sections must be followed.⁸⁶

Purpose Approach: The legal researcher's task utilizing the purpose approach is to ascertain and then give meaning to the legislature's grounds for enacting the statute, thus, respecting legislative intent. In order to determine what the legislators intend the statute to mean and what the policy is meant to pursue, judges (courts), lawyers and researchers use legislative intent when possible. Legislative intent can be inferred from a historical context when looking at the *events and conditions* that might have *motivated* the legislature to act. Intent can also be found through interpretations of the statute by administrative agencies charged with enforcing the statute; interpretations of the statute by scholars who are recognized experts in the field;⁸⁷ and the statute's legislative history,

⁸⁴ Another means of identifying the underlying policies of a statute is to find prior case law applying the statute. In such instances, the policy behind the statute is sometimes discussed. For purposes of this study, however, the statute was recently enacted and so such case law is available.

⁸⁵ Wren, supra note 71.

⁸⁶ Id.

⁸⁷ Mere publication of a law review article – without more – does not demonstrate recognized expertise.

which consists of the documents and records created by various parts of the legislature during the course of enactment.

Golden Rule: The third approach to statutory interpretation is the Golden Rule.⁸⁸

The Golden Rule is actually a meshing of the plain meaning rule and the purpose approach because the approach directs the researcher to disregard the literal wording of the statute when it generates an incongruous or irrational result, calls for an impracticable conclusion, or yields an unconstitutional result.

Step 4 of Legal Method: Synthesizing Applicable Law

The fourth step of legal methodology is to structure the applicable law and policy into a framework that can be applied to the facts.⁸⁹ Two methods of legal analysis standard to the legal profession are incorporated to conduct the synthesis: induction and analogy.⁹⁰ Legal researchers utilize the methods of analysis independently or simultaneously depending on the presented situation.

Induction and analogy each have a technical definition logicians use to define and defend the processes at length. For purposes of the current research study and to simply, yet adequately, illustrate the manner in which legal researchers synthesize the rules of law, this study defined the methods of reasoning as so: Induction is the process of reasoning from specific cases to a general rule. Analogy is reasoning from one specific

⁸⁸ See, Hamilton v. Rathbone, 175 U.S. 414, 420-421 (1899). “The general rule is perfectly well settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it. . . . The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be referred to solve but not to create an ambiguity.”

⁸⁹ Cohen, supra note 71.

⁹⁰ There are three different logical processes standard to legal methodology that are actually being used; the third being the process of deduction. Deduction, while a method of legal analysis used for this study is describe in Step 5 of the legal methodology – applying the law to the facts.

case to another specific case. Processes of induction and analogy were both used throughout the study with each process highlighted at various points of the study.

Induction and analogy were primarily used in the review of the literature. Chapter II illustrated how the courts over the past thirty years declined to impose a legally recognized duty to teach; in effect, rejecting claims of instructional educational malpractice. The researcher, using inductive reasoning, constructed the rules of law underlying policies considerations from the specific instructional educational malpractice cases and synthesized the holdings of the judicial opinions to develop a general rule of law outlining how courts determined the legal duties of educators towards students.

The process of analogy – the comparison of judicial decisions in order to identify if a person had some legal right or duty as a result of a similar set of circumstances illustrated in precedent cases (prior judicial opinions) – was an ever present necessity in synthesizing the rules of law and underlying policy. In order to reason from specific case to general rule – the process of induction – the legal researcher first had to identify which specific instructional educational malpractice cases were similar enough to construct a rule of law that included the elements of the essential facts of each case without being overbroad. For example, if research showed that the facts of the current case were analogous to prior cases then the conclusion is that precedent would be followed.

Step 5 of Legal Method: Applying the Rule(s) Law

The final step of legal methodology is to apply the synthesized rule of law and underlying policy to the facts to determine the rights and duties of the people involved in the situation.⁹¹ Application of the law to the facts can be conducted by analogy or

⁹¹ Cohen, *supra* note 71.

deduction; however the application of policies to a situation involves the use of methods quite different from those used to apply rules.

Legal analysis by deduction is the dominant process utilized in the study to substantiate a legally recognized duty to teach on educators and entails reasoning from a general rule to a specific case. Reasoning by deduction consists of a major premise, a minor premise, and a conclusion. The major premise posits a statement that is true of a class of objects – a rule of law, the minor premise characterizes a particular object as belonging to the class – the facts of the given situation, and the conclusion asserts that the statement is therefore true of the particular object – whether or not the right or duty described in the rule of law has been demonstrated to exist under the facts of the given situation. For example, the rule of law states that educators will not be held liable for negligent teaching until public policy and [standards of care] educational accountability factors are adequately addressed. The current state of public education show that the public policy landscape has since changed along with the development of educational accountability measures; thus, one could deduce that in our current context these are reasonable means to hold educators liable.

STANDARDS OF ADEQUACY FOR LEGAL RESEARCH

Criteria for judging adequacy of a legal research study include a clearly defined statement of the legal issue, scope and limitations of the problem explained, logical organization and analysis of data sources, careful selection of appropriate sources, unbiased treatment of the topic, and logical relationship of conclusions to the analysis.⁹²

⁹² McMillian, James H., and Sally Shumacher. *Research in Education: A Conceptual Introduction*. 2nd ed, 1989.

Criticism of sources in legal research is a primary concern.⁹³ According to McMillian and Shumacher external criticism determines whether the documents used are authentic.⁹⁴ Authenticity of case law was determined by using the commonly recognized federal and regional case reporting systems as primary source. As noted previously, primary sources for statutes were state official and annotated codes. Established legal citation standards will be used in documentation of sources.⁹⁵

Internal criticism determines the accuracy and trustworthiness of the statements in the source.⁹⁶ When using secondary sources such as law reviews and other scholarly writings, accuracy and trustworthiness will be assessed based on the scholars' use of credible sources and the degree of bias presented. Conformation of stated ideas is sought by using multiple sources. Since a witness's chronological and geographical proximity to the events presented in the reported cases cannot be confirmed, accuracy and trustworthiness of statements are assumed. As stated previously, annotated codes and codes designated as official will be used as data sources as much as possible. Any conclusions drawn from statutory compilations not designated as official will be assumed to be tentative at best.

⁹³ Id. at 446-450.

⁹⁴ Id. at 446.

⁹⁵ *The Bluebook: A Uniform System of Citation*. 18th ed: Harvard Law Review Association, 2005.

⁹⁶ McMillian, supra note 92, at 448.

CHAPTER III

REVIEW OF THE LITERATURE

Chapter III examines the scholarship relevant to investigating the viability of a cause of action in negligence alleging educational malpractice. Specifically, the study is an analysis of how the development of standards of care in public education instruction and changes in public policy surrounding public education substantiate a legally recognizable duty to care on an educator toward a student. Chapter III is arranged and discussed under the following topics: (1) the nature of tort law and public policy (2) the theory of negligence, (3) an overview of malpractice law, (4) an examination of the standard of care concept in the two major professions [occupations] where the courts have accepted claims of malpractice – medicine and law, (5) the differentiation between instructional educational malpractice and placement educational malpractice, (6) case law establishing precedent for educational malpractice, and (7) the literature and test data that sets the context for educational outcomes and academic achievement gaps.

NATURE OF TORT LAW AND PUBLIC POLICY

The nature of tort law, from its creation in the common law to the present, has been portrayed as, “dynamic in adjusting to the changing needs and mores of society.”⁹⁷ Throughout the development of tort law, courts have continually recognized that certain interests, not previously protected by the law, are worthy of legal protection.⁹⁸ Bischoff

⁹⁷ Bischoff, Ralph F. "The Dynamics of Tort Law: Court or Legislature?" *Vermont Law Review* 4 (1979, Spring): 35-85.

⁹⁸ “Restatement (Second) of Torts.” 1965, § 1, Comment e.

characterizes torts as an area that is continually redefining justifiable interference with another or his property.⁹⁹ Prosser has this to say about tort law:

New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before. . . . The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection, the mere fact that the claim is novel will not of itself operate as a bar to the remedy.¹⁰⁰

Although the recognition of new torts is characteristic of this area of law, it must be balanced against the view of many courts and legal scholars that it is not in society's best interest to remedy every wrong.¹⁰¹ Courts are thus faced with the decision of determining which wrongs or injuries are in society's best interest to remedy. Once an injury has been recognized legally and accorded an appropriate remedy, tort law will expand and receive the new area.¹⁰²

When considering society's best interest, courts and legal scholars examine the prevailing public policy to determine whether an injury should be protected. If a plaintiff can show that he has suffered a wrong and that public policy demands a remedy, courts will disregard the absence of any precedent in the area and grant relief. This will usually be based upon a sound principle of law

⁹⁹ Bischoff, *supra* note 97, at 42-43.

¹⁰⁰ Prosser, William L., W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, and David G. Owen, eds. *Prosser & Keeton on Torts*. 5th ed. St. Paul, MN: West Group, 1984, § 1, p.3; See also Speiser, Stuart M., Charles F. Krause, and Alfred W. Gans. *The American Law of Torts, Vol. 1*. Rochester: The Lawyers Co-operative Publishing Co., 1983, § 1.5.

¹⁰¹ Jerry, Robert H., II. "Recovery in Tort for Educational Malpractice: Problems of Theory and Policy." *Kansas Law Review* 29 (1981): 195-212, 206.

¹⁰² Prosser, *supra* note 100, at § 4, pp. 21-22.

which can be found to govern directly or by analogy to another area where an injury has been previously accorded legal protection.¹⁰³

Public policy evolves as a reflection of social expectations and societal values.¹⁰⁴ Eventually, it becomes written as a part of the case law handed down by courts and the statutes passed by legislatures.¹⁰⁵

Courts consider many facts to determine whether public policy demands a remedy. They often balance conflicting interests of individuals with the interests of the community as a whole to achieve a desirable social result.¹⁰⁶ This balancing of interests has been referred to by Prosser as “social engineering.” Prosser explains:

... the law of torts is a battleground of social theory. Its primary purpose, of course, is to make a fair adjustment of the conflicting claims of the litigating parties... The administration of the law becomes a process of weighing the interests for which the plaintiff demands protection against the defendant’s claim to untrammelled freedom in the furtherance of his own desires, together with the importance of those desires themselves. When the interest of the public is thrown into the scale and allowed to swing the balance for or against the plaintiff, the result is a form of ‘social engineering’ that deliberately seeks to use the law as an instrument to promote that ‘greatest happiness of the great number,’ which by common consent is the object of society.¹⁰⁷

Prosser lists four public policy factors that affect a court’s decision to provide a remedy for an injury. One such factor is the interrelationship between public policy and the doctrine of stare decisis. Under this doctrine, a rule once laid

¹⁰³ Speiser, *supra* note 100, § 1.5, p. 19.

¹⁰⁴ Lynch, Patrick D. "Legal Implications of Models of Individual and Group Treatment by Professionals." *NOLPE School Law Journal* 9 (1980): 38, 57.

¹⁰⁵ Lynch, Patrick D. "Education Policy and Educational Malpractice." In *Contemporary Legal Issues in Education*. Topeka: National Organization on Legal Problems in Education, 1979, p. 220.

¹⁰⁶ Speiser, *supra* note 100, § 1.26, p. 84.

¹⁰⁷ Prosser, *supra* note 100, § 3, p. 15.

down by a court will be followed when similar fact situations arise until the court finds good reason to depart from it.¹⁰⁸ Stare decisis has firm support in policy considerations concerned with the evenhanded application of the law that is essential both to fair and efficient adjudication and to the guidance of private conduct in reliance upon the law.¹⁰⁹

A second factor is the convenience of administration. Courts by necessity must have the time to ascertain the real facts of any case and to provide an effective remedy.¹¹⁰ Already congested with extensive caseloads, courts fear that fraudulent claims may be brought or that a “flood of litigation” may result if new injuries are recognized which they are not prepared to handle.¹¹¹ Some human wrongs, according to Prosser, “do not lie within the power of any judicial system to remedy.”¹¹²

A third factor weighed by the courts is the relative ability of the respective parties to bear the loss of the injury. To determine whether an injury should be legally protected, courts may decide to allocate the loss to the party who is best able to bear it. This decision involves a consideration of the capacity of the parties to either absorb the cost or avoid it by passing it on to the public or the consumer through rates, prices, taxes or insurance.¹¹³

¹⁰⁸ Prosser, *supra* note 100, § 4, p. 19-21.

¹⁰⁹ Speiser, *supra* note 100, § 1.6, pp. 23-24.

¹¹⁰ Prosser, *supra* note 100, § 4, p. 21.

¹¹¹ Prosser, *supra* note 100, § 4, pp.21-22.

¹¹² Prosser, *supra* note 100, § 4, p. 21.

¹¹³ Prosser, *supra* note 100, § 4, pp.22-23.

Two final factors that courts consider are the prevention of future wrongs and punishment of the defendant. Courts may recognize that an injury needs legal protection in order to prevent the occurrence of the harm in the future.¹¹⁴

The nature of tort law is dynamic in relationship to the needs and mores of society. This flexibility, which involves the consideration of various public policy factors in the formulation of judicial opinions, is the essence of tort law.

THEORY OF NEGLIGENCE

The theory of negligence holds the most promise for a cause of action in primary and secondary instructional educational malpractice.¹¹⁵ In an action for negligence, the plaintiff has the burden of proving:

- (a) facts which give rise to a legal duty on the part of the defendant to conform to the standard of conduct established by law for the protection of the plaintiff,
- (b) failure of the defendant to conform to the standard of conduct,
- (c) that such failure is a legal cause of the harm suffered by the plaintiff, and
- (d) that the plaintiff has in fact suffered harm of a kind legally compensable by damages.¹¹⁶

Phrased another way the basic elements are (1) a duty owed, (2) a breach of the duty, (3) a causal relationship,¹¹⁷ and (4) actual loss or damage.¹¹⁸ Each of these elements will be discussed separately with emphasis on application in the area of educational malpractice.

Negligence began to develop as a separate tort in the early part of the nineteenth century.¹¹⁹ As accidents caused by industrial machinery increased, so did the recognition

¹¹⁴ Prosser, *supra* note 100, § 4, p. 21; Bischoof, *supra* note 97, at 44.

¹¹⁵ Calavenna, Karen H. "Educational Malpractice." *University of Detroit Law Review* 64 (1987): 717, 726; Wilkins, Kimberly A. "Educational Malpractice: A Cause of Action in Need of a Call to Action." *Valparaiso University Law Review* 22 (1988): 427, 458; "Comment: Educational Malpractice." *University of Pennsylvania Law Review* 124 (1976): 755, 804; Butler, Eugene R. "Educational Malpractice Update." *Capital University Law Review* 14 (1985): 609-706, 628.

¹¹⁶ "Restatement (Second) of Torts." 1965, § 328A at 149.

¹¹⁷ Legal cause is comprised of two components: cause in fact and proximate cause.

¹¹⁸ Prosser, William L., W. P. Keeton, D. B. Dobbs, R.E. Keeton, and D.G. Owen, eds. *Prosser & Keeton on Torts*. 5th ed. St. Paul, MN: West Group, 1984, § 30 at 164-165.

of negligence.¹²⁰ Early writers recognized the potential impact of changing technologies when they stated:

In determining what constitutes negligence, regard is to be had to the growth of science . . . which takes place from generation to generation; and many acts or omissions are now evidence of gross carelessness, which a few years ago would not have been culpable at all, as many acts are now consistent with great care and skill, which in a few years will be considered the height of imprudence.¹²¹

A prime example of technological impact has been in the arena of medical malpractice in prenatal injury cases of “wrongful birth”,¹²² “wrongful life”,¹²³ and “wrongful death”.¹²⁴

Duty

A duty is an obligation to conform to a particular standard of conduct toward another.¹²⁵ Before the emergence of negligence as a separate tort, the duty to take care was taken for granted and only the extent of duty was in question.¹²⁶ However, as the theory of negligence developed in both English and American law, the need for proof of duty, rather than an implied duty, became more prevalent. The precedent followed by today’s courts is that there can be no recovery in negligence unless there is a legally imposed duty of care upon the defendant.¹²⁷ As Prosser notes there is no universal test for establishing a duty and its character is artificial at best.¹²⁸ The essential question is

¹¹⁹ Winfield, Percy H. "The History of Negligence in the Law of Torts." *Law Quarterly Review* 42 (1926): 184, 185; Prosser, *supra* note 100, § 28 at 160.

¹²⁰ *Id.*

¹²¹ Sherman, Thomas G., and Amasa A. Redfield. *A Treatise on the Law of Negligence*. 2nd ed: New York: Baker, Voorhis & Company, 1870, 5-6 § 7.

¹²² Generally considered a parent’s right of action. See e.g. *Garrison v. Medical Center of Delaware, Inc.* 581 A. 2d 288 (Del. Supp. 1989); *Phillips v. U.S.*, 566 F. Supp. 1 (1981).

¹²³ A child’s right of action in prenatal injuries. See generally 62A Am. Jur. 2d, §§ 89-180.

¹²⁴ Actions for prenatal injury to decedent. See generally 62A Am. Jur. 2d, §§ 38-88.

¹²⁵ Prosser, *supra* note 100, § 53 at 356.

¹²⁶ Winfield, Percy H. "Duty in Tortious Negligence." *Columbia Law Review*, no. 34 (1934): 41, 45.

¹²⁷ *Palsgraf v. Long Island Railroad Company* 248 N.Y. 339, 162 N.E. 99, 1928.

¹²⁸ Prosser, *supra* note 100, § 53 at 357-358.

whether the plaintiff's interests are entitled to legal protection against the defendant's conduct.¹²⁹

For an educator to be held liable in a suit alleging negligent teaching, the plaintiff would first have to successfully prove that the defendant had a legal duty to provide competent instruction.¹³⁰ The two possible origins of this duty that have been proposed by legal scholars are common law principles and statutory enactments.¹³¹ To date, there is no direct precedent for a common law duty, but three common law principles discussed as possible sources are the theory of undertaking, the duty of care for physical safety, and professional negligence.

The theory of undertaking relies on the common law of rescue. Broadly stated when one undertakes to render a service to another upon which the other relies, the actor will be liable for any harm that results from negligent performance.¹³² As Funston notes "The uneducated child is like a potential victim in need of rescue. When the schools undertake the attempt to educate this child, though they need not succeed, they do assume a duty to make the attempt non-negligently."¹³³ The central issue is one of reliance on the good faith efforts of the rescuer. The analogy drawn is that the student is dependent on the individual skills and information provided by the instructors.¹³⁴ Arguably additional

¹²⁹ Prosser, *supra* note 100, § 53 at 357.

¹³⁰ See generally Tracy, Destin Shann. "Educational Negligence: A Students' Cause of Action for Incompetent Academic Instruction." *North Carolina Law Review* 58 (1980): 561, 564-572; Woods, Nancy L. "Educational Malfeasance: A New Cause of Action for Failure to Educate?" *Tulsa Law Journal* 14 (1978): 383, 393-396; Blackburn, Joan. "Educational Malpractice: When Can Johnny Sue?" *Fordham Urban Law Journal* 7 (1978): 117, 118-130; Elson, *supra* note 51, at 693-697; "Comment: Educational Malpractice." *University of Pennsylvania Law Review* 124 (1976): 755, 767-781.

¹³¹ Funston, Richard. "Educational Malpractice: A Cause of Action in Search of a Theory." *San Diego Law Review* 18 (1981): 743, 772; Calavenna, *supra* note 115, at 726; Tracy, Destin Shann. "Educational Negligence: A Students' Cause of Action for Incompetent Academic Instruction." *North Carolina Law Review* 58 (1980): 561, 565.

¹³² Prosser, *supra* note 100, § 56 at 378-382; "Restatement (Second) of Torts." 1965, § 323.

¹³³ Funston, *supra* note 131.

¹³⁴ Wilkins, *supra* note 115, at 455.

reliance is placed in the educational institution from a public consensus that education is beneficial to both the individual and society.¹³⁵

No legal requirement exists to undertake a rescue – the action must be voluntary.¹³⁶ A problem in trying to establish duty through the theory of undertaking is that education is not voluntary, it is mandatory. The greater problem is the fact that the courts have been reluctant to apply the undertaking theory where the undertaking in question was the provision of some broad social service.¹³⁷

The duty of care for the physical safety of students is well established for educators and institutions at all levels.¹³⁸ The vast majority of suits filed against teachers involve some aspect of negligent supervision.¹³⁹ The degree of supervision required varies with the age of the students, the level of instruction, and the potential risk of harm.¹⁴⁰ Teachers have also been held to a duty to provide students with adequate and appropriate instruction prior to beginning an activity that poses a risk of harm,¹⁴¹ but liability is not usually imposed on school personnel if students willfully disregard instructions.¹⁴² The student alleging academic harm might argue that there is no

¹³⁵ Shapo, Marshall S. *The Duty to Act: Tort Law, Power and the Public Power*: University of Texas Publishers, 1977, pg. 150.

¹³⁶ Prosser, *supra* note 100, § 56 at 375-377.

¹³⁷ Funston, *supra* note 131, at 773; *Moch v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928) (suit against the water company for negligent failure to provide adequate water to extinguish a fire before it destroyed plaintiff's warehouse was held not maintainable as an action for a common law tort. Judge Cardozo characterized the failure to supply adequate water as a denial of a benefit not the commission of a wrong).

¹³⁸ See generally Strahan, Richard D., and L. Charles Turner. *The Courts and the Schools: The School Administrator and Legal Risk Management Today*. New York: Longman, 1987, 159-164; McCarthy, Martha M., and Nelda H. Cambron-McCabe. *Public School Law: Teachers' and Students' Rights*. 3rd ed. Boston, MA: Allyn & Bacon, 1992; Strickland, Rennard, Janet F. Phillips, and William R. Phillips. *Avoiding Teacher Malpractice: A Practical Handbook for the Teaching Professional*. New York: Hawthorne Books, 1976, pp. 51-61; Funston, *supra* note 131, at note 20; Tracy, *supra* note 131, at 566.

¹³⁹ Strahan, *supra* note 138, at 160.

¹⁴⁰ Strahan, *supra* note 138, at 160.

¹⁴¹ McCarthy, *supra* note 138, at 459.

¹⁴² McCarthy, *supra* note 138, at 460.

difference from physical harms caused by improper instruction and supervision. It has been claimed that preventing failure of a student to learn is no less important than preventing physical injuries.¹⁴³ While the foreseeable nature of injury in both circumstances might support the analogy, the standard of conduct imposed is different and has been the major argument against the use of this common law principle.¹⁴⁴ The duty to act non-negligently in caring for the physical safety of students is based on the reasonable person standard, but the educational malpractice plaintiff is seeking to hold educators to a higher professional or “reasonable teacher” standard.¹⁴⁵ Thus, creation of a duty in educational malpractice based on duty of care in physical injury cases law may be unsuccessful.

Of the three common law principles proposed, analogy to professional negligence provides the strongest argument for legal recognition of duty to provide competent academic instruction.¹⁴⁶ Attributes common to actions for professional negligence include the defendant’s obligation incurred from a contract to provide a service and a specific standard of care to which the defendant is held. Additionally, a judgment against the defendant may be very harmful to his/her reputation.¹⁴⁷ A professional is one who undertakes any work calling for specialized skill and who is required to possess a standard minimum of special knowledge and ability.¹⁴⁸

¹⁴³ "Comment: Educational Malpractice." *University of Pennsylvania Law Review* 124 (1976): 755, 773. Recovery for non-physical injuries has been permitted in other areas of tort law such as defamation, invasion of privacy, and mental distress.

¹⁴⁴ Tracy, *supra* note 131, at 566; Funston, *supra* note 131, at 773.

¹⁴⁵ Tracy, *supra* note 131, at 566; Funston, *supra* note 131, at 773.

¹⁴⁶ Tracy, *supra* note 131, at 567 .

¹⁴⁷ Rody, Jr., Thomas G., and William R. Anderson, eds. *Professional Negligence*. Nashville, TN: Vanderbilt University Press, 1960.

¹⁴⁸ Prosser, *supra* note 100, § 32 at 185.

Unfortunately, problems are also associated with creating the professional negligence analogy. First, educators must be recognized as professionals. Although educators may consider themselves professionals, self-characterization by an occupational group does not constitute legal recognition as such.¹⁴⁹ While some state statutes expressly recognize educators as professionals,¹⁵⁰ and some courts have referred to educators as professionals,¹⁵¹ the designation in itself is not enough. The professional usually relies on status and reputation to determine earning capacity.¹⁵² Second, educators are commonly employed under contractual agreements with institutions or systems and not with the individuals to whom services are being rendered. Finally, there is the question of educators possessing certain skills and specialized knowledge. Some believe that educators may meet this criterion in specific content areas rather than in the broad area of education.¹⁵³ Others have concluded not only do educators fulfill the specialized skill and knowledge criteria, but the general public expects them to perform accordingly.¹⁵⁴

Statutorily imposed obligations are a final area to be considered as potentially creating the element of duty necessary to recover damages in negligence. Sources of statutory duty may be (1) provisions in state constitutions and other legislative enactments providing for the creation and maintenance of public school systems, and (2)

¹⁴⁹ Funston, *supra* note 131, at 774. The author goes on to question somewhat sarcastically “Could physicians escape professional liability if the American Medical Association were to unilaterally reclassify medicine as a trade?”

¹⁵⁰ See e.g., ALA. CODE § 16-23-16.1 (1995), GA. CODE ANN. §20-2-791 (1996), W. VA. CODE § 18a-1-1 (1997).

¹⁵¹ *Hunter v. Board of Education*, 439 A.2d 582, 589 (1982) (Davidson, J., concurring in part dissenting in part), *Donohue v. Copiague Union Free School District*, 47 N.Y.2d 440, 443, 418 N.Y.S. 2d 375, 377 (1979).

¹⁵² Funston, *supra* note 131, at 775.

¹⁵³ Funston, *supra* note 131, at 774-75.

¹⁵⁴ Tracy, *supra* note 131, at 568.

statutes or regulations requiring specific actions in defined situations particularly those involving students with identifiable learning problems.¹⁵⁵ It has been proposed that state statutes reflect public policy attitudes that school districts should be held responsible for their actions.¹⁵⁶ Duty of care imposed by statute should not be confused with liability based on violation of constitutional or statutory rights.¹⁵⁷

The primary problem with a statutorily created duty is that of legislative intent. In many cases the evident policy of the legislature was to protect only a limited class of individuals and that the harm suffered must be of the kind the statute intended to prevent.¹⁵⁸ Provisions related to creation and maintenance of public school systems are generally seen as conferring the benefit of education on the general public and are not

¹⁵⁵ Tracy, *supra* note 131, at 569, citations omitted.

¹⁵⁶ Woods, *supra* note 130, at 395.

¹⁵⁷ 42 U.S.C. § 1983 (1988) states:

Every person, who under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, and citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

The scope of liability of public entities and public officials under § 1983 has been greatly expanded and has been extended to school officials. *See e.g.*, Wood v. Strickland, 420 U.S. 308 (1977).

San Antonio Independent School Dist. V. Rodriguez, 411 U.S. 1, 35 (1973); e.g. Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973); Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977); 20 U.S.C. § 1400 to 1454 (1982); Butler, Eugene R. "Educational Malpractice Update." *Capital University Law Review* 14 (1985): 609, 623; Collis, John W. *Educational Malpractice: Liability of Educators, School Administrators, and School Officials*. Charlottesville, VA: Michie Co, 1990; E.G. Loughran v. Flanders, 470 F. Supp. 110 (1979); See e.g. Lindsay v. Thomas, 465 A.2d 122 (Pa. comwlth. 1983); B.M. v. State, 649 P.2d 425 (Mont. 1982); D.S.W. v. Fairbanks North Star Borough School District, 628 P.2d 554 (1981); Funston, Richard. "Educational Malpractice: A Cause of Action in Search of a Theory." *San Diego Law Review* 18 (1981): 743, 768-770; Woods, *supra* note 130, at 402-403; Wilkins, Kimberly A. "Educational Malpractice: A Cause of Action in Need of a Call to Action." *Valparaiso University Law Review* 22 (1988): 427, 451-454 (The leading cases dealing with involuntarily confined mental patients are *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), vacated 422 U.S. 563 (1975), and *Youngberg v. Romeo*, 457 U.S. 307 (1982).

¹⁵⁸ Prosser, *supra* note 100, § 36 at 224-225. *Gorris v. Scott*, L.R. 9 Ex. 125 (1874) (Sheep carried on the deck of a ship were washed overboard and lost. Plaintiff sued carrier seeking to establish negligence based on Contagious Disease Act which carried criminal penalties for transporting sheep without supplying pens and footholds. Court held for carrier on the ground that injuries were not of the type the statute was designed to prevent.) Noted in Morris, Clarence, and C. Robert Morris, Jr. *Morris on Torts*. 2nd ed. Mineola, NY: Foundation Press, 1980, § 5 at 167.

intended to protect individual students from the harm caused by negligent instruction.¹⁵⁹ An individual may, however, maintain an action in tort on the basis of statutory violation if he suffers a harm distinct from that suffered by the rest of the community.¹⁶⁰ The harm suffered by the student alleging negligent instruction is quite different from that suffered by the general community.¹⁶¹

Standard of care

The second major element of a cause of action based on negligence is a failure on the defendant's part to conform to the standard required: a breach of the duty.¹⁶² A legal standard of conduct can either be that of the reasonable person¹⁶³ or a statutory standard of conduct.¹⁶⁴ The qualities and attributes of the reasonable person differ in suits dealing with ordinary negligence and those dealing with professional negligence.

The standard of conduct which the community demands must be an external and objective one, applied equally to all, but sufficiently flexible to allow for the risk apparent to the actor within the circumstances under which he must act.¹⁶⁵ In an attempt to develop a standard the courts have created the "reasonable man of ordinary prudence" who as Prosser notes "is fictitious and has never existed on land or sea."¹⁶⁶

The standard of conduct of a reasonable man may be:

¹⁵⁹ Funston, *supra* note 131, at 777; contra see "Comment: Educational Malpractice." *University of Pennsylvania Law Review* 124 (1976): 755, 780 (statutory duty is imposed if the person injured is a member of the class for whose benefit the statute was enacted and the injury is of a type intended to prevent). It should be noted that in states where statutory wording includes provision of "adequate" educational services or opportunity, there is a growing body of case law particularly related to "adequacy" in funding.

¹⁶⁰ "Restatement (Second) of Torts." 1965, § 288, comment on clause (b).

¹⁶¹ "Comment: Educational Malpractice." *University of Pennsylvania Law Review* 124 (1976): 755, 780-781.

¹⁶² Prosser, *supra* note 100, § 30 at 164.

¹⁶³ The original phrase was reasonable man, but later courts have adopted the unisex person term.

¹⁶⁴ Lynch, *supra* note 105.

¹⁶⁵ Prosser, *supra* note 100, § 32 at 173-174.

¹⁶⁶ Prosser, *supra* note 100, § 32 at 173-174.

- a. Established by legislative enactment or administrative regulation,
- b. Adopted by the court from legislation or administrative regulation which does not so provide,
- c. Established by judicial decision, or
- d. Applied by the facts of the case by the trial judge or jury, if there is no legislation, regulation or decision.¹⁶⁷

The standard of conduct expected of the reasonable person of ordinary prudence is not a strictly objective one. Acceptable conduct may vary with the situation because negligence is based on what the reasonable person would do “under the same or similar circumstances.”¹⁶⁸ Other components that add some subjective variance to the reasonable person standard are physical attributes, mental capacity, age, and knowledge level of the actor. The physical characteristics are said to be identical with the actor, that is if the defendant is disabled in some way then the standard by which his conduct would be judged would be the reasonable person of ordinary prudence with a similar limitation.¹⁶⁹ Generally altered mental capacity ranging from poor judgment to more severe disabilities including total insanity does not release a person from being held to the reasonable person standard.¹⁷⁰

The knowledge level of the actor presents one of the most difficult questions in connection with negligence.¹⁷¹ The reasonable person standard is one of general average intelligence and actions will be judged not only on the basis of intelligence, but with

¹⁶⁷ “Restatement (Second) of Torts.” 1965, § 285 at 20.

¹⁶⁸ “Restatement (Second) of Torts.” 1965, § 285 at 12; Prosser, *supra* note 100, § 32 at 175.

¹⁶⁹ See generally Prosser, William L., W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, and David G. Owen, eds. *Prosser & Keeton on Torts*. 5th ed. St. Paul, MN: West Group, 1984, § 32 at 175-176; Morris, Clarence, and C. Robert Morris, Jr. *Morris on Torts*. 2nd ed. Mineola, NY: Foundation Press, 1980, § 4 at 52; “Restatement (Second) of Torts.” 1965, § 283A-283C (describing the standards for children, mental deficiency, and physical disability).

¹⁷⁰ Prosser, *supra* note 100, § 32 at 177. Rationales offered for this apparent injustice include the difficulty in distinguishing true incapacity from mere bad judgment, the belief that custodians of incompetents should be encouraged to control their charges, and the perceived sense of fairness that those with altered mental capabilities (Prosser used the term “mental defectives”) who live within the rest of society should conform to the general standard of conduct. *Id.*

¹⁷¹ Prosser, *supra* note 100, § 32 at 177.

knowledge of the world about them.¹⁷² Based on what is common to the community there is a minimum standard of knowledge and individuals who come into a community are expected to conform to that set of standards rather than the ones they may have been familiar with previously.¹⁷³ An individual will usually not be held to knowledge of risks which are not known or apparent to him unless he is engaged in an activity or stands in a relationship to another that imposes an obligation to find out about potential risks.¹⁷⁴ If educators are found to have a duty of care based their relationship to students, then it might be reasonable to conclude the educators have an obligation to find out what instructional risks their students might face.¹⁷⁵ As is true of negligence in general,¹⁷⁶ advances in scientific knowledge must be considered. Prosser states “what was excusable ignorance yesterday becomes negligent ignorance today.”¹⁷⁷

Thus far this review has outlined the minimum standards of conduct required of the reasonable person of ordinary prudence. It is by these standards that the triers of fact will judge the acts or omissions of the everyday layperson in cases alleging ordinary negligence. If, however, a person has or holds him or herself out as having knowledge, skill or intelligence superior to that of the ordinary person, then the law will demand a higher level of conduct.¹⁷⁸ It is this higher standard upon which professional negligence is based.

¹⁷² Roady, supra note 147.

¹⁷³ Prosser, supra note 100, § 32 at 184.

¹⁷⁴ Prosser, supra note 100, § 32 at 184-185.

¹⁷⁵ Psychometric testing is a standard component in evaluation of students both as individuals and as groups. While there is constant controversy on issues of reliability and validity of these tests, there is a general consensus that the various tests, taken as a whole, can provide information that the educator can use in designing learning experiences appropriate for students of varying capabilities.

¹⁷⁶ Sherman, supra note 121, at 5-6 § 7.

¹⁷⁷ Prosser, supra note 100, § 32 at 185.

¹⁷⁸ Prosser, supra note 100, § 32 at 185.

Professional Negligence

The relationship between the legally imposed duty of care and the standard of care related to that duty is readily apparent when considering professional negligence.¹⁷⁹ Several commentators have noted that unlike supervision for physical safety, which uses the reasonable person standard, academic instruction has no close analogy in the experience of most laymen.¹⁸⁰ Although potentially every judge and juror has had some experience with various educational systems from the student perspective, very few are likely to have the teacher's perspective.¹⁸¹ Because of this limited knowledge level the trier of fact must rely on expert testimony regarding what teachers actually and customarily do under similar circumstances.¹⁸²

Most legal scholars and educational commentators support holding educators to the higher professional standard because teachers hold themselves out as having special knowledge that required specific training to acquire.¹⁸³ Professionals are required to both exercise reasonable care in what they do and to possess a standard minimum of special knowledge and ability.¹⁸⁴ In medicine, the formula for the standard minimum is that the doctor must have and use the knowledge, skill and care ordinarily possessed and

¹⁷⁹ The judicial consideration of existence of duty and applicable standard does not proceed in two separate and distinct phases. Funston, Richard. "Educational Malpractice: A Cause of Action in Search of a Theory." *San Diego Law Review* 18 (1981):743, 777.

¹⁸⁰ Elson, John. "A Common Law Remedy for the Harms Caused by Incompetent or Careless Teaching." *Northwestern University Law Review* 73, no. 4 (1978): 641, 701; Tracy, supra note 131, at 573; Funston, supra note 131, at 779.

¹⁸¹ Elson, supra note 180, at 701; Tracy, supra note 131, at 573; Funston, supra note 131, at 779.

¹⁸² Elson, supra note 180, at 700.

¹⁸³ See for example Elson, John. "A Common Law Remedy for the Harms Caused by Incompetent or Careless Teaching." *Northwestern University Law Review* 73, no. 4 (1978): 641, 700; Tracy, Destin Shann. "Educational Negligence: A Students' Cause of Action for Incompetent Academic Instruction." *North Carolina Law Review* 58 (1980): 561, 573; Loscalzo, Theresa E. "Liability for Malpractice in Education." *Journal of Law & Education* 14, no. 4 (1985): 595, 604-605; "Comment: Educational Malpractice." *University of Pennsylvania Law Review* 124 (1976): 755, 771.

¹⁸⁴ Prosser, supra note 100, § 32 at 185.

employed by members of the profession in good standing.¹⁸⁵ Some argue, however, that the abstract quality of education, the lack of consensus of the primary goals of education, and conflicting theories of learning make the establishment of a workable standard difficult if not impossible.¹⁸⁶ Lack of consensus on guidelines of practice is not unique to education and will be discussed in the subsequent section in relation to medical malpractice.¹⁸⁷

Causation

The third major element necessary to a cause of action in negligence is the establishment of a connection between the conduct of the defendant and the injury to the plaintiff.¹⁸⁸ Causation is based on several legal concepts, but the major two that will be discussed are “causation in fact” and “proximate cause”.¹⁸⁹ Within those two concepts the “but-for” and “substantial-factor” rules help to determine facts and legal significance.¹⁹⁰ Causation is a basic determinant of tort liability for no matter what specific type of tort is being considered there must be a connection between the defendant and the plaintiff’s damages.¹⁹¹ The relationship between legal cause and liability in the theory of negligence has been stated as follows: In order that a negligent actor shall be liable for another’s

¹⁸⁵ Prosser, *supra* note 100, § 32 at 185.

¹⁸⁶ Funston, *supra* note 131, at 780 (1981); Tracy, *supra* note 131, at 575; Calavenna, *supra* note 115, at 727.

¹⁸⁷ “Restatement (Second) of Torts.” 1965, § 229A, comment f.; Prosser, *supra* note 100, § 32 at 187 (For more in-depth discussion of “school of practice” see generally McCoid, Allan H., ed. *Professional Negligence*. Edited by Thomas G. Roady Jr. and William R. Andersen. Vol. 14. Nashville: Vanderbilt University Press, 1960, pp. 14, 24-29; Harney, David M. *Medical Malpractice*. 2nd ed. Charlottesville, Va: Lexis Law Publishing, 1987; Curran, William J., ed. *Professional Negligence*. Edited by Thomas G. Roady Jr. and William R. Andersen. Nashville: Vanderbilt University Press, 1960.

¹⁸⁸ Prosser, *supra* note 100, § 30 at 165.

¹⁸⁹ See generally Prosser, William L., W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, and David G. Owen, eds. *Prosser & Keeton on Torts*. 5th ed. St. Paul, MN: West Group, 1984, Chapter 7 (discussing in detail proximate cause).

¹⁹⁰ Prosser, *supra* note 100, § 41 at 276.

¹⁹¹ Prosser, *supra* note 100.

harm, it is necessary not only that the actor's conduct be negligent toward the other, but also that the negligence of the actor be a legal cause of the other's harm.¹⁹²

Causation in fact is based on a search for what factually caused the injury. In the simplest form, establishment of cause is limited to a factual investigation and excludes the policy considerations of remote consequence.¹⁹³ Causation in fact covers not only conduct, both acts and omissions, and active physical forces, but also pre-existing conditions which played a part in bringing about an event.¹⁹⁴ This is best summarized in the "but-for" or "sine qua non" rule and is stated: "The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it."¹⁹⁵ The "but for" rule used as a rule of exclusion is useful in explaining the factual causes in a great number of cases, but it fails in one specific situation: when two causes concur to bring about an event, and either one occurring alone would have been sufficient to cause the identical result.¹⁹⁶ In this type of situation, strict application of the "but for" rule would tend to absolve each individual cause from liability on the grounds that the identical harm would have occurred without the single conduct.¹⁹⁷

Determination of causation in cases with concurrent causes is based on the broader "substantial factor" rule.¹⁹⁸ This rule states: the defendant's conduct is a cause of

¹⁹² "Restatement (Second) of Torts." 1965, § 430 at 426.

¹⁹³ Prosser, supra note 100.

¹⁹⁴ Prosser, supra note 100, § 41 at 265.

¹⁹⁵ Prosser, supra note 100, § 41 at 266.

¹⁹⁶ Prosser, supra note 100, § 41 at 266.

¹⁹⁷ Prosser, supra note 100, § 41 at 267.

¹⁹⁸ Prosser, supra note 100, § 41 at 267.

the event if it was a material element and a substantial factor in bringing it about.¹⁹⁹

Several considerations help determine whether negligent conduct is a substantial factor in bringing about harm to another:

- (a) additional contributing factors and the extent of their effect on producing the harm;
- (b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;
- (c) lapse of time.²⁰⁰

The mere existence of contributing factors does not relieve the actor of liability because it is commonly recognized that there are frequently a number of events that can contribute or have an appreciable effect on a single outcome. The actor's conduct is only one of the potential causes. If one or a combination of other contributing factors has such a predominant effect in bringing about the harm that the actor's conduct becomes insignificant, then the actor's negligent conduct is no longer considered a substantial factor.²⁰¹

Usually the actor's negligent act must be in continuous and active force up to the actual harm in order for it to be considered a substantial factor.²⁰² If some intervening event or contributing factor is sufficient to break the chain of events causing the injury, the original negligent act may be considered an insignificant force in the harm.²⁰³ For instance, where a student was cleaning a power saw in shop class and another student turned on the switch starting the machine in violation of safety rules, the court held that

¹⁹⁹ Prosser, *supra* note 100, § 41 at 267. It should be noted that the "substantial factor" rule is also used in determining proximate cause. Morris, Clarence, and C. Robert Morris, Jr. *Morris on Torts*. 2nd ed. Mineola, NY: Foundation Press, 1980, § 7 at 174.

²⁰⁰ "Restatement (Second) of Torts." 1965 § 433.

²⁰¹ "Restatement (Second) of Torts." 1965, § 433, comment on clause (c).

²⁰² Alexander, Kern, and M. David Alexander. *American Public School Law*. 6th ed: Cengage Learning, 2004, 699; "Restatement (Second) of Torts." 1965, § 439.

²⁰³ Alexander, *supra* note 202, at 699.

the school board's negligence in not having a guard over the beltdrive was not the proximate or legal cause of the injury.²⁰⁴ The existence of intervening events, however, does not necessarily relieve an actor of liability for negligent conduct.²⁰⁵ If the intervening act had been foreseeable and could not have been prevented by reasonable care by the defendant, then liability may still attach as a "substantial factor".²⁰⁶

When there has been a great length of time between the actor's negligent conduct and harm to another, multiple contributing factors may have intervened making the actor's conduct insignificant compared to the aggregate of other factors. No matter how long the lapse of time, if there is evidence that the influence of the actor's negligence is still a substantial factor, that conduct will still be considered the legal cause of harm. Where statutes of limitation²⁰⁷ exist the lapse of time may become a decisive factor.²⁰⁸ However, the trend toward the liberal interpretation of statutes of limitations has caused courts not to invoke these statutes as a bar to suits involving long-latent injuries.²⁰⁹

The burden of proof on the issue of the fact of causation is on the plaintiff. Evidence must be introduced that leads to the reasonable conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result.²¹⁰ The mere possibility of causation is not enough. If the conclusion is not common knowledge, expert

²⁰⁴ Meyer v. Board of Education, 9 N.J. 46, 86 A. 2d 761 (1952).

²⁰⁵ McCarthy, supra note 138, at 455.

²⁰⁶ Alexander, supra note 202, at 700.

²⁰⁷ See e.g. Prosser, William L., W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, and David G. Owen, eds. *Prosser & Keeton on Torts*. 5th ed. St. Paul, MN: West Group, 1984, § 30 at 165-168 (discussing when the statute of limitations begins to run).

²⁰⁸ "Restatement (Second) of Torts." 1965, § 433, comment on clause (c).

²⁰⁹ Litan, Robert E., and Clifford M. Winston, eds. *Liability Perspectives and Policy*. Washington, D.C.: Brookings Institution Press, 1988.

²¹⁰ Prosser, supra note 100, § 41 at 269.

testimony may be used to provide a basis for conclusion.²¹¹ However, if it is a matter of ordinary experience that certain conduct might be expected to produce a particular result, that does in fact occur, then the conclusion is permissible that the causal relation exists.²¹²

Even though the defendant's conduct may be established as one of the factual causes of the plaintiff's injury, there is still the question of whether the defendant should be held legally responsible for that injury.²¹³ The terms "proximate cause" and "legal cause" are used to denote the boundaries of liability that the courts have placed on the actor for the consequences of the actor's conduct.²¹⁴ The limitations of liability depend essentially on whether the policy of the law will extend the responsibility for the conduct to the consequences that have in fact occurred.²¹⁵ Policy is the expression of ideas of what justice demands or what is administratively possible and convenient.²¹⁶ Summarized simply, the doctrine of proximate cause requires that the plaintiff's injury be the natural, probable, and foreseeable consequence of the defendant's conduct.²¹⁷

Proximate cause is closely related to both duty and breach of duty. It is related to duty because both concepts deal with the issue of extent of liability. To establish proximate cause this question must be answered: Was the defendant under a duty to protect the plaintiff against the event which did in fact occur?²¹⁸ This returns to the issue of whether there exists some relationship between the defendant and plaintiff such that

²¹¹ Prosser, supra note 100, § 41 at 269. No expert testimony is required on medical matters within common knowledge.

²¹² Prosser, supra note 100, § 41 at 270.

²¹³ Prosser, supra note 100, § 42 at 272-273.

²¹⁴ Prosser, supra note 100, § 42 at 264.

²¹⁵ Prosser, supra note 100, § 42 at 273.

²¹⁶ Prosser, supra note 100, § 42 at 264.

²¹⁷ Funston, supra note 131, at 789.

²¹⁸ Funston, Richard. "Educational Malpractice: A Cause of Action in Search of a Theory." *San Diego Law Review* 18 (1981): 743, 789. Stated differently it has been noted "To establish proximate cause there must first be a duty or obligation on the part of the actor to maintain in a *reasonable standard of conduct*." (emphasis added) Alexander, supra note 202, at 699.

there is a legally recognized obligation of conduct for the plaintiff's benefit.²¹⁹ Proximate cause is related to breach of duty because both are established by the same conduct.²²⁰

Just as the "but for" and "substantial factor" rules are important in establishing factual causation, foreseeability is important in establishing proximate cause. What consequences would the reasonable person expect to follow from the conduct? Generally the defendant is liable if the reasonable person could foresee the likelihood of injury that occurred.²²¹ Since no specific injury is ever foreseeable in every detail, when foreseeability is a prerequisite to liability, the exact details of the actual injury need not have been foreseen.²²² A Pennsylvania court concluded that teachers are not "[r]equired to anticipate the myriad unexpected acts which occur daily in classrooms."²²³

The vast number of contributing factors that influence the outcome of the educational process have led both legal scholars and the courts to contend that causation would be difficult, if not impossible, to prove.²²⁴ One popular argument is that a failure to teach does not cause a state of illiteracy because a child is born ignorant of how to read or write, thus failure to achieve a certain level of academic achievement leaves the child no worse off than when he or she entered the educational system.²²⁵ The court in *Donohue* stated: "The failure to learn does not bespeak a failure to teach."²²⁶ Strict application of the "but for" rule might support this argument, but at least one writer believes that this

²¹⁹ Prosser, *supra* note 100, § 42 at 274-275.

²²⁰ Woods, *supra* note 130, at 398.

²²¹ Morris, Clarence, and C. Robert Morris, Jr. *Morris on Torts*. 2nd ed. Mineola, NY: Foundation Press, 1980, § 5 at 171.

²²² *Id.*

²²³ *Simonetti v. School District of Philadelphia*, 454 A.2d 1038, 1041 (Pa. Super. Ct. 1982), *appeal dismissed*, 473 A.2d 1015 (Pa. 1984) (Teacher was monitoring hallway as students returned from recess. Student entering classroom was struck in the eye by a pencil that had been thrown by a classmate.)

²²⁴ Calavenna, *supra* note 115, at 728-729 (1987); Funston, *supra* note 218, at 784; Tracy, *supra* note 131, at 583; Deborah D. Dye, *Education Malpractice: A Cause of Action That Failed To Pass The Test*, 90 W. VA. L. Rev. 499, 507 (1987).

²²⁵ Funston, *supra* note 218, at 785; Tracy, *supra* note 131, at 583.

²²⁶ *Donohue v. Copiague Union Free School District*, 64 A.D. 2d. at 39, 407 N.Y.S. 2d at 881.

narrow interpretation goes too far stating: “A student’s inability to read or write when he enters school clearly does not warrant the conclusion that an active cause is operating that will preclude his learning in the future whether or not he is adequately instructed.”²²⁷ It is the multiplicity of factors affecting the learning process that is more often cited as a reason for refusing to recognize a suit for educational malpractice. The Peter W. court held:

The achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified.²²⁸

This has been cited with approval in the opinions of several other cases dealing with the question of educational malpractice.

Other writers, while acknowledging the problems associated with multiple causative factors, point out this only represents a problem of proof for the plaintiff and does not justify judicial refusal to recognize a cause of action in all cases.²²⁹ The New York Court of Appeals, in Donohue, reflected a similar attitude stating in dicta that while causation “[m]ight indeed be difficult, if not impossible, to prove . . . it perhaps assumes too much to conclude that it could never be established.”²³⁰ It has been urged that the

²²⁷ Tracy, supra note 131, at 584.

²²⁸ Peter W. v. San Francisco Unified School District, 60 Cal. App. 3d 814, 824, 131 Cal. Rptr. 854, 861 (1976).

²²⁹ Collingsworth, Terrence P. "Applying Negligence Doctrine to the Teaching Profession." *Journal of Law & Education* 11 (1982): 479, 498-499; Wilkins, Kimberly A. "Educational Malpractice: A Cause of Action in Need of a Call to Action." *Valparaiso University Law Review* 22 (1988): 427, 458; Jerry, supra note 101, at 204.

²³⁰ Donohue v. Copiague Union Free School Dist., 64 A.D. 2d. at 39, 418 N.Y.S. 2d 375, 377, 47 N.Y. 2d 440, 443 (1979).

questions of fact be put to a jury.²³¹ In B.M. v. State, the Supreme Court of Montana noted that questions of breach of duty and the breach as a cause of any injury “[r]aise material questions of fact for which a trial is necessary.”²³²

The issue in an educational malpractice case is whether the school district and/or individual educators failed to take reasonable measures under the circumstances and this conduct was a cause of the student’s educational injury.²³³ It would appear that based on the “substantial factor” rule there is no requirement that the educator’s conduct be the sole or even dominant factor in causing harm to the student.²³⁴ One writer notes that proximate cause is self-evident under the formulation that a student’s failure to learn is clearly among the foreseeable risks of a teacher’s poor classroom methods.²³⁵

Injury / Damage

The final element necessary for a cause of action based in the theory of negligence is that of actual loss or damage to the interests of another.²³⁶ A court will not rule on a controversy unless the plaintiff can be compensated by some judicially manageable remedy.²³⁷ Terms that are used interchangeably with loss and damage are “injury” and “harm”. As in the case of causation, legal scholars and the courts are divided in their assessment of how easy or difficult the actual definition and measurement of

²³¹ Woods, supra note 130, at 399; Elson, supra note 180, at 747; Collingsworth, supra note 229, at 499.

²³² B.M. v. State, 649 P.2d 425, 426 (Mont. 1982).

²³³ Woods, supra note 130, at 398.

²³⁴ For definition of the “substantial factor” rule see Morris, Clarence, and C. Robert Morris, Jr. *Morris on Torts*. 2nd ed. Mineola, NY: Foundation Press, 1980, § 5 at 171.

²³⁵ “Comment: Educational Malpractice.” *University of Pennsylvania Law Review* 124 (1976): 755, 768. *Contra* see Funston, Richard. “Educational Malpractice: A Cause of Action in Search of a Theory.” *San Diego Law Review* 18 (1981): 743, 785; Tracy, supra note 131, at 583-84; Donohue v. Copiague Union Free School District, 64 A.D. 2d at 39, 407 N.Y.S. 2d at 881; Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 824, 131 Cal. Rptr. 854, 861 (1976) (concerning lack of consensus or evidence that classroom methodology impacts student learning.)

²³⁶ Prosser, supra note 100, § 30 at 165. See generally 74 Am. Jur. 2D, *Torts* § 7 at 625-626.

²³⁷ “Restatement (Second) of Torts.” 1965, § 903 (defining compensatory damages).

educational injuries might be. At least part of the difficulty is related to the problems of differing purposes and goals of schooling.²³⁸ A few writers have taken the rather simplistic approach that indisputably plaintiffs suffer harm²³⁹ and the true victims of educational malpractice will have no difficulty in establishing harm as a result of decreased ability to seek gainful employment.²⁴⁰ Other commentators have stated that definition and measurement of injuries in a legally recognizable manner are at least as difficult as establishing duty, standards, and causation.²⁴¹ In Peter W., the court found “[n]o reasonable ‘degree of certainty that . . . plaintiff suffered injury’ within the law of negligence”.²⁴² When refusing to recognize the “injury” of ignorance, the New York Supreme Court, Appellate Division relied on the argument of plaintiffs born lacking in knowledge, education and experience.²⁴³ Subsequently the New York Court of Appeals conceded that the inability to comprehend simple English upon graduation from high school represented a type of “injury”, but still refused to recognize educational malpractice as a cause of action based on public policy concerns.²⁴⁴ Many are in agreement, however, that the difficulties in definition and measurement are not legitimate reasons to refuse to recognize educational malpractice as a proper cause of action.²⁴⁵

Three basic types of injuries may be alleged in educational malpractice suits: failure to learn a given amount of factual information, failure to learn basic skills, and

²³⁸ See generally Lynch, Patrick D. "Education Policy and Educational Malpractice." In *Contemporary Legal Issues in Education*. Topeka: National Organization on Legal Problems in Education, 1979).

²³⁹ Klein, Alice J. "Educational Malpractice: Can the Judiciary Remedy the Growing Problem of Functional Illiteracy?" *Suffolk University Law Review* 13 (1979): 27-62, 48.

²⁴⁰ Wilkins, *supra* note 229, at 458.

²⁴¹ Funston, *supra* note 218, at 783.

²⁴² Peter W., 131 Cal. Rptr. 854, 861, 60 Cal. App. 3d 814, 825. (Quoted with approval in Donohue).

²⁴³ Donohue v. Copiague Union Free School Dist., 407 N.Y.S. 2d 874, 880 (1978).

²⁴⁴ Donohue, 47 N.Y. 2d at 244.

²⁴⁵ Collingsworth, *supra* note 229, at 502; Jerry, *supra* note 101, at 203; Elson, *supra* note 180, at 755.

harm in the affective or emotional domain.²⁴⁶ Examples of these injuries might be the inability to secure and hold employment due to lack of basic skills²⁴⁷ or the loss of the motivation and self-confidence necessary to learn resulting from the emotional injury caused by a teacher's ridiculing and berating a student.²⁴⁸ Daniel Hoffman claimed the misclassification and improper enrollment in classes for Children with Retarded Mental Development (CRMD) resulted in severe injury to his intellectual and emotional well-being and reduced his ability to obtain employment.²⁴⁹

A claim of purely mental injuries such as harm in the affective domain will meet with traditional common law disfavor.²⁵⁰ One writer noted if the psychological harm claimed is lowered self-esteem, then the value of literacy to an individual is so highly personal that the calculation of damages would be speculative.²⁵¹ Although there has been some relaxation of the rule²⁵² it is generally held there can be no recovery for psychological damages in the absence of physical injury.²⁵³ Despite the potential difficulties involved for the educational malpractice plaintiff,²⁵⁴ mental harms are recognized as a legitimate basis of legal redress and are commonly assessed as money damages.²⁵⁵

²⁴⁶ Elson, supra note 180, at 755.

²⁴⁷ Peter W. v. San Francisco Unified School Dist., 131 Cal. Rptr. 854, 856, 60 Cal. App. 3d 817, 818 (1976); Woods, supra note 130, at 399.

²⁴⁸ Elson, supra note 180, at 755.

²⁴⁹ Hoffman v. Board of Education, 400 N.E.2d 317, 49 N.Y.2d 121, 125, 424 N.Y. Supp.2d 376, 378 (1979).

²⁵⁰ Elson, supra note 180, at 755; Tracy, supra note 131, at 580.

²⁵¹ Funston, supra note 218, at 784.

²⁵² Prosser, supra note 100, § 54 at 364-365.

²⁵³ Prosser, supra note 100, § 54 at 361. Compare Rowe v. Bennett, 514 A.2d 802 (Me. 1986) (social worker counselor malpractice; claim allowed for emotional distress alone).

²⁵⁴ See e.g., Village Community School v. Adler, 124 Misc. 2d 817, 478 N.Y.S.2d 546, 548-549 (1984) (court held that there may be recovery for emotional distress from a negligent act, but may not sue for mental distress caused by "*negligence in educational malpractices*") (emphasis added).

²⁵⁵ Elson, supra note 180, at 756.

The claim of loss of expectancy or failure to receive a benefit from non-negligent education, particularly of a specific type of employment or level of income may also present problems for the plaintiff.²⁵⁶ In Moch v. Rensselaer Water Co. the court held actions that caused denial of a benefit did not constitute an injury within tort.²⁵⁷ Analogy to *Moch* may be made for the student who fails to learn because of teacher negligence.²⁵⁸ Even though lower-income employment may be a foreseeable consequence of an inadequate education, particularly through the high school level, the range of student ability is too broad to create the expectation of qualification for specific jobs.²⁵⁹ The plaintiff in specific professional or vocational / technical education programs would conceivably have much less difficulty with the expectancy issue.²⁶⁰ While education beyond a certain level cannot guarantee an adequate financial income,²⁶¹ the student plaintiff might be able to recover for negligently induced loss of prospective pecuniary advantage.²⁶² To sustain this argument there must be evidence that some special relationship exists between the parties involved in the dispute.²⁶³ One writer further contends the relationship is mandated and “individuals and society rely on the effectiveness of the relationship to produce an informed populace.”²⁶⁴

²⁵⁶ Funston, supra note 218, at 784; Tracy, supra note 131, at 581.

²⁵⁷ Moch, 247 N.Y. 160, 159, N.E. 896, 899 (1928).

²⁵⁸ Funston, supra note 218, at 784; Contra see "Comment: Educational Malpractice." *University of Pennsylvania Law Review* 124 (1976): 755, 775-778.

²⁵⁹ Tracy, supra note 131, at 580-81.

²⁶⁰ See e.g., Peretti v. State of Montana, 464 F. Supp. 784 (1979) (Students in aviation technology program brought suit against the state when the course was terminated due to cuts in funding. Literature published by the vocational center described the course as leading to a private pilots' license and to employment by the general aviation industry.)

²⁶¹ Calavenna, supra note 115, at 730.

²⁶² Klein, supra note 239 at 49.

²⁶³ Prosser, supra note 100, § 130 at 1008.

²⁶⁴ Klein, supra note 239 at 49.

MALPRACTICE: DEFINED

Malpractice is an accepted cause of action against many professionals such as attorneys, physicians, surgeons, nurses, pilots, accountants, and construction inspectors.

²⁶⁵ The most common claim of malpractice is based on negligence.²⁶⁶ According to

Prosser and Keeton²⁶⁷ to show a cause of action in negligence the plaintiff must show:

1. “A duty, or obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks.”²⁶⁸
2. “A failure on the person’s part to conform to the standard required is a breach of duty.”

The existence of and adherence to a standard of care is the basis of the law of negligence.

Such rules of conduct are not definite and are relative to the need and the occasion.

Conduct that would be proper under some circumstances becomes negligent under others.²⁶⁹

In occupational areas where the courts have accepted malpractice based on negligence, they have done so based on a breach of a duty prescribed by the professional standard of care rather than by the reasonable man standard.²⁷⁰ This professional standard means professionals are “required not only to exercise reasonable care in what they do, but also to possess a standard minimum of special knowledge and ability.”²⁷¹ However, without a contract to accomplish a particular result, the professional does not guarantee

²⁶⁵ Prosser, *supra* note 100.

²⁶⁶ Meiselman, David J. *Attorney Malpractice: Law and Procedures*. Thomson West Publishing, 2007.

²⁶⁷ Prosser, *supra* note 100.

²⁶⁸ Prosser, *supra* note 100, at 164.

²⁶⁹ Prosser, *supra* note 100.

²⁷⁰ Meiselman, *supra* note 266.

²⁷¹ Prosser, *supra* note 100, at 185.

success and is not liable for an honest mistake in judgment where there is reasonable doubt about the proper course of action.

Prosser and Keeton²⁷² emphasized the extent of this special knowledge and ability by saying:

Experienced milk haulers, hockey coaches, expert skiers, construction inspectors, doctors, pilots, nurses, Karate teachers, travel agents must all use care which is reasonable in light of their superior learning and experience, and any special skills, knowledge or training they may personally have over and above what is normally possessed by persons in the field.²⁷³

The basic premise of malpractice law is that professionals will be liable when unnecessary deviations from the standards of the profession cause harm. The professional is obligated to follow the customary procedures necessary to reach their best judgment. Failure to do this could result in liability of the professional.²⁷⁴

Since the courts' major reason for reluctance in establishing a legal duty of care for educators was the lack of an acceptable standard of care against which to measure the educator's conduct, it is now beneficial to examine the standard of care concept in occupations where the courts have accepted claims of malpractice.²⁷⁵ The claims in cases alleging educational malpractice used terminology usually identified with other malpractice cases. The complaint in Peter W. alleged that the defendants "failed to exercise that degree of professional skill required of an ordinary prudent educator under the same circumstances."²⁷⁶ In Donohue,²⁷⁷ the plaintiff alleged that the defendants

²⁷² Prosser, supra note 100.

²⁷³ Prosser, supra note 100, at 185.

²⁷⁴ Elson, supra note 180.

²⁷⁵ Peter W., 60 Cal. App. 3d 817, 131 Cal Rptr. 854 (1976).

²⁷⁶ Peter W., 60 Cal. App. 3d 817, 818, 131 Cal Rptr. 854, 856 (1976).

²⁷⁷ Donohue v. Copiague, 408 N.Y.S. 2d 584 (1977), 407 N.Y.S. 2d. 874 (1978), 391 N.E. 2d. 1352 (1979).

“failed to adopt the professional standards and methods to evaluate and cope with plaintiff’s problems” which constituted educational malpractice.²⁷⁸

MEDICAL MALPRACTICE

Medical malpractice is the “infliction of injury or death under circumstances where it may be said that the cause thereof is a failure on the part of the medical practitioner to have complied with applicable standards of medical practice.”²⁷⁹ In a negligence action against a physician, the difficulty occurs when determining an objective standard against which to measure the defendant’s conduct. Ultimately, the conduct will be measured by the conduct of other physicians. By undertaking to render medical services, a physician will ordinarily be understood to hold himself out to the public as having and using standard professional skill and knowledge. According to Prosser and Keeton,²⁸⁰ the formula by which this is measured is that the physician must have and use the reasonable degree of knowledge, skill, and care ordinarily possessed and employed by members of the profession in good standing; and a physician will be liable if harm results because he does not have them. Good medical practice is the standard; it includes what the average careful, diligent, and skillful physician would do or not do in the care of similar cases. As a general rule, physicians are required to use their “best judgment” in the care and treatment of a patient but are not liable for mere errors of judgment provided they do what they believe is best after careful examination and where the proper course of action is open to reasonable doubt.²⁸¹

²⁷⁸ Donohue v. Copiague, 408 N.Y.S. 2d 584, 586 (1977), 407 N.Y.S. 2d. 874, 876 (1978), 391 N.E. 2d. 1352, 1354 (1979).

²⁷⁹ Harney, supra note 187, at 411.

²⁸⁰ Prosser, supra note 100.

²⁸¹ Pegalis, Steven. E. *American Law of Medical Malpractice*. 3rd ed. Eagan, MN: Thomson West, 2005; Prosser, supra note 100.

In alleging medical malpractice, the plaintiff must prove, by a preponderance of the evidence: (a) What the recognized standard of care is which would be exercised by physicians in the same specialty under similar circumstances; and (b) that the physician deviated from the standard of treatment for the plaintiff.²⁸² To prove this the plaintiff must use expert medical testimony to establish the standard of care and show the defendant's deviation from it. The standard of care against which the conduct of a professional is measured is a matter best determined by knowledge of the expert.²⁸³ Prosser and Keeton go so far as to say "it has been held in the great majority of malpractice cases that there can be no finding of negligence in the absence of expert testimony to support it."²⁸⁴

It is the responsibility of the trial judge to determine who is and is not qualified to act as an expert. Expert witnesses must establish that they are familiar with the methods, and customary and proper medical treatment. It is permissible that the testimony of the defendant serve as the expert to establish the standard of care by which his actions will be judged.²⁸⁵ Concerning expert testimony, the courts have recognized there are areas in which even the experts will disagree. A physician is to be judged by the tenets of the school he professes to follow. However, that school must be recognized, having definite principles and being in the line of thought of a respectable minority of the profession.²⁸⁶ If expert testimony is so contradictory, then the jury must deny the plaintiff's claim. Exceptions to the requirement of expert testimony include: (a) When the injury obviously

²⁸² Pegalis, *supra* note 281; Harney, *supra* note 187, at 411.

²⁸³ Dooley, James A., and Barry A. Lindahl. *Modern Tort Law*. Wilmette, IL: Callaghan and Company, 1983.

²⁸⁴ Prosser, *supra* note 100, at 188.

²⁸⁵ Dooley, *supra* note 283.

²⁸⁶ Prosser, *supra* note 100.

lies within the common knowledge of a layperson (leaving a sponge in a patient); (b) when the physician obviously disregards the directions from a drug manufacturer (prescribing a drug for a child when the label said NOT FOR USE BY CHILDREN); and (c) when a physician willfully abandons a patient.²⁸⁷

Prosser and Keeton said the ultimate result of all of the expert testimony is that the standard of care becomes one of good medical practice, which is to say, what is customary and usual in the profession. However, the courts have said customary practice is not conclusive and should be considered as just one factor in determining what is good medical practice. In Darling v. Charleston Community Memorial Hospital 211 N.E.2d. 253 (1965), the court said evidence that a physician followed customary practice is not the sole test of malpractice. It does illustrate what is feasible, it suggests a body of knowledge of which the defendant should be aware, but it should not be conclusive.

Reliance on expert testimony has not been absolutely followed in every situation. In Helling v. Carey, 519 P.2d. 981 (1974), the court established a basis for determining what constituted good medical practice, even though the medical issue was beyond the layman's knowledge. The court held two ophthalmologists negligent as a "matter of law" for failing to give a glaucoma test to a patient in her 20's even though the custom among professionals was to not give the test to anyone so young. A California court disagreed with the Helling decision saying it should not be construed to mean that just because a medical custom is negligent, such negligence can be found as "a matter of law."²⁸⁸

In addition to the issue of custom, other aspects of the standard of care issue are important. Many physicians hold themselves out as being specialists in a particular area

²⁸⁷ Dooley, supra note 283.

²⁸⁸ See, Barton v. Owen, 139 Cal. Rptr. 494 (1977).

of medical science. In most cases, they have specialized training and possess a special license or certification. When physicians hold themselves out as specialists in a medical field, they are held to a higher standard of care, knowledge, and skill than a general practitioner.²⁸⁹ However, the courts still emphasize that there are minimum requirements of skill and knowledge, which anyone who holds himself out as competent to treat human ailments is required to have.²⁹⁰

Another important aspect of medical malpractice used by the courts in distinguishing the proper standard of care is locality. The courts have said that in establishing a standard of care by which to judge a professional, it is necessary to compare the physician to other physicians in the same location. A country doctor should not be held to the same standard of care as an urban doctor. While this was a popular distinction in the past, the courts today are modifying this to mean similar locations or are completely abolishing it, saying there is a minimum to which all physicians should be held.²⁹¹

Despite the previous discussion regarding the standard of care in medical malpractice, it is a concept which is difficult to define. It is helpful to examine some of the types of situations where the courts have said that a physician owes to the patient a duty of care based on an established standard of care. Some of those situations include:

1. A physician has a duty to take a proper medical history. Failure to do this may mean that the physician lacks the proper facts and circumstances needed to adequately treat the illness or injury.²⁹²
2. A physician has a duty to conduct a careful and proper physical exam so that liability is not claimed for lack of best judgment.²⁹³

²⁸⁹ Dooley, supra note 283.

²⁹⁰ Prosser, supra note 100.

²⁹¹ Prosser, supra note 100,.

²⁹² Rostron v. Klein, 178 N.W.2d 675 (1970).

3. A physician has a duty to properly use laboratory and ancillary procedures. The professional is obligated to use the appropriate tests, and to know the limitations and value of each test.²⁹⁴
4. A physician has a duty to make the proper diagnosis. The process must be logical. The facts must be collected and analyzed in such a way that care is used in reaching the diagnosis. However, a wrong diagnosis does not in and of itself support a malpractice claim.²⁹⁵
5. A physician has a duty to refer the patient to a specialist if he knows the patient's ailment is beyond his knowledge or skill.²⁹⁶
6. A physician has a duty to obtain informed consent by informing the patient of the nature of the condition, the risks in the proposed treatment, the risks involved in the alternative forms of treatment, and the risks in failure to treat the condition. Failure to do this to the appropriate standard of care will result in the physician being negligent.²⁹⁷
7. A physician has a duty to keep abreast of medical knowledge but is not required to have extraordinary knowledge and ability. The physician is to practice in accordance with generally approved methods.²⁹⁸
8. A physician has a duty to continue attention to the patient by not abandoning at will a patient unless the treatment is no longer needed, the relationship is dissolved by mutual agreement, or unless reasonable notice is given.²⁹⁹

These are some of the claims of malpractice for which the courts have said physicians owe a duty of care to the patients. In each of these cases, the physician's liability was measured by the professional standards of care. The plaintiff offered expert testimony to establish the applicable standard of care and to show the defendant's deviation from the standard.³⁰⁰

²⁹³ Revels v. Pohle, 418 P.2d 364 (1966).
²⁹⁴ Lambert v. Michel, 364 So.2d 248 (1978).
²⁹⁵ Steeves v. United States, 294 F. Supp 446 (D.C. S.C.1968).
²⁹⁶ Steele v. United States, 463 F. Supp. 321 (D.C. Alaska, 1978).
²⁹⁷ Schloendorf v. Society of New York Hospital, 105 N.E. 92 (1914).
²⁹⁸ Pike v. Honsinger, 49 N.E. 760 (1898).
²⁹⁹ Ricks v. Budge, 64 P.2d. 208 (1937).
³⁰⁰ Dooley, supra note 283.

While no written standard of care exists and while the standard of care in medicine is greatly dependent on particular circumstances, it is common for the courts to analyze professional liability in terms of ethical standards and rules established by professional associations. In legal malpractice most of the standards established by the courts have been modeled after professional standards established by the American Bar Association.³⁰¹ While this is not quite as common in medical malpractice, it is still applicable so it is beneficial to review the Code of Medical Ethics of the American Medical Association.³⁰² These are not laws but are standards of conduct that define the essentials of honorable behavior for the physician.

1. “A physician shall be dedicated to providing competent medical service with compassion and respect for human dignity.
2. A physician shall deal honestly with patients and colleagues, and strive to expose those physicians deficient in character or competence, or who engage in fraud or deception.
3. A physician shall respect the law and also recognize a responsibility to seek changes in these requirements which are contrary to the best interests of the patient.
4. A physician shall respect the rights of patients, of colleagues, and of other health professionals, and shall safeguard patient confidences within the constraints of the law.
5. A physician shall continue to study, apply and advance scientific knowledge, make relevant information available to patients, colleagues, and the public, obtain consultation, and use the talents of other health professionals when indicated.
6. A physician shall, in the provision of appropriate patient care, except in emergencies, be free to choose whom to serve, with whom to associate, and the environment in which to provide medical services.

³⁰¹ Mallen, Ronald E., and Jeffrey M. Smith. *Legal Malpractice*. 2nd ed. St. Paul, MN: West Publishing, 2008.

³⁰² Council on Ethical and Judicial Affairs. *Code of Medical Ethics of the American Medical Association: 2008-2009 Edition*: American Medical Association Press, 2008.

7. A physician shall recognize a responsibility to participate in activities contributing to an improved community.”³⁰³

It is important to remember these principles are not the legal standard of care but are used by many courts to establish an appropriate standard of care.

Thus, the standard of care by which a physician is to be judged in claims of malpractice is a professional standard established by whether the physician possessed and used a reasonable degree of skill and care ordinarily possessed and employed by members of the profession in good standing. Failure to do so will mean the physician is liable for failing to meet the established standard of care.³⁰⁴ Each procedure, treatment, or test will involve a specific standard to be established by professionals. Failure to comply with the applicable standard of care may result in claims of medical malpractice.³⁰⁵

LEGAL MALPRACTICE

Legal malpractice is similar to medical malpractice in several ways: (a) Both establish a standard of care based on professional practice; (b) each use expert testimony to establish the standard of care; and (c) members of both professions hold themselves out to the public as possessing special skill and knowledge. Though similar, the two areas of malpractice also differ in some ways: (a) The attorney frequently must advocate and justify a position desired by the client; (b) locality and custom are more important in law than in medicine; and (c) statements from the American Bar Association are used more often by the courts than statements from the American Medical Association in determining the professional standard of care.

³⁰³ Id., at 2.

³⁰⁴ Prosser, supra note 100.

³⁰⁵ Harney, supra note 187, at 411.

For an attorney, the standard of care applied in most jurisdictions is that the attorney must act with reasonable care and diligence as well as possess and use the skill and knowledge ordinarily held by members of the legal profession.³⁰⁶ The ultimate test of competence is reasonable care, which is determined by a standard of care requiring the exercise of skill and knowledge ordinarily possessed by attorneys under similar circumstances.³⁰⁷ Like medicine, law is not an exact science. An attorney is not required to exercise extraordinary skill or ability nor be held liable for an error of judgment so long as the attorney exercises his best judgment based upon his knowledge and experience.³⁰⁸

Establishing a standard of care requires the determination of the abilities and degree of skill which the attorney must apply in the particular situation. In establishing competence, as one element of the standard of care, the courts consider such elements as skill (poor preparation of a document), knowledge, care, diligence (allow expiration of a statute of limitations), and capacity.³⁰⁹ For the most part, allegations of legal malpractice have been framed in phrases such as: (a) neglect of a reasonable duty; (b) lack of ordinary skill and diligence; (c) lack of a reasonable amount of skill and knowledge; and (d) lack of a reasonably average degree of professional skill and knowledge.³¹⁰ When judging allegations of legal malpractice, the courts analyze these phrases as one aspect of determining if the standard of care was met.

Another aspect used in establishing the appropriate standard of care for an attorney is the locality rule as defined in terms of local custom, community standard and

³⁰⁶ Meiselman, *supra* note 266.

³⁰⁷ Mallen, *supra* note 301.

³⁰⁸ Meiselman, *supra* note 266.

³⁰⁹ Mallen, *supra* note 301.

³¹⁰ Meiselman, *supra* note 266.

practice. The attorney must have knowledge of local considerations (practices, rules). This may be the determining factor in whether the attorney exercised adequate care and skill. The attorney must know local statutes and ordinances. Frequent use of local social, economic, and racial characteristics is made by an attorney when establishing a claim. For instance, to help show housing discrimination an attorney might use local demographic information. While local considerations are important, the importance of maintaining the standard of care is not reduced. Local considerations simply aid in determining if an attorney properly represented the client. If not, the attorney may be negligent because of a lack of knowledge of the characteristics of the local community and judiciary.³¹¹ As in medicine, courts hearing legal malpractice claims have recognized that the basic skill and ability should not vary between communities, but an attorney, more so than a physician, must be aware of local customs, statutes, and practices in order to meet the standard of care.

Unlike medicine, only a few states recognize or license the practice of legal specialties, so for the attorney who claims to possess a specialized practice the question is whether or not such a claim requires a higher standard of care. While no court has rejected the concept of a higher or different standard of care for an attorney practicing in a specialized area of the law, the standard must be established by attorneys practicing in that specialty.³¹²

Like physicians, attorneys have no written standards defining liability as such, but the American Bar Association's Model Code of Professional Responsibility is relied upon heavily by the courts in establishing rules for care. Ethical considerations help

³¹¹ Mallen, supra note 301.

³¹² Mallen, supra note 301.

define what constitutes ordinary skill and care, and set specific parameters of obligations for the attorney.³¹³ Since the courts rely heavily on these statements, it is beneficial to look at them.

Canon 1. A lawyer should assist in maintaining the integrity and competence of the legal profession.

Canon 2. A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available.

Canon 3. A lawyer should assist in preventing the unauthorized practice of law.

Canon 4. A lawyer should preserve the confidences and secrets of a client.

Canon 5. A lawyer should exercise independent professional judgment on behalf of a client.

Canon 6. A lawyer should represent a client competently.

Canon 7. A lawyer should represent a client zealously within the bounds of the law.

Canon 8. A lawyer should assist in improving the legal system.

Canon 9. A lawyer should avoid even the appearance of professional impropriety.³¹⁴

Accompanying the statement of each canon, the Code list ethical considerations and disciplinary rules for each canon. Some of these specific statements include:

1. Before recommending an applicant for admission, a lawyer should satisfy himself that the applicant is of good moral character.
2. A lawyer should not accept compensation or any thing of value incident to his employment or services from one, other than his client without the knowledge and consent of his client after full disclosure.
3. A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

³¹³ Mallen, *supra* note 301.

³¹⁴ American Bar Association. ABA Model Code of Professional Responsibility. In, <http://www.abanet.org/cpr/mrpc/mcpr.pdf>. (accessed 2008).

4. The professional judgment of a lawyer should be exercised within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties.
5. Because of his vital role in the legal process, a lawyer should act with competence and proper care in representing clients.
6. A lawyer shall not handle a legal matter which he knows or should know he is not competent to handle, without associating with him a lawyer who is competent to handle it.
7. A lawyer as adviser furthers the interest of his client by giving his professional opinion as to what he believes would likely be that ultimate decision of the courts on the matter at hand and by informing his client of the practical effect of such decision.
8. A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations.
9. A lawyer should not suppress evidence that he or his client has a legal obligation to reveal or produce.
10. A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.
11. A lawyer shall promote public confidence in our system and in the legal profession.³¹⁵

These and many other specific, ethical and disciplinary statements combine to form the Model Code of Professional Responsibility for all attorneys. In most situations these are heavily relied upon by the court in determining the standard of care for a particular situation.

While the concept of a standard of care for attorneys is no more exact and concrete than for physicians, the courts have recognized that an attorney does owe a duty

³¹⁵ American Bar Association. ABA Model Code of Professional Responsibility. In, <http://www.abanet.org/cpr/mrpc/mcpr.pdf>. (accessed 2008).

of care to his client and the attorney is judged by the established standard of care. The standard of care in legal malpractice was summarized by the court in Hodges v. Carter:³¹⁶

1. He possesses the requisite degree of learning, skill, and ability necessary to the practice of his profession and which others similarly situated ordinarily possess;
2. He will exert his best judgment in the prosecution of the litigation entrusted to him; and
3. He will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his clients cause.

INSTRUCTIONAL VERSUS PLACEMENT EDUCATIONAL MALPRACTICE

In claiming educational malpractice plaintiffs have claimed either instructional or placement malpractice. In early complaints, the plaintiffs claimed students failed to learn basic skills because educators were negligent in their duty to provide adequate instruction, guidance, counseling, and supervision.³¹⁷ Later, plaintiffs claimed that improper placement in educational programs was the result of negligence on the part of professional educators.³¹⁸ In both claims the plaintiffs (students and parents) alleged that the defendants failed to exercise the degree of professional skill required of an ordinary professional in similar circumstance. According to the claims, the injuries suffered by the student were a direct and proximate result of the acts and omissions of the educators. The courts' decisions in Peter W., and Donohue v. Copiague Union Free School District established the basis for judicial rejection of all claims, instructional and placement, of educational malpractice.

Claims of instructional and placement malpractice were rejected for the same reasons. The courts could find no duty of care and no standard of care against which to

³¹⁶ Hodges v. Carter, 80 S.E.2d. 144 (1954).

³¹⁷ Peter W., 60 Cal. App. 3d 814 (1976).

³¹⁸ Hoffman v. Board of Education of the City of New York, 64 A.D.2d 369 (1978).

judge the actions of educators. Concern that the alleged injuries could have been caused by many factors outside the school caused the courts to question the cause of the alleged injury. Several of the courts' concerns related to public policy. If claims of educational malpractice were permitted the courts feared a flood of such litigation would follow, burdening the schools. Also, the tradition of judicial non-interference in the day-to-day operations of the schools and the courts' belief that they lacked expertise in education matters kept the courts from accepting educational malpractice.

While some aspects of instructional and placement malpractice litigation are similar, distinctions can be made. Similarities include establishing a duty of care and a standard of care, as well as addressing the concerns related to public policy. Distinctions include the type of judicial expertise required to decide each case, the nature of the duty claimed, and the influence of external factors.

Plaintiffs in instructional and placement malpractice claims alleged the defendants had violated a duty of care. Instructional malpractice claims alleged violation of a duty to provide adequate instruction and guidance related to basic academic skills. Claims of placement malpractice alleged violation of a duty to properly test and place students. In finding no legal concept of duty to exist for educators, the courts rejected claims of malpractice. However, the legal concept of duty is not absolute. Prosser said, "But it should be recognized that 'duty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy that lead the law to say that the particular plaintiff is entitled to protection".³¹⁹ The courts' judgment that educators did not owe a

³¹⁹ Prosser, William L. *Handbook of the Law of Torts*. 4th ed. St. Paul, MN: West Publishing Co., 1971, 325-326.

duty of care to students is relative and could change as the public mood changes. Cardozo reminded us that “[t]he law never is, but is always about to be.”³²⁰

In rejecting claims of instructional and placement malpractice, many of the courts refused to find the existence of a duty of care based in part on the lack of a standard of care against which to judge the conduct of educators. This lack of a standard of care is related to the discussions of whether educators are to be considered professionals. In occupations recognized by the courts as professions, the courts have recognized the existence of a standard of care. Professionals are characterized by possession of specialized knowledge and skill requiring special training unique to the profession, and by society’s reliance on the professional’s expert judgment.

It can be argued that educators are professionals and as such owe a legal duty of care based on a professional standard of care determined in much the same way as in the medical and legal professions. Educators represent themselves to the public as possessing specialized knowledge and skill requiring special training. Physicians and attorneys are no different. Historically the public has relied on the best judgment of physicians and attorneys when needing medical and legal assistance. Physicians and attorneys were viewed as experts. In much the same way, society has placed its trust in and reliance upon the best judgment of educators in educating succeeding generations. The single, most important aspect common to medicine, law, and education is the exercise of judgment based on the history of the person seeking the service. Thus in claims of malpractice against educators, the courts’ judgment regarding a lack of a standard of care appears

³²⁰ Cardozo, Benjamin N. *The Nature of the Judicial Process*. New Haven, Ct: Yale University Press, 1921.

vulnerable. If the courts recognized malpractice in medicine and law, then given the similarities to education, the recognition of educational malpractice is possible.

A third similarity of the courts' decisions concerning instructional and placement malpractice is the issue of policy concerns. The courts cited the tradition of noninvolvement by the judiciary in matters of educational policy as one reason for rejecting claims of malpractice in education. Since Brown v. Board of Education of Topeka³²¹ state and federal courts have been involved in several aspects of education. However, this involvement has been reluctant and only occurred in matters directly relating to the protection of constitutional rights. The United States Supreme Court did take an active role in supervising school districts formulating guidelines for desegregation.³²² Also, the Court assumed the role of guarantor of a student's First Amendment right to symbolic speech.³²³ Courts in New Jersey have supervised legislative refinancing of the state's public schools.³²⁴

Considering the courts' previous willingness to be involved in matters of education, the relative flexibility of the legal concept of duty and the similarities between educators and other professionals, it would appear that the courts' reasons for rejecting claims of educational malpractice are open to challenge. The distinctions between instructional and placement malpractice litigations, however, point to unlikely acceptance of instructional malpractice, but possible acceptance of placement malpractice.

In rejecting claims of educational malpractice, the courts believed they lacked the expertise to judge the actions of professional educators. The courts said the conflicting

³²¹ Brown, 347 U.S. 483 (1954).

³²² Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

³²³ Tinker v. Des Moines School District, 393 U.S. 503 (1969).

³²⁴ Abbott v. Burke, 495 A.2d. 376 (1985).

theories and methodologies in education made it impossible to judge the actions of educators.³²⁵ Indeed the plaintiffs in Peter W. and Donohue were asking the courts to judge the adequacy of instruction, guidance, and supervision methods related to basic skills instruction. However in cases alleging placement malpractice, the plaintiffs were asking the courts to judge the proper use of placement, testing tools, and procedures. A distinction is to be made between requiring the courts to substitute judicial judgment for educational methodology, and requiring the courts to judge the appropriateness of what educators do or do not do to a student during school. While claims of instructional malpractice require judgment apparently beyond the courts' preference, claims of placement malpractice may not.

The plaintiffs in Hoffman v. Board of Education of the City of New York³²⁶ based their allegations of negligence on such actions by educators as failure to investigate the child's history and previous test results, and failure to retest the child as recommended by a psychologist. In Smith v. Alameda County Social Services Agency and Haywood Unified School District,³²⁷ the court was asked to judge whether negligent test interpretation had resulted in misplacement of the plaintiff. In B.M. v. State of Montana,³²⁸ the court was asked to rule on the classification of a child as mentally handicapped despite state guidelines to the contrary. In each of these placement claims, the court was not required to judge educational methodology. Rather the required judgments were more closely related to actions of educators with respect to students.

³²⁵ Donohue v. Copiague Union Free School District, 407 N.Y.S.2d. 874 (1978).

³²⁶ Hoffman, 410 N.Y.S.2d. 99 (1978).

³²⁷ Smith v. Alameda County Social Services Agency and Haywood Unified School District, 153 Cal. Rptr. 712 (1979).

³²⁸ B.M. v. State of Montana, 649 P.2d. 425 (1982).

As previously argued, educators are similar to other professionals especially with respect to the exercise of their best judgment. Like physicians, educators must know the background and history of the student. The educator must use the proper testing, diagnostic, and treatment procedures when determining the best course of action for the student. Also, educators must be aware of the availability and usefulness of various procedures. Physicians and educators must take all reasonable steps to evaluate the situation and then take a reasonable course of action. A Michigan court's decision in Rostron v. Klein³²⁹ resulted in a physician being found guilty of malpractice because he did not obtain a proper history of the patient so that he was informed of the facts and circumstances concerning the patient's injury. The plaintiff in Hoffman³³⁰ alleged a similar failure, yet the courts refused to hear the allegations.

In the dissenting opinion of the instructional malpractice case of Donohue v. Copiague Union Free School District,³³¹ the judges referred to placement issues regarding the use of appropriate and educationally accepted testing procedures. The judges said:

The negligence alleged in the case at bar is not unlike that of a doctor who, although confronted with a patient in a cancerous condition, fails to pursue medically accepted procedures to (1) diagnose the specific condition, and (2) treat the condition, and instead allows the patient to suffer inevitable consequences of the disease. Such medical malpractice would never be tolerated. At the very least, a complaint alleging same would not be dismissed upon motion. In the case at bar, the plaintiff displayed, through his failing grades, a serious condition with respect to his ability to learn. Although mindful of his learning disability, the school authorities made no attempt, as they were required to do, by appropriate and educationally accepted testing procedures, to diagnose the nature and extent of his learning problem and thereafter to take or recommend

³²⁹ Rostron v. Klein, 178 N.W.2d. 675 (1970).

³³⁰ Hoffman, 410 N.Y.S.2d. 99 (1978).

³³¹ Donohue, 407 N.Y.S.2d. 874 (1978).

remedial measures to deal with this problem. Instead, the plaintiff was just pushed through the education system without any attempt made to help him. Under these circumstances, the cause of action at bar is no different from the analogous cause of action for medical malpractice.³³²

The use of appropriate and educationally accepted testing procedures is one of the concrete issues involved in placement malpractice claims.

Placement malpractice claims deal more with concrete, prescriptive issues rather than the intangible issues related to instructional malpractice. Whether a student learns the basic academic skills can be affected by many factors external of the school. The courts addressed this concern in the decision of Peter W. v. San Francisco Unified School District.³³³ A student's ability to learn in a specific situation can be affected by learning styles, economic background, home environment, etc. Thus, the courts are unwilling to judge whether the student's failure to learn resulted from these external factors or from actions of educators.

However, judging placement claims does not involve such distinction. Whether an educator properly used or interpreted a test, or properly placed a student is generally not affected by external factors such as economic background. Thus, in many respects the judgment required by the courts concerning placement malpractice is much more objective than the judgment required in instructional malpractice claims.

EDUCATIONAL MALPRACTICE CASE LAW

With the arrival of educational malpractice claims, the courts have been presented with the novel legal question of whether to expand the area of tort law to include

³³² Donohue, 407 N.Y.S.2d. at 884-885.

³³³ Peter W., 60 Cal. App. 3d 814 (1976).

complaints arising from the area of academic negligence.³³⁴ The courts have responded negatively to this question and have refused to extend the umbrella of tort protection to include educational malpractice basing their conclusion on various public policy considerations.³³⁵

A cursory historical survey of education reveals that the effectiveness of teachers has seldom been challenged. The attitude toward teachers, teaching and learning is summarized by Lynch:

Until the last half of the twentieth century the school was an institution whose officers and employees enjoyed, under the common law, the freedom to treat pupils with a wide latitude of discretion. Rarely challenged and even more rarely checked in courts in the exercise of their duties, the school resembled a primary grouping as much as a secondary organization. The school teachers and administrators, much like parents, were assumed to protect the interests of children even when it hurt the children.³³⁶

Students and parents, however, are beginning to question the adequacy of the education being provided by the public school. They are turning to the courts with the view that malpractice actions are a recognized and legitimate means of redressing grievances and injuries in other professions, and therefore should also be applied to professionals in the field of education.³³⁷

Educational malpractice as a cause of action has not been recognized or defined by any court. Its existence is recognized only in the literature generated by educational and legal scholars as a result of the court actions brought by students against their school

³³⁴ "Comment: Professional Negligence." *University of Pennsylvania Law Review* 121 (1973, Jan): 627, 632.

³³⁵ Jorgensen, Cynthia A. "Donohue V. Copiague Union Free School District: New York Chooses Not to Recognize 'Educational Malpractice'." *Albany Law Review* 43 (1979): 339-59.

³³⁶ Lynch, Patrick D. "Education Policy and Educational Malpractice." In *Contemporary Legal Issues in Education*. Topeka: National Organization on Legal Problems in Education, 1979, p. 209.

³³⁷ Braverman, June R. "Educational Malpractice: Fantasy or Reality?" *The Executive Review* 2, no. 3 (1982, Jan): 1-5.

districts, administrators and teachers. A review of the educational malpractice cases reveals that the students are claiming they have been inadequately educated as a result of the failure of the schools to teach them sufficiently, and to diagnose and place them correctly in an appropriate school environment based upon that assessment and classification.³³⁸ The students in these actions are seeking to recover for the loss of learning caused by the negligent teaching.³³⁹

A potential educational malpractice claim can be framed in the language of a negligence cause of action. The University of Pennsylvania Law Review states that the cause of action would read as follows:

At the very least, the plaintiff's case would involve establishing that the student's failure to learn is a 'harm' cognizable in tort, and that the teacher had a duty to teach the student non-negligently. Proximate cause is self-evidently present under most interpretations of the term. A student's failure to learn is clearly among the foreseeable risks of a teacher's poor classroom methods, thus satisfying one formulation of the term. Under the second major interpretation, proximate cause exists because a student's failure to learn is a direct consequence of the teacher's incompetent teaching. [Citations omitted.]³⁴⁰

Various court cases throughout the country have confronted the issue of educational malpractice, but five cases are of primary importance. The first case, Peter W. v. San Francisco Unified School District was discussed in Chapter One. Edward Donohue v. Copiague Union Free School District,³⁴¹ Daniel Hoffman v. Board of

³³⁸ Peter W. v. San Francisco Unified School District, 60 Cal. App. 3d 814 (1976); Edward Donohue v. Copiague Union Free School District, 47 N.Y. 2d 440 (1979); Daniel Hoffman v. Board of Education of the City of New York, 49 N.Y. 2d 121 (1979); D.S.W., by his next of friends, R.M.W. and J.K.W. v Fairbanks North Star Borough School District, 628 P.2d 554 (1981); Ross J. Hunter et al. v. Board of Education of Montgomery County et al., 425 A.2d 681 (1981).

³³⁹ Jerry, supra note 101, at Footnote 2.

³⁴⁰ "Comment: Educational Malpractice." *University of Pennsylvania Law Review* 124 (1976): 755, 768.

³⁴¹ Donohue, 47 N.Y. 2d 440 (1979).

Education of the City of New York,³⁴² D.S.W., by his next of friends, R.M.W. and J.K.W. v Fairbanks North Star Borough School District³⁴³ and Ross J. Hunter et al. v. Board of Education of Montgomery County et al.³⁴⁴ have also been selected and reviewed because of their impact on understanding the parameters of educational malpractice in public primary and secondary educational institutions. In fact, the public policy factors the courts have cited in denying recognition of educational malpractice derive from these five cases.

Edward Donohue v. Copiague Union Free School District

One year after the Peter W. case was decided a similar case was filed in New York. This well publicized case was Edward Donohue v. Copiague Union Free School District.³⁴⁵ Edward Donohue [hereinafter, Donohue] was a student at a high school operated by Copiague Union Free School District. Even though Donohue received failing grades in several subjects and lacked basic reading and writing skills, he was allowed to graduate. Donohue then found it necessary to seek tutoring in order to acquire those basic skills which he had not obtained in high school. Donohue's complaint against the school district for \$5 million in damages alleged deficiencies in his knowledge and contained two causes of action. The first cause of action alleged that the Copiague Union Free School District was under an obligation and duty to not only teach varied subjects to Donohue but also ascertain his learning capacity and ability. The complaint also stated that the school district was obligated to correctly and properly test Donohue in order to evaluate his ability to comprehend the subject matter of the various courses and have

³⁴² Hoffman, 49 N.Y. 2d 121 (1979).

³⁴³ Fairbanks North Star, 628 P.2d 554 (1981).

³⁴⁴ Hunter, 425 A.2d 681 (1981).

³⁴⁵ Donohue, 47 N.Y.2d 440 (1979).

sufficient understanding and comprehension of the subject matters to achieve passing grades and qualify for a Certificate Graduation.³⁴⁶

The complaint further averred that since the plaintiff, following graduation, was unable to read and write simple basic English and did not have an understanding of the other subjects covered in his high school courses, Copiague Union Free School District, by and through its agents, servants and/or employees, failed to perform their duty to him in that they:

Gave to the plaintiff passing grades and/or minimal or failing grades in various subjects; failed to evaluate the plaintiff's mental ability and capacity to comprehend the subjects being taught to him at said school; failed to take proper means and precautions that they reasonably should have taken under the circumstances; failed to interview, discuss, evaluate and/or psychologically test the plaintiff in order to ascertain his ability to comprehend and understand such subject matter; failed to provide adequate school facilities, teachers, administrators, psychologists, and other personnel trained to take the necessary steps in testing and evaluation processes insofar as the plaintiff is concerned in order to ascertain the learning capacity, intelligence and intellectual absorption on the part of the plaintiff; failed to hire proper personnel, experienced in the handling of such matters; failed to teach the plaintiff in such a manner so that he could reasonably understand what was necessary under the circumstances so that he could cope with the various subjects which they tried to make the plaintiff understand; failed to properly supervise the plaintiff; failed to advise his parents of the difficulty and necessity to call in psychiatric help; that the processes practiced were defective and not commensurate with a student attending a high school within the county of Suffolk; failed to adopt the accepted professional standards and methods to evaluate and cope with plaintiff's problems which constituted educational malpractice.³⁴⁷

³⁴⁶

Id.

³⁴⁷

Edward Donohue v. Copiague Union Free School District, 64 A.D. 2d 29, 31-32 (1979).

For his second cause of action Donohue stated that he is the third-party beneficiary of a duty imposed upon the school district by section I of article XI of the New York State Constitution, which provides: “The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.”³⁴⁸ Donohue argued that the Copiague Union Free School District chose to operate a public school pursuant to the State constitution yet failed to educate him.

Copiague Union Free School District moved to dismiss the complaint stating Donohue failed to state a cause of action. The New York Supreme Court, Special Term, granted the motion to dismiss. The court wrote:

The first cause of action sounds in negligence and malpractice; the second in breach of a statutory duty. Taking the second cause of action first, the facts alleged fail to state a claim upon which relief can be granted. [Citations omitted]. Turning to the first cause of action, a reading of the complaint reveals that it is parallel if not identical to the complaint in Peter W. v. San Francisco School District (citations omitted). While different statutes are concededly involved the Court finds the reasoning of the California intermediate appellate court persuasive. Concededly no statutory liability is here involved (citations omitted); based upon the cogent reasoning in the cited case, the court finds no common-law duty in New York upon which the complaint at bar, alleging both negligence and malpractice, can be bottomed. Defendant’s motion to dismiss for failure to state facts sufficient to constitute a cause of action is granted.³⁴⁹

The court then went on to state:

The court notes that this is apparently a case of first impression in New York, and that the commencement of this action has received substantial attention both in education circles and in the news media. This factor,

³⁴⁸ Donohue, 64 A.D.2d at 32.

³⁴⁹ Donohue v. Copiague Union Free School District, 408 N.Y.S. 2d 584, 585 (1977).

combined with the recent adoption of 8 N.Y.C.R.R. sec. 3.45 by the Board of Regents (amended July 2, 1976 effective June 1, 1979), and the establishment by the Commissioner of basic competency tests pursuant to such provision, justifies the Court's suggesting that the grave policy questions posed by the issue at bar should be passed upon by Appellate Courts. (Emphasis added).³⁵⁰

The case then was appealed to the Supreme Court, Appellate Division. The Appellate Division, in affirming the Special Term's decision, held in substance that: (1) educators do not owe a legal duty of care to their students upon which to base a negligence action for "educational malpractice;" (2) the educators' failure to evaluate an "under-achiever" student as set forth in statute did not give rise to action sounding in tort, and (3) because of multitude of factors affecting learning process it would be impossible to prove that acts or omissions of educators were proximate cause of student illiteracy.³⁵¹

In justification of its holding the court commented:

Upon our own examination and analysis of the relevant factors discussed above, which are involved in determining whether to judicially recognize the existence of a legal duty of care running from educators to students, we, like the court in Peter W., hold that no such duty exists. Other jurisdictions have adopted this reasoning as well (Citations omitted). This determination does not mean that educators are not ethically and legally responsible for providing a meaningful public education for the youth of our State. Quite the contrary, all teachers and other officials of our schools bear an important public trust and may be held to answer for the failure to faithfully perform their duties. It does mean, however, that they may not be sued for damages by an individual student for an alleged failure to reach certain educational objectives.

The courts are an inappropriate forum to test the efficacy of educational programs and pedagogical methods. That judicial interference would be the inevitable result of the recognition of a legal duty of care is clear from the fact that

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Id.

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Donohue, 64 A.D. 2d 29 (1978).

in presenting their case, plaintiffs would, of necessity, call upon jurors to decide whether they should have been taught one subject instead of another, or whether certain tests should have been administered or tests results interpreted in one way rather than another, and so on, ad infinitum. It simply is not within the judicial function to evaluate conflicting theories of how best to educate. Even if it were possible to determine with exactitude the pedagogical course to follow with respect to particular individuals, yet another problem would arise. Public education involves an inherent stress between taking action to satisfy the educational needs of the individual student and the needs of the student body as a whole. It is not for the courts to determine how best to utilize scarce educational resources to achieve these sometimes conflicting objectives. Simply stated, the recognition of a cause of action sounding in negligence to recover for “educational malpractice” would impermissibly require the courts to oversee the administration of the State’s public school system.

On a number of occasions, the Court of Appeals has explicitly stated that educational policies are solely the province of the duly constituted educational authorities of this State. Thus, in Matter of Vetere v. Allen, 15 N.Y.2d 259, 267; 258 N.Y.S.2d 77, 80; 206 N.E.2d 174, 176, the Court of Appeals upheld the power of the Commissioner of Education to direct local school boards to take steps to eliminate racial imbalance, noting:

“Disagreement with the sociological, psychological and educational assumptions relied on by the Commissioner cannot be evaluated by this court. Such arguments can only be heard in the Legislature which has endowed the Commissioner with an all but absolute power, or by the Board of Regents, who are elected by the Legislature and make public policy in the field of education.”³⁵²

Concerning Donohue’s second cause of action the court noted:

It is our opinion that these enactments require the creation of a system of free common schools. Their purpose is to confer the benefits of a free education upon what would otherwise be an uneducated public. They were not intended to protect against the “injury” of ignorance for every individual is born lacking knowledge, education and

³⁵² Id. at 35-6.

experience. For this reason the failure to educational achievement cannot be characterized as “injury” within the meaning of the tort law.³⁵³

The Court further added:

Finally, the plaintiff’s complaint must be dismissed because of the practical impossibility of demonstrating that a breach of the alleged common law and statutory duties was the proximate cause of his failure to learn. The failure to learn does not bespeak a failure to teach. It is not alleged that the plaintiff’s classmates, who were exposed to the identical classroom instruction, also failed to learn. From this it may reasonably be inferred that the plaintiff’s illiteracy resulted from other causes. A school system cannot compel a particular student to study or to be interested in education. Here, the plaintiff is not totally illiterate and his academic record indicates satisfactory achievement in several subjects. In addition to innate intelligence, the extent to which a child learns is influenced by a host of social, emotional, economic and other factors which are not subject to control by a system of public education. In this context, it is virtually impossible to calculate to what extent, if any, the defendant’s acts or omissions proximately caused the plaintiff’s inability to read at his appropriate grade level.

Accordingly, we hold that the public policy of this State recognizes no cause of action for educational malpractice. We note that unlike the case of Peter W., supra, the complaint here contains no allegation of a cause of action for intentional and fraudulent misrepresentation. We, therefore, do not pass upon the viability of any such cause of action.³⁵⁴

There was a dissenting opinion by one of the justices who argued that the complaint did state a valid cause of action. Justice Suozzi contended:

Initially, it must be emphasized that the policy considerations enunciated in Peter W., (Citation Omitted) do not mandate a dismissal of the complaint. Whether the failure of the plaintiff to achieve a basic level of literacy was caused by the negligence of the school system, as the

³⁵³ Id. at 37.

³⁵⁴ Id. at 39.

plaintiff alleges, or was the product of forces outside the teaching process, is really a question of proof to be resolved at a trial. The fear of a flood of litigation, perhaps much of it without merit, and the possible difficulty in framing an appropriate measure of damages, are similarly unpersuasive grounds for dismissing the instant cause of action. Fear of excessive litigation caused by the creation of a new zone of liability was effectively refuted by the abolition of sovereign immunity many years ago, and numerous environmental actions fill our courts where damages are difficult to assess. Under the circumstances, there is no reason to differentiate between educational malpractice on the one hand, and other forms of negligence and malpractice litigation which currently congest our courts.³⁵⁵

He further went on to say:

In my view, the negligence alleged in the case at bar is not unlike that of a doctor who, although confronted with a patient with a cancerous condition, fails to pursue medically accepted procedures to (1) diagnose the specific condition and (2) treat the condition, and instead allows the patient to suffer the inevitable consequences of the disease. Such medical malpractice would never be tolerated. At the very least, a complaint alleging same would not be dismissed upon motion. In the case at bar, the plaintiff displayed, through his failing grades, a serious condition with respect to his ability to learn. Although mindful of this learning disability, the school authorities made no attempt as they were required to do, by appropriate and educationally accepted testing procedures, to diagnose the nature and extent of his learning problem and thereafter to take or recommend remedial measures to deal with this problem. Instead, the plaintiff was just pushed through the educational system without any attempt made to help him. Under these circumstances, the cause of action at bar is no different from the analogous cause of action for medical malpractice and, like the latter, is sufficient to withstand a motion to dismiss.³⁵⁶

³⁵⁵ Id. at 41-2.

³⁵⁶ Id. at 44.

The case then was appealed to the Court of Appeals of New York.³⁵⁷ In 1979, the Court of Appeals affirmed the decision by the Supreme Court, Appellate Division. The Court of Appeals held that: “(1) although the Constitution places the obligation of maintaining and supporting a system of public schools on the legislature, such general directive was not intended to impose a duty flowing directly from a local school district to individual pupils to insure that each pupil receives minimum level of education, the breach of which duty will entitle the student to compensatory damages, and (2) the cause of action against the school district seeking monetary damages for educational malpractice is not cognizable in the courts as a matter of public policy.”³⁵⁸

After first disposing the second cause of action the court observed:

Appellant’s first action bears closer scrutiny. It may very well be that even within the strictures of a traditional negligence or malpractice action, a complaint sounding in “educational malpractice” may not be formally pleaded. Thus, the imagination need not be overly taxed to envision allegations of a legal duty of care flowing from educators, if viewed as professionals, to their students. If doctors, lawyers, architects, engineers and other professionals are charged with a duty owing to the public whom they serve, it could be said that nothing in law precludes similar treatment of professional educators. Nor would creation of a standard with which to judge an educator’s performance of that duty necessarily pose an insurmountable obstacle. (Citations omitted). As for proximate causation, while this element might indeed be difficult, if not impossible, to prove in view of the many collateral factors involved in the learning process, it perhaps assumes too much to conclude that it could never be established. (Emphasis added). This would leave only the element of injury and who can in good faith deny that a student who upon graduation from high school cannot comprehend simple English – a deficiency allegedly attributable to the negligence of his educators – has not in some fashion been “injured.”

³⁵⁷ Donohue v. Copiague Union Free School District, 47 N.Y. 2d 440 (1979).

³⁵⁸ Id. at 441.

The fact that a complaint alleging “educational malpractice” might on the pleadings state a cause of action within traditional notions of tort law does not, however, require that it be sustained. The heart of the matter is whether, assuming that such a cause may be stated, the courts should, as a matter of public policy, entertain such claim. We believe they should not.³⁵⁹

The court went on to add:

To entertain a cause of action for “educational malpractice” would require the courts not merely to make judgments as to the validity of broad educational policies – a course we have unfalteringly eschewed in the past – but, more importantly, to sit in review of the day-to-day implementation of these policies. Recognition in the courts of this cause of action would constitute blatant interference with the responsibility for the administration of the public school system lodged by Constitution and statute in administrative agencies. [Citations omitted]. Of course, “[t]his is not to say that there may never be gross violations of defined public policy which the courts would be obliged to recognize and correct.” [Citations omitted].

Finally, not to be overlooked in today’s holding is the right of students presently enrolled in public schools, and their parents, to take advantage of the administrative process provided by statute to enlist the aid of the Commissioner of Education in insuring that such students receive a proper education. The Education Law (§ 310, subd. 7) permits any person aggrieved by an “official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools” to seek review of such act or decision by the commissioner.³⁶⁰

Judge Wachtler wrote a separate short concurring opinion in which he stated:

I agree that complaints of “educational malpractice” are for school administrative agencies, rather than the courts, to resolve.

There is, however, another even more fundamental objection to entertaining plaintiff’s cause of action alleging

³⁵⁹ Id. at 443-44.

³⁶⁰ Id. at 445.

educational malpractice. It is a basic principle that the law does not provide a remedy for every injury. (Citations omitted). As the majority notes, the decision of whether a new cause of action should be recognized at law is largely a question of policy. Critical to such a determination is whether the cause of action sought to be pleaded would be reasonably manageable within our legal system. The practical problems raised by a cause of action sounding in educational malpractice are so formidable that I would conclude that such a legal theory should not be cognizable in our courts. These problems, clearly articulated at the Appellate Division, include the practical impossibility of proving that the alleged malpractice of the teacher proximately caused the learning deficiency of the plaintiff student. Factors such as the student's attitude, motivation, temperament, past experience and home environment may all play an essential and immeasurable role in learning. Indeed as the majority observes proximate cause might "be difficult, if not impossible, to prove."³⁶¹

Hoffman v. the City of New York and the Board of Education of the City of New York

The fact that the California Court dismissed the Peter W. case and the New York Court did not recognize a cause of action for educational malpractice in the Donohue case did not stop or discourage another New York student, Danny Hoffman [hereinafter, Hoffman], from bringing a suit on a similar theory. In 1979, the case of Hoffman v. the City of New York and the Board of Education of the City of New York,³⁶² was decided. Danny Hoffman was born in April, 1951, and was walking and talking by the time he was one years old. Soon after his first birthday, his father died, and Hoffman's development visibly slowed including his ability to walk and talk. In 1956, at the age of 4 years and 10 months, Hoffman's mother took him to the National Hospital for Speech Disorders where records reflect that he was "a friendly child with little or no intelligible speech. Produced infantile equivalents for names of some objects – or will vocalize in imitations of

³⁶¹ Id. at 445-46.

³⁶² Daniel Hoffman v. the City of New York and the Board of Education of the City of New York, 49 N.Y.2d 121 (1979).

infection.*** Appears to be retarded and should have psychological [sic].”³⁶³ Hoffman’s hospital record also described him as having Mongoloid eyes possibly referring to the “angles on each side of his eyes formed by junction of the upper and lower lids was somewhat greater than is usual among occidental children.”³⁶⁴ Danny Hoffman was not a Mongoloid child even though the “impression” was that Hoffman suffered from borderline Mongolism. Other physical features noted in his record were accounted characteristics he inherited from his mother.³⁶⁵

Hoffman was administered a nonverbal intelligence test known as the Merrill-Palmer Test by another hospital employee a month after his initial visit and scored an I.Q. of 90, with a mental age of four years and five months. Hoffman’s actual age was four years and 11 months. As such, his score was deemed within the normal range of intelligence. The psychologist noted that “his range – particularly whenever form perception and problem solving acuity are involved – indicates that he can work well into the average and even brighter range.”³⁶⁶ At the psychologist’s recommendation, Hoffman began weekly therapy at the New York Speech Institute and continued with the therapy until after his placement in his first Children with Retarded Mental Development [hereinafter, CRMD] class.

In September, 1956, Danny Hoffman entered kindergarten. In early 1957, he was administered the Stanford-Binet Intelligence Test by a certified clinical psychologist employed by the New York City Board of Education. The doctor reported:

Mongolian tendencies, severe speech defects, slow in response.

³⁶³ Daniel Hoffman v. Board of Education of the City of New York, 64 A.D.2d 369, 371 (1978).

³⁶⁴ Id. at 371.

³⁶⁵ Id.

³⁶⁶ Id. at 372.

RECOMMENDATION:

Eligible for placement in a CRMD class at P77Q In September 1957.

* * *

Danny impresses as a shy, cooperative youngster. Mongoloid features are observable. There is a marked speech defect which makes Danny hesitant in speaking up. He obviously understands more than he is able to communicate. With careful listening, it is frequently possible to understand what he is driving at.

On the Stanford-Binet, L, he achieves a mental age of 4-3 and an I.Q. of 74, indicating borderline intelligence. The obtained I.Q. may be higher than it ought to be as the Examiner was confronted with the task of having to interpret what Danny was trying to say, Danny being given the benefit of the doubt with it seemed reasonable to do so.

Danny is frequently bored in class and needs a specialized individualized teaching program. At this point, a continued, yet varied readiness program should be offered to him. He is not yet able to do formal learning. He needs help with his speech problem in order that he be able to learn to make himself understood. Also *his intelligence should be reevaluated within a two-year period so that a more accurate estimation of his abilities can be made.*³⁶⁷

The psychologist testified in court on Hoffman's behalf as to why he recommended that Hoffman be placed in CRMD including "the general incapacities that seemed to be there."³⁶⁸ In describing Hoffman's speech, the psychologist testified:

It was like listening to a radio at a very low level, with a lot of static. *You think you know what is being said, but you can't be sure, and I think that comes through here, that I really wasn't sure and that's why we wanted him retested within two years.* This was always Bureau procedure. We were always concerned in the [Bureau of Child Guidance] not to make mistakes with kids and we were careful to see to it we had doubts about what we were doing, that *we recommended that he be retested and say it, and that's what happened here.*³⁶⁹

³⁶⁷ Id. at 372.

³⁶⁸ Id. at 373.

³⁶⁹ Id. at 373.

He further testified that:

*It was assumed that there was retardation and there was also contributing factors. How much was a pure retardation and how much was the result of contributing factors couldn't be known, at least by me * * * It was my feeling that there was retardation, but I doubted some of the results and therefore I suggested a retesting. (Emphasis included.)*³⁷⁰

In relating the facts, the New York Supreme Court, Appellate Division stated:

Despite his borderline finding of retardation and that “he doubted some of the results,” he made no requests to interview plaintiff’s mother, or to learn whether plaintiff had been receiving treatment for his speech condition. Indeed, no attempt was made to obtain his social history and the mother was never told that the diagnosis of retardation was based on her son’s failing short of the cut-off score of 75 by only one point or that, upon her request, the school authorities, by their own rules, would be required to retest the child. If they had informed her of her right to have her soon retested, they might well have learned that he had achieved an I.Q. rating of 90 on the non-verbal Miller-Palmer Test given only 10 months earlier at the National Hospital for Speech Disorders.³⁷¹

After Hoffman was given the I.Q. test, his mother had an opportunity to speak with someone in the principal’s office. She testified:

He told me they had a report from the Bureau of Child Guidance that my son was a Mongoloid child, and I asked him, I said, “Well, what can I do?” and he says, “Well, there are several things you can do. One, you can put him in an institution.” And I believe I asked him if that meant keeping him away from home and I told him I could never do that and then he says, “The only thing, they could put him in special classes.”³⁷²

³⁷⁰ Id. at 373.

³⁷¹ Id. at 373-74.

³⁷² Id. at 374.

From 1957 to the conclusion of the 1967 / 68 academic year, Hoffman attended 5 different schools – all the while residing at the same address – because of his placement in CRMD classes. In 1968, he was transferred to the Queens Occupational Training Center which was a training institution for retarded youths. The Queens Occupational Training Center did not engage in academic preparation. Towards the end of his first year as a student at the training center, a series of events would lead to Hoffman being administered a new I.Q. exam and being told that “since it had not been determined that he was not retarded he was not eligible to remain at the [Queens Occupational Training Center].”³⁷³

Hoffman was just past his 18th birthday and Social Security refused to continue paying benefits for him citing “he was not sufficiently handicapped by his retarded status to pursue gainful employment.”³⁷⁴ After more than 12 years of participating in classrooms with mentally retarded children and at the request of his mother in an attempt to have his social security benefits re-instated, Hoffman was administered an I.Q. test by one of the doctors at the Bureau of Child Guidance.³⁷⁵

Hoffman took the Wechsler Intelligence Scale for Adults (W.A.I.S.) test and scored a verbal I.Q. of 85 and a performance I.Q. of 107 resulting in a full scale I.Q. of 94. According to the doctor’s report:

[Hoffman] is a tall, well-built boy, alert looking and charming in manner, who is so incapacitated by a speech defect that communication is difficult for him. He relates very well, displays humor, and appears reality oriented.

On the W.A.I.S., he obtained a Verbal Scale I.Q. 85, Performance I.Q. 107 and Full Scale I.Q. 94. This places

³⁷³ Id. at 374.

³⁷⁴ Id. at 376.

³⁷⁵ Id. at 376.

him in the normal range. However, his superior performance on tests of non-verbal intelligence, as well as the fact that his extremely poor academic background, severely depreciated his scores on some verbal tests make it very likely that *his intellectual potential is at least Bright Normal.*

Projective tests and tracings of geometric designs confirm the impression of good intelligence and contraindicate organicity. He is however extremely compulsive, to a degree that sometimes reality testing suffers in his distribution of time for a task.

This boy is above average intellectual potential and a good personality structure. Due to his being almost immobilized in the speech area, as well as considering his extremely defective academic background he would find it difficult, if not impossible, to function in a regular high school. Psychomotor coordination is good, however. Referral to [Division of Vocational Rehabilitation of the State Education Department] is suggested for specialized training and alleviation of the speech problem. (Emphasis included).³⁷⁶

Hoffman nor his mother were made aware of the test results at that time. He completed his first academic year at the training center but was told to leave when he attempted to return in September, 1969, because he did not belong there anymore. One of the school officials told Hoffman's mother that "from their tests they discovered he was not retarded and they could no longer keep him there because he doesn't qualify;"³⁷⁷ this after 12 years of being in classrooms for children with retarded mental development.

In January, 1970, Hoffman was examined by another clinical psychologist and was administered several tests including the Wechsler Adult Intelligence Scale. Hoffman attained an I.Q. of 89 and 114 on the predominately verbal portion of the exam and performance subtests, respectively. Overall, Hoffman's full scale I.Q. was 100. The

³⁷⁶ Id. at 376-77.

³⁷⁷ Id. at 377.

clinical psychologist noted that Hoffman's lower I.Q. score on the verbal portion of the exam was heavily influenced by his CRMD placement for so many years.³⁷⁸

The doctor concluded that:

Plaintiff's learning potential had always been above average and that one of the reasons his intellectual development had been diminished was the assumption of the correctness of the school's diagnosis by his family and others, by reason of which they did not provide the stimulation that would otherwise have been given the child. . . . [Hoffman] felt that he was substantially without an education; that he did not know what he could do to earn a living; and that he did not know "where he fitted in the world, and even where he fitted into his family." All this was a competent producing cause of the condition of depression that he noted in plaintiff.³⁷⁹

In filing his complaint, Hoffman stated that the Board of Education was not only negligent, but reckless and careless in failing to provide sufficient procedures to truly evaluate his mental intelligence when he was first tested. His educational circumstances were exacerbated by the school system's hiring of incompetent personnel and failure to properly supervise said personnel. The school system was also negligent in that they failed to re-test and re-evaluate Hoffman's condition which could have saved him from participating in an inadequate educational program for 12 years. Furthermore, the school system misled Hoffman's mother as to the true nature of her son's capacities and led her to believe Hoffman was mentally retarded when in fact he was not.

As to the second cause of action, Hoffman alleged that he and his mother suffered severe financial loss including Hoffman's diminished earning capacity as well as the money he needed to expend for re-training and further treatment and his mother's long-term financial expenditures for transportation to and from special schools over the course

³⁷⁸ Id. at 379.

³⁷⁹ Id. at 379.

of his academic career. Both Hoffman and his mother sought one million five hundred thousand (\$1,500,000.00) dollars for the educational negligence and five hundred thousand (\$500,000.00) dollars for the first and second cause of action, respectively.

The Supreme Court, Trial Term, entered a judgment on a jury verdict in the principal amount of seven hundred and fifty thousand (\$750,000.00) dollars. The New York City Board of Education appealed to the New York Supreme Court, Appellate Division which held among other things that the school system was negligent for not following the school psychologist's recommendation that Hoffman be re-evaluated within 2 years and that Hoffman was entitled to recover \$500,000 from the New York City Board of Education because of his diminished intellectual development and psychological injury as a result of the school system employees' negligence.³⁸⁰ However, the Appellate Division reversed the judgment and granted a new trial on issue of damages only, unless Hoffman consented to reduction of a verdict of \$500,000, in which even judgment would be affirmed. The court reasoned:

Defendant's affirmative act in placing plaintiff in a CRMD class initially (when it should have known that a mistake could have devastating consequences) created a relationship between itself and plaintiff out of which arose a duty to take reasonable steps to ascertain whether (at least, in a borderline case) that placement was proper. [Citations omitted]. We need not here decide whether such duty would have required "intelligence" retesting (in view of plaintiff's poor showing on achievement tests) had not the direction for such retesting been placed in the very document which asserted that plaintiff was to be placed in a CRMD class. It ill-becomes the board of education to argue for the untouchability of its own policy and procedures when the gist of plaintiff's complaint is that the entity which did not follow them was the board itself.

³⁸⁰ Id. at 369.

New York State and its municipalities have long since surrendered immunity from suit. Just as well established is the rule that damages for psychological and emotional injury are recoverable even absent physical injury or contact [Citations omitted]. Had plaintiff been improperly diagnosed or treated by medical or psychological personnel in a municipal hospital, the municipality would be liable for the ensuing injuries. There is no reason for any different rule here because the personnel were employed by a government entity other than a hospital. Negligence is negligence, even if defendant and Mr. Justice Damiani prefer semantically to call it educational malpractice. Thus, defendant's rhetoric constructs a chamber of horrors by asserting that affirmance in this case would create a new theory of liability known as "educational malpractice" and that before doing so we must consider public policy [Citations omitted] and the effects of opening a vast new field which will further impoverish financially hard pressed municipalities. Defendant, in effect, suggests that to avoid such horrors, educational entities must be insulated from the legal responsibilities and obligations common to all other governmental entities no matter how seriously a particular student may have been injured and, ironically, even though such injuries were caused by their own affirmative acts in failing to follow their own rules.

I see no reason for such a trade-off, on alleged policy grounds, which would warrant a denial of fair dealing to one who is injured by exempting a governmental agency from its responsibility for its *affirmative* torts. Such a determination would simply amount to the imposition of private value judgments over the legitimate interests and legal rights of those tortiously injured. That does not mean that the parents of the Johnnies who cannot read may flock to the courts and automatically obtain redress. Nor does it mean that the parents of all the Janies whose delicate egos were upset because they did not get the gold stars they deserved will obtain redress. If the door to "educational torts" for nonfeasance is to be opened [citations omitted], it will not be by this case which involves *misfeasance* in failing to follow the individualized and specific prescription of defendant's own certified psychologist, whose very decision it was in the first place, to place plaintiff in a class for retarded children, or in the initial making by him of an ambiguous report, if that be the fact. (Emphasis included).

As Professor David A. Diamond noted [citations omitted], when discussing this very case after the judgment at Trial Term, and contrasting it with the *Donohue* case, upon which Mr. Justice Damiani lays so much stress, "the thrust of the plaintiff's case is not so much a failure to take steps to detect and correct a weakness in a student, that is, a failure to provide a positive program for a student, but rather, affirmative acts of negligence which imposed additional and crippling burdens upon a student" and that "it does not seem unreasonable to hold a school board liable for the type of behavior exhibited in Hoffman." I agree.³⁸¹

In concluding the opinion for the majority, Mr. Justice Shapiro added:

Therefore, not only reason and justice, but the law as well, cry out for an affirmance of plaintiff's right to a recovery. Any other reason would be a reproach to justice. In the words of the ancient Romans: "*Fiat justitia, ruat coelum*" (Let justice be done, though the heavens fall).³⁸²

Two of the justices, however, dissented and in writing separate opinions voted to reverse the judgment and dismiss the complaint. In his dissent, Mr. Justice Martuscello mentioned:

The two theories of liability as pleaded in the complaint were submitted to the jury. The jury returned a general verdict in favor of the plaintiff awarding him damages of \$750,000. On this appeal the defendant challenges, *inter alia*, each theory of liability on the ground that the plaintiff failed to sustain his burden of proving his claim as a matter of law and therefore neither theory of liability should have been submitted to the jury.

I find merit in the defendant's position. It is conceivable that a case of educational malpractice may be pleaded and established against a board of education for an act of misfeasance. However, the plaintiff in the instant case has failed to establish the negligence of the defendant by its breach of a duty owed to the plaintiff under either theory of

³⁸¹ Id. at 385-86.

³⁸² Id. at 387.

liability. Therefore, the plaintiff's complaint should have been dismissed at the case of the entire case.³⁸³

He further contended:

The issue of whether the Board of Education had a duty to periodically retest plaintiff's I.Q. should not have been submitted to the jury, . . . a jury should not be permitted to evaluate the merits of plaintiff's disagreement with the educational assumptions relied upon by a board of education. Questions regarding a board's exercise of judgment and discretion, and its allocation of available resources, are inappropriate for resolution in the courts. [Citations omitted]. Under the guise of enforcing a vague educational public policy, a jury should not be permitted to assume the exercise of an educational policy that is vested by constitution and by statute in school administrative agencies. [Citations omitted].³⁸⁴

Justice Damiani also dissented from the majority and voted not only to reverse the lower court's ruling on behalf of Hoffman but to also dismiss Hoffman's complaint because as the court ruled in Donohue, public policy dictated that no cause of action existed to recover for so-called educational malpractice. He reasoned:

In the Donohue case, this court decided that the strong public policy of [New York] was to avoid judicial interference in educational matters and that the recognition of a cause of action sounding in negligence to recover for so-called "educational malpractice" would impermissibly require the courts to oversee and, with hindsight, to evaluate the professional judgment of those charged with the responsibility for the administration of public education. As was predicted in Donohue, this case has involved the courts in an evaluation of judgments and actions of educators. In addition, the jury here was required to decide, among other issues "whether certain tests should have been administered or test results interpreted in one way rather than another" [citations omitted]. The result was a trial transcript of some 2036 pages, wherein the parties explored every facet of the plaintiff's education. Questions as to the propriety of educational judgments and actions are

³⁸³ Id. at 391.

³⁸⁴ Id. at 397.

inappropriate for resolution in the judicial arena. [Citations omitted].³⁸⁵

The decision, as would have been expected, was appealed to the Court of Appeals of New York.³⁸⁶ In December, 1979, the Court of Appeals in an opinion by Justice Josen reversed the Appellate Division. The court stated at the outset that the cause of action in this case sounded in educational malpractice. Following a review of its holding in the Donohue case the court concluded:

In order to affirm a finding of liability in these circumstances, this court would be required to allow the finder of fact to substitute its judgment for the professional judgment of the board of education as to the type of psychometric devices to be used and the frequency with which such tests are to be given. Such a decision would also allow a court or a jury to second-guess the determinations of each of plaintiff's teachers. To do so would open the door to an examination of the propriety of each of the procedures used in the education of every student in our school system. Clearly, each and every time a student fails to progress academically, it can be argued that he or she would have done better and received a greater benefit if another educational approach or diagnostic tool had been utilized. Similarly, whenever there was a failure to implement a recommendation made by any person in the school system with respect to the evaluation of a pupil of his or her educational program, it could be said, as here, that liability could be predicated on misfeasance. However, the court system is not the proper forum to test the validity of the educational decision to place a particular student in one of the many educational programs offered by the schools of the State. In our view, any dispute concerning the proper placement of a child in a particular educational program can best be resolved by seeking review of such professional educational judgment through the administrative processes provided by statute. (Citation omitted).³⁸⁷

³⁸⁵ Id. at 397-98.

³⁸⁶ Hoffman v. Board of Education of the City of New York, 49 N.Y. 2d 121 (1979).

³⁸⁷ Id. at 126-27.

In a 4-3 decision, three other justices concurred with the majority opinion written by Justice Josen and Justice Meyer writing the dissent argued:

I agree with Mr. Justice Irwin Shapiro, on the analysis spelled out in his well-reasoned decision at the Appellate Division [citations omitted], that this case involves not “educational malpractice” as the majority in this court suggests [citations omitted] but discernible affirmative negligence on the part of the board of education in failing to carry out the recommendation for re-evaluation within a period of two years which was an integral part of the procedure by which plaintiff was placed in a CRMD class, and thus readily identifiable as the proximate cause of plaintiff’s damages. I therefore dissent.³⁸⁸

D.S.W. by His Next of Friends, R.M.W. and J.K.W. v. Fairbanks North Star Borough School District

In 1981, the Supreme Court of the State of Alaska rendered an opinion in two companion cases regarding whether an action for damages may be maintained against a school district for the negligent classification, placement or teaching of a student. These were the cases of D.S.W. by His Next of Friends, R.M.W. and J.K.W. v. Fairbanks North Star Borough School District and L.A.H. by his next of friends, L.H. and V.H. v. Fairbanks North Star Borough School District otherwise referred to as Fairbanks North Star.³⁸⁹ The facts of the case are as follows:

L.A.H. is seventeen years old and suffers from a learning disability commonly known as dyslexia. L.A.H. attended Borough School District schools from kindergarten through the sixth grade during which time the District negligently failed to ascertain that he was suffering from dyslexia. On the last day of L.A.H.’s second year in the sixth grade the District determined that he was dyslexic. Thereafter, for a time, the District gave him special education courses to assist in overcoming the effects of this disability. These courses were then negligently terminated, despite the

³⁸⁸ Id. at 127.

³⁸⁹ D.S.W. by His Next of Friends, R.M.W. and J.K.W. v. Fairbanks North Star Borough School District, 628 P.2d 554 (1981).

District's awareness that L.A.H. had not overcome his dyslexia, and were never resumed. The complaint alleges that L.A.H. has suffered damage caused by the negligent acts and omissions of the District including loss of education, loss of opportunity for employment, loss of opportunity to attend college or post high school studies, past and future mental anguish and loss of income and income earning ability.

D.S.W.'s claim is similar. He too is dyslexic. The School District discovered this condition in the first grade but did not assist him in overcoming it until the fifth grade. The School District gave D.S.W. a special education program during the fifth and sixth grade but negligently discontinued it in the seventh grade knowing that he had not been adequately trained to compensate for dyslexia at that point. Beginning with the seventh grade and continuing to the present, the defendant has failed to provide proper education to assist D.S.W. in overcoming his dyslexia. D.S.W. claims money damages against the School District for the same injuries claimed by L.A.H.³⁹⁰

In affirming the Superior Court's dismissal of the claims, the Supreme Court of the State of Alaska followed in the footsteps of the Peter W. case decided in California and Donohue which had been heard in New York; neither case establishing a successful claim of damages in educational malpractice. Focusing on precedent set in Peter W., Donohue, Hoffman and Smith v. Alameda County Social Services Agency,³⁹¹ the Court proceeded to state:

We agree with the results reached in these cases and with the reasoning employed by the California Court of Appeals in Peter W. and Smith. In particular we think that the remedy of money damages is inappropriate as a remedy for one who has been a victim of errors made during his or her education. The level of success which might have been achieved had the mistakes not be made will, we believe, be necessarily incapable of assessment, rendering legal cause

³⁹⁰ Id. at 555-56.

³⁹¹ Peter W., 60 Cal. App. 3d 814 (1976); Donohue, 47 N.Y. 2d 440 (1979); Hoffman, 49 N.Y. 2d 121 (1979); Smith, 153 Cal. Rptr. 712 (Cal. App. 1979).

an imponderable which is beyond the ability of courts to deal with in a reasoned way.

No different result is mandated under the Alaska statutes to which appellants have referred us [citations omitted] the so-called Education for Exceptional Children Act. Nothing in the Act either expressly or impliedly authorizes a damage claim. The same considerations which preclude a damage claim at common law for educational malpractice precludes inferring one from the Act. Similar statutory claims were presented, and rejected, in Peter W. v. San Francisco Unified School District [citations omitted], and Donohue v. Copiague Union Free School District. [Citations omitted].³⁹²

The court went on to comment concerning the rights of parents who felt their children were wrongfully classified or placed. The court noted:

Our conclusion does not mean that parents who believe that their children have been inappropriately classified or placed without recourse. As 14.30.191(c) provides that any parent believing classification or placement to be in error may request an independent examination and evaluation of the child and for a hearing before a hearing officer in the event of a substantial discrepancy. Further, that section provides that the proceedings so conducted are subject to the Administrative Procedure Act, which in turn expressly provides for judicial review. [Citations omitted].

In our view it is preferable to resolve disputes concerning classification and placement decisions by using these, or similar (see U.S.C. 1415), procedures than through the mechanism of tort action for damages. Prompt administrative and judicial review may correct erroneous action in time so that any educational shortcomings suffered by a student may be corrected. Money damages, on the other hand, are a poor, and only tenuously related, substitute for a proper education. We recognize, of course, that there may be cases when a student in need of special placement is negligently not given it by the school district, and the student's parents, having no reason to know of the need, do not initiate an administrative review proceeding. In such cases there are authorities suggesting that corrective

392 Fairbanks North Star, 628 P. 2d at 7-8.

tutorial programs may be appropriately mandated [citations omitted]. However, we need not reach that question here.³⁹³

Ross J. Hunter et al. v. Board of Education of Montgomery County, et al.

Montgomery County, Maryland, was the venue of the 1978 educational malpractice case of Ross J. Hunter et al. v. Board of Education of Montgomery County, et al.³⁹⁴ On behalf of their son, Mr. & Mrs. Hunter filed a six count declaration seeking recovery for “educational malpractice” from the Board of Education of Montgomery County and three of its employees. In general:

Count I of the complaint alleged “educational malpractice” in the traditional negligence form. Count II realleged the averments of Count I and added that the acts were willful and deliberate. Count III alleged that the Board was negligent in evaluating its personnel and programs. Count IV was identical to Count I but alleged a statutory duty. Count V alleged a breach of an implied contract. These first five counts constituted the suit of the minor Hunter against the appellees. In the sixth and final count Mr. and Mrs. Hunter “incorporate by reference all of . . . the allegations of the prior counts.”³⁹⁵

When the Hunters took their case before the Circuit Court, the court held that public policy barred the action even though the school board did not dispute the truth of the allegation.³⁹⁶ Appealing to the Court of Special Appeals of Maryland, Mr. & Mrs. Hunter faced the same verdict when they asked the court to reverse the circuit court’s decision.³⁹⁷ The Court focused on only one issue brought by the Hunters, was the circuit court correct in ruling for the board even though the board did not dispute the Hunter’s allegations. The court looked to other jurisdictions for guidance on answering the question because the Hunter’s case was one of first impression for the Maryland.

³⁹³ Fairbanks North Star, 628 P. 2d at 8-10.

³⁹⁴ Ross J. Hunter et al. v. Board of Education of Montgomery County, et al., 47 Md. App. 709 (1981).

³⁹⁵ Id. at 11 n. 3.

³⁹⁶ Hunter, 47 Md. App. 709 (1981).

³⁹⁷ Id.

Reviewing the holdings of Peter W., Smith v. Alameda County Social Services Agency, Donohue and Hoffman, the Court followed suit by not legally recognizing educational malpractice and held:

To adopt the position that appellants urge upon us would place all teachers under judicial scrutiny. Courts would sit in judgment not only of educational policies and matters entrusted by the General Assembly to the Department of Education [citations omitted], and to the local school boards [citations omitted], but also of day-to-day implementation of those policies.

It is conceivable that, if allowed, suits for educational malpractice might arise every time a child failed a grade, subject, or test, with the result that teachers could possibly spend more time in lawyers' offices and courtrooms than in classrooms. That happening could give rise to claims of educational malpractice predicated on the teacher's failure to devote sufficient time to teaching. The opposite side of the matter is that if, to avoid suits arising from a student's failing a grade, subject, or test, the teacher "passed" the child, the teacher would likely find himself or herself defending a malpractice suit because the child was promoted when promotion was not warranted.

We are aware that a serious social problem exists when, as here, a student is "promoted" through the school system, from grade to grade, and yet, he or she has not been taught to read. We are equally cognizant of criticisms of the teaching profession. The situation is even more serious when one recalls to mind the words of Thomas Jefferson, that a nation cannot be ignorant and free, in a state of civilization, at one and the same time.

The seriousness of a matter, however, does not mean that a solution may be found, or redress obtained, through the use of the courts. Courts cannot solve every societal problem. The courts, on constitutional grounds, can decide that all schools must afford equal protections of the laws, but courts may not decide the curriculum, nor the degree of proficiency needed to advance from grade to grade through the school system. The field of education is simply too fraught with unanswered questions for the courts to

constitute themselves as a proper forum for resolution of those questions.³⁹⁸

Mr. and Mrs. Hunter continued with their fight by appealing to the Maryland Court of Appeals. In January, 1982, in a 6 to 1 decision, the Court of Appeals rejected the Hunter's claim of educational malpractice.³⁹⁹ The court had never addressed the question of whether a school board and its agents could be held liable for not properly evaluating, placing or teaching a student. As such, the Court of Appeals affirmed the lower court's holding that an educational negligence action could not be maintained; however the Court of Appeals reversed the verdict that dismissed Mr. and Mrs. Hunter's claim of intentional mistreatment of their child, Ross, by his teachers. The Court stated:

We find ourselves in substantial agreement with the reasoning employed by the courts in Peter W. and Donohue, for an award of money damages, in our view, represents a singularly inappropriate remedy for asserted errors in the educational process. [Footnote omitted]. The misgivings expressed in these cases concerning the establishment of legal cause and the inherent immeasurability of damages that is involved in such educational negligence actions against the school systems are indeed well founded. Moreover, to allow petitioners' asserted negligence claims to proceed would in effect position the courts of this state as overseers of both the day-to-day operation of our educational process as well as the formulation of its governing policies. This responsibility we are loath to impose on our courts. Such matters have been properly entrusted by the General Assembly to the State Department of Education and the local school boards who are invested with authority over them. . . .

Our conclusion on this point, however, does not imply that parents who feel aggrieved by an action of public educators affecting their child are without recourse. For example: (1) the General Assembly has provided a comprehensive scheme for reviewing a placement decision of a handicapped child including an appeal to the circuit court

³⁹⁸ Id. at 715-16.

³⁹⁹ Ross J. Hunter et al. v. Board of Education of Montgomery County et al., 439 A.2d 582 (1981).

[Citation omitted]; (2) both parent and child have the right to review educational records and, if appropriate, insist that the documents be amended [Citation omitted]; (3) section 4-205 (c)(3) of the Education Article commands that each county superintendent, “without charge to the parties concerned . . . shall decide all controversies that involve: (i) [t]he rules and regulations of the county board and then to the state board of education, §4-205(c)(4), and further, if appropriate, to the courts through the administrative procedure act [Citation omitted]; and (4) county boards of education are required to establish “at least one” citizen committee “to advise the board and to facilitate its activities and programs in the public schools,” and similar committees may be established for an individual school. [Citations omitted]. Thus, it is preferable, in the legislative’s view to settle disputes concerning classification and placement of students and the like by resorting to these and similar informal measures than through the *post hoc* remedy of a civil action. With this we have no quarrel, for, as aptly noted by the Alaska Supreme Court in this regard, “[p]rompt administrative and judicial review may correct erroneous action in time so that any educational shortcomings suffered by a student may be corrected. Money damages, on the other hand, are a poor, and only tenuously related, substitute for a proper education.” [Citation omitted] . . .

Count II represents the parents’ somewhat amorphous claim that the respondents intentionally and maliciously acted to injure their child. Research reveals that none of the prior cases discussing educational malpractice have squarely confronted the question of whether public educators may be held responsible for their intentional torts arising in the educational context. [Footnote omitted]. In declining to entertain the educational negligence and breach to contract actions, we in no way intend to shield individual educators from liability for their intentional torts. It is our view that where an individual engaged in the educational process is shown to have willfully and maliciously injured a child entrusted to his educational care, such outrageous conduct greatly outweighs any public policy considerations which would otherwise preclude liability so as to authorize recovery. [Footnote omitted]. It may well be true that a claimant will usually face a formidable burden in attempting to produce adequate evidence to establish the intent requirement of the tort, but

that factor alone cannot prevent a plaintiff from instituting the action. [Footnote omitted]. Thus, the petitioners are entitled to make such an attempt here.⁴⁰⁰

Mr. Justice Davidson concurred in part and dissented in part. He wrote:

I agree with the majority that individuals engaged in educational process who intentionally injure a child entrusted to their educational care should be held liable. Accordingly, I agree with the majority's holding that petitioners are entitled to maintain an action against the individual defendants for the intentional injuries alleged.

I do not agree with the majority, however, that individuals engaged in the educational process who, through professional malpractice, negligently injure a child entrusted to their educational care should not be held liable. In my view a cause of action against such individuals should exist for such negligent injuries.⁴⁰¹

The justice went on to add:

This Court has consistently recognized, notwithstanding the existence of a myriad of intangibles, a multiplicity of unknown quantities and a variety of other uncertainties attendant in any profession, that a professional owes a duty of care to a person receiving professional services; that a standard of care based upon customary conduct is appropriate; and that it is possible to maintain a viable tort action against a professional for professional malpractice. Finally, . . . this Court has recognized that under certain circumstances there can be recovery for mental or emotional distress resulting from non-intentional negligent acts. The application of all of these principles to this case leads me to the conclusion that there should be a viable cause of action on the facts alleged here.⁴⁰²

In my view, public educators are professionals. [Emphasis added]. They have special training and state certification is a prerequisite to their employment. They hold themselves out as possessing certain skills and knowledge not shared by non-educators. As a result, people who utilize their services have a right to expect them to use that skill and

⁴⁰⁰ Id. at 585-87.

⁴⁰¹ Id. at 587-88.

⁴⁰² Id. at 589.

knowledge with some minimum degree of competence. In addition, like other professionals, they must often make educated judgments in applying their knowledge to specific individual needs. As professionals, they owe a professional duty of care to children who receive their services and a standard of care based upon customary conduct is appropriate. There can be no question that negligent conduct on the part of a public educator may damage a child by inflicting psychological damage and emotional distress. Moreover, from the fact that public educators purport to teach it follows that some causal relationship may exist between the conduct of a teacher and the failure of a child to learn. Thus, it should be possible to maintain a viable tort action against such professionals for educational malpractice.

Here the declaration alleges, in pertinent part, that the individual defendants “owed a duty to the minor plaintiff to comport themselves within the standards of their profession, and to exercise that degree of care and skill ordinarily exercised by those similarly situated in the profession; . . .” The declaration further alleges that the defendants breached that duty by, among other things, placing the child in the second grade and requiring him to repeat first grade materials even though he had satisfactorily completed these materials in his first year in school, subsequently placing him in a grade ahead of the material he was actually studying, testing the child so incompletely and inadequately as to result in total failure of evaluation of the problems, and insulting and demeaning the child in private and public. Finally, the declaration alleges that the defendants’ acts in breach of their duties were the proximate cause of injuries to the child which included, among other things, substantial learning deficiencies, psychological damage and emotional stress. This declaration alleges that the defendants owed a professional duty to the child to act in conformity with an appropriate standard of care based upon customary conduct, that there was a breach of that duty, and that unforeseeable injuries were proximately caused by that breach. Manifestly, it states a cause of action that comports with traditional notions of tort law.

Unlike my colleagues, I believe that public policy does not prohibit such claims from being entertained. It is common knowledge, and indeed the majority recognizes, that the

failure of schools to achieve educational objectives has reached massive proportions. It is widely recognized that, as a result, not only are many persons deprived of the learning that both materially and spiritually enhances life, but also that society as a whole is beset by social and moral problems. These changed circumstances mandate a change in the common law. New and effective remedies must be devised if the law is to remain vital and viable.

Moreover, I do not agree with my colleagues that adequate internal administrative procedures designed for the achievement of educational goals are available within the educational system. In my view none of the available procedures adequately deal with incompetent teaching or provide adequate relief to an injured student. A cause of action for educational malpractice meets these social and individual needs.

In addition, I do not agree with the majority that recognition of such a cause of action will result in a flood of litigation imposing an impossible burden on the public educational system and the courts. Similar arguments appearing in cases that recognized the constitutional rights of students have not been validated by subsequent empirical evidence. [Citations omitted].

Finally, I do not agree with the majority that the recognition of such a cause of action “would in effect position the courts of this State as overseers of both the day-to-day operation of our educational process as well as the formulation of its governing policies”, roles that have been “properly entrusted by the General Assembly to the State Department of Education and the local school boards.” That the legislature has delegated authority to administer a particular area to certain administrative agencies should not preclude judicial responsiveness to individuals injured by unqualified administrative functioning. In recognizing a cause of action for educational malpractice, this Court would do nothing more than what courts have traditionally done from time immemorial – namely provide a remedy to a person harmed by the negligent act of another. Our children deserve nothing less.⁴⁰³

⁴⁰³ Id. at 589-90.

EDUCATIONAL OUTCOMES & ACADEMIC ACHIEVEMENT GAP

Educational integrity on the part of educators is a much-debated issue today. The former basis of trust and respect among parents, students and teachers in elementary and secondary schools as well as institutions of higher learning is slowly but surely deteriorating. More and more demands are being made for a measurable standard of educational delivery and performance whose effectiveness can be shown by results, as measured by student performance and a student's "actually acquired" knowledge.

According to Black's Law Dictionary, "education" encompasses the following elements of knowledge and skill a student is supposed to acquire in school: the student "comprehends not merely the instruction received at [school], but the whole course of training; moral, . . . vocational, intellectual, and physical. Education may be particularly directed to either the mental, moral, or physical powers and faculties, but in its broadest and best sense it relates to them all. Acquisition of all knowledge tending to train and develop the individual."⁴⁰⁴

Definitions aside, what do students actually know and what are students capable of doing? During the 1990s, while minority students generally showed improvement the gaps that separated them from White students remained alarmingly wide. Large gaps were also evident between the children of low-income families – predominately Title I students – and others. For example, Black, Latino and poor students of all races are already about two years behind other students by the end of the 4th grade; three years behind by about the 8th grade. If these very same students happen to reach the 12th grade, the NAEP long-term trend assessments tell us that too few 17 year-old Latino and African American students read at the same levels as White 13 year-olds much less read

⁴⁰⁴ Black, Henry Campbell (1990). Black's Law Dictionary 6th ed. West Publishing Co., p. 514.

and understand the kinds of text that are common both in college and in our modern office economy.⁴⁰⁵

By age 17, only about 1 in 17 students can read and gain information from specialized text, i.e., the science section in the Washington Post. Students of color fare significantly worse in that only 1 in 50 Latinos and 1 in 100 Black 17 year-olds can read at this level, compared to about 1 in 12 Whites.⁴⁰⁶ In mathematics, where 91% of 17 year-olds have taken at least one algebra course, only about 1 in 12 of all 17 year-olds can comfortably do multi-step problem-solving and elementary algebra.⁴⁰⁷ Observed along racial lines, 1 in 10 White students are able to perform multi-step problem solving compared to only 1 in 30 Latino students and 1 in 100 Black students.⁴⁰⁸

In earlier times, findings like these were reasonably tolerable. For those with strong backs and willing hands, there were decent jobs available that did not require diplomas or advanced-level skills. Things are different in the 21st Century and not just in the workplace but around the world. As citizens and parents, we face increasingly complex issues that require us to have higher level skills and knowledge.

Clearly, it would help if there were changes outside of schools, too – if parents spent more time with their children, if poverty did not crush so many spirits, if the broader culture did not bombard young people with so many destructive messages. But the public ca not ignore the damage done by what educators do: take the children who have less to begin with, and then systematically give them less in school, too. In fact,

⁴⁰⁵ U.S. Department of Education National Center for Education Statistics [NCES]. "NAEP 1999 Long Term Trends." Washington, DC: U.S. Dept of Education, 2000.

⁴⁰⁶ Id.

⁴⁰⁷ Id.

⁴⁰⁸ Id.

educators give these children less of everything that researchers, policymakers and even to some extent, students, know makes a difference.

The public education system has functioned on the belief that student achievement has more to do with a student's background than with the quality of instruction received for well over 30 years. Poor and minority children were a major focus at all levels of government from the mid-1960s to the early 1980s. Early legislation such as the Elementary and Secondary Education Act of 1965⁴⁰⁹ classified "disadvantaged" children as being able to learn some basic skills but not much more because their home lives were just too deprived to allow them to attain the same levels of learning as their affluent suburban peers. At the same time, public debate and social norms have convinced the public that inner city and rural schools face overwhelming complications caused by classism and racism;⁴¹⁰ however, school districts across the country have quantifiably results demonstrating otherwise – the most prevailing data coming from the National Assessment of Educational Progress (NAEP).

The NAEP illustrates that demographic factors do not exert the overwhelming impact on learning as once suspected.⁴¹¹ Case in point, Black and Latino children and children from low-income families are not performing the same on the NAEP from school district to school district, or state to state.⁴¹² Particularly at the state level, where nuances get lost and variations wash out, differences in average state scores for the same

⁴⁰⁹ Elementary and Secondary Education Act, Public Law 89-10 (1965).

⁴¹⁰ Rothenberg, Paula S. *Race, Class, and Gender in the United States: An Integrated Study*. Worth Publishers, 2006.

⁴¹¹ U.S. Department of Education National Center for Education Statistics [NCES]. "NAEP 1999 Long Term Trends." Washington, DC: U.S. Dept of Education, 2000.

⁴¹² Id.

groups of students are often staggering.⁴¹³ For example, the average score for Black students ranged from 121 points in Arkansas to 146 points in Texas on the 1998 NAEP 8th grade writing test.⁴¹⁴ The range is equivalent to 2 ½ years' worth of learning and is the same size or larger than the gap between White and Black students in about half the states. According to the National Center for Education Statistics, if Black 8th graders in Arkansas, Hawaii, Louisiana, Mississippi, Missouri and West Virginia could exchange NAEP writing scores with their peers in Texas, the Black – White achievement gap in all of those states would virtually disappear.⁴¹⁵ A similar paradigm holds for Latinos. Latino 8th grade writing assessment scores range from 108 in Mississippi to 146 in Virginia – about three to four years of learning.⁴¹⁶

NAEP 1996 science results illustrate that low-income 8th graders in North Dakota scored higher than middle- to high-income students in 20 states.⁴¹⁷ In comparison to low-income students in Delaware and California, North Dakota low-income students scored nearly 40 points higher, a gap far wider than the affluent – less affluent gap within any single state.⁴¹⁸ In mathematics, Black 4th graders in Texas averaged a score the equivalent of 2 ½ years worth of learning over Black 4th graders in California.⁴¹⁹ This gap is similar

⁴¹³ U.S. Department of Education National Center for Education Statistics [NCES]. "NAEP 1999 Long Term Trends." Washington, DC: U.S. Dept of Education, 2000; U.S. Department of Education. *National Assessment of Educational Progress (NAEP)*. In, United States Department of Education, <http://nces.ed.gov>. (accessed 2007); U.S. Department of Education Office of Educational Research and Improvement. "What Do Student Grades Mean? Differences across Schools." Washington, DC: U.S. Dept of Education, 1994.

⁴¹⁴ U.S. Department of Education National Center for Education Statistics [NCES]. "NAEP 1999 Long Term Trends." Washington, DC: U.S. Dept of Education, 2000.

⁴¹⁵ Id.

⁴¹⁶ Id.

⁴¹⁷ U.S. Department of Education. *National Assessment of Educational Progress (NAEP)*. In, United States Department of Education, <http://nces.ed.gov>. (accessed 2007).

⁴¹⁸ Id.

⁴¹⁹ Id.

to the achievement gap between Black and White 4th graders in Massachusetts on the same math test.

According the 1998 NAEP reading assessment, Latino 4th graders in Colorado and Connecticut are approximately 1 ½ years ahead of their counterparts in New York and Georgia.⁴²⁰ Black students in Colorado and Connecticut are about 1 year ahead of Black 4th grades in New York and Georgia.⁴²¹

While significant energy has been expended examining the differences in academic achievement between peer groups around the country, far less attention has been paid to an even more devastating difference between schools serving poor and minority children and those serving other young public primary and secondary education students: the quality of their teachers.

The study is not intended to denigrate the many incredibly talented and dedicated teachers who are teaching our most vulnerable children, often under deplorable conditions. In my examination of teacher quality – and inequality – it is not my goal to bash teachers or any other dedicated educator. What the literature tells us, however, is that the long-standing belief that teacher quality does not really matter because poor and minority children are too damaged by the other conditions of their lives to learn very much is false.

In a knowledge and information-based economy, it goes without saying that students are served best by teachers who have a strong grounding in the subjects they are teaching. And indeed, there is considerable evidence that students whose teachers have that strong grounding achieve at higher levels than students whose teachers have only a

⁴²⁰ Id.
⁴²¹ Id.

thin grasp of their content.⁴²² Students who have several effective teachers in a row make dramatic gains in achievement, while those who have even two ineffective teachers in a row lose significant ground which they may never recover.

On a national average, many secondary teachers – between 18 and 28% in each of the four core academic areas (math, science, English and social studies) – do not have even the equivalent of a college minor in their teaching field.⁴²³ In schools with concentrations of low-income and/or minority students, the scenario is worse – between 18% and 40% in each of the four core academic areas.⁴²⁴ To illustrate the damaging effects of these percentages, results from a Boston study revealed that in just one academic year, the top third of teachers produced as much as six times the learning growth as the bottom third of teachers. Tenth grade students taught by the least effective teachers made nearly no gains in reading, and even lost ground in math.⁴²⁵

Strength of content area is not the only area of concern to be addressed, teacher certification also factors into student achievement. Unfortunately, students in low-socioeconomic schools are about ten times as likely to be taught by uncertified teachers as students in high-socioeconomic schools.⁴²⁶ When reviewing the patterns of urban versus suburban primary and secondary public institutions, students in urban institutions

⁴²² See, Ferguson, Robert, and Helen F. Ladd. "How and Why Money Matters: An Analysis of Alabama Schools." In *Holding Schools Accountable: Performance Based Reform in Education*. Washington, DC: Brookings Institute, 1996; Goldhaber, Daniel D., and Dominic J. Brewer. "Evaluating the Effect of Teacher Degree Level on Educational Performance." *Developments in School Finance* (1996): 197-210; Ingersoll, Richard. "The Problem of Underqualified Teachers in American Secondary Schools." *Educational Researcher* 28, no. 2 (1999).

⁴²³ Ingersoll, *supra* note 428, at 29.

⁴²⁴ Ingersoll, *supra* note 428, at 29; National Commission on Teaching and America's Future. 1996. *What Matters Most: Teaching for America's Future*. In, Author, <http://www.nctaf.org/documents/WhatMattersMost.pdf>. (accessed 2007) , p. 16.

⁴²⁵ Boston Public Schools. *High School Restructuring*: Bain and Company, 1998.

⁴²⁶ Betts, Julian R., Kim S. Reuben, and Anne Danenberg. *Equal Resources, Equal Outcomes? The Distribution of School Resources and Student Achievement in California*. San Francisco: Public Policy Institute of California, 2000.

are about four times as likely to be taught by uncertified teachers. For example, according to the New York Times, in New York State, only 1 in 33 teachers is uncertified, while in New York City 1 in 7 teachers is uncertified.⁴²⁷

After certification is acquired, another factor impacting student achievement is classroom experience. Nationally, students in high-poverty schools are more likely than students in low-poverty schools to be taught by teachers with 0-3 years experience. Examining this issue by race, the pattern holds true.⁴²⁸ In California, “the median percentage of low-experience teachers (0-2 years experience) ranges from 24% in the most-disadvantaged school populations to 17% in the least-disadvantaged school populations. In grade spans 6-8 and 9-12, the low-experience medians range from 14% in the most-disadvantaged school populations to 10% in the least-disadvantaged school populations.”⁴²⁹ Looking at the statistics more closely, the fact that only 24% of the teachers in a highly-disadvantaged school population have little to no experience does not mean that the other 76% are fine. The other teachers can have experience in content areas they are not currently teaching or have never taught in the first place.

The pattern is similar no matter which measure of teacher qualifications you use – academic preparation, certification or classroom experience. Low-income and minority children are attending public primary and secondary educational institutions that are essentially dumping grounds for unqualified (or underqualified) teachers and the practice is having a negative impact on student academic achievement outside the realm of

⁴²⁷ Goodnough, Abby. "City's Teachers Perform Poorly on State Exams." *New York Times*, November 16 1999.

⁴²⁸ National Commission on Teaching and America's Future. 1996. What Matters Most: Teaching for America's Future. In, Author, <http://www.nctaf.org/documents/WhatMattersMost.pdf>. (accessed 2007), p. 16.

⁴²⁹ Betts, *supra* note 430.

student demographics. How do we address (if not correct) the issue of poor educational outcomes of students who are most dependent upon their teachers for academic learning yet are assigned to the institutions' weakest teachers.

CHAPTER IV

ANALYSIS OF REJECTION STANDARDS

In Chapter III, Peter W., Donohue, Hoffman, Fairbanks North Star and Hunter were selected, reviewed and analyzed because they covered the parameters of the contemporary area of law of educational malpractice. Nearly thirty years later, these five cases are still the controlling force behind the court's decision to deny recognition of instructional educational malpractice as a valid cause of action. In this chapter, I present the substantive legal findings of the educational malpractice case law examined in Chapter 3. I start by identifying the public policy factors used by the courts to deny recognition of educational malpractice. I also dissect the rejection standards generated by the case law to which all future arguments must be directed in order to present a legally recognizable claim of instructional educational malpractice. The evidence is organized around the rejection standards outlined in Chapter 3.

Rejection Standard One: Lack of Judicially Workable Standard of Care

The courts have failed to recognize a cause of action for educational malpractice because no workable standard of care could be determined by which to assess an educator's conduct. This forms the basis for Rejection Standard One. The court in Peter W. announced that, "An affirmative declaration of duty simply amounts to a statement that two parties stand in such relationship that the law will impose on one a responsibility for the exercise of care toward the other. Inherent in this simple description are various

and sometimes delicate policy judgments.”⁴³⁰ One element of policy judgment which has frustrated courts in their analysis of the potential educational malpractice action has been the determination of which standard should be used to evaluate the conduct of the defendant educator or educational institution. The standards to which the behavior of an educator can be held are difficult to establish because of vague and undefined principles in the field of education.⁴³¹ The court in Peter W. expressed this concern by stating, “unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught.”⁴³² The diversity of opinion regarding a workable standard of care for educators has caused the courts to rule that a school does not owe a plaintiff any more than as Cohen has phrased it, “ a chair in the classroom.”⁴³³

Klein suggests that this absence of standards has weighed against the imposition of liability and must be overcome before a successful cause of action will be recognized by the courts.⁴³⁴ Legal scholars have identified two broad categories used to classify standards of conduct. Conduct expected of individuals has been judged by either the “reasonable man” standard of care or the “professional” standard of care to determine potential negligence. It is within this framework that legal scholars analyze potential workable standards of care for educators.

⁴³⁰ Peter W. v. San Francisco Unified School District, 60 Cal. App. 3d 814, 822 (1976).

⁴³¹ Peter W., 60 Cal. App. 3d 814, 824 (1976); Klein, Alice J. "Educational Malpractice: Can the Judiciary Remedy the Growing Problem of Functional Illiteracy?" *Suffolk University Law Review* 13 (1979): 27-62, 40.

⁴³² Peter W., 60 Cal. App. 3d 814, 824 (1976).

⁴³³ Berliner Cohen, Judith H. "The Abc's of Duty: Educational Malpractice and the Functionally Illiterate Student." *Golden Gate University Law Review* 8 (1978): 293-315, 313.

⁴³⁴ Klein, supra note 435, at 40.

The Reasonable Man Standard of Care

The theory of negligence presupposes some uniform standard of behavior. In order to deal with the problem of uniformity, the courts have created a fictitious person, the “reasonable man of ordinary prudence.”⁴³⁵ The conduct of a reasonable man will vary with the individual circumstances and the situation with which he is confronted. Negligence therefore becomes a failure to do what the reasonably prudent man would do under the same or similar circumstances.⁴³⁶

One of the key elements which distinguishes the reasonable man from his professional counterpart is the standard to be used by a jury. When the reasonable man standard is applied to a set of facts, the determination of whether or not conduct is negligent resides within each individual juror. Each juror must ask himself what he thinks a reasonable man of ordinary prudence would have done in a similar situation. Collingsworth observes that when applying this standard, “the reasonable man would probably be quite surprised that the courts have thus far held that students are not entitled to protection from teachers’ educational malpractice.”⁴³⁷ The reasonable man standard is the lowest level of care required of an individual once a duty relationship has been established.⁴³⁸

Thus far the concern has been to identify a minimum standard below which the individual will not be permitted to fall. Elson recognizes that if the individual has in fact any special knowledge, skill, or even intelligence superior to that of the reasonable man,

⁴³⁵ Prosser, William L., W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, and David G. Owen, eds. *Prosser & Keeton on Torts*. 5th ed. St. Paul, MN: West Group, 1984, § 32 at 149-150.

⁴³⁶ Id.

⁴³⁷ Collingsworth, Terrence P. "Applying Negligence Doctrine to the Teaching Profession." *Journal of Law & Education* 11 (1982): 479, 490.

⁴³⁸ Prosser, supra note 439, § 32 at 61.

the law will demand of him conduct consistent with it. As applied to the area of education, this higher standard would require a teacher to exercise the care that a reasonably prudent teacher would exercise under the circumstances, taking into consideration the knowledge, skill or experience the teacher actually has.⁴³⁹ This reasonable educator standard was used in Peter W., where the defendant school district was charged with failure to demonstrate the skill and knowledge of a reasonable educator under similar circumstances.⁴⁴⁰ Abel, in his discussion of this standard, admits that it is difficult to form standards of care for teachers. However, he finds critics hard pressed to maintain that the placement of Peter W. into an eleventh grade college preparatory English class, when he read at a fifth grade level, was the act of a reasonable educator.⁴⁴¹

Educators have been held to the standard of a reasonable teacher with respect to physical injury and supervision.⁴⁴² The California Supreme Court in Bellman v. San Francisco High School District, held that school districts are liable for injuries sustained by pupils resulting from the failure of employees to exercise reasonable care in supervision.⁴⁴³ Collingsworth,⁴⁴⁴ Gordon,⁴⁴⁵ Tracy,⁴⁴⁶ and Cohen⁴⁴⁷ suggest that if this is an acceptable standard for supervision, it could be adopted for academic injury because there is no legally significant distinction between physical injuries and the kind of non-physical injuries caused by negligent academic instruction. Collingsworth remarks that,

⁴³⁹ Elson, John. "A Common Law Remedy for the Harms Caused by Incompetent or Careless Teaching." *Northwestern University Law Review* 73, no. 4 (1978): 641, 698-699.

⁴⁴⁰ Peter W., 60 Cal. App. 3d 814, 856 (1976).

⁴⁴¹ Abel, David. "Can a Student Sue the Schools for Educational Malpractice?" *Harvard Educational Review* 44 (1974): 416, 435.

⁴⁴² Elson, *supra* note 443, at 726.

⁴⁴³ Bellman v. San Francisco High School District, 11 Cal. 2d 576 (1938).

⁴⁴⁴ Collingsworth, *supra* note 441, at 490.

⁴⁴⁵ Gordon, Belle Lind. "Schools and School Districts - Doe V. San Francisco Unified School District, Tort Liability for Failure to Educate." *Loyola University Chicago Law Journal* 6 (1975): 462, 474.

⁴⁴⁶ Tracy, Destin Shann. "Educational Negligence: A Students' Cause of Action for Incompetent Academic Instruction." *North Carolina Law Review* 58 (1980): 561, 566.

⁴⁴⁷ Berliner Cohen, *supra* note 439, at 302.

“It seems anomalous that teachers have a duty to supervise with care but not to teach with care.”⁴⁴⁸ Cohen interprets the Bellman decision as finding “liability arising not only out of inadequate supervision but alternatively out of improper instruction.”⁴⁴⁹ In the case of Mastrangelo v. West Side Union High School District,⁴⁵⁰ which involved an accident in a chemistry lab, the court found that once a teacher decides to use a certain method of teaching or study a specific subject matter, he must administer the method without negligence.⁴⁵¹

Commentators have found a primary flaw when comparing educational malpractice to physical safety. Teachers have been traditionally held to a reasonable man standard with regard to physical safety, but authors suggest that it would be more appropriate to hold them to a professional standard with regard to academic instruction.⁴⁵²

The Professional Standard of Care

The exercise of professional judgment is the most important characteristic distinguishing the role of the professional from that of the reasonable man. The professional must exercise his best judgment after taking all reasonable measures to gather information and evaluate the situation, but is not liable for “honest errors of judgment.”⁴⁵³ Collingsworth explains this honest error of judgment principle as follows:

If generally accepted methods are correctly implemented in identifying the problem, but there are two or more possible courses of action available to correct it, professional malpractice doctrine does not require the

⁴⁴⁸ Collingsworth, supra note 441, at 490.

⁴⁴⁹ Berliner Cohen, supra note 439, at 302.

⁴⁵⁰ Mastrangelo v. West Side Union High School District, 2 Cal. 2d 540 (1935).

⁴⁵¹ Collingsworth, supra note 441, at 490.

⁴⁵² Tracy, supra note 450, at 566.

⁴⁵³ Elson, supra note 443, at 733.

professional to make the right choice, provided there is a reasonable basis for the choice made.⁴⁵⁴

Elson asserts that courts have found professionals liable only for the harm caused by erroneous judgments where they have not followed customary procedures necessary for them to render their best judgments.⁴⁵⁵

The standard used to judge the conduct of a professional differs in one significant respect from the reasonable man standard. A professional is required not only to exercise reasonable care in what he does, but he must also possess and apply a minimum standard of special knowledge and skill. Juries are instructed that the professional must have the skill and learning commonly possessed by members of the profession in good standing, and if he does not, he will be liable if injury results from his negligent actions.⁴⁵⁶ Thus, as the University of Pennsylvania Law Review summarizes, "A professional will be judged not by the 'reasonable man' standard applied in ordinary negligence cases, but by comparison with his professional peers."⁴⁵⁷

Finding acceptable standards by which to measure the skill and knowledge of an educator is a difficult challenge. Lynch highlights the courts' opinion regarding this challenge referring to Peter W. and Donohue which dismissed the existence of any professional consensus of what is negligent or non-negligent conduct in the field of education.⁴⁵⁸ Pabian claims that the community standard applied in medical malpractice litigation could be utilized, although the teaching profession does not lend itself easily to

⁴⁵⁴ Collingsworth, *supra* note 441, at 497.

⁴⁵⁵ Elson, *supra* note 443, at 733.

⁴⁵⁶ Prosser, *supra* note 439, § 32 at 161.

⁴⁵⁷ "Comment: Educational Malpractice." *University of Pennsylvania Law Review* 124 (1976): 755, 770.

⁴⁵⁸ Lynch, *supra* note 335, at 212.

such a standard.⁴⁵⁹ Blackburn observes that unlike the medical profession, educators cannot agree on what care and skill is ordinarily required in a given situation.⁴⁶⁰

The measurement of student learning has been cited as an alternative form of an acceptable standard. Gordon dismisses this form by saying, “It would be unfair for the courts to subject school districts to the crushing burden of tort liability for a student’s failure to learn.”⁴⁶¹ Tracy sees no logical basis for blaming the teacher for the failure of the student to learn without proof of the teacher’s affirmative negligence. Instead, emphasis should be placed on the responsibility of the teachers to instruct non-negligently and not on the degree of student learning.⁴⁶²

Five sources from which professional standards may be derived have been discussed by the authors and are as follows: a statutory standard, a community standard, a self-imposed standard, a certification standard and a school of thought standard.

A Statutory Standard – A standard for evaluation of teacher conduct, found in statutory or administrative guidelines, is discussed frequently in the literature. Lynch states that, “if a statute exists which defines the duty of care, a cause of action should exist and a negligent violation should result in a trial.”⁴⁶³ However, he continues, if the legislature has not made explicit provision for civil suit, the court is not compelled to invoke in a tort action the standard of care provided in the statute.⁴⁶⁴ Abel summarizes that the trend toward accountability legislation indicates that there is public policy support for holding educators accountable for failure to exercise care in the discharge of

⁴⁵⁹ Pabian, Jay M. "Educational Malpractice and Minimal Competency Testing: Is There a Legal Remedy at Last?" *New England Law Review* 15 (1979): 101, 111.

⁴⁶⁰ Blackburn, Joan. "Educational Malpractice: When Can Johnny Sue?" *Fordham Urban Law Journal* 7 (1978): 117-144, 126.

⁴⁶¹ Gordon, *supra* note 449, at 469.

⁴⁶² Tracy, *supra* note 450, at 574-579.

⁴⁶³ Lynch, *supra* note 335, at 215-216.

⁴⁶⁴ *Id.* at 221.

their school duties.⁴⁶⁵ Tracy adds that “Competency Based Teacher Education” statutes that define specific teaching behaviors may be adopted by courts to formulate a professional standard.⁴⁶⁶ Patterson notes that the potential exists for the legislature to set a high standard of accountability which would leave educators extremely vulnerable, and suggests that educators could respond by lobbying for a return of governmental immunity.⁴⁶⁷

As statutes become more prescriptive, the possibility increases that they will establish a workable standard of care for educators. Lynch contends that the more prescriptive the law becomes, the more it approaches the likelihood of being construed as a statutory duty of care.⁴⁶⁸ States such as Georgia, which explicitly recognize teachers as professionals, may already provide the necessary language needed to hold an educator accountable.⁴⁶⁹

A Community Standard – A professional standard of care can be derived from commonly accepted principles and procedures that are customarily followed in the professional community. Collingsworth explains that under this community standard, the teachers would not be liable if he used an approach generally accepted by competent members of the profession.⁴⁷⁰ This standard seeks to impose upon teachers the responsibility to use reasonable care in utilizing the tools of the trade in fulfilling their duty to teach students. Klein observes that one of the inherent difficulties with the potential use of the community standard to make a qualitative assessment of educational

⁴⁶⁵ Abel, *supra* note 447, at 426.

⁴⁶⁶ Tracy, *supra* note 450, at 577.

⁴⁶⁷ Patterson, Arlene H. *Educational Malpractice: Guidelines for School Districts to Avoid Liability for Academic Negligence*. Tallahassee, Florida: Patterson Associates, 1981, p.22.

⁴⁶⁸ Lynch, *supra* note 335, at 222.

⁴⁶⁹ *Georgia Code Annotated* § 20-2-942.

⁴⁷⁰ Collingsworth, *supra* note 441, at 497.

programs, is the lack of consensus in the profession with regard to the best method of teaching or even the purpose of education.⁴⁷¹ Tracy emphasizes that determining a minimum level of skill and knowledge common to members of the profession is the major hurdle in formulating a workable professional standard.⁴⁷² Alternatively, Elson foresees no difficulty in ascertaining a commonality of knowledge because there is an extensive body of pedagogy to which almost all teachers are exposed in their formal training.⁴⁷³ Braverman suggests that it does not seem unreasonable “for an educator to be judged in comparison with his professional peers, based on his conformity to the norm or minimum of that professional community in which he works.”⁴⁷⁴

A Self-Imposed Standard – The self-imposed standards of the school district provide another standard which is reviewed by several authors. Elson maintains that the school system’s self-definition of the standard of care it owes individual students comprises an appropriate standard and could become the most significant genesis of educational malpractice litigation.⁴⁷⁵ Patterson recommends that educators should develop and follow guidelines which establish specific goals and objectives for each grade level.⁴⁷⁶ The University of Pennsylvania Law Review cautions that once a teacher and school district undertake to provide education, they assume a duty to educate non-negligently under the general principle of voluntary assumption of duty. If they voluntarily render this assumed duty upon which the parents rely, they can be held to this

⁴⁷¹ Klein, supra note 435, at 39.

⁴⁷² Tracy, supra note 450, at 574.

⁴⁷³ Elson, supra note 443, at 730.

⁴⁷⁴ Braverman, June R. "Educational Malpractice: Fantasy or Reality?" *The Executive Review* 2, no. 3 (1982, Jan): 1, 2.

⁴⁷⁵ Elson, supra note 443, at 739.

⁴⁷⁶ Patterson, supra note 471, at 18.

duty.⁴⁷⁷ Tracy considers it only reasonable and fair to expect an educational system to behave in accordance with self-imposed procedures, and a judicial remedy should be available if it fails to do so.⁴⁷⁸ Braverman notes that evaluations of a teacher by a principal or supervisor might also be useful as evidence of a self-imposed standard of care, especially if the teacher is retained.⁴⁷⁹

A Certification Standard – Teacher competency exams and certification criteria have been suggested as another basis for a standard of care. Pabian observes that Florida’s competency test for teachers, which includes 23 generic competencies, could formulate the basis for measuring teacher conduct.⁴⁸⁰ Both Elson and Braverman speak of the importance of teacher certification upon education as a profession and mention that standards could be developed based upon certification criteria. Elson reviews such certification requirements as a traditional indicium of professional status.⁴⁸¹ Braverman contends that these requirements could be used to evaluate the conduct of the teacher.⁴⁸²

A School of Thought Standard – The final suggested source of a professional standard is similar to that which has developed for psychiatrists. Elson states that, “psychology has no clearly ascertainable routine, procedures or technology for successful psychotherapy, yet psychiatrists are nevertheless judged by a professional standard.”⁴⁸³ Although the court in Otero v. Mesa County⁴⁸⁴ concluded that, “the disagreement between educators, when compared with those of psychiatrists, makes the latter appear

⁴⁷⁷ "Comment: Educational Malpractice." *University of Pennsylvania Law Review* 124 (1976): 755,774.

⁴⁷⁸ Tracy, *supra* note 450, at 578.

⁴⁷⁹ Braverman, *supra* note 480, at 2.

⁴⁸⁰ Pabian, *supra* note 463, at 112.

⁴⁸¹ Elson, *supra* note 443, at 739.

⁴⁸² Braverman, *supra* note 480, at 2.

⁴⁸³ Elson, *supra* note 443, at 723-724.

⁴⁸⁴ Otero v. Mesa County Valley, School District No. 51, 408 F. Supp. 162 (D.C. Colo. 1975). Vacated on procedural grounds, 568 F.2d 312 (10th Cir. 1978).

singleminded,” there is merit in using this formula for developing standards in the education area. A psychiatrist will be held to a standard which conforms to the school of thought he espouses. Courts have determined that disputes between schools of thought cannot be settled by the law. In order for a school of thought to be used as a standard, it must be recognized as having definite principles, and must be the line of thought of at least a respectable minority of the profession.⁴⁸⁵ An application of this standard to the field of education would cause a teacher to be held to the principles of the school of thought upon which he based his teaching.⁴⁸⁶

The standard for psychiatry was developed on the premise that unless modern psychiatry is allowed to explore new methods of treatment, the future growth of the profession and discovery of new cures will be greatly inhibited.⁴⁸⁷ Authors agree that because there exists the need for teachers to implement diverse methods of instruction, this standard is equally applicable to the field of education.⁴⁸⁸

Outrageous Conduct

In addition to the standards proposed for evaluating the conduct of teachers, Blackburn⁴⁸⁹ and Klein⁴⁹⁰ suggest that if the conduct of the defendant is so outrageous, the courts should not dismiss an educational malpractice suit because they cannot find either a workable reasonable man or professional standard of care by which to judge the conduct of an educator. Blackburn cites social promotion as an example of an outrageous act which is based upon a lack of due care which should not be passed over the courts.⁴⁹¹

⁴⁸⁵ Prosser, *supra* note 439, § 32 at 163.

⁴⁸⁶ Elson, *supra* note 443, at 724.

⁴⁸⁷ *St. Helaine Maze v. Henderson*, 496 F.2d 973 (CA 8 1974).

⁴⁸⁸ Elson, *supra* note 443, at 723-724.

⁴⁸⁹ Blackburn, *supra* note 466, at 127.

⁴⁹⁰ Klein, *supra* note 435, at 40.

⁴⁹¹ Blackburn, *supra* note 466, at 127.

Klein remarks that social promotion is a blatant violation of the legally mandated student-teacher relationship which should result in the recognition of a legal duty.⁴⁹²

Pabian cites a study which concluded that the best way to improve teacher quality is to legally define teachers as professionals. He warns that once this occurs, teachers would have to assume the responsibility of professionals, including the defense of a malpractice suit if one should arise.⁴⁹³ As educators strive for a wider acceptance as professionals, clearer quantifiable standards may emerge. Carter, an educator, advises, "In short we must devote attention to what we must do to move education to professional status in the eyes of the law. I am convinced it is better to develop rules than to be ruled."⁴⁹⁴ Klein further concludes that, "to demean the status of educators while relying on them to shape the future of society is counterproductive to our own best interests."⁴⁹⁵

In summary, the authors have analyzed Rejection Standard One, Lack of a Judicially Workable Standard of Care, under the categories of reasonable man and professional standard of care. They have conjectured in their arguments that a workable standard of care can be ascertained by which to evaluate teacher conduct in academic areas. They project that this standard can either be the reasonable man or the professional standard of care. They caution that lack of definition and agreement regarding classroom methodology and the science of pedagogy can only be overcome by identifying consistent variables in the field of education.

⁴⁹² Klein, supra note 435, at 40.

⁴⁹³ Pabian, supra note 463, at 112-114.

⁴⁹⁴ Carter, David, G., Sr. "The Educator and the Liability Law of Professional Malpractice: A Historical Analysis." Paper presented at the American Educational Research Association, San Francisco, CA 1979, April 8-12, pg. 18.

⁴⁹⁵ Klein, supra note 435, at 43.

Rejection Standard Two: No Certainty of Injury

The courts have failed to recognize a cause of action for educational malpractice because no reasonable degree of certainty that the student suffered injury could be perceived. This forms the basis for Rejection Standard Two. The court in Peter W. held that there was “no reasonable ‘degree of certainty that... plaintiff suffered injury’ within the meaning of the law of negligence.”⁴⁹⁶ Later court decisions have affirmed and incorporated this principle into their rationale for denying recognition of this cause of action. Among the injuries that have been claimed in educational malpractice suits within the context of inadequate education are functional illiteracy, inability to obtain other than menial employment, and various psychological injuries which include severe depression and loss of self-esteem.⁴⁹⁷

Authors have remarked that the task of determining the certainty of injury should not deter courts from allowing the jury to decide its compensability. Collingsworth writes that in some cases a quantification of the injury suffered may prove to be difficult, but this is not a sound reason for denying a cause of action.⁴⁹⁸ Prosser states that the type of injury should not be a bar to recovery, noting that, “mental suffering is no more difficult to estimate in financial terms and no less a real injury than physical pain.”⁴⁹⁹ It was the view of the Supreme Court in Story Parchment Co. v. Paterson Parchment Co. that the defendant must bear the risk of uncertainty which his harm has created:

Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of

⁴⁹⁶ Peter W., 60 Cal. App. 3d at 825.

⁴⁹⁷ Tracy, supra note 450, at 579-580.

⁴⁹⁸ Collingsworth, supra note 441, at 602.

⁴⁹⁹ Prosser, supra note 439, § 54 at 327-328.

fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.⁵⁰⁰

Authors have divided their analysis of the certainty of injury issue into two categories: (1) Is the injury claimed a legally recognizable injury under tort law; and, (2) When does determination of an injury become certain.

A Legally Recognized Injury

Once the plaintiff establishes a duty and breach of that duty in his alleged educational malpractice action, Tracy remarks, that the greatest obstacle remaining for him is to show that he has suffered a legally compensable injury. Two questions must be answered by the court before an academic injury will be legally recognized: (1) Does the academic injury constitute the invasion of a legally protected interest;⁵⁰¹ and, (2) Is the academic injury of the type for which the law will supply a remedy.⁵⁰²

An answer to the first question can be derived from the holding of the Supreme Court in Goss where the court elevated education to the status of a property interest protected by the Due Process Clause of the Fourteenth Amendment.⁵⁰³ Pabian acknowledges that the property interest “involved was not the right to be assured a certain level of education, such as functional literacy. Rather, it was the right to attend school and not be deprived of that right without adequate notice;”⁵⁰⁴ i.e., a student could not be arbitrarily expelled from school without a hearing. However, he poses that the recognition of education as a property interest could be extended to compensate the

⁵⁰⁰ Story Parchment Co. v. Paterson Parchment Co., 282 U.S. 555, 563 (1931).

⁵⁰¹ Klein, supra note 435, at 48.

⁵⁰² "Comment: Educational Malpractice." *University of Pennsylvania Law Review* 124 (1976): 755, 775.

⁵⁰³ Gordon, supra note 449, at 480, citing Goss, p. 574.

⁵⁰⁴ Pabian, supra note 463, at 126.

victim of educational malpractice.⁵⁰⁵ Klein maintains that judicial acknowledgment of academic injury would be congruent with the policy judgment rendered in Goss that the law will protect the right of a student to a minimal level of education.⁵⁰⁶ In addition, many state statutes extend the right of a child to a free education and may, as the Supreme Court indicated in Goss, give the students a property right in educational benefits.⁵⁰⁷

After establishing that students have a legally protected right to an education, the second question asks whether a failure to receive an adequate education is the type of injury for which the law will provide a remedy. The University of Pennsylvania Law Review states that plaintiffs in educational malpractice suits have claimed that their failure to learn because of teacher negligence is a legally cognizable injury in tort for which the law will provide a remedy. Alternatively, defendants in these suits have argued that the student's failure to learn "is not an injury at all, but rather a loss of expectancy or failure to receive a benefit."⁵⁰⁸ Consequently, they argue that it is not the type of injury for which a remedy can be granted by law.⁵⁰⁹ This poses the question of whether an inadequate education is a legally recognizable injury that can be accorded a remedy or merely the loss of a benefit that will receive no compensable recognition under the law.

In their discussion of whether an inadequate education is a legally recognizable injury, authors examine two types of injuries pleaded by plaintiffs in educational malpractice litigation. Several plaintiffs have claimed a direct academic injury and others

⁵⁰⁵ Pabian, *supra* note 463, at 126.

⁵⁰⁶ Klein, *supra* note 435, at 48.

⁵⁰⁷ Goss v. Lopez, 419 U.S. 565 (1975).

⁵⁰⁸ "Comment: Educational Malpractice." *University of Pennsylvania Law Review* 124 (1976): 755, 775.

⁵⁰⁹ *Id.*

have claimed forms of indirect injury. Elson delineates three major types of direct academic injury which can be alleged in educational malpractice suits. First, the injury could be the failure to learn a given quantum of factual information, such as geometry or German. Second, the injury could be the failure to learn certain basic skills, such as elementary reading, writing and arithmetic. Finally, the negligence of the educator could lead to injury in the affective or emotional, rather than cognitive or intellectual domain.⁵¹⁰

The failure to learn a given quantum of factual information was addressed in the case of Trustees of Columbia University v. Jacobsen, where the court failed to recognize the university's non-fulfillment of its catalog representations to teach, "wisdom, truth, character, enlightenment, understanding, justice, liberty, honesty, courage, and beauty," as a legally sufficient injury.⁵¹¹

It is Tracy's opinion that the best claim for educational injury is the nonlearning of basic skills. She explains that, "This injury, often referred to as functional illiteracy is much easier to identify and measure than many other tort injuries. It is the most direct and foreseeable result of a breach of duty."⁵¹² The measurement tools which could be used to determine injury are student competency or achievement tests. Pabian reports that student competency tests are currently being considered, planned or implemented in nearly every state.⁵¹³ He proposes that, "the tests should serve two purposes: (1) early identification of students with learning difficulties, and (2) indication of the need for remedial aid to assure that the students possess adequate proficiency in basic skills at

⁵¹⁰ Elson, supra note 443, at 755.

⁵¹¹ Trustees of Columbia University v. Jacobsen, 148 A.2d 63, 64 (N.J., 1959).

⁵¹² Tracy, supra note 450, at 581.

⁵¹³ Pabian, supra note 463, at 115.

graduation.”⁵¹⁴ Pabian foresees a problem with the usage of student competency tests and cautions that, “by implementing such a low standard (minimum competency), concern has arisen whether teachers, especially in the middle to upper income areas, will structure their teaching to the minimal competency exam instead of to their students’ abilities.”⁵¹⁵ Lynch explains that proof of injury requires a comparison of pre-achievement test results given before the alleged negligent instruction and post-achievement test results given after the instruction in conjunction with a reliable measurement of ability.⁵¹⁶

Lynch conjectures that injury to the affective domain is the most difficult of the three academic injuries to prove and perhaps the most devastating.⁵¹⁷ Such injury may be caused by a teacher who ridicules, berates, totally ignores or excessively criticizes a student which may cause a student to lose the motivation and self-confidence necessary to learn or even to come to school.⁵¹⁸ This form of behavior by a teacher would approach the intentional infliction of emotional distress illustrated in Johnson v. Sampson, where a teacher, who bullied a school girl with threats of prison and public disgrace unless she signed a confession of immoral conduct, was found guilty.⁵¹⁹ Lynch fears that malpractice suits, if successful in obtaining extensive damages for cognitive type injuries, would cause schools to concentrate on basic skill development to the exclusion of affective values or attitude formation.⁵²⁰

In addition to the direct academic injuries which have been pleaded, plaintiffs have also complained of indirect injuries. The most common indirect injury is

⁵¹⁴ Pabian, supra note 463, at 116.

⁵¹⁵ Pabian, supra note 463, at 119.

⁵¹⁶ Lynch, supra note 335, at 231.

⁵¹⁷ Lynch, supra note 335, 233.

⁵¹⁸ Elson, supra note 443, at 755.

⁵¹⁹ Johnson v. Sampson, 208 N.W. 814 (1926).

⁵²⁰ Lynch, supra note 335, at 233.

psychological harm which has resulted from the failure to achieve an adequate education. The humiliation of not being able to fill out a job application, the failure to get a job because of the lack of required basic skills, and the inability to advance beyond menial labor, are instances where psychological harm occurs.⁵²¹ Although many of these psychological injuries occur outside the classroom, Jerry maintains that this does not justify non-recognition of a duty or cause of action if the injury resulted, in part, from improper classroom instruction.⁵²² Tracy cautions plaintiffs that courts are already highly suspicious of psychological injuries due to their fear of the unmanageability of these claims. Because of this fact, Tracy advises plaintiffs to avoid claiming psychological injuries if they can obtain an adequate remedy for other types of injury. Furthermore she states, the pleading of psychological injuries may divert the courts' attention from the stronger arguments of the plaintiff and lead to confusion of the fundamental issues.⁵²³ Another form of indirect injury alleged by plaintiffs has been the loss of future wages. Jerry acknowledges that projecting the lost future earnings because a student "cannot acquire meaningful employment is difficult, but is certainly not impossible."⁵²⁴ Klein explains that plaintiffs can offer proof that loss of potential earning power is a recompensable injury. The failure to offer such proof can result in a finding that the loss of potential earning power is not an injury but "a mere expectancy interest – that is, only a probable economic advantage."⁵²⁵ Tracy warns that plaintiffs should avoid claiming that incompetent instruction resulted in loss of expected employment. It is her position

⁵²¹ Tracy, *supra* note 450, at 579.

⁵²² Jerry, Robert H., II. "Recovery in Tort for Educational Malpractice: Problems of Theory and Policy." *Kansas Law Review* 29 (1981): 195-212, 211.

⁵²³ Tracy, *supra* note 450, at 580.

⁵²⁴ Jerry, *supra* note 528, at 203.

⁵²⁵ Klein, *supra* note 435, at 49.

that it is unreasonable for a student to expect to graduate qualified for a specific type of employment or level of income given the range of student ability anticipated to emerge from a compulsory education system.⁵²⁶

When is an Injury Certain?

One concern authors have expressed when addressing the issue of legally recognizable injuries has been the inability to determine when an academic injury has occurred. Pabian notes that students who are victims of teacher malpractice often get as far as high school before the injury is realized.⁵²⁷ Jorgensen observes that education is not an emergency service, but rather an ongoing process that probably will result in damage only if negligently performed over a period of time.⁵²⁸ Authors such as Lynch have formulated pre-test and post-test strategies to determine which individual teachers may be negligent.⁵²⁹

Lynch expresses this aspect of the injury issue in this way, “At what point in the lifetime of the plaintiff are the opportunities, which would have been present with non-negligent teaching, reduced significantly?”⁵³⁰ He suggests that when an opportunity to be employed is rendered unobtainable because of negligent teaching or inadequate occupational counseling, is the time when injury becomes certain. This would be a matter for the court to decide on a case by case basis.⁵³¹ Lynch draws attention to the fact that some students may be able to alleviate the affects of negligent teaching by electing to

⁵²⁶ Tracy, *supra* note 450, at 581-582.

⁵²⁷ Pabian, *supra* note 463, at 104.

⁵²⁸ Jorgensen, Cynthia A. "Donohue V. Copiague Union Free School District: New York Chooses Not to Recognize 'Educational Malpractice'." *Albany Law Review* 43 (1979): 339, 349.

⁵²⁹ Lynch, *supra* note 335, at 231.

⁵³⁰ Lynch, *supra* note 335, at 226.

⁵³¹ Lynch, *supra* note 335, at 226.

take G.E.D. examinations or enrolling in junior colleges. Such action could totally mitigate or at least significantly cloud the ability to establish certainty of injury.⁵³²

In summary, the authors have analyzed Rejection Standard Two, Certainty of Injury, by addressing the issues of (1) whether the injury claimed is a legally recognizable injury under tort law, and (2) when does the determination of injury become certain. They have conjectured in their arguments that academic injury is legally recognizable and can be determined with certainty. They project that courts could recognize either direct or indirect injuries. They caution that to claim indirect injury could detrimentally bias courts in their analysis of direct injuries and confuse fundamental issues. Additionally, they maintain that the defendant must bear the risk of uncertainty and not the plaintiff.

Rejection Standard Three: No Causal Link

The courts have failed to recognize a cause of action for educational malpractice because no causal connection could be established. This forms the basis for Rejection Standard Three. The courts which have been confronted with the educational malpractice claim have stated that no perceptible causal connection can be established between teaching methods and the failure to learn because learning is “influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers.”⁵³³ In so holding, the courts have failed to adequately address the causal connection issue.⁵³⁴

⁵³² Lynch, *supra* note 335, at 226.

⁵³³ *Peter W.*, 60 Cal. App. 3d at 824.

⁵³⁴ Woods, Nancy L. "Educational Malfeasance: A New Cause of Action for Failure to Educate?" *Tulsa Law Journal* 14 (1978): 383, 396.

The plaintiff must prove in every negligence action that the injuries he sustained were caused by the defendant's conduct and were a foreseeable or reasonably direct risk of the conduct in which the defendant was engaged. The authors discuss the elements of the causation issue by addressing two questions: (1) whether the defendant's conduct was the legal cause of the plaintiff's injury, and (2) whether the defendant's conduct was the proximate cause of the injury.

Legal Cause

The test frequently discussed by the authors, used to assess whether the defendant's conduct legally caused the plaintiff's injury, is the substantial factor test. Collingsworth frames the language of the test as, "whether the defendant's conduct was a material element and a substantial factor in bringing" about the plaintiff's injury.⁵³⁵ He contends that the substantial factor test is more appropriate than the but-for test in the educational malpractice case. A host of factors are involved in the educational malpractice situation which all influence the failure of a student to learn. The but-for test is not designed to accommodate multiple factors but rather weighs only one potential cause of the injury.⁵³⁶

Elson asserts that the court in Peter W. misread the common law principles of causation in negligence cases when it ruled as a matter of law that the plaintiff could not prove under any circumstances that the conduct of the defendant caused his inability to read above a fifth grade level. He further states that the common law principles "do not require proof that the defendant's conduct was the sole or even dominant factor in bringing about the harm to the plaintiff. Rather, it need only be shown that defendant's

⁵³⁵ Collingsworth, supra note 441, at 499.

⁵³⁶ Collingsworth, supra note 441, at 499.

conduct was a substantial factor in causing the harm.”⁵³⁷ Blackburn refers to the substantial factor test as one that determines the significance of the various causes of the injury. If the conduct of the defendant was a significant factor in causing the plaintiff’s inadequate education, the fact that other causes have also contributed to the same result will not remove liability from the defendant.⁵³⁸ Klein describes this test as one of “substantial cause” and explains that “liability should result if acts and omissions of educators represent a substantial cause of plaintiff’s inadequate education.”⁵³⁹

Burden of Proof – The plaintiff has the burden of proof in a negligence cause of action. He must identify the cause of his injury and rule out other possible causes if they could have contributed to the injury. The amount of proof required to prove these elements is discussed by several authors. Elson⁵⁴⁰ and Tracy⁵⁴¹ write that a student need not prove with mathematical precision or scientific reliability that the conduct of the defendant was the cause of his injury, but he must show that it was more probable than not that the conduct was a substantial factor. Pabian⁵⁴² and Braverman⁵⁴³ claim that the student must prove causation by a preponderance of the evidence or by clear and convincing evidence depending upon the requirements of the jurisdiction. Abel suggests that causation must be established minimally “beyond a mere possibility,” and therefore the student would not be required to prove causation by direct and positive evidence to the exclusion of every other possible cause of his injury.⁵⁴⁴

⁵³⁷ Elson, supra note 443, at 747.

⁵³⁸ Blackburn, supra note 466, at 131-132.

⁵³⁹ Klein, supra note 435, at 40.

⁵⁴⁰ Elson, supra note 443, at 747.

⁵⁴¹ Tracy, supra note 450, at 584.

⁵⁴² Pabian, supra note 463, at 109.

⁵⁴³ Braverman, supra note 480, at 2.

⁵⁴⁴ Abel, supra note 447, at 430.

Proof of Causation – Proof of causation in the educational malpractice cause of action is difficult because of the “host of factors” concern which was identified in Peter W. The Peter W. court identified physical, neurological, emotional, cultural and environmental factors which affect a student’s ability to learn and which are not under the control of the school system.⁵⁴⁵ Additional factors, identified by Pabian, are self-motivation, socio-economic factors, the influence of television, grade inflation, and any innovative program that may have been instituted by the school or teacher.⁵⁴⁶

Klein suggests a two step method of proof by which plaintiffs could prove causation which would account for the host of factors concern. The first step is to determine which components of the learning process educators can control. The second step would assess the performance of the educator by correlating the components determined in the first step with the student’s expectations of instructional success and predetermined factors in learning which cannot be controlled by the educator. In addition to those factors previously mentioned by the Peter W. court and Pabian, Klein lists home environment, peer pressure and subjective interaction between the teacher and the student. If the uncontrollable factors play a predominant role in causing the inadequate education of the student, the court may determine that the defendant’s conduct was not a substantial factor even though the conduct may have been negligent.⁵⁴⁷

The ability of the student to learn is an important element in the case. Consequently, the student must prove that he has not achieved functional literacy although he has a normal capacity to learn. Klein recommends three ways to prove ability to learn. First, the student can introduce evidence of progress in a remedial program

⁵⁴⁵ Peter W., 60 Cal. App. 3d at 824.

⁵⁴⁶ Pabian, supra note 463, at 104-107.

⁵⁴⁷ Klein, supra note 435, at 46-47.

initiated after graduation or after leaving public school. Second, evidence of the student's aptitude test scores, which measure his general scholastic aptitude and task oriented ability, can be introduced. Third, evidence of normal intelligence test scores may be utilized to draw inferences regarding the ability of the student to learn.⁵⁴⁸

Klein proposes two methods by which the student can prove that he has not achieved functional literacy although he has a normal capacity to learn. First, the student may introduce his standardized test scores as evidence of his learning deficiencies. These can provide a basis for determining the effectiveness of the educational program and the degree to which the student has reached his expected level of achievement. Second, the inability of the student to accomplish practical and necessary tasks such as completing a job application form can be presented as evidence.⁵⁴⁹

In addition to the host of factors concern, another difficulty a student faces when proving causation is the length of time which passes before he realizes he has received an inadequate education. A student may not become aware of his deficiency until he has graduated from high school and seeks employment. After this length of time, it is difficult if not impossible, to identify and prove which teacher or teachers were responsible for the failure to learn.⁵⁵⁰

The approaches by which students may prove causation despite the difficulties presented has been a subject of discussion by the authors. They propose that the following three types of evidence can be used by a student to establish causation: circumstantial evidence, expert testimony and common knowledge.

⁵⁴⁸ Klein, supra note 435, at 49-51.

⁵⁴⁹ Klein, supra note 435, at 51-52.

⁵⁵⁰ Pabian, supra note 463, at 106.

Circumstantial Evidence – Through the use of circumstantial evidence, the jury could infer that the defendant school district or the conduct of an individual teacher caused the failure of a student to learn. One form of circumstantial evidence described by Elson suggests that the student's history of academic achievement could be presented to demonstrate the likelihood that a teacher's conduct was a substantial factor in contributing to the academic failure of a student. This history may show a constant level of achievement which suddenly drops off at the same time the student is exposed to a certain teacher or teaching method. If such evidence were to be presented to a jury, a presumption could arise from which they might infer that absent the challenged teacher or teaching method, the student's level of achievement would have continued on the same pattern.⁵⁵¹

A second form of circumstantial evidence which may be presented is discussed by Elson,⁵⁵² Collingsworth,⁵⁵³ Lynch,⁵⁵⁴ Braverman,⁵⁵⁵ and the University of Pennsylvania Law Review.⁵⁵⁶ Through comparison, inferences could be made that an individual student or class of students failed to learn because of a teacher's negligent conduct or the teaching methods used by a school district. By comparing an individual student or class which did not learn with others similarly situated who did learn, but were not exposed to the teacher's conduct or teaching methods challenged, a presumption could arise that the conduct or methods challenged were the cause of the failure to learn. A prima facie

⁵⁵¹ Elson, supra note 443, at 749.

⁵⁵² Elson, supra note 443, at 748.

⁵⁵³ Collingsworth, supra note 441, at 500-501.

⁵⁵⁴ Lynch, supra note 335, at 235-236.

⁵⁵⁵ Braverman, supra note 480, at 2.

⁵⁵⁶ "Comment: Educational Malpractice." *University of Pennsylvania Law Review* 124 (1976): 755, 790-796.

showing of causation therefore would be made, and this evidence would suffice to prove causation until evidence to the contrary was presented by the defendants.⁵⁵⁷

With this form of evidence, it is difficult to hold constant the many variables which affect the learning process in order to determine the effect of the conduct of the teacher or teaching methods on the student's learning.⁵⁵⁸ Collingsworth asserts that this difficulty may be overcome by eliminating the competing variables through proof that the plaintiff has all of the qualities of his more successful peers.⁵⁵⁹

A third form of circumstantial evidence which a plaintiff may present to prove causation can be derived by comparing the defendant's conduct "to the requirements of a statutory or regulatory provision designed to prevent the type of educational injury that has occurred."⁵⁶⁰ Elson⁵⁶¹ and Lynch⁵⁶² cite as an example of this form of evidence a student who alleges educational negligence due to the failure of the defendant to identify him as a student with a learning disability and to refer him for special education. Elson states that a prima facie case of negligence would be established if a regulation exists which mandates such identification and referral. Proof of violation of the regulation by the defendant "would also presumptively establish that the student's lessened learning achievement, which the regulation was designed to minimize, was caused by the defendant's failure to follow the regulatory requirement."⁵⁶³

⁵⁵⁷ Elson, supra note 443, at 748.

⁵⁵⁸ Elson, supra note 443, at 748.

⁵⁵⁹ Collingsworth, supra note 441, at 500.

⁵⁶⁰ Elson, supra note 443, at 749.

⁵⁶¹ Elson, supra note 443, at 749-750.

⁵⁶² Lynch, supra note 520, at 222-223.

⁵⁶³ Elson, supra note 443, at 750.

Expert Testimony – A second type of evidence which can be used to prove the requisite causal connection is expert testimony. Elson,⁵⁶⁴ Tracy,⁵⁶⁵ and Abel⁵⁶⁶ mention that experts in the field of education could be called to testify regarding the usual results of certain types of teaching methods and whether the teacher’s conduct was a substantial factor in causing the student’s lack of learning. Tracy foresees weaknesses in utilizing expert testimony because such testimony is often unavailable, and even if it were available, it would be disputed in court due to a lack of scientific evidence and theoretical consensus in the field of education.⁵⁶⁷ Elson identifies another weakness with this type of evidence pointing out that there is little empirical evidence available on the cause and effect relationship between teaching methods and student performance. As a result, the opinion of the expert “will be based largely on either the witnesses’ personal experiences or deductive reasoning from pedagogical theory.”⁵⁶⁸

Common Knowledge – A final type of evidence which could be used to prove the causal relationship is suggested by Elson. He states that a commonsense understanding of cause and effect relationships may be critical in proving the student’s case, although it is not conclusive evidence of the causal connection. The trier of fact should be able to draw the commonsense conclusion that the conduct of the defendant was a substantial factor in the failure of the student to learn.⁵⁶⁹

⁵⁶⁴ Elson, supra note 443, at 749.

⁵⁶⁵ Tracy, Destin Shann. "Educational Negligence Suits." *School Law Bulletin* 11, no. 3 (1980, Jul): 1-9.

⁵⁶⁶ Abel, supra note 447, at 428.

⁵⁶⁷ Tracy, supra note 569, at 7.

⁵⁶⁸ Elson, supra note 443, at 749.

⁵⁶⁹ Elson, supra note 443, at 750.

Proximate Cause

Proving that the conduct of the defendant in fact is the legal cause of the failure of the student to learn is the first question in the causation issue. After legal cause has been established, the second question is whether the defendant's conduct was the proximate cause of the failure to learn. It is the position of Woods,⁵⁷⁰ Collingsworth,⁵⁷¹ and the University of Pennsylvania Law Review⁵⁷² that proximate cause should not create a major obstacle for the student if he has already proven the legal cause question.

Proximate cause attempts to limit the liability of the defendant to cases where the harm flowing from the conduct is foreseeable. Collingsworth writes that an obviously foreseeable result of incompetent teaching is impaired learning.⁵⁷³ The University of Pennsylvania Law Review focuses on the effects of hiring incompetent teachers and suggests that the failure of a student to learn is clearly a direct and foreseeable result of hiring an incompetent teacher.⁵⁷⁴ Woods asserts that proximate cause is "undoubtedly satisfied," because "it is unquestionably foreseeable that a school district charged with the responsibility of taking reasonable measures to educate its pupils will damage those students when it breaches this duty."⁵⁷⁵

Defenses to a Negligence Action

Defenses which may be pleaded and proven by the defendant school district or teacher are also the subject of discussion of the commentators and present challenges for

⁵⁷⁰ Woods, *supra* note 538, 399.

⁵⁷¹ Collingsworth, *supra* note 441, at 501.

⁵⁷² "Comment: Educational Malpractice." *University of Pennsylvania Law Review* 124 (1976): 755, 796.

⁵⁷³ Collingsworth, *supra* note 441, at 501.

⁵⁷⁴ "Comment: Educational Malpractice." *University of Pennsylvania Law Review* 124 (1976): 755, 796.

⁵⁷⁵ Woods, *supra* note 538, at 399.

the student in the educational malpractice case. These defenses are contributory negligence, assumption of risk and third-party defendant.

Contributory negligence is a defense which can be raised by the defendant to bar his liability even though his conduct was negligent. The defendant must prove that the student was negligent in not taking reasonable steps to learn or to protect himself from the defendant's conduct.⁵⁷⁶ Elson observes that the contributory negligence defense may be an obstacle for the student because "the ultimate success or failure of a student to achieve in school depends upon the willingness and ability of the individual student."⁵⁷⁷ Klein states that the defendant could introduce evidence of a poor attendance record and a generally negative attitude towards school to prove the student's contributory negligence.⁵⁷⁸ Abel⁵⁷⁹ and Klein⁵⁸⁰ mention that courts are reluctant to attribute contributory negligence to a child and would be lenient when asked to apply it to a student in the educational malpractice case.⁵⁸¹

A second defense which is available to the defendant is assumption of risk. The defendant must prove first, that the student knew and understood the risk he was incurring and second, that his choice to incur the risk was entirely free and voluntary. Abel states that it is unlikely any defendant who bases such a defense on a student's attendance will be successful because of the intervening compulsory attendance statute that requires compliance.⁵⁸²

⁵⁷⁶ Elson, *supra* note 443, at 750-751.

⁵⁷⁷ Elson, *supra* note 443, at 750-751.

⁵⁷⁸ Klein, *supra* note 435, at 52.

⁵⁷⁹ Abel, *supra* note 447, at 430.

⁵⁸⁰ Klein, *supra* note 435, at 53.

⁵⁸¹ Abel, *supra* note 447, at 430.

⁵⁸² Abel, *supra* note 447, at 431.

A third possible defense exists if the defendants join the student's parents as third-party defendants. Braverman remarks that the defendants may argue that the parents neglected or failed to supervise their child and as a consequence are jointly liable with the school district.⁵⁸³ Abel sees this defense as questionable because historically courts have given protective immunity to the parent-child relationship, and recognition of this defense would be contrary to public policy.⁵⁸⁴

Several of the scholars⁵⁸⁵ discuss the rule of law which holds that the issue of causation is a question of fact for the jury to decide unless the court can conclude as a matter of law that reasonable men could differ in their finding of causation. Jerry emphasizes that difficulty in proving causation is not a reason for the court to hold as a matter of law that a student cannot prove his case.⁵⁸⁶ Collingsworth summarizes this position of the authors:

Causation is for the fact finder to decide based on the merits and courts are therefore not justified in barring all educational malpractice claims because of a feeling that causation is uncertain.⁵⁸⁷

In summary, the authors have analyzed Rejection Standard Three, No Causal Link, by addressing the two elements of the causation issue: (1) legal cause and (2) proximate cause. They have conjectured in their arguments that both legal and proximate cause may be established thus creating the necessary rationale for legal recognition of causation. They project several methods of proof and types of evidence whereby legal cause and proximate cause may be established. They caution that the host of factors and

⁵⁸³ Braverman, supra note 480, at 3.

⁵⁸⁴ Abel, supra note 447, at 431.

⁵⁸⁵ Woods, supra note 538, at 399; Collingsworth, supra note 441, at 500-502; Blackburn, supra note 466, at 121; Jerry, supra note 528, at 211.

⁵⁸⁶ Jerry, supra note 528, at 211.

⁵⁸⁷ Collingsworth, supra note 441, at 502.

timeliness difficulties that influence the determination of proof should be carefully controlled utilizing the substantial factor test.

Rejection Standard Four: No Appropriate Remedy

The courts have failed to recognize a cause of action for educational malpractice because no appropriate remedy could be identified. This forms the basis for Rejection Standard Four. The courts which have confronted the issue of educational malpractice have held that they can find no appropriate remedy for the student who claims he failed to receive an adequate education in the public schools. The award of monetary damages in the educational malpractice area involves an impermissible speculation by the courts because the extent of academic injury is incapable of precise assessment.⁵⁸⁸ The court in Fairbanks North Star expressed this concern:

In particular we think that the remedy of money is inappropriate as a remedy for one who has been a victim of errors made during his or her education. The level of success which might have been achieved had the mistakes not been made will, we believe, be necessarily incapable of assessment. . . .⁵⁸⁹

Furthermore, monetary damages may place an undue financial burden on the school districts and society. Peter W. recognized that, “the ultimate consequences, in terms of public time and money, would burden them and society beyond calculation.”⁵⁹⁰

If a plaintiff can prove the requisite elements of a negligence cause of action, he is entitled to relief. An appropriate remedy will be granted by the court to compensate the plaintiff for this injury and to place him in the same position he would have been in had the injury not occurred.⁵⁹¹ Authors have responded to the position of the courts by

⁵⁸⁸ Pabian, supra note 463, at 108.

⁵⁸⁹ Fairbanks North Star, 628 P.2d 554, 556 (1981).

⁵⁹⁰ Peter W., 60 Cal. App. 3d at 825 (1976).

⁵⁹¹ Jorgensen, supra note 534, at 355.

analyzing the appropriateness of remedy issue under two categories: (1) the appropriateness of awarding monetary damages, and (2) the appropriateness of awarding alternative remedies.

Monetary Damages

The plaintiffs in the educational malpractice cases brought thus far have sought relief in the form of monetary damages, which the courts have consistently denied. Jorgensen maintains that monetary damages should be awarded to compensate the student for his disability and for the effect his inadequate education will have on his future earning capacity. She admits, however, that monetary damages are difficult to calculate, are subject to speculation, and are a potential drain on resources of the school district.⁵⁹²

Collingsworth suggests that the amount of monetary damages could be ascertained if the student also seeks remedial instruction. The measure of monetary damages would be the wages lost by the student while he is out of the workforce attending remedial instruction to complete his education.⁵⁹³

The University of Pennsylvania Law Review claims that a student seeking relief in the courts for educational malpractice could ask for monetary compensation for the diminished future income he would have earned had he received the proper education. The article notes, however, that this remedy would have several disadvantages. First, courts which are already reluctant to award damages based upon speculation would be hesitant to address another speculative area. Second, if the plaintiff had not sought remedial instruction, the defendants could argue that the student had not attempted to

⁵⁹² Jorgensen, supra note 534, at 355.

⁵⁹³ Collingsworth, supra note 441, at 502.

mitigate his damages and therefore is not entitled to relief. Finally, the award of monetary damages could exact a crushing financial burden on the school district.⁵⁹⁴

Abel and Tracy also discuss disadvantages of awarding monetary damages. Abel states that the payment of monetary damages neither benefits the school nor remedies the student's inadequate education.⁵⁹⁵ Tracy questions the appropriateness of monetary damages for loss of expected employment because it does not conform to the purpose of public education which historically has been to create a productive and literate citizenry.⁵⁹⁶

Alternative Remedies

Commentators have suggested various alternative remedies that the plaintiff could seek and the courts could award which would be more appropriate than monetary damages. One alternative remedy available to a student is proposed by the University of Pennsylvania Law Review. It maintains that the student could seek removal and replacement of the incompetent teacher. The removal could be accomplished by means of a court injunction which would be directed against the school officials to remove the teacher. It could alternatively be directed only against the teacher to enjoin him from teaching. This remedy has the advantage of being relatively inexpensive. Although it would eliminate potential injury that the teacher may cause in the future, it would not make whole the student who has been subjected to incompetent teaching.⁵⁹⁷

⁵⁹⁴ "Comment: Educational Malpractice." *University of Pennsylvania Law Review* 124 (1976): 755, 759.

⁵⁹⁵ Abel, *supra* note 447, at 427.

⁵⁹⁶ Tracy, Destin Shann. "Educational Negligence: A Students' Cause of Action for Incompetent Academic Instruction." *North Carolina Law Review* 58 (1980): 561, 580-581.

⁵⁹⁷ "Comment: Educational Malpractice." *University of Pennsylvania Law Review* 124 (1976): 755, 757.

A second alternative remedy suggested by several of the authors would require the schools to provide or pay for remedial instruction for the student. This form of remedy has several advantages which have been identified by the authors. Pabian proposes that it would not only compensate the plaintiff for his injury, but would punish the school district and/or the teacher, thus affecting deterrence for future negligent conduct.⁵⁹⁸

Jorgensen cites other advantages. First, the payment or provision of remedial instruction would cost the school district less than the payment of monetary damages. Consequently, the threat of placing an undue financial burden on the schools would be alleviated. Second, the student would receive the education he allegedly failed to receive while enrolled in the public school system. Third, it would discourage lawsuits brought by the insincere plaintiff who is seeking a windfall through an award of monetary damages.⁵⁹⁹

Another advantage mentioned by Tracy is that the award of remedial instruction would eliminate the problem of speculative monetary damages.⁶⁰⁰ Klein suggests that requiring schools to provide an appropriate remedial program for a student would enable him to enhance his academic competencies, increase his chances for higher earnings and better jobs, and repair his emotional injuries by improving his self-image through scholastic success.⁶⁰¹ The University of Pennsylvania Law Review states that the award of remedial instruction will make the student whole in the majority of cases.⁶⁰²

⁵⁹⁸ Pabian, *supra* note 463, at 108.

⁵⁹⁹ Jorgensen, *supra* note 534, at 355.

⁶⁰⁰ Tracy, *supra* note 600, at 581.

⁶⁰¹ Klein, *supra* note 435, at 57.

⁶⁰² "Comment: Educational Malpractice." *University of Pennsylvania Law Review* 124 (1976): 755, 758.

Klein alternatively asserts that remedial instruction by itself can never make a student whole, fully compensate him for losses incurred or deter future harm. She suggests a third alternative remedy which, in addition to providing remedial instruction, would grant a limited monetary award in the form of a salary for attending the remedial program. The amount of the salary would be equivalent to the earnings lost by the student while he is attending the remedial program. Alternatively, the student could receive the earnings lost over a designated period of time, the length of which would be determined without reference to the time required for the student to gain the necessary skills. This method of allocating a fixed monetary amount would limit the court's need to speculate.⁶⁰³

Jorgensen and the University of Pennsylvania Law Review remark that remedial instruction coupled with monetary damages may be ideal for the student who has been out of school for several years and has suffered diminished earnings because of his lack of skills or reading ability.⁶⁰⁴

Tracy advises that the court should limit that monetary award to reimbursement for the cost of remedial instruction if a student has already received this instruction and under certain circumstances, allow for reimbursement for wages lost during the remedial period. Tracy further states that relief should be limited to remedial instruction whenever possible both to alleviate the financial burdens which large monetary awards would bring to schools, and to discourage students from filing suit to receive such awards.⁶⁰⁵

⁶⁰³ Klein, *supra* note 435, at 58.

⁶⁰⁴ Jorgensen, *supra* note 534, at 355; "Comment: Educational Malpractice." *University of Pennsylvania Law Review* 124 (1976): 755, 758.

⁶⁰⁵ Tracy, *supra* not 600, at 582.

Several authors have commented on the potential long-term effect created by the courts' position that an appropriate remedy cannot be found to compensate the student who claims academic injury. Collingsworth summarizes this effect by observing:

Denial of the suit makes the plaintiff, who . . . may be a victim of clear negligence, bear the loss himself. . . the state benefits when an individual receives an education. It enables the individual to fend for himself and not be a burden to the state. However, in a case where an individual is negligently injured by the state, the entire populace should bear this burden at the outset rather than place it entirely upon the innocent party who may eventually become a burden to the entire populace anyway.⁶⁰⁶

In summary, the authors have analyzed Rejection Standard Four, No Appropriate Remedy, by addressing the categories: (1) the appropriateness of awarding monetary damages, and (2) the appropriateness of awarding alternative remedies. They have conjectured in their arguments that monetary damages could be detrimental to the recognition of a successful cause of action. They project that alternative forms of remedial instruction for the allegedly injured student is an appropriate remedy. They caution that claims for large monetary awards will be rejected by courts due to the speculative nature of calculating a proper amount.

Rejection Standard Five: Flood of Litigation

The courts have failed to recognize a cause of action for educational malpractice because they fear that excessive litigation and fraudulent claims would result. This forms the basis for Rejection Standard Five. The Peter W. court feared that recognition of a new cause of action to remedy academic injury could bring a flood of litigation which would overwhelm the already congested court system. The court also feared that recognition could attract opportunistic plaintiffs bringing fraudulent claims. Finally, they feared that

⁶⁰⁶ Collingsworth, supra note 441, at 504.

recognition could place an undue financial burden upon the schools and society. The court expressed this concern by stating:

To hold them to an actionable ‘duty of care’, in the discharge of their academic functions, would expose them to the tort claims – real or imagined – of disaffected students and parents in countless numbers... The ultimate consequences, in terms of public time and money, would burden them – and society – beyond calculation.⁶⁰⁷

When a court is asked to recognize a new cause of action, it will consider what effect the recognition will have upon the court system and upon society. Later court decisions have reaffirmed the fears announced in Peter W., and much discussion on the subject has appeared in the legal and educational literature. The authors have responded to the fear by analyzing: (1) the effects of recognition or non-recognition of the cause of action, (2) the possible measures which could be taken by the courts to limit the undesirable consequences recognition could bring, and (3) the inconsistency of the courts’ rationale.

Effects of Recognition of an Educational Malpractice Cause of Action – Many of the authors have discussed the potential flood of litigation which the courts fear. Pabian observes that the fear is exaggerated because malpractice suits would be too time consuming and expensive to be brought without good cause. He points out that the flood of litigation argument, “seems a convenient way for the courts to avoid becoming involved in educational matters.”⁶⁰⁸ Tracy writes that the fear of excessive litigation “represents a concern with judicial efficiency that is inimical to basic concepts of justice and should not be decisive when a genuine need for relief is demonstrated.”⁶⁰⁹ Elson emphasizes that the courts should not bar all students with educational grievances

⁶⁰⁷ Peter W., 60 Cal. App. 3d at 825.

⁶⁰⁸ Pabian, supra note 463, at 105.

⁶⁰⁹ Tracy, supra not 600, at 586-587.

because of the fear that some teachers may be forced to defend themselves in court against unjustified claims. This would undermine the principles of fairness, equality, and individualized justice which are basic to the common law.⁶¹⁰

The courts have stated that recognition of a cause of action for educational malpractice would result in excessive litigation and fraudulent claims which the court system would be unable to handle. In addition to these alleged negative effects of recognition, authors have identified other positive and negative results. Jorgensen believes that the fear of lawsuits by dissatisfied students would serve as an incentive to school systems to improve the quality of their education.⁶¹¹ Gordon remarks that holding school districts liable would provide a deterrent to the indiscriminate and arbitrary exercise of judgment by an employee of the school district regarding a student's educational needs.⁶¹²

Several authors discuss negative effects of recognition. Blackburn predicts that the quality of education may decrease because large amounts of money originally intended for financing public education would be channeled into large recoveries for students.⁶¹³

Tracy foresees that these actions for individual grievances would consume time and money otherwise available for instruction and would therefore take away from the overall quality of the education provided. She also states that recognition could discourage competent prospective teachers from entering the profession and inhibit individualized experimental teaching methods that adapt to the individual needs of

⁶¹⁰ Elson, *supra* note 443, at 698-699.

⁶¹¹ Jorgensen, *supra* note 534, at 351.

⁶¹² Gordon, *supra* note 449, at 476.

⁶¹³ Blackburn, *supra* note 466, at 141.

students. Tracy believes that educators might “voluntarily retreat to a safe, minimal position to reduce vulnerability to suits.”⁶¹⁴ Such a position could be interpreted by courts as minimal standards of teacher competency and accordingly cement educational theories into tort standards, thus inhibiting flexibility in the teaching process. Tracy concludes that the quality of education would not improve in all likelihood if educational malpractice causes of action were recognized.⁶¹⁵

Measures to Limit the Undesirable Consequences of Recognition – Various measures have been recommended by the commentators that could be utilized by the courts to limit the undesirable consequences which could result if legal recognition were accorded the educational malpractice cause of action. One approach which would enable courts to keep the floodgates closed and the fraudulent claims out of court requires the student to present actual injuries. Jorgensen maintains that if the courts can effectively distinguish the false claims from the legitimate ones, excessive litigation will not result. The court can make this distinction by requiring all students alleging educational malpractice to prove actual injury.⁶¹⁶

Abel proposes that the court invent by way of precedent, a procedure for establishing proof for screening educational malpractice actions that would serve to deter all but the most meritorious of suits. This procedure would be followed whenever a student were to seek damages for educational malpractice. Such a procedure would eliminate those suits where damages are sought only because jobs are unavailable, and not because a job is unobtainable due to the student’s inadequate education. The student

⁶¹⁴ Tracy, Destin Shann. "Educational Negligence Suits." *School Law Bulletin* 11, no. 3 (1980, Jul): 1, 8-9.

⁶¹⁵ Id.

⁶¹⁶ Jorgensen, supra note 534, at 351.

would be required to produce evidence of probable educational deficiency as part of this procedure. Abel suggests the usage of tests and other instruments that evaluate educational achievement to indicate the presence of educational deficiencies. He further states that proof of proximate cause will provide an inherent screening mechanism that, in conjunction with the court determined procedure, would permit only the most meritorious of claims. Abel concludes that a flood of litigation would not result if courts were to adopt such a procedure.⁶¹⁷

A second approach which would limit the undesirable consequences is presented by the University of Pennsylvania Law Review⁶¹⁸ and Braverman.⁶¹⁹ They suggest that “holding teachers to only a community norm or minimum should keep the number of educational malpractice suits within reasonable limits.”⁶²⁰ By utilizing this professional community standard, teachers would only have to conform their conduct to what is required minimally to teach with competence, which could be readily determined before frivolous claims would be filed. In the alternative, if the courts were to invoke a reasonable man standard, no preconceived minimum level of conduct would be assumed, and therefore by necessity the level of conduct would be subjected to jury discretion.⁶²¹

The University of Pennsylvania Law Review⁶²² and Klein⁶²³ present a third approach by asserting that excessive and fraudulent litigation and the ensuing financial burden on schools could be controlled by courts through the type of remedy which they

⁶¹⁷ Abel, *supra* note 447, at 428-430.

⁶¹⁸ "Comment: Educational Malpractice." *University of Pennsylvania Law Review* 124 (1976): 755, 770.

⁶¹⁹ Braverman, *supra* note 480, at 2.

⁶²⁰ "Comment: Educational Malpractice." *University of Pennsylvania Law Review* 124 (1976): 755, 770.

⁶²¹ *Id.*

⁶²² *Id.* at 763.

⁶²³ Klein, *supra* note 435, at 56.

allow a student to demand and receive. If the remedy is limited to provision of or payment for remedial instruction, coupled with limited monetary relief under certain circumstances, the number of suits will be kept to a minimum. This in turn would reduce the financial burden placed upon the school systems. The University of Pennsylvania Law Review proposes that courts which allow dismissal of incompetent teachers as a remedy will minimize the monetary cost to schools and discourage students from filing suits just to seek large monetary awards.⁶²⁴

It has been recommended by several commentators that malpractice insurance could be purchased by schools to subrogate their liability for educational malpractice. Blackburn states that schools can use insurance to spread the loss they may suffer if courts allowed monetary awards to students.⁶²⁵ Abel asserts that it would be “unlikely that any sizeable diversion of educational dollars from public school coffers to individual plaintiffs” would result if insurance were made available for educational malpractice.⁶²⁶ He further observes that courts have looked to the availability of insurance as a means of relieving the financial liability placed upon a defendant when they have been asked to abrogate traditional immunities. The University of Pennsylvania Law Review comments that school districts and individual teachers should be able to purchase insurance at a reasonable price because the possibility of a successful educational malpractice lawsuit is slight under the standards of negligence. If school districts were to purchase insurance,

⁶²⁴ "Comment: Educational Malpractice." *University of Pennsylvania Law Review* 124 (1976): 755, 763.

⁶²⁵ Blackburn, *supra* note 466, at 141.

⁶²⁶ Abel, *supra* note 447, at 427.

the fear that a large monetary award would place an undue financial burden upon the schools would be alleviated.⁶²⁷

Klein⁶²⁸ and Pabian⁶²⁹ suggest the defense of contributory negligence as a viable response to the floodgate argument. This defense, available to both school districts and teachers, could “curb the appetite of litigious individuals and thereby protect school systems from extreme claims.”⁶³⁰

The time and expense involved in bringing an educational malpractice suit has also been discussed in response to the courts’ fear of a flood of litigation. Elson contends that the cost of a lawsuit to challenge negligent educational practices would be expensive, and the chance of success highly speculative. Consequently, attorneys who handle these cases will require a large retainer fee as opposed to taking cases on a contingency fee arrangement. Based on these reasons, Elson does not believe a flood of litigation will occur. If parents use the courts to press claims against teachers for “vexations or malicious reasons,” the court may require the parents to pay the teacher’s litigation costs and attorneys’ fees.⁶³¹

Elson⁶³² and Pabian⁶³³ further contend that excessive and fraudulent litigation would not result because most jurisdictions do not allow minors to sue in their own names. Elson explains, “such requirements ensure that a student’s immature impulses are not the sole motivating force behind the lawsuit.”⁶³⁴

⁶²⁷ "Comment: Educational Malpractice." *University of Pennsylvania Law Review* 124 (1976): 755, 763.

⁶²⁸ Klein, *supra* note 435, at 54.

⁶²⁹ Pabian, *supra* note 463, at 109.

⁶³⁰ Klein, *supra* note 435, at 54.

⁶³¹ Elson, *supra* note 443, at 652-653.

⁶³² Elson, *supra* note 443, at 652.

⁶³³ Pabian, *supra* note 463, at 108.

⁶³⁴ Elson, *supra* note 443, at 652.

Inconsistency of the Courts' Rationale – Several authors comment that the fear expressed by the courts are an unpersuasive ground for denying a student his day in court. This argument, they note, has been rejected in other areas of the law when courts have been asked to recognize a new tort. Collingsworth insists that this argument should not be considered by the courts because the various state legislatures settled debate on this when they removed blanket governmental immunity from state agencies. Protection of the state treasury was a primary argument in favor of governmental immunity from private lawsuits. When the states removed the immunity with full knowledge of this concern, the issue was settled. Collingsworth further states that the courts should not use the very rationale discarded by the legislature to indirectly reinstate immunity by denying a cause of action.⁶³⁵ Collingsworth claims that the courts which advance this argument have been “extremely inconsistent in applying it.”⁶³⁶ They have refused to invoke this argument and have recognized liability when school districts are negligent in supervision or when doctors or employees of city-owned hospitals are negligent. Collingsworth maintains that the state treasury should be able to withstand an educational malpractice lawsuit if it can withstand these other types of suits.⁶³⁷

Woods⁶³⁸ and Blackburn⁶³⁹ state that the California and New York courts had previously addressed the flood of litigation argument before Peter W. and Donohue were brought, and that it was rejected in both states as grounds for denying recognition of a new cause of action. The California Supreme Court in Dillion v. Legg, 68 Cal. 2d 718

⁶³⁵ Collingsworth, supra note 441, at 503.

⁶³⁶ Collingsworth, supra note 441, at 503.

⁶³⁷ Collingsworth, supra note 441, at 503.

⁶³⁸ Woods, supra note 538, at 395.

⁶³⁹ Blackburn, supra note 466, at 142.

(1968)⁶⁴⁰ held that the facts of each case must be weighed alone to determine the viability of a cause of action, and fear of similar suits should not be considered as a legitimate factor in refusing to hear the action. The New York courts confronted the argument in Buttalla v. State of New York, 10 N.Y. 2d 240 (1961)⁶⁴¹ and declared, “Although fraud, extra litigation and a measure of speculation are, of course, possibilities, it is no reason for a court to eschew a measure of its jurisdiction.”⁶⁴² Blackburn concludes that the right to bring an action was enforced in this case and it was recognized that problems of proof were for the court and the jury to decide.⁶⁴³

In their discussion of the floodgate argument, the University of Pennsylvania Law Review cites the observation made by the Pennsylvania Supreme Court in Doyle v. South Pittsburgh Water Co.:

Throughout the entire history of the law, legal Jeremiahs have moaned that if financial responsibility were imposed in the accomplishment of certain enterprises, the ensuing litigation would be great, chaos would reign and civilization would stand still. It was argued that if railroads had to be responsible for their acts of negligence, no company could possibly run trains; if turnpike companies had to pay for harm done through negligence, no roads would be built; if municipalities were to be financially liable for damage done by their motor vehicles, their treasuries would be depleted. Nevertheless, liability has been imposed in accordance with elementary rules of justice and the moral code, and civilization in consequence, has not been bankrupted, nor have the courts been inundated with confusion.⁶⁴⁴

Finally, several of the authors suggest that courts should not refuse to recognize this new cause of action based on the potential volume of litigation. Tracy encourages

⁶⁴⁰ Dillion v. Legg, involved negligent infliction of emotional trauma and physical injury from witnessing daughter’s death.

⁶⁴¹ Buttalla v. State of New York, involved a cause of action for physical or mental injury where the injury was not caused by impact, but rather by fright negligently induced.

⁶⁴² Buttalla v. State of New York, 10 N.Y. 2d at 240-241 (1961).

⁶⁴³ Blackburn, *supra* note 466, at 142.

⁶⁴⁴ "Comment: Educational Malpractice." *University of Pennsylvania Law Review* 124 (1976): 755, 770, 765-766 quoting from Doyle v. South Pittsburgh Water Co., 414 Pa. 199, 218-219; 199 A.2d 875, 884 (1964).

courts to limit potential claims by requiring students to exhaust all administrative remedies before seeking relief in the courts.⁶⁴⁵ Pabian recommends that an administrative court system could be developed to handle all educationally related disputes. If excessive and fraudulent litigation were to result, he remarks that the present court system would be available for appeal of the decisions of the administrative court. He contends that administrative courts have succeeded in the area of tax law where they have been able to efficiently and expertly handle a large volume of cases.⁶⁴⁶

Many alternative measures are suggested by authors which would limit the undesirable consequences of recognition of an educational malpractice cause of action. They have questioned the wisdom of the courts' floodgate argument, and as Pabian concludes, the argument "seems a convenient way for the courts to avoid becoming involved in educational matters."⁶⁴⁷

In summary, the authors have analyzed Rejection Standard Five, Flood of Litigation, under the following three categories: (1) the effects of recognition or non-recognition of the cause of action, (2) the possible measure which could be taken by the courts to limit the undesirable consequences, and (3) the inconsistency of the courts' rationale. They have conjectured in their arguments that recognition of an educational malpractice cause of action would not be as undesirable as the courts fear. They project that there are a number of measures that would limit excessive amounts of lawsuits, fraudulent claims and financial burdens on schools. They caution that recognition of a

⁶⁴⁵ Tracy, Destin Shann. "Educational Negligence: A Students' Cause of Action for Incompetent Academic Instruction." *North Carolina Law Review* 58 (1980): 561, 588.

⁶⁴⁶ Pabian, *supra* note 463, at 108.

⁶⁴⁷ Pabian, *supra* note 463, at 108.

cause of action could lead to minimal teaching efforts and a distraction of public school funds away from the development of quality educational programs.

Rejection Standard Six: Improper Forum

The courts have failed to recognize a cause of action for educational malpractice because they have held that the courts are an improper forum in which to resolve educational disputes. This forms the basis for Rejection Standard Six. The court in Donohue declared that:

To entertain a cause of action for “educational malpractice” would require the courts not merely to make judgments as to the validity of broad educational policies – a course we have unalteringly eschewed in the past – but, more importantly, to sit in review of the day-to-day implementation of these policies.⁶⁴⁸

Tracy poses four reasons why courts have abstained due to this factor, (1) the longstanding historical pattern of judicial non-intervention, (2) the lack of judicial expertise in the field of education, (3) better service of educational issues by political solutions, and (4) the delegation of education matters to administrative bodies via constitution and statute.⁶⁴⁹ Commentators have divided the area of improper forum into two major concerns which are as follows: (1) the appropriateness of court intervention, and (2) the availability of an administrative forum.

The Appropriateness of Court Intervention

In Donohue, the New York Court of Appeals was concerned that the recognition of a cause of action for educational malpractice based on negligence would impermissibly require the courts to oversee the administration of the public school system

⁶⁴⁸ Donohue v. Copiague Union Free School District, 47 N.Y. 2d 440, 445 (1979).

⁶⁴⁹ Tracy, supra note 649, at 589-590.

of the state.⁶⁵⁰ Pabian reports that, “many courts adhere to a doctrine of academic freedom, a philosophy which stresses that teaching and learning must be free of outside interferences.”⁶⁵¹ The Hoffman court apparently believed, according to Collingsworth, that all educationally related actions were beyond judicial scrutiny.⁶⁵² This attitude is incongruous with the position of other courts, including that of the Supreme Court. Jerry details a number of areas in which the courts have intervened in educational issues:

In desegregation cases, courts make judgments about the quality of education in racially unbalanced schools. See e.g., Milliken v. Bradley, 418 U.S. 717, 737 (1974); Brown v. Board of Education, 347 U.S. 483, 495 (1954). Questions of public school financing directly impact upon the quality of education, e.g., San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973). First Amendment issues have forced courts to decide what may or may not be taught in the schools, e.g., Epperson v. Arkansas, 393 U.S. 97 (1968). In considering the statutory rights of handicapped children, courts have evaluated the quality and effect of the efforts of educators, e.g., In re Peter H., 323 N.Y.2d 302 (Family Court 1971). The question of compulsory language programs for non-English speaking students also requires courts to appraise the quality of education, e.g., Lau v. Nichols, 414 U.S. 563 (1974).⁶⁵³

Klein comments on the impropriety of the court’s reasoning stating that, “the courts have already expanded judicial review to include students rights, liability of school boards, financial policies and education of the handicapped and delinquent.”⁶⁵⁴ As a result, she sees no real barrier to extending school liability to educational malpractice.⁶⁵⁵

Authors that espouse the appropriateness of court intervention regarding educational issues have had to overcome the following concerns of the courts: (1) the court’s lack of expertise in the area of educational issues; (2) the fear that the courts will

⁶⁵⁰ Donohue, 47 N.Y. 2d 440 (1979).

⁶⁵¹ Pabian, supra note 463, at 103.

⁶⁵² Collingsworth, supra note 441, at 586.

⁶⁵³ Jerry, supra note 528, at 203.

⁶⁵⁴ Klein, supra note 435, at 38.

⁶⁵⁵ Klein, supra note 435, at 38.

become involved in a day-to-day monitoring of the public schools; and, (3) the propriety of judicial involvement in administrative policy making.

The first court concern, the lack of judicial expertise, is summarized by the Donohue court in the following statement:

The courts are an inappropriate forum to test the efficacy of education programs and pedagogical methods. That judicial interference would be the inevitable result of the recognition of a legal duty of care is clear from the fact that in presenting their case, plaintiffs should, of necessity call upon jurors to decide whether they should have been taught one subject instead of another, or whether one teaching method was more appropriate than another, or whether certain tests should have been administered or test results interpreted in one way rather than another, and so on, ad infinitum. It simply is not within the judicial function to evaluate conflicting theories of how best to educate.⁶⁵⁶

The Donohue court did however, as Collingsworth distinguishes, “leave the door open a crack by saying that teachers could be held liable for negligence in administering policy.”⁶⁵⁷ Although some critics suggest that a lack of judicial expertise in the field of education justifies restraint, a look at the wide scope of judicial decisions encompassing medicine, psychiatry, and industry refutes that contention.⁶⁵⁸ Klein notes that by appointing “Masters” in complex situations as courts do in other professional malpractice cases, courts would be able to offer relief to injured plaintiffs in the educational malpractice situation.⁶⁵⁹ Tracy recommends the use of educational expert testimony to make up for the lack of court expertise in the area.⁶⁶⁰

Gordon addresses the second court concern by reporting that courts have been reluctant to interfere with the day-to-day decisions of schools for fear that such

⁶⁵⁶ Donohue v. Copiague Union Free School District, 64 A.D. 2d 29, 35 (1978).

⁶⁵⁷ Collingsworth, supra note 441, at 458.

⁶⁵⁸ Klein, supra note 435, at 38.

⁶⁵⁹ Klein, supra note 435, at 38.

⁶⁶⁰ Tracy, supra note 653, at 589.

interference might be viewed as a challenge to the professional competency of school officials.⁶⁶¹ This reasoning is usually based on vague and general state education statutes which delegate state control of education to an administrative agency. Elson proposes what he believes is the proper relationship between the courts and schools in stating:

Courts naturally cannot be expected to conduct general supervisory programs over teachers and, therefore, should not be looked to by policy makers as a primary means for eliminating substandard teaching. But, intervention does help alleviate the gross imbalance of power in the student- school relationship.⁶⁶²

Klein maintains that the third court concern, the propriety of court involvement in educational policy making, is perhaps the prime underlying reason for judicial reluctance to recognize a cause of action for educational malpractice.⁶⁶³ Pabian stresses that the public school systems, like administrative agencies, have full-time administrators and elected school board officials to manage their affairs and set administrative policy.⁶⁶⁴ A stronger argument against judicial involvement in educational decision making, as Elson contends, is that the processes by which courts reach decisions are inappropriate for the affirmative educational policy decisions that are involved in educational malpractice suits. The court is designed to work best in a narrow fact finding capacity, whereas educational policy considerations often require broad inquiry and deliberation.⁶⁶⁵ Woods finds it difficult to comprehend why a court would not become involved with the problem of graduating illiterates when they have not hesitated in the past to become involved in internal decision making in other areas.⁶⁶⁶

⁶⁶¹ Gordon, *supra* note 449, at 479.

⁶⁶² Elson, *supra* note 443, at 657.

⁶⁶³ Klein, *supra* note 435, at 37.

⁶⁶⁴ Pabian, *supra* note 463, at 103.

⁶⁶⁵ Elson, *supra* note 443, at 671.

⁶⁶⁶ Woods, *supra* note 538, at 394.

Authors express that the greatest disservice done by the use of the improper forum argument is the loss of the courts as a deterrent to negligent acts and a check on the administrative agencies. Woods comments that, “the national publicity surrounding such an action would put school districts nationwide on notice that they will be held accountable for their teaching.”⁶⁶⁷ Tracy also acknowledges that the courts play an important role in the check on administrative agencies regarding matters which have been delegated to them by the constitution or statutes.⁶⁶⁸ Elson observes that the failure of the courts to provide a judicial remedy in this area removes the pressure on school districts to develop effective internal procedures. Consequently, the likelihood and severity of injury has been increased because of the lack of a deterrent.⁶⁶⁹ Elson comments further:

A court that refuses to interfere with a school official’s decision because of its belief in the safeguards against abuse that are inherent in the democratic system of American public school governance is ignoring the realities of social class in America and is perpetuating some of its inequities.⁶⁷⁰

Availability of an Administrative Forum – The second major concern raised by courts in their improper forum argument relates to the availability of various administrative forums to handle legal problems in the field of education. Three primary administrative forums have been discussed in the literature as potential avenues of relief for students harmed by educational malpractice: (1) the local school board, (2) the state office of education, and (3) an administrative court system.

Pabian discusses the fact that public school systems are similar to administrative agencies with their full-time administrators and elected school board officials to manage

⁶⁶⁷ Woods, supra note 538, at 394.

⁶⁶⁸ Tracy, supra note 653, at 590.

⁶⁶⁹ Elson, supra note 443, at 657.

⁶⁷⁰ Elson, supra note 443, at 666.

their affairs.⁶⁷¹ Elson theorizes that the philosophy which presently guides the courts is the “historic hands-off attitude towards educators which may be found in the ideology of school-community relations that has traditionally been shared by the country’s middle and upper socioeconomic classes, from which the judicial leadership in the United States has been predominately selected.”⁶⁷² Elson contends that the local school board follows the democratic principles of government. These principles embody the basic tenets that the elected school board is responsive to the will of the community and the community will always have ultimate recourse to the school board if they have grievances with the decisions of the board. Elson maintains that the current reluctance of courts to intrude into the area of educational decision making would be warranted in light of these principles and the court’s recognition of the undemocratic nature of judicial review, if the local community participation were really there. However, as Elson states, “Unfortunately, [the local community participation model of school governance is contradicted in almost every respect by the reality that the urban populace faces in trying to move the public school bureaucracy to respond to its grievances.”⁶⁷³

Many courts have acknowledged the state educational agency’s role in dealing with these problems. Collingsworth points to the New York Court of Appeals in Donohue and Hoffman where it declared that policy formation was vested in the State Board of Education and that the court should not substitute its judgment for that of the judgment of the Board.⁶⁷⁴ Tracy contends that although the legislature may delegate authority to

⁶⁷¹ Pabian, supra note 463, at 103.

⁶⁷² Elson, supra note 443, at 663.

⁶⁷³ Elson, supra note 443, at 663-664.

⁶⁷⁴ Collingsworth, supra note 441, at 486.

administer a particular area, judicial response to individuals injured should not be precluded by incompetent administrative functioning.⁶⁷⁵ Elson warns that:

to accept the principle that a public agency controlling a certain activity has the exclusive competence to understand and evaluate the facts peculiar to that activity would have the ultimate effect of sacrificing what judicial safeguards there now are against arbitrary governmental violations of individual rights for a faith in the beneficence and omniscience of the agency official. Such faith is as unfounded for the public school official as it is for the policeman, local zoning board or Immigration and Naturalization Service.⁶⁷⁶

Several authors have suggested the need for a system of administrative courts to handle educational complaints. Pabian comments that an administrative court system could be developed which is similar to the tax court system, with the civil courts available if an appeal is taken.⁶⁷⁷ The University of Pennsylvania Law Review recommends a system of review boards which would be a less expensive and more efficient way of enforcing professional standards and compensating individuals than the civil lawsuit.⁶⁷⁸ Lynch favors an administrative court system and proposes the following ten advantages of these courts with special administrative judges:

1. These judges would have an expertise in assessing the relationship of educational service to the law.
2. Their judicial expertise would consist of hearing and judging complaints in the educational system.
3. Such a system will reduce the number of cases going to courts, helping to lighten a very heavy case burden.
4. Those cases proceeding from the administrative legal system to the courts would likely present better definitions of issues for the courts than at present.

⁶⁷⁵ Tracy, *supra* note 653, at 591.

⁶⁷⁶ Elson, *supra* note 443, at 679.

⁶⁷⁷ Pabian, *supra* note 463, at 108.

⁶⁷⁸ "Comment: Educational Malpractice." *University of Pennsylvania Law Review* 124 (1976): 755, 764.

5. The expense to litigants would be considerably lessened. The cost would be part of the state's education or justice budget.
6. A clearer focus on educational problems with the objective of improving the educational opportunities for students would exist than in the courtroom where the discussion of remedy shifts to monetary damages.
7. Administrative judges would make decisions which would be equal to those of court judges.
8. A body of administrative law concerning malpractice would emerge, to which school officials and plaintiffs could refer.
9. The proceedings over which they presided would be less likely to be found faulty by courts on appeal, because of their formal and correct proceedings.
10. Administrative hearings conducted by officers of a district too often lead to confusion in roles of prosecutor and judge. This creates difficulties in the administration of schools in that plaintiffs or would-be plaintiffs feel threatened by facing administrators in another quasi-judicial role.⁶⁷⁹

There presently exists in our public school system an imbalance of power in the student-school relationship. The American court system was established to be a check on executive and administrative agencies to remedy just such an imbalance. There may be administrative forums which are capable of functioning in the role of forcing educators to accountability for the quality of their work product, but at present, they have been ineffective. The recognition that the courts may be a proper forum for an educational malpractice cause of action may be just the stimulus needed to get the system operational.⁶⁸⁰

In summary, the authors have analyzed Rejection Standard Six, Improper Forum, by addressing the concerns of the appropriateness of court intervention and the availability of an administrative forum. They have conjectured in their arguments that

⁶⁷⁹ Lynch, Patrick D. "Legal Implications of Models of Individual and Group Treatment by Professionals." *NOLPE School Law Journal* 9 (1980): 38, 59.

⁶⁸⁰ Elson, supra note 443, at 659-679.

court intervention is appropriate and administrative forums may present an alternate avenue of relief. They project that courts have the capabilities of rectifying their lack of expertise in the area of educational disputes and could become involved without monitoring the day-to-day affairs of schools. They caution that if courts allow public schools to operate without judicial restraint, there is a likelihood that academic injuries would increase.

SUMMARY

This chapter has analyzed the six rejection standards which have been generated from the public policy factors identified by the courts in their refusal to recognize an educational malpractice cause of action. Literature produced by education and legal scholars regarding the validity of the public policy factors was positioned in arguments based on traditional negligence theory and applied to each rejection standard. The literature was reviewed to reveal the strengths and weaknesses of the rejection standards. Understanding the rejection standards as well as its strengths and weaknesses is vitally important to this study because it provides predictive data the researcher will then use to determine the educational and public policy variables the court requires to recognize and acknowledge a successful cause of action of educational malpractice based on traditional negligence theory.

The first rejection standard, lack of a judicially workable standard of care, is directly connected to the first research question regarding legal duty of care. The courts were unable to ascertain what guidelines to use to evaluate the conduct of the teacher. Without guidelines to understand what it is a teacher is suppose to be doing in the

classroom, there is no way for the court to establish whether the teacher even has a legal duty towards the student and if they do, whether the teacher is fulfilling that duty.

The second rejection standard, no certainty of injury, mirrors the second research question involving the student's ability to demonstrate actual harm. The difficulty surrounding this rejection standard is that harm in this instance is not the type of harm understood in layman's terms but a legally recognizable harm. For the courts to recognize that harm has been suffered, the student must show that the injury is a result of the teachers' invasion of a legally protected interest and that the injury the student suffers from is something the courts can supply a remedy.

The third rejection standard, no causal link, corresponds to the third research question involving the role of the teacher in causing the student's functional illiteracy. Even if a legal duty towards students is acknowledged by the courts, causation is the most controversial and contentious standard a student will have to surmount in order to win a cause of action because the learning process is influenced by academic, social, economic, environmental, cultural, psychological and personal factors. Looking at the host of factors, the courts have focused on a student's failure to learn but legal literature suggests that the issue should be framed as one involving the teacher's failure to teach.

In addition to being the study's fourth research question, identifying an appropriate remedy for functional illiteracy in the event that a successful claim of educational malpractice made its way to the court was the court's fourth rejection standard. In any successful presentation of a cause of action in negligence, the appropriate remedy granted by the court would place the injured party in the same position they would have been in had they not been injured. Unfortunately, students

claiming diminished earning capacity and loss of job opportunities cannot be properly remedied because to do so would require too much speculation as to the monetary value of the injury and the courts were also reluctant to set precedent that could potential drain a school district's resources as a result of awarding sole monetary damages.

The fifth and sixth rejection standards, while not as determinative as the prior standards in recognizing educational malpractice as a valid cause of action, speaks to the court's hesitancy of creating a new area of law. Bringing a flood of litigation to an already congested court system and declaring the courts as an improper forum to resolve educational disputes are rejection standards five and six, respectively. The court feared that acknowledging educational malpractice as a cause of action would prompt an overwhelming influx of cases lacking merit. Legal scholars found this scenario highly unlikely considering the difficulty involved in establishing causation.

In regards to the improper forum, the courts feared that by recognizing educational malpractice, it would put itself in a position of passing judgment on the day-to-day activities regulated by school policies. The court held that not only was it not in a position of expertise to make educational decisions but to do so would be in direct violation of academic freedom; as such, the issue of educational malpractice would be best resolved by an administrative forum. Legal scholars countered the courts declaration of abstention due to lack of expertise by examining the court's intervention in other malpractice matters such as medicine and psychiatry. Furthermore, intervention by the Supreme Court in desegregation cases and school finance litigation contradict the court's call for academic freedom and fear of constant surveillance of day-to-day school activities. In regards to having the issue of educational malpractice resolved by an

administrative forum, legal scholars have countered that the improper forum is counter to the use of the judicial system as a deterrent and check on the administrative agencies.

With an outline of the court's rejection standards and respective strengths and weaknesses identified by legal scholars, the researcher will proceed with Chapter 5 by identifying and examining the changes in the field of education. Deciding which changes in education to include in the next chapter will be contingent on the substantive relevance the change has to meeting the conditions set out by the judicial system in establishing a successful cause of action for educational malpractice.

CHAPTER V

CHANGES IN THE FIELD OF EDUCATION

In Chapter IV, the researcher presented and analyzed the rejection standards offered by the courts rationalizing why instructional educational malpractice would not be recognized as a cause of action. The foremost rejection standards are in alignment with the legal theory of negligence – the theoretical framework of this study. The courts found that while an educator may have an expectation to provide an adequate education, because there was no consensus of what an educator should be doing to provide that education, the courts had no workable standard of care in which to assess an educator’s conduct. In regards to injury, the courts could not identify how a student’s “failure to learn” is a legally recognized injury. The courts third rejection standard addressed the issue of causation when it ruled as a matter of law that all things considered a student could not substantiate the allegation that an educator was legally and proximally the cause of the student receiving an inadequate education. Finally, the courts ruling that monetary compensation would not make a student whole in the context of educational litigation refers to the element of damages in the theory of negligence.

Thirty years have passed since the court addressed the issue of instructional education malpractice and not only has public policy surrounding K-12 education changed drastically but the field of education has developed such that the institution of primary and secondary education does not reflect the context addressed by the courts in the 1970s and 1980s. Chapter 5 outlines several major changes that have transformed the field of education. These changes have been organized around the courts rejection

standards as a way to analyze them. Based on the court's rejection standards and rationale as well as the analysis of legal scholars discussed in Chapter 4, the manner in which to pursue an action of instructional educational malpractice is not by focusing on a student's failure to learn as previously hypothesized but on the educator's failure to teach. Along these lines, the researcher examines the changes in public policy and the field of K-12 education in four parts: Part I focuses on the development of professional teaching standards; Part II examines the increasing influence, value and impact of student assessments and achievement examinations; Part III investigates the development of research surrounding the impact of educator performance on student learning; and, Part IV discusses remedial education programs as a method of compensating for academic deficiencies brought about by receiving an inadequate education.

PART I:

Professional Teaching Standards

At the time when the landmark cases addressing 'educational malpractice' were being decided, there were no nationally accepted professional teaching standards to which teachers could aspire. Indeed, the authority structure of school organizations often placed little faith in the wisdom of the teaching practice. Standards for the teaching profession were at the bottom of the professional ladder when the education of our future leaders was at a critical point. Of course, this phenomenon predates Peter W.'s litigation.

Since the October 4, 1957, launch of Sputnik, educational accountability and the role of the teacher have become increasingly more preeminent on the American political, economic, social and education agenda. Russia's ability to surpass the United States in launching the first space satellite made it of utmost importance for our nation to develop

teachers and ensure that teachers would be “professionally current.”⁶⁸¹ President Johnson’s “Great Society” and “War on Poverty” brought about federal intervention in the school house with the Elementary and Secondary Education Act of 1965.⁶⁸² By using federal funding as leverage to ensure state’s compliance with federal philosophy and directives, the ESEA of 1965 effectively put the federal government in the door of the school and “established a comptroller relationship overseeing state departments of education, the autonomy of the local public schools and classroom instruction.”

President Ronald Reagan’s administration saw to a renewed focus on American education when the National Commission on Excellence in Education presented *A Nation at Risk: The Imperative for Educational Reform*.⁶⁸³ Citing “the educational foundation of our society is presently being eroded by a tide of mediocrity that threatens our very future as a Nation and a people,”⁶⁸⁴ the Commission familiarized the American public to the predicament of our nation’s schools and lack of highly qualified teachers. In addition to its many recommendations, including increased professional standards for teachers,⁶⁸⁵ the scorching rhetoric of *A Nation at Risk* kept education at the forefront of the national agenda and made all facets of American industry take notice.

Soon after *A Nation at Risk*, a consortium of education deans and chief academic officers from the major research universities across the country formed The Holmes

⁶⁸¹ Speck, Marsha, and Carroll Knipe. *Why Can't We Get It Right? Professional Development in Our Schools*. Thousand Oaks, CA: Corwin Press, Inc., 2001, pg. 207.

⁶⁸² Elementary and Secondary Education Act, Public Law 89-10 (1965).

⁶⁸³ National Commission on Excellence in Education. *A Nation at Risk: The Imperative for Educational Reform. A Report to the Nation and the Secretary of Education United States Department of Education*. Washington, DC: Author, 1983.

⁶⁸⁴ *Id.* at 2.

⁶⁸⁵ *Id.* at Recommendation B: Standards and Expectations, para.1.

Group.⁶⁸⁶ Their report, *Tomorrow's Teachers: A Report of the Holmes Group*, focused on the improvements that the nation's institutions of higher education could make in teacher education and identified five goals in support of reforming teacher education and improving the teaching profession.⁶⁸⁷

In an effort to meet the challenges documented in *A Nation at Risk*, the Carnegie Corporation of New York assembled leaders from business, education, government to explore the link between economic growth and a well-educated citizenry. From the gathering, the Carnegie Task Force on Teaching as a Profession was created. A month after The Holmes Report, the task force issued a report that recognized the vital role of teacher quality in the successful implementation of reforms aimed at improving student learning by revamping and revitalizing the teaching profession – *A Nation Prepared: Teachers for the 21st Century*. One of the recommendations made by the Carnegie Task Force was that teachers not only have a broad base of knowledge acquired from a Bachelors degree in the arts and sciences but that teachers also have subject area knowledge in the classes they intend to teach. The recommendation of teachers having subject area knowledge presents itself time and time again in various education reform measures. Another recommendation involved the creation of a board to “define what teachers should know and be able to do” and “support the creation of rigorous, valid

⁶⁸⁶ The Holmes Group. "Tomorrow's Teachers: A Report of the Holmes Group." East Lansing, MI: The Holmes Group, 1986.

⁶⁸⁷ *Id.* at 4.

To make the education of teachers intellectually more solid.

To recognize differences in teachers' knowledge, skill, and commitment, in their education, certification and work.

To create standards of entry to the profession – examinations and education requirements – that are professionally relevant and intellectually defensible.

To connect our own institutions to schools.

To make schools better places for teachers to work, and to learn.

assessments to see that certified teachers do meet those standards.”⁶⁸⁸ This recommendation has become the legacy of the Carnegie Task force on Teaching as a Profession, the establishment of the National Board for Professional Teaching Standards.

National Board for Professional Teaching Standards: History & Mission

The National Board of Professional Teaching Standards is a non-governmental, not-for-profit, nonpartisan organization. NBPTS is governed by a board of directors consisting of leaders of teacher unions and subject area associations, teachers noted for excellence in the classroom, school administrators, local and state school board members, former and current governors, higher education officials, and business and government leaders. In addition to assessment fees from teacher pursuing certification, NBPTS is funded through both federal grants and private sources.

The NBPTS was created to respond to the claims that “the teaching profession, unlike medicine, architecture or accounting, has not codified the knowledge, skills and dispositions that account for accomplished practice” and that “certain misconceptions about what constitutes good teaching continue to exist.”⁶⁸⁹ The NBPTS was to address these claims by creating a system of teacher certification, designed to go beyond the minimum requirements of state licensure, to acknowledge and certify advanced or accomplished practice. These certifications were to align to a specific set of teachers and to develop a unified vision of teaching across the United States.

NBPTS has a three-fold mission: 1) to establish high and rigorous standards for what accomplished teachers should know and be able to do, (2) to advance related

⁶⁸⁸ National Board for Professional Teaching Standards. 2007. National Board for Professional Teaching Standards. In, http://www.nbpts.org/about_us/mission_and_history/mission. (accessed 2007).

⁶⁸⁹ Baratz-Snowden, Joan, Barbara C. Shapiro, and K. Streeter. "The National Board for Professional Teaching Standards: Making a Profession." *Middle School Journal* 25, no. 2 (1993): 68-71.

education reforms to capitalize on the expertise of National Board Certified Teachers (NBCTs), and (3) to develop and operate a national voluntary system to assess and certify teachers who meet these standards.⁶⁹⁰ Inherent in this certification process is the requirement that and opportunity for teachers to reflect upon and analyze their classroom practices while stressing professional collaboration and community involvement.

National board certification has been identified as the centerpiece of the nationwide effort to boost the profile of high-quality teaching;⁶⁹¹ a symbol of teaching excellence that is complement to, not a replacement of, existing licensure requirements in the United States.⁶⁹² As other professional organizations have researched and developed standards in their content areas (e.g., National Council of Teachers of English, National Council of Teachers of Mathematics), the NBPTS claims to “reflect the first thoroughly researched standards for what excellent teaching ought to be.”⁶⁹³ The stated purpose for the creation of these teaching standards suggests that “as the demands on students become more rigorous, guarantees that the education system is staffed with professionals capable of teaching to achieve these standards becomes more essential. Standards for students must be matched by standards for teachers.”⁶⁹⁴

NBPTS central policy statement, *What Teachers Should Know and Be Able to Do*, is reflective of research findings that show quality teaching makes a difference in student

⁶⁹⁰ National Board for Professional Teaching Standards. 2007. National Board for Professional Teaching Standards. In, http://www.nbpts.org/about_us/mission_and_history/mission. (accessed 2007).

⁶⁹¹ Humphrey, Daniel C., Julia E. Koppich, and Heather J. Hough. "Sharing the Wealth: National Board Certified Teachers and the Students Who Need Them Most." *Education Policy Analysis Archives* 13, no. 18 (2005)

⁶⁹² National Board for Professional Teaching Standards. 2004. Questions and Answers About National Board Certification. In, <http://www.nbpts.org/events/qabrochure.cfm>. (accessed 2007).

⁶⁹³ Lewis, Anne C. "Teachers Take Control of Reform." *Phi Delta Kappan* 76, no. 1 (1994): 4-5.

⁶⁹⁴ Ambach, Gordon. "Standards for Teachers: Potential for Improving Practice." *Phi Delta Kappan* 78, no. 3 (1996): 207-10.

academic achievement.⁶⁹⁵ These findings were also used by the NBPTS in designing the five core propositions for teaching illustrated in the following table.⁶⁹⁶

⁶⁹⁵ Darling-Hammond, Linda. "School Reform at the Crossroads: Confronting the Central Issues of Teaching." *Educational Policy* 11, no. 2 (1997): 151-66; DeLeon de Leon, Anne Grosso. 2003. After 20 Years of Educational Reform, Progress, but Plenty of Unfinished Business. In *Carnegie Results 1(3)*, Carnegie Corporation of New York, <http://www.carnegie.org/results/03/index.html>. (accessed 2007); Goldhaber, Daniel. 2002. The Mystery of Good Teaching. In *Education Next 2(1)*, Hoover Institution, <http://www.educationnext.org/20021/50.html> (accessed 2007); National Commission on Teaching and America's Future. 1996. What Matters Most: Teaching for America's Future. In, Author, <http://www.nctaf.org/documents/WhatMattersMost.pdf>. (accessed 2007); Sanders, William L., and Sandra P. Horn. "Research Findings from the Tennessee Value-Added Assessment System (Tvaas) Database: Implications for Educational Evaluation and Research." *Journal of Personnel Evaluation in Education* 12, no. 3 (1998, Sept): 247-56; Stronge, James H., ed. *Evaluating Teaching: A Guide to Current Thinking and Best Practice*. Thousand Oaks, CA: Corwin Publications, Inc., 1997; Wenglinsky, Harold. *How Teaching Matters: Bringing the Classroom Back into Discussions of Teacher Quality*. Princeton, NJ: Educational Testing Service, 2000; Xin, Tao, Zeyu Xu, and Kikumi Tatsuoka. "Linkage between Teacher Quality, Student Achievement, and Cognitive Skills: A Rule Space Model." *Studies in Educational Evaluation* 30, no. 3 (2004): 205-33.

⁶⁹⁶ National Board for Professional Teaching Standards. 2007. Five Core Propositions. In, http://www.nbpts.org/the_standards/the_five_core_propositio. (accessed 2007).

TABLE 1: The Five Core Propositions

<p>Proposition 1: Teachers are Committed to Students and Learning</p>	<ul style="list-style-type: none"> • NBCTs are dedicated to making knowledge accessible to all students. They believe all students can learn. • They treat students equitably. They recognize the individual differences that distinguish their students from one another and they take account for these differences in their practice. • NBCTs understand how students develop and learn. • They respect the cultural and family differences students bring to their classroom. • They are concerned with their students’ self-concept, their motivation and the effects of learning on peer relationships. • NBCTs are also concerned with the development of character and civic responsibility.
<p>Proposition 2: Teachers Know the Subjects They Teach and How to Teach Those Subjects to Students.</p>	<ul style="list-style-type: none"> • NBCTs have mastery over the subject(s) they teach. They have a deep understanding of the history, structure and real-world applications of the subject. • They have skill and experience in teaching it, and they are very familiar with the skills gaps and preconceptions students may bring to the subject. • They are able to use diverse instructional strategies to teach for understanding.
<p>Proposition 3: Teachers are Responsible for Managing and Monitoring Student Learning.</p>	<ul style="list-style-type: none"> • NBCTs deliver effective instruction. They move fluently through a range of instructional techniques, keeping students motivated, engaged and focused. • They know how to engage students to ensure a disciplined learning environment, and how to organize instruction to meet instructional goals. • NBCTs know how to assess the progress of individual students as well as the class as a whole. • They use multiple methods for measuring student growth and understanding, and they can clearly explain student performance to parents.
<p>Proposition 4: Teachers Think Systematically about Their Practice and Learn from Experience.</p>	<ul style="list-style-type: none"> • NBCTs model what it means to be an educated person – they read, they question, they create and they are willing to try new things. • They are familiar with learning theories and instructional strategies and stay abreast of current issues in American education. • They critically examine their practice on a regular basis to deepen knowledge, expand their repertoire of skills, and incorporate new findings into their practice.
<p>Proposition 5: Teachers are Members of Learning Communities.</p>	<ul style="list-style-type: none"> • NBCTs collaborate with others to improve student learning. • They are leaders and actively know how to seek and build partnerships with community groups and businesses. • They work with other professionals on instructional policy, curriculum development and staff development. • They can evaluate school progress and the allocation of resources in order to meet state and local education objectives. • They know how to work collaboratively with parents to engage them productively in the work of the school.

The National Board certification process is the aggregate of the five core propositions. The five core propositions not only identify the values, beliefs, and assumptions underlying good teaching⁶⁹⁷ but they also set standards for quality teaching and the practice of teaching – standards developed in large part by classroom teachers as well as experts in teacher education and other disciplines. Standards are developed for each of the 24 subject areas available for national certification. Common in every certificate, however, are the domains of knowledge of students, subject area, and pedagogy, use of a variety of assessment methods, reflection on practice, and collaboration with parents and colleagues.⁶⁹⁸ As such, achieving national certification is a declaration to the teaching profession that as a National Board Certified Teacher your peers deem you to be an accomplished teacher who is capable of making sound professional judgments and acts in accordance with those judgments for the betterment of students and the practice of teaching.⁶⁹⁹

National board certification is achieved based on an applicants' ability to demonstrate mastery of a set of standards laid out by the National Board. National Certification Applicants estimate they spend approximately 200 hours on the two-part process. Candidates are evaluated based on the submission of a teaching portfolio containing samples of student work, teaching lessons, documentation of involvement in the parent community as well as professional community, and the completion of assessment exercises on pedagogical and content knowledge related to the NBPTS certification area

⁶⁹⁷ Harrison Berg, Jill. *Improving the Quality of Teaching through National Board Certification: Theory into Practice*. Norwood, MA: Christopher Gordon Publishers, Inc., 2003.

⁶⁹⁸ National Board for Professional Teaching Standards. "Moving Education Forward through National Board Certification." Arlington, VA., 2002.

⁶⁹⁹ Shakowski, Nancy. "National Board Certification: Setting High Standards for Teaching, Learning, and Schools: An Administrator's Perspective." *Teaching and Change* 6, no. 4 (1999, Sum): 387-97.

for which they are applying. A written examination on age-appropriate and content-appropriate teaching strategies is also part of the evaluation process. Traditional tests of teacher knowledge had been criticized for failing to accurately measure professional knowledge.⁷⁰⁰ Each portfolio includes video submissions of teaching accompanied by written commentaries – found to be a better measure of accomplished teaching than a score on a multiple choice test.⁷⁰¹ The written commentaries are designed to demonstrate reflection, analysis, and evaluation of the lessons as well as document the impact on student learning.⁷⁰² Each portfolio component is then scored and weighted according to a rubric specific to the certification area.

The National Board certification process emphasizes reflection, inquiry, and collaboration as crucial to teachers' growth as professionals.⁷⁰³ Reflection requires the teacher to think about what the teacher is doing in the classroom, why they are doing it, the outcomes they expect and how they can change and improve.⁷⁰⁴ Reflection provides substance to the evaluation process. Examination, preparation and rationalization offer insight into and improvement of the multiple facets of the teaching and learning process.⁷⁰⁵

⁷⁰⁰ Darling-Hammond, Linda, Arthur E. Wise, and Stephen P. Klein. *A License to Teach: Raising Standards for Teaching*. San Francisco, CA: Jossey-Bass Publishers, 1999; Shulman, Lee S. "Assessment for Teaching: An Initiative for the Profession." *Phi Delta Kappan* 69, no. 1 (1987): 38-44.

⁷⁰¹ Wilcox, Bonita L., and Lawrence A. Tomei. *Professional Portfolios for Teachers: A Guide for Learners, Experts, and Scholars*. Norwood, Mass.: Christopher-Gordon Publishers, 1999; Wyatt, Robert L., III, and Sandra K. Looper. *So You Have to Have a Portfolio: A Teacher's Guide to Preparation and Presentation*. 2nd ed. Thousand Oaks, CA: Corwin Press, 2004.

⁷⁰² National Board for Professional Teaching Standards. *The National Board Certification Process*. Southfield, Mich: National Board for Professional Teaching Standards, 1992.

⁷⁰³ Blackwell, Peggy J., and Mary E. Diez. "Achieving the New Vision of Master's Education for Teachers." 41. Washington, DC: National Council for Accreditation of Teacher Education, 1999.

⁷⁰⁴ McEntee, Grace Hall, John Appleby, JoAnne Dowd, Jan Grant, Simon Hole, Peggy Silva, and Joseph Check. *At the Heart of Teaching: A Guide to Reflective Practice*. New York: Teachers College Press, 2003.

⁷⁰⁵ Schon, Donald A. *Educating the Reflective Practitioner, Toward a New Design for Teaching and Learning in the Professions*: The Jossey-Bass Higher Education Series, 1990.

National Board for Professional Teaching Standards: National Support

As mentioned earlier, NBPTS is funded through both federal grants and private sources in addition to assessment fees from teachers pursuing national board certification. Incentives and other supports totaling in the millions have been disbursed by schools, local school districts, federal and state government as well as private corporations in an effort to get teachers to acquire national board certification.⁷⁰⁶ Research shows that the monetary investment from the policymakers, teachers and other stakeholders as well as the investment of numerous hours preparing portfolios for evaluation is well worth it when considering the return.⁷⁰⁷

The NBPTS and National Board certification has garnered the support of the American public and has become a principal means of addressing the national issue of how to define, identify and improve teacher quality and the profession of teaching. From its inception, the NBPTS has had the backing of education groups, policymakers and just about every national organization involved with education policy. Currently, all 50 states and over 700 districts offer some supports and incentives for board-certified teachers,⁷⁰⁸

⁷⁰⁶ From monetary contributions such as partial or full assessment fee payment / reimbursement, monetary bonuses, salary increases; supplies or resources including release time from classroom obligations, video cameras and other provisions needed to complete their portfolios to professional development opportunities coinciding with the certification process.

⁷⁰⁷ Cavalluzzo, Linda C. *Is National Board Certification an Effective Signal of Teacher Quality?* Alexandria, VA: The CNA Corporation, 2004; Goldhaber, Daniel, and Emily Anthony. 2004. Can Teacher Quality Be Effectively Assessed? In, <http://www.urban.org/url.cfm?ID=410958>. (accessed September 28, 2007); Vandevort, Leslie G., Audrey Amrein-Beardsley, and David C. Berliner. "National Board Certified Teachers and Their Students' Achievement." *Education Policy Analysis Archives* 12, no. 46 (2004).

⁷⁰⁸ National Board for Professional Teaching Standards. 2004. State Policies and/or Appropriations Providing National Board Certification Incentives and Supports. In, http://www.nbpts.org/about/images/stateicen_sup.table.pdf. (accessed 2007).

this national support is most likely due to research that shows that National Board certification is “a distinction that matters.”⁷⁰⁹

Bond, Smith, Baker and Hattie conducted one of the first major studies to investigate National Board certification and student academic achievement when they investigated 65 teachers from North Carolina, Ohio, and Washington, DC, on 13 dimensions of teaching expertise based on research concerning effective teaching over the last 20 years.⁷¹⁰ Although all 65 teachers had pursued National Board certification, not all had achieved it. Each teacher was assessed by two evaluators who examined instructional objectives and lesson plans, made classroom observations and scripted interviews of teachers and students. The evaluators were unaware of which teachers were board-certified and which were not. The findings showed that not only were board-certified teachers more effective on all 13 dimensions of teaching expertise but there was as a statistically significant difference on 11 of the 13 dimensions.⁷¹¹ The teaching effectiveness of National Board Certified Teachers and their impact on student academic achievement was later confirmed by three large-scale studies.⁷¹²

Cavalluzzo examined a little over 100,000 Miami-Dade County, Florida, student records from 1999 through 2003 using scale scores to measure individual student growth over time.⁷¹³ Cavalluzzo found that, all else being equal, math teachers with National

⁷⁰⁹ Bond, Lloyd. *The Certification System of the National Board for Professional Teaching Standards: A Construct and Consequential Validity Study*. Greensboro, N.C.: Center for Educational Research and Evaluation, University of North Carolina at Greensboro, 2000.

⁷¹⁰ Id.

⁷¹¹ Id.

⁷¹² Cavalluzzo, supra note 711; Goldhaber, supra note 711; Vandervoort, supra note 711.

⁷¹³ Cavalluzzo, supra note 711.

Board Certification helped their students achieve larger testing gains than did colleagues without National Board certification.⁷¹⁴

Vandervoort, Amrein-Beardsley and Berliner investigated the impact NBCTs had on student academic achievement by using 1999-2003 data examining student academic achievement for grades two through six in 14 districts in Arizona.⁷¹⁵ Student academic achievement was measured by student performance on the Stanford Achievement Test (SAT-9). The researchers found that students with a NBCT had as much as a one month advantage in academic achievement than their peers with a non-NBCT.⁷¹⁶

Goldhaber and Anthony analyzed student achievement data for over 600,000 third, fourth, and fifth graders from North Carolina's Department of Public Instruction for school years 1996 through 1999.⁷¹⁷ Third, fourth, and fifth graders were used because they were more likely than not to have had only one teacher; thus, the researchers were better able to pair student records and teachers.⁷¹⁸ Another benefit was that researchers were able to look at the teaching effectiveness of teachers before receiving board certification as well as after receiving board certification. Goldhaber and Anthony's findings revealed that while students performed better with National Board Certified Teachers, i.e., current NBCTs, there were larger gains by students whose teachers later achieved board certification, i.e., future NBCTs, versus students whose teachers pursued, yet failed to achieve, national board certification.⁷¹⁹ It is an interesting finding that future NBCTs appear to be more effective prior to receiving their certification than after they

⁷¹⁴ Cavalluzzo, *supra* note 711.

⁷¹⁵ Vandervoort, *supra* note 711.

⁷¹⁶ Vandervoort, *supra* note 711.

⁷¹⁷ Goldhaber, Daniel, and Emily Anthony. 2004. Can Teacher Quality Be Effectively Assessed? In, <http://www.urban.org/url.cfm?ID=410958>. (accessed September 28, 2007).

⁷¹⁸ *Id.*

⁷¹⁹ *Id.*

achieve certification. Goldhaber and Anthony speculate that the teacher's effectiveness wanes in the year they achieve board certification because of the labor intensive nature of the certification process.⁷²⁰ Opponents of the NBPTS and National Board Certification process had other ideas.

According to Goldhaber, Perry & Anthony, "the relatively few studies which do assess the impact of NBPTS have been criticized both for a lack of independence from the organization and for a focus on teaching methods rather than student outcomes."⁷²¹ In addition to a lack of evidence to adequately assess positive impact on student academic achievement, critics have also cited cost-effectiveness⁷²² and the value of board certification⁷²³ as reasons to question the importance of the NBPTS. For example, Ballou and Podgursky take issue with the validity of the certification assessment process and its ability accurately measure accomplished teaching.⁷²⁴ They contend that the use of only four self-selected portfolio entries by candidates to represent a comprehensive assessment of their performance is too limited.⁷²⁵ Stone's research dismissed the value of board certification when it purported that students' gains were no greater on average than those

⁷²⁰ Id.

⁷²¹ Goldhaber, Daniel, David Perry, and Emily Anthony. 2003. NBPTS Certification: Who Applies and What Factors Are Associated with Success? In, Microfiche Only - ED475841. (accessed 2007).

⁷²² Rotberg, Iris C., Mary Hatwood Futrell, and Anne E. Holmes. "Increasing Access to National Board Certification." *Phi Delta Kappan* 81, no. 5 (2000, Jan): 379-82; Archer, Jeff. "National Board Is Pressed to Prove Certified Teachers Make Difference." *Education Week* 21 (2002); Ballou, Dale. "Certifying Accomplished Teachers: A Critical Look at the National Board for Professional Teaching Standards." *Peabody Journal of Education* 78 (2003): 201-219; Boyd, William Lowe, and Jillian P. Reese. "Great Expectations." *Education Next* (2006, Spring): 50-57.

⁷²³ Keller, Bess. "National Board Teachers No Better Than Other Educators, Long-Awaited Study Finds." *Education Week [Web Only]* (2006); Keller, Bess. "NBPTS Upgrades Profession, Most Agree, Despite Test-Scores." *Education Week* 25, no. 40 (2006).

⁷²⁴ Ballou, Dale, and Michael Podgursky. "Some Unanswered Questions Concerning National Board Certification of Teachers." *Education Week* 17 (1998, June 10).

⁷²⁵ Id.

made by students of teachers without national board certification.⁷²⁶ The small-scale study examined the effectiveness of 16 NBCTs by investigating the annual test-score gains of Tennessee students in various subjects over three years.⁷²⁷

Articulation of what a good teacher can do and what a good teacher knows is a step toward the attainment of the ultimate goal of school reform, to reach all students.⁷²⁸ The standards established by the teachers, for the teachers, within the National Board for the Professional Teaching Standards has been a major influence in how teachers, policymakers and the public view qualified teachers and the teaching profession. However, NBPT certification is a voluntary method of securing qualified teachers for all students. The federal government has since placed both feet into the jurisdiction of education and mandated that the states select a method of securing a qualified teacher for all students.

Elementary and Secondary Education Act 2002 Reauthorization

National scrutiny of teaching standards is not new to educational reform, neither are the steps taken by the federal government to influence the role and identity of the primary and secondary education classroom teacher. As discussed earlier, the “Space Race” against Russia prompted the federal government to take a more active role in the development of “professionally current”⁷²⁹ teachers by establishing the National Defense Education Act. Soon after, President Johnson authorized federal policy to play a role in directing education with the Elementary and Secondary Education Act of 1965 (ESEA).

⁷²⁶ Stone, John E. 2002. The Value-Added Achievement Gains of NBPTS-Certified Teachers in Tennessee: A Brief Report. In, http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1a/af/96.pdf. (accessed 2007).

⁷²⁷ Id.

⁷²⁸ Darling-Hammond, Linda. 1994. Reinventing Our Schools: A Conversation with Linda Darling-Hammond. In, <http://www.ed.psu.edu/insys/ESD/darling/menu.html>. (accessed 2007).

⁷²⁹ Speck, supra note 685, at 207.

The ESEA would have a substantial impact on the field of education in the years to come. The significance of the ESEA and its reauthorization will be discussed a little later.

During the Reagan era, the federal government commissioned a report on the quality of education in America. The commission was the National Commission on Excellence in Education created by then Secretary of Education, T. H. Bell; the report was *A Nation at Risk: The Imperative of Education Reform*. The scathing report brought an unprecedented amount of national attention to the state of affairs of education in the United States.

Six years after *A Nation at Risk*, President George H. W. Bush convened a summit of the nation's governors because his administration recognized the lack of measurable progress toward the recommendations made by the National Commission on Excellence in Education in their report. President Bush chaired, and then Governor, William (Bill) Clinton, served as vice-chair for the National Governors Association. The National Governors Association produced a report entitled *Goals 2000*.⁷³⁰ The National Governors Report repeated and expanded the recommendations made by the National Commission on Excellence in *A Nation at Risk*.

The next major election saw Governor Clinton unseat President George H. W. Bush not as chair of the National Governors Association but as President of the United States of America. In an effort to formalize "clear and rigorous standards" from Goals 2000, President Clinton signed into law, Goals 2000: Educate America Act;⁷³¹ thus reestablishing educational priorities as federal policy.

⁷³⁰ Goals 2000: Educate America Act. 1994. In, One Hundred and Third Congress of the United States of America, <http://www.ed.gov/legislation/GOALS2000/TheAct/index.html>. (accessed 2007).

⁷³¹ Id.

At the turn of the century, educational reform is still at the top of the national agenda, still under national scrutiny and still heavily influenced by the federal government. However, something has changed. Whereas the federal government recommended measures of accountability in the past in an effort to share the stage with states and local school districts,⁷³² the current administration under President George W. Bush has taken an unprecedented level of control of the primary and secondary education classroom and is telling the states who can teach in the public schools⁷³³ with the 2002 reauthorization of the Elementary and Secondary Education Act also known as the No Child Left Behind Act.⁷³⁴

No Child Left Behind

President George W. Bush's No Child Left Behind Act [hereinafter, NCLB] as a directive for accountability and inclusion is significantly more expansive than both *A Nation at Risk* and *Goals 2000*, and augments earlier reauthorizations of the Elementary and Secondary Education Act by incorporating specificity to earlier requirements of standards and assessment. In order for schools to continue receiving federal funding, they are required to meet Adequate Yearly Progress, use scientifically-based research practices, provide school choice for parents who have children in schools failing to meet NCLB requirements and prepare, train and recruit a highly qualified teacher for every

⁷³² Chubb, John E. "Saving No Child Left Behind." In *Within Our Reach: How America Can Educate Every Child*, edited by John E. Chubb. Toronto, Oxford: Rowman & Littlefield Publishers, Inc., 2005.

⁷³³ Moe, Terri M. "A Highly Qualified Teacher in Every Classroom." In *Within Our Reach: How America Can Educate Every Child*, edited by John E. Chubb, 173-99. Toronto, Oxford: Rowman & Littlefield Publishers, Inc., 2005.

⁷³⁴ No Child Left Behind, Public Law 107-110, One Hundred and Seventh Congress of the United States of America (2002). <http://www.ed.gov/nclb> (accessed 2007).

classroom.⁷³⁵ On Tuesday, January 8, 2002, the federal government codified the teacher standards movement.

Highly Qualified Teachers

NCLB was not the first education reform effort to alert the American public to the trials and tribulations of the teaching practice. The state of affairs in primary and secondary education did, however, present several motivating factors on the need of quality teaching. Not only were schools having difficulty keeping the teachers they currently had on staff, but there was a widespread shortage of new teachers. For instance, subject areas, such as mathematics and science, were in dire need of qualified teachers.⁷³⁶ There was a high prevalence of teachers instructing students in subject areas where the teacher never had at least a college minor; and scientifically-based research positively connected more often than not quality teachers with student academic achievement.

Accordingly, the No Child Left Behind Act mandated that states

...focus[es] on using practices grounded in scientifically based research to prepare, train, and recruit high-quality teachers... States and LEAs [local educational agencies] [have / were given] flexibility to select the strategies that best meet [met] their particular needs for improved teaching that will [would] help them raise student achievement in the core academic subjects. In return for this flexibility, LEAs are [were] required to demonstrate annual progress in ensuring that all teachers teaching in core academic subjects within the state are [were] highly qualified.⁷³⁷

Highly qualified teachers as defined by NCLB must have a bachelor's degree, state certification and the ability to demonstrate subject area competence.⁷³⁸ Teachers currently in the classroom, i.e., experienced teachers, must meet the requirements for new

⁷³⁵ Id.

⁷³⁶ U.S. Department of Education. 2004. No Child Left Behind. In, <http://nclb.org/start/facts/teachers/html>. (accessed 2007).

⁷³⁷ U.S. Department of Education. 2002. Executive Summary: The No Child Left Behind Act of 2001. In, http://www.policyalmanac.org/education/archive/no_child_left_behind.shtml. (accessed 2007).

⁷³⁸ U.S. Department of Education. 2003. No Child Left Behind: A Toolkit for Teachers. In, <http://www.ed.gov/teachers/nclbguide/index2.html>. (accessed 2007).

teachers or demonstrate mastery of subject area content. Individual states, however, have the flexibility to determine state certification requirements and mastery of subject area content as long as both are grounded in scientifically based research.

The latitude given states offers an opportunity for states through local control to take advantage of what is known about preparing effective teachers and assuring that a license to teach is meaningful and effective. For teachers who did not meet the requirements of highly qualified as outlined by NCLB and defined by individual states, corrective action had to be taken in their professional development activities so they would meet the federal standard no later than the end of the 2005-2006 school year.⁷³⁹

NCLB gives States unparalleled leeway “in the use of Federal education funds in exchange for strong accountability results.”⁷⁴⁰ Each school district that receives Title I funds must use “at least 5% of its Title I allocation on professional development activities to help teachers become highly qualified.”⁷⁴¹ The United States Department of Education identified eight (8) key elements of professional development to attract and retain “highly qualified” teachers:

1. All activities are referenced to student learning;
2. Schools use data to make decisions about the content and type of activities that constitute professional development;
3. Professional development activities are based on research-validated practices;
4. Subject mastery for all teachers is a top priority;
5. A long-term plan that must provide focused and ongoing professional development with time well allocated;

⁷³⁹ Paraprofessionals, i.e., instructional aides, have their own “highly qualified” standards since they, too, are involved with student instruction. Paraprofessionals must possess an associate degree or higher (or the equivalent of 2 years of postsecondary education); or, pass a rigorous state or local assessment that demonstrates knowledge, abilities and skills needed to assist in teaching reading, writing and mathematics. (U.S. Department of Education. 2003. No Child Left Behind: A Toolkit for Teachers. In, <http://www.ed.gov/teachers/nclbguide/index2.html>. (accessed 2007).

⁷⁴⁰ U.S. Department of Education. 2002. Executive Summary: The No Child Left Behind Act of 2001. In, http://www.policyalmanac.org/education/archive/no_child_left_behind.shtml. (accessed 2007).

⁷⁴¹ U.S. Department of Education. 2003. No Child Left Behind: A Toolkit for Teachers. In, <http://www.ed.gov/teachers/nclbguide/index2.html>. (accessed 2007).

6. Professional development activities match the content that is being instructed;
7. All professional development activities are fully evaluated;
8. Professional development is aligned with state standards, assessment, and the local school curriculum.⁷⁴²

An example of the USDEs eight (8) elements of professional development is National Board Certification. In compliance with NCLB, states and / or local educational agencies could use at least 5% of its Title I funds to pay the full or partial assessment fee of the National Board for Professional Teaching Standards for its teachers to pursue certification.

Challenges to / Support of No Child Left Behind

Since the 2002 reauthorization of the Elementary and Secondary Education Act, controversy has ensued. One of the issues being debated is the matter of federal government intrusion on the state's jurisdiction over education. The Constitution of the United States of America, by its silence, delegates responsibility and authority for public primary and secondary education to each of the states. However, the United States Constitutional phrase '...provide for the ...general welfare...' has been the basis of national involvement in education throughout our nation's history.⁷⁴³ One commentator noted that:

As the federal role has increased, it has always had to carefully share the stage with states and local school districts, which want their historical prerogatives and powers protected. This sharing of power has not made the accomplishment of national goals easy...⁷⁴⁴

⁷⁴² U.S. Department of Education. 2002. No Teacher Left Behind: Strategies for Improving Teacher Quality. In, <http://www.ed.gov/admins/tchrqual/learn/tqstr/edlite-slide002.html>. (accessed 2007).

⁷⁴³ Royster, Preston M., and Gloria J. Chernay. *Teacher Education: The Impact of Federal Policy*. Springfield, VA: Banister Press, 1981.

⁷⁴⁴ Chubb, *supra* note 736, at 28-29.

A proponent of the highly qualified stipulation reflecting on the national goals of academic excellence, the need for effective teachers, and increased student academic achievement overall, had this to say:

In a culture that prizes local democracy, such a move raises all kinds of issues. But judged purely by its goal of improving student achievement, NCLB would appear to be on solid ground in pushing for higher quality teachers. ... were such a reform to bring high quality teachers to the most disadvantaged districts, as NCLB fully intends, it could help narrow the achievement gaps that have long plagued American education.⁷⁴⁵

Another issue being debated is the availability of “highly qualified teachers.” A survey of Americans in 1998 and again in 2000 ranked the quality of teachers as having the greatest influence on learning;⁷⁴⁶ however, attracting and retaining quality teachers is a struggle (and always has been) especially since the best applicants tend to command more lucrative career offers outside the field of education.⁷⁴⁷ Also, the assignment of highly qualified teachers to students who require their abilities the most is of concern especially when looking at school districts suffering teacher shortages or having a high number of low performing schools;⁷⁴⁸ for example, inner-city urban schools tend to have a high number of inexperienced first-year, novice teachers. Clement suggests a thorough discussion of career supports during the job interview, effective induction, support, and mentoring programs in the initial phases of teaching, follow through on promises made during the school year, the career of the teacher, and the development of a professional

⁷⁴⁵ Moe, *supra* note 737, at 173.

⁷⁴⁶ Haskelkorn, David, and Louis Harris. "The Essential Profession, American Education at the Crossroad: A National Survey of Public Attitudes toward Teaching, Educational Opportunity and School Reform." 49. Belmont, MA: Recruiting New Teachers, 2001.

⁷⁴⁷ Kaplan, Leslie S., and William Owing. "Teacher Quality and Student Achievement: Recommendations for Principals." *NASSP Bulletin* 85, no. 628 (2001): 64-73.

⁷⁴⁸ Donlevy, Jim. "Teachers, Technology & Training, No Child Left Behind: In Search of Equity for All Children." *International Journal of Instructional Media* 29 (2002): 257-59.

learning community within the school can assist in the retention of highly qualified teachers.⁷⁴⁹

In connection to the availability of highly qualified teachers, another issue of debate is how states and/or local educational agencies interpret the “highly qualified” provision of NCLB or identify “highly qualified” teachers. NCLB gives states and local educational agencies the flexibility to establish licensing and certification requirements. As such, licensing and certification standards differ from state to state partly as a result of differences in prerequisite and proficiency requirements between colleges and universities, state departments of education and exam designers. By requiring the utilization of scientifically-based research in addition to the provisions of Title II, NCLB makes reasonable demands on defining and identifying teacher quality.⁷⁵⁰ Administrators must follow suit when making decisions about licensing, certification, program development and staffing.

PART II:

The Increasing Value and Impact of Student Achievement Assessments and Measurement

In the 21st century, the United States cannot afford to neglect the importance of education and the academic achievement of its citizens in public primary and secondary educational institutions. Considering the global economy in which we currently exist, ensuring student academic achievement is essential to meet the world’s growing

⁷⁴⁹ Clement, Mary. *Finding and Keeping High Quality Teachers*. Arlington, VA: Educational Research Service, 2003.

⁷⁵⁰ Darling-Hammond, Linda, and Gary Sykes. "Wanted: A National Teacher Supply Policy for Education: The Right Way to Meet the "Highly Qualified Teacher" Challenge." *Educational Policy Analysis Archives* 11, no. 33 (2003); U.S. Department of Education. 2004. No Child Left Behind. In, <http://nclb.org/start/facts/teachers/html>. (accessed 2007).

technological and business demands. Academically prepared students contribute to the growth of the literate populace which guarantees the continuation of productive and competitive human capital in the country.

The United States has sustained its position as a world power by developing from an industry-based market to an information-based financial system. In order for the country to maintain its social and economic standing as a world power, not only must its citizens be literate but the country must strengthen the public education system and make certain that resources are in place that will foster the academic success of its future leaders; students in the public education system. It is to the country's benefit to maintain a public education system where academic success is the first priority so that students can learn from and contribute to the growing information-based financial system.

Achievement tests and other student assessment tools are used to identify and quantify the academic talents of primary and secondary education students. The results of these examinations are used to make determinations as to whether a student advances to higher course levels, graduates from high school, or receives an academic scholarship. Thus, an essential component of student academic achievement is an educator who is assessment literate. Keeping in mind the importance of student academic achievement, this section continues with a discussion of the purpose and significance of student assessments and measurements and the assessment competency of classroom teachers public school students rely on for accurate evaluation of their learned content.

Purpose of Examinations

Hopkins and Stanley and later, Mehrens and Lehman, found that achievement tests had instructional, guidance, and administrative purposes in schools.⁷⁵¹ According to Mehrens and Lehman, the instructional use of examinations by educators included “obtaining knowledge concerning the students’ entry behaviors; setting, refining, and clarifying realistic goals for each student; clarifying, refining course objectives, and evaluating the degree to which the objectives have been achieved; and determining, evaluating, and refining their instructional techniques.”⁷⁵² For students, achievement test are believed to communicate the teacher’s goals, increase student’s motivation, encourage good study habits and provide feedback that identifies strengths and weaknesses.⁷⁵³

Achievement examinations have also been used to assist educators in guiding students with educational and career decisions. Whether or not a student is identified as having a suitable knowledge base for a chosen career or a level of aptitude to pursue an academic interest has become an all-important decision influenced by the results of an academic achievement test.

Educators also use achievement exams to make selection, classification, and placement decisions. At the elementary school level, students have been selected for gifted and talented programs based on exam scores and / or an educator’s interpretation of achievement test scores. Special Education students are partially classified as such

⁷⁵¹ Mehrens, William A., and Irvin J. Lehmann. *Measurement and Evaluation in Education and Psychology*. 5th ed. Fort Worth, TX: Holt, Rinehart and Winston, 1992; Hopkins, Kenneth D. *Educational and Psychological Measurement and Evaluation*. 8th ed. Needham Heights, MA: Allyn & Bacon, 1997.

⁷⁵² Mehrens, William A., and Irvin J. Lehmann. *Measurement and Evaluation in Education and Psychology*. 5th ed. Fort Worth, TX: Holt, Rinehart and Winston, 1992.

⁷⁵³ Id.

based on exam scores. High school students are tracked or placed in vocational courses versus college preparatory courses based on their scores on academic achievement tests.⁷⁵⁴

The atmosphere of importance surrounding achievement assessments has not only changed the nature of teaching and learning but also the accountability provision tied to measurements and assessments.⁷⁵⁵ Accountability in academic assessments is best exemplified by high-stakes testing – student academic achievement assessments whose results are highly influential in determining whether or not a student is promoted from one grade to the next and / or graduates from high school.⁷⁵⁶ Student performance on high-stakes tests not only reflect student academic achievement but are also a comprehensive measure of teacher quality. As such, educators are adjusting curriculum requirements in an effort to prepare students for high-stakes tests by ‘teaching to the test,’ i.e., providing classroom instruction that incorporates, as practice activities, actual items on the district and / or state assessment or supplying practice exercises so similar to the tests that contextual knowledge is forgotten.

Based on usage, prevalence and weight given to academic measurements and assessments, it is safe to say that educators, policy makers and the public find achievement tests to be an important component of the educational process. Considering the importance placed on academic achievement tests and educational assessments and measurements, it is equally important to look at not only the history of measurements and

⁷⁵⁴ Id.

⁷⁵⁵ Gandal, Matthew, and Jennifer Vranek. "Standards: Here Today, Here Tomorrow." *Educational Leadership* 59, no. 1 (2001): 6-13.

⁷⁵⁶ Franklin, John. "Trying Too Hard? How Accountability and Testing Are Affecting Constructivist Teaching." *Education Update* 43, no. 3 (2001): 4-8.

assessments in the field of education but also the competency of educators in applying, interpreting and understanding assessments and measurements.

History of Achievement Tests / Assessments

Since 1845 when Horace Mann introduced the written essay examination in Boston public schools to replace the oral examinations,⁷⁵⁷ standardized achievement assessments have grown exponentially.⁷⁵⁸ The first half of the 20th century alone generated the completion technique in 1896, the multiple-choice test in 1914, the true-false examination in 1920 and the creation of the test scoring machine in 1934;⁷⁵⁹ and let us not forget the first book on educational measurement and assessment of human abilities and traits in 1904 by Thorndike and the first standardized achievement test battery in 1923, the Stanford Achievement Test, followed by the Scholastic Aptitude test in 1926.⁷⁶⁰

The 1930s witnessed the development of tests that linked teaching goals to student comprehension and application of knowledge. During this time, there was growing concern that instead of evaluating the whole child, student assessments were only measuring isolated facts.⁷⁶¹ Ralph Tyler, director of the Bureau of Educational Research at Ohio State University, and the Progressive Education Association conducted an experimental project from 1932 to 1940 commonly known as the Eight Year Study.

⁷⁵⁷ Madaus, George F., and Ann G. Tan. "The Growth of Assessment." In *Challenges and Achievements of American Education*, edited by Gordon Cawelti, 53-79. Alexandria, VA: Association for Supervision and Curriculum Development, 1993.

⁷⁵⁸ Chauncey, Henry, and John E. Dobbin. *Testing: Its Place in Education Today*. New York, NY: Harper & Row, 1963, pg. 11.

⁷⁵⁹ DuBois, Phillip H. *A History of Psychological Assessment*. Boston, Ma: Allyn and Bacon, Inc., 1970.

⁷⁶⁰ Glaser, Robert, and Edward Silver. "Assessment, Testing, and Instruction: Retrospect and Prospect." Los Angeles, CA: UCLA Center for Research on Evaluation, Standards, and Students Testing (CRESST), 1994.

⁷⁶¹ Noll, Victor H. *Introduction to Educational Measurement*. Boston, MA: Houghton Mifflin Co., 1965,

The project allowed 30 high schools the opportunity to redesign their curriculum while initiating innovative practices in student testing among other things. As a result of the Eight Year Study, not only have more sophisticated student exams and forms of assessment been developed but students from the participating high schools showed significantly higher levels of academic achievement than their counterparts at schools that did not participate in the Eight Year Study.

In the 1940s, measurements and assessments were utilized at an extraordinary level for the sake of the nation. The College Board formulated tests to identify potential officer candidates and select military personnel for specialized training to serve the United States in World War II.⁷⁶² Winning the war brought about renewed confidence in the use of assessments and measurements and ushered in a pivotal era of assessments and measurements in national and state education reform.⁷⁶³ For starters, the federal government began to mandate that school systems objectively evaluate the effects of federally funded programs on student achievement with the authorization of the Elementary and Secondary Education Act of 1965.⁷⁶⁴ In addition, the infamous Coleman Report used student academic achievement data to evaluate the quality of primary and secondary education programs.⁷⁶⁵ To close out the 1960s, the National Assessment of Education Progress (NAEP) was organized to evaluate the educational attainment of primary and secondary education students. Measuring student academic achievement at

⁷⁶² Zwick, Rebecca, ed. *Rethinking the Sat: The Future of Standardized Testing in University Admissions*. New York: Routledge, 2004, pg. xii.

⁷⁶³ Id.

⁷⁶⁴ Elementary and Secondary Education Act, Public Law 89-10 (1965).

⁷⁶⁵ Coleman, James S. "Equality of Educational Opportunity (Coleman) Study." Washington, DC: National Center for Educational Statistics (DHEW/OE), 1966.

grades 4, 8, and 12, the NAEP reports what students know and can do and conducts research that would provide an empirical base for student achievement.⁷⁶⁶

By 1978, two hundred million achievement test forms were used each year in the United States.⁷⁶⁷ Nearly a decade later, the National Commission on Assessment and Public Policy estimated that primary and secondary education students took an estimated 127 million separate tests as part of standardized test batteries mandated by states and districts.⁷⁶⁸

In the 1980s, reform commissions dominated the discussion on the importance of assessment and measurement of student academic achievement. The reports also focused the discussion on accountability. The National Commission on Excellence in Education was the primary player and *A Nation at Risk: the Imperative for Educational Reform*, was the trump card used to put public primary and secondary educational institutions on notice.

The 1990s found federal government reforms further linking student academic achievement and test proficiency with performance standards.⁷⁶⁹ President George H. W. Bush proposed “America’s Test” and called for Volunteer National Testing – a tool to hold school systems accountable to the public for students’ academic performance.⁷⁷⁰ Under President Clinton, provisions in the reauthorization of the Elementary and Secondary Education Act of 1994 and Goals 2000 legislation called for primary and secondary education reform. During his 1997 State of the Union address, President

⁷⁶⁶ See, National Center for Educational Statistics. The Nation's Report Card. In, <http://nces.ed.gov/nationsreportcard/about/>. (accessed 2007).

⁷⁶⁷ Yeh, Jennie P. "Test Use in Schools. Studies in Measurement and Methodology, (Work Unit 4)." Los Angeles, CA: University of California at Los Angeles, Center for the study of Evaluation, 1978.

⁷⁶⁸ Madaus, *supra* note 761.

⁷⁶⁹ Wise, Laress, Robert M. Hauser, Karen J. Mitchell, and Michael J. Feuer. "Evaluation of the Voluntary National Tests, Phase 1." Washington, DC: National Academy Press, 1999.

⁷⁷⁰ *Id.*

Clinton announced a federal initiative to develop 4th grade reading and 8th grade math tests to be administered on a voluntary basis by states and school districts; thus making standardized academic achievement tests a priority of the national educational agenda.⁷⁷¹

President George W. Bush significantly increased the federal government's involvement in educational assessment with the No Child Left Behind Act, his administration's 2002 reauthorization of the Elementary and Secondary Education Act. The federal government's *demand for measurable and vigorous standards* has transformed assessments and measurements of academic achievement into a high-stakes measure of education for students, teachers and state education agencies.

No Child Left Behind legislation mandates that states track assessment results for elementary and secondary education students attending schools that receive federal funding. In addition, not only are States required to adopt a definition of "adequate yearly progress" that sets increasing goals of the percentage of students achieving proficient performance on standardized assessments but each state must establish a 12-year timeline with increasing annual goals for each core subject that theoretically gets all students to proficiency in 12 years.

Federal and State government is not the only voice to be heard on the growth and importance of academic achievement assessments and measurements. Researchers have been reporting that the practice of standardized assessments and measurements was a reliable measure of student progress, academic achievement and a contributor in the

⁷⁷¹ Id.

decision making process for future instruction for quite some time.⁷⁷² Madaus and Tan identified four broad social forces that impacted the growth in assessment:⁷⁷³

1. Recurring public dissatisfaction with the quality of education in the United States and efforts to reform education.
2. A broad shift in attention from focusing on the inputs or resources devoted to education toward emphasizing the outputs or results of our educational institutions.
3. An array of legislation, at both federal and state levels, promoting or explicitly mandating standardized assessment programs.
4. Bureaucratization of education and schooling.

Hathaway speculated that the increase in the volume of assessment in American education was due to “the quest to improve standards and accountability in the face of dwindling resources and support; the research on effective schools and classrooms, with its emphasis on clear, high academic expectations and prompt, accurate knowledge of results.”⁷⁷⁴ With all of these assessments and measurements of student achievement, what are the standardized tests truly accomplishing if educators are incapable of adequately analyzing, interpreting, understanding and correctly applying the results?

Competency and Practice of Teachers in Assessment

Educators in primary and secondary educational institutions are as ill prepared to appropriately assess student academic achievement today as they were over 30 years ago.⁷⁷⁵ In 1955, Noll found that few states had a measurement and evaluation course

⁷⁷² Guba, Egon, and Yvonne Lincoln. *Effective Evaluation*. San Francisco, CA: Jossey-Bass, 1981; Heubert, Jay P., and Robert M. Hauser. *High Stakes: Testing for Tracking, Promotion and Graduation*. Washington, D.C.: National Academy Press, 1999; Cross, Christopher T., and Scott Jofus. 1997, Sep. Are Academic Standards a Threat or an Opportunity. In *NASSP Bulletin*, <http://www.ecs.org/clearinghouse/14/66/1466.htm>. (accessed 2007); Madaus, *supra* note 761.

⁷⁷³ Madaus, *supra* note 761.

⁷⁷⁴ Hathaway, Walter E., ed. *Assessment in Schools: New Directions for Assessment and Measurement*. San Francisco, CA: Jossey-Bass, 1983, pg.1.

⁷⁷⁵ Gullickson, Arlen R. 2000, May. The Need for Student Evaluation Standards. In, The Joint Committee on Standards for Educational Evaluation, <http://www.wmich.edu/evalctr/jc/pubs/SESNeed.pdf>.

requirement for teacher candidates.⁷⁷⁶ Surveying 108 experienced teachers, Noll found that classroom teachers demonstrated a serious lack of understanding of the basic concepts in classroom assessment.⁷⁷⁷ Goslin came to similar conclusions a decade later when a survey of 1,450 public secondary school teachers found that less than 25% reported they had never taken measurement coursework,⁷⁷⁸ and Goslin's definition of tests and measurement was very broad. In 1973, Roeder noted that most elementary school teachers were better prepared to carry out spontaneous art and music lessons than they were to properly evaluate student performance.⁷⁷⁹ Roeder's study examined how effectively colleges and universities prepared teacher candidates in tests and measurement.⁷⁸⁰

Mayo conducted a seminal piece of research involving the competency of teachers in assessment.⁷⁸¹ Mayo investigated what new teachers comprehended about educational measurement compared to what they ascertained about measurement two years after graduation using the Measurement Competency Test. Pre-testing a random sample of 2,877 senior education majors from 86 teacher training institutions across the nation and post-testing 541 of the original group two years later, Mayo concluded that new teachers did not have the requisite measurement competency to effectively manage

(accessed 2008) pg.4; Mertler, Craig A. "Teacher-Centered Fallacies of Classroom Assessment Validity and Reliability." *Mid-Western Educational Researcher* 13, no. 4 (2000): 29-35.

⁷⁷⁶ Noll, Victor H. "Requirements in Educational Measurement for Prospective Teachers." *School and Society* 85 (1955): 88-90.

⁷⁷⁷ Id.

⁷⁷⁸ Goslin, David A. *Teachers and Testing*. New York: Russell Sage Foundation, 1967

⁷⁷⁹ Roeder, Harold H. "Teacher Education Curricula -- Your Final Grade Is F." *Journal of Educational Measurement* 10, no. 2 (1973, Summer): 141-43.

⁷⁸⁰ Id.

⁷⁸¹ Mayo, Samuel T., and Chicago Loyola Univ., IL. *Pre-Service Preparation of Teachers in Educational Measurement. Final Report.*, 1967 (ERIC Document Reproduction Service No. ED 021 784).

classroom assessment responsibilities.⁷⁸² Mayo recommended that in addition to teachers receiving improved measurement course work in preservice training, all teacher candidates should be required to complete measurement and assessment course work in their teacher education programs.⁷⁸³ Mayo also recommended that “measurement courses have a practical focus in order to better reveal to preservice teachers the need for measurement competencies and to increase the commitment to attaining these competencies.”⁷⁸⁴

Nearly two decades later, *A Nation at Risk* rocked the field of education.⁷⁸⁵ The report strongly suggested changes in elementary school instructional methods, high school graduation requirements as well as teacher education program certification fundamentals. The National Commission on Excellence in Education recommended that “. . . as part of a nationwide (but not federal) system of state and local standardized tests”⁷⁸⁶ achievement assessments be administered at key change points from one school level to another. Unfortunately, educators were still ill-equipped to mete out and appropriately evaluate assessments of any significance. For example, Carter found that many teachers were unable to recognize the particular skill being tested by individual multiple-choice test items previously developed for a widely and validated criterion-referenced test.⁷⁸⁷ Gullickson and Ellwein found that even with measurement training,

⁷⁸² Id.

⁷⁸³ Id.

⁷⁸⁴ Id.

⁷⁸⁵ National Commission on Excellence in Education. *A Nation at Risk: The Imperative for Educational Reform. A Report to the Nation and the Secretary of Education United States Department of Education*. Washington, DC: Author, 1983.

⁷⁸⁶ Wise, Laress, Robert M. Hauser, Karen J. Mitchell, and Michael J. Feuer. "Evaluation of the Voluntary National Tests, Phase 1." Washington, DC: National Academy Press, 1999, pg.28.

⁷⁸⁷ Carter, Kathy. "Test-Wiseness for Teachers and Students." *Educational Measurement: Issues and Practice* 5, no. 4 (1986, Winter): 20-23.

not all teachers adhered to what they learned when analyzing test results.⁷⁸⁸ They concluded, “without systematic analyses of [measurement] tests, [elementary and secondary education] teachers do not have assurance that their tests function as desired. At best this means teachers realize less than the full potential of their tests. At worst, many tests may misdirect teachers and their students.”⁷⁸⁹

The *Nation at Risk* report prompted many states to update or initiate state-mandated proficiency examinations for teacher candidates but studies in the 1990s continued to produce findings of teachers unable to administer, interpret or understand achievement assessments. Wise et al. discovered that 397 teachers with formal preservice training in tests and measurements believed that most of their knowledge in testing and measurement was acquired following graduation in their own classrooms via trial-and-error.⁷⁹⁰ Stiggins found that “teachers cannot diagnose student needs, group students intelligently, assign meaningful grades, or evaluate the impact of instructional treatments without sound day-to-day assessments.”⁷⁹¹ Schafer continued that assessment conducted by means of trial-and-error was not a viable plan and that such assessments resulted in negative consequences for students’ learned content, the method by which students learned, and the value of the teacher’s decisions made regarding students’ academic achievement.⁷⁹²

⁷⁸⁸ Gullickson, Arlen R., and Mary C. Ellwein. "Post-Hoc Analysis of Teacher-Made Tests: The Goodness-of-Fit between Prescription and Practice." *Educational Measurement: Issues and Practice* 4, no. 1 (1985, Spring): 15-18.

⁷⁸⁹ *Id.* at 17.

⁷⁹⁰ Wise, Steven L., Leslie E. Lukin, and Linda L. Roos. "Teacher Beliefs About Training in Testing and Measurement." *Journal of Teacher Education* 42, no. 1 (1991): 37-42.

⁷⁹¹ Stiggins, Richard J. "Relevant Classroom Assessment Training for Teachers." *Educational Measurement: Issues and Practice* 10, no. 1 (1991, Spring): 7-12, 7.

⁷⁹² Schafer, William D. "Assessment Literacy for Teachers." *Theory into practice* 32, no. 2 (1993, Spring): 118-26.

“Evaluation is probably the most common and pervasive aspect of student instruction. It is the primary tool for guiding student development, crossing all academic disciplines.”⁷⁹³ Teachers’ assessment techniques have proven to be poor and / or inadequate when investigating validity and reliability in classroom assessments.⁷⁹⁴ Unfortunately, little has changed since Mayo first called for tests and measurement course work to be made a mandatory prerequisite for teacher candidates so many years prior.⁷⁹⁵ Assessments and measurements continue to be performed unsystematically in public primary and secondary educational institutions, often without regard to planning, implementation, or negative consequences to students.⁷⁹⁶

PART III:

The Development of Research Surrounding the Impact of Educator Performance on Student Learning

Early research on teaching impact failed to produce practical results and became obsolete in the early 1980s because the studies assessed student achievement using standardized academic achievement tests which presupposes students studied a standard curriculum, which was not the case.⁷⁹⁷ In the 1990s, education reform efforts and research on teacher impact on student academic achievement began centering on teaching experience, teacher academic background, certification standing and subject area and

⁷⁹³ Gullickson, Arlen R. 2000, May. The Need for Student Evaluation Standards. In, The Joint Committee on Standards for Educational Evaluation, <http://www.wmich.edu/evalctr/jc/pubs/SESNeed.pdf>. (accessed 2008), pg.4.

⁷⁹⁴ Mertler, *supra* note 779.

⁷⁹⁵ Mayo, *supra* note 785.

⁷⁹⁶ Schafer, *supra* note 796.

⁷⁹⁷ Shavelson, Richard J., Noreen Webb, and Leigh Burstein. "Measurement of Teaching." In *Handbook of Research on Teaching*, edited by Merlin C. Wittrock, 50-91. New York: Macmillan, 1986; Schmidt, William H. "Content Biases in Achievement Tests." *Journal of Educational Measurement* 20, no. 2 (1983, Summer): 165-78.

pedagogical knowledge.⁷⁹⁸ In addition, as opposed to using research results where the data was gathered from teachers in an individual school or single school district, the use of large-scale studies such as the National Assessment of Educational Progress (NAEP) and the National Educational Longitudinal Study (NELS) or meta-analysis and reviews of research on teaching studies provided better insight regarding the relationship between teacher characteristics and student academic achievement.⁷⁹⁹

Teacher's Role in Student Academic Achievement

Teachers are not the solitary influence on a student's academic achievement. This is not being suggested, implied or inferred; home environment, peer influences, cultural understanding and socio-economic status also have an influence on a student's academic achievement. In looking at the issue of causation, however, the goal of this research is to address what impact does a teacher's education, degree attained, certification status or pedagogical knowledge have on a student's academic achievement? Wenglinsky examined 1996 NAEP data using a multilevel structural equation model which distinguished student level and school level data to reduce the error in analysis estimates and to map out the relationships between independent variables.⁸⁰⁰ Using this method, Wenglinsky's findings proposed that teacher practices and teacher quality had the

⁷⁹⁸ Buttram, Joan L., and Timothy Waters. "Improving America's Schools through Standards-Based Education. Introduction." *NASSP Bulletin* 81, no. 590 (1997, Sep): 1-6; Stedman, Lawrence C. "International Achievement Differences: An Assessment of a New Perspective." *Educational Researcher* 26, no. 3 (1997, April): 4-15; O'Day, Jennifer A., and Marshall S. Smith. "Systemic Reform and Educational Opportunity." In *Designing Coherent Education Policy: Improving the System*, edited by Susan H. Fuhrman, 250-312. San Francisco: Jossey-Bass, 1993.

⁷⁹⁹ Wenglinsky, Harold. "The Link between Teacher Classroom Practices and Student Academic Performance." *Education Policy Analysis Archives* 10, no. 12 (2002, Feb); Wright, S. Paul, Sandra P. Horn, and William L. Sanders. "Teacher and Classroom Context Effects on Student Achievement: Implications for Teacher Evaluation." *Journal of Personnel Evaluation in Education* 11, no. 1 (1997, April): 57-67; Sanders, William L., and June C. Rivers. *Cumulative and Residual Effects of Teachers on Future Student Academic Achievement*. Knoxville: University of Tennessee Value-Added Research and Assessment Center, 1996.

⁸⁰⁰ Wenglinsky, *supra* note 803.

greatest impact on student achievement – much more so than student background variables – especially when looking at teacher practices and quality together.⁸⁰¹

Teacher's Education and Academic Background

Research studies looking at the impact of teacher's education level and academic major on student academic achievement has varied over time. A closer examination of the analysis method utilized in some of the studies sheds some light on the contradictory opinions. In 1986, Hanushek used meta-analysis to investigate school expenditures, student achievement, student-teacher ratio and teacher quality from 1955 to 1980.⁸⁰² After reviewing over 100 studies, Hanushek found that holding a graduate degree had no significant effect on student academic achievement. Hanushek also concluded that notwithstanding the increase in school resources, student academic achievement, particularly at the secondary level, showed signs of declining.

Greenwald, Hedges, and Laine came to a contradictory conclusion ten years later.⁸⁰³ Not only did they conduct a meta-analysis on sixty educational production studies but they also used a combination of significance testing and effect magnitude analyses to examine the impact of teacher education and experience.⁸⁰⁴ Greenwald, Hedges, and Laine concluded that the teacher qualities of academic background and experience had a strong, positive relationship with student academic achievement.⁸⁰⁵

801 Wenglinsky, *supra* note 803.

802 Hanushek, Erik A. "The Economics of Schooling: Production and Efficiency in Public Schools." *Journal of Economic Literature* 24, no. 3 (1986, Sept): 1141-77.

803 Greenwald, Rob, Larry V. Hedges, and Richard D. Laine. "The Effect of School Resources on Student Achievement." *Review of Educational Research* 66, no. 3 (1996, Fall): 361-96.

804 *Id.*

805 *Id.*

Goldhaber and Brewer supported the findings of Greenwald, Hedges & Laine using the 1988 National Educational Longitudinal Study [NELS] data set.⁸⁰⁶ Goldhaber and Brewer investigated the influence of teacher education level on student academic achievement and argued that early research failed to aggregate teacher qualification data at the correct level.⁸⁰⁷ As a result, teacher qualification variables lost their sensitivity for variability in earlier studies and underestimated the impact of teacher qualities on student achievement. Goldhaber and Brewer concluded that just having an advanced degree did not have a statistically significant impact on student academic achievement; however, when a teacher had an advanced degree in the subject area being taught, i.e., Masters in mathematics, student academic achievement was significantly higher than those students whose teachers had a lower degree in the subject area being taught, i.e., Bachelors in mathematics.⁸⁰⁸

Teaching Credentials and Professional Experience

Research examining years of teaching experience and certification / licensure standing on student academic achievement has also had contradictory conclusions. Researchers agree that there is a positive impact of a teacher's subject area knowledge on student academic achievement but there is uncertainty surrounding the relationship between degree attained, years of experience and student academic achievement. As the following studies show, the conflicting views may be a result of analysis techniques chosen, context of the research study, distribution of the data in the research study and / or errors in measurement.

⁸⁰⁶ Goldhaber, Daniel D., and Dominic J. Brewer. "Why Don't Schools and Teachers Seem to Matter? Assessing the Impact of Unobservables on Educational Productivity." *Journal of Human Resources* 32, no. 3 (1997, Summer): 505-23.

⁸⁰⁷ Greenwald, *supra* note 807.

⁸⁰⁸ Goldhaber, *supra* note 810.

As mentioned earlier, Hanushek found that a teacher's experience did not have a significant impact on student academic achievement.⁸⁰⁹ The validity of these results have been questioned because the analysis was based on aggregated trends over time. Researchers now know "that aggregating school inputs into one level causes some of the variables to lose their sensitivity in terms of variation, hence, resulting in non-significant impacts on student achievement."⁸¹⁰

Greenwald, Hedges, and Laine concluded that the teacher's experience had a strong, positive relationship with student academic achievement⁸¹¹ but neglected to explain how much teaching experience was important.

Darling-Hammond analyzed the impact of teacher education, subject area concentration, licensure, experience and other teacher quality measures and school inputs on student achievement in different states using information from the 1993-94 Schools and Staffing Surveys (SASS) and the National Assessment of Educational Progress (NAEP).⁸¹² The study aggregated the data at the state level but failed to note the consequences of the aggregation. Darling-Hammond's findings proposed that licensed / certified teachers as well as teachers with subject area knowledge had a positive, strong relationship with student academic achievement.⁸¹³ Later confirmed by Goldhaber and Anthony,⁸¹⁴ Darling-Hammond also found that years of experience had a non-linear impact on student academic achievement.⁸¹⁵ Her findings implied that whereas educators

809 Hanushek, *supra* note 806.

810 Goldhaber, *supra* note 810.

811 Greenwald, *supra* note 807.

812 Darling-Hammond, Linda. "Teacher Quality and Student Achievement: A Review of State Policy Evidence." *Education Policy Analysis Archives* 8, no. 1 (2000).

813 *Id.*

814 Goldhaber, Daniel D., and Emily Anthony. "Teacher Quality and Student Achievement. Urban Diversity Series Report: UDS-115." Washington, DC: US Dept of Education, 2003.

815 Darling-Hammond, *supra* note 816.

with more than five years of teaching experience showed no difference in levels of effectiveness, teachers with less than 3 years of experience were not as effective as experienced teachers and had a negative impact on student academic achievement.⁸¹⁶ Darling-Hammond's findings confirm a conclusion made 25 years prior when it was observed that the learning curve for instructors was steep at the beginning of their teaching career and, after reaching its peak – 2 to 3 years – tended to level off for the remainder of the teacher's career.⁸¹⁷

Looking specifically at the value of teacher certification, Laczko-Kerr and Berliner compared fully certified teachers, under-certified teachers and teachers in the program Teach for America.⁸¹⁸ The study measured the impact of the three teacher groups on student performance on an Arizona State University test in mathematics, reading and language. Findings revealed that students with fully certified teachers performed 20% better than students with teachers who were under-certified.⁸¹⁹ While the study is limited in that it was conducted in five school districts, the results are important when considering the impact of certification / licensure in student academic achievement and growth nationwide.

Teacher's Pedagogical Knowledge

The relationship of an educator's pedagogical knowledge and a student's achievement is probably the most examined and equally criticized subject of educational

816 Darling-Hammond, *supra* note 816.

817 Murnane, Richard J. *The Impact of School Resources on the Learning of Inner City Children*. Cambridge, MA: Balinger Publishing Co., 1975.

⁸¹⁸ Laczko-Kerr, Ildiko, and David C Berliner. "The Effectiveness of "Teach for America" and Other under-Certified Teachers on Student Academic Achievement: A Case of Harmful Public Policy." *Education Policy Analysis Archives* 10, no. 37 (2002, Sept). Teach for America teachers are volunteers from prestigious universities who teach in schools in underdeveloped communities for a limited amount of time and are considered to be uncertified teachers.

⁸¹⁹ *Id.*

research.⁸²⁰ Over the past 30 years, the research regarding this relationship has made some progress.

In the context of the classroom environment, the purpose of this area of research is to comprehend effective teacher behaviors that lead to increased academic achievement as well as illuminate typical teaching practices, how teachers use instructional strategies, and how pupils respond to these strategies to show the relationship between common patterns in teacher practices and student performance or achievement testing. Findings overall show that collaborative, contextual, and student-centered teaching practices generates better outcomes in academic achievement than teacher-centered practices.⁸²¹

At the time of Peter W., research on teaching emphasized a teacher's observable behavior in classrooms. The conclusions reached by these studies highlighted the issue of whether teachers posed special skills as professionals. The Coleman Report, at the time considered important, claimed little or no impact of teacher characteristics on student academic achievement.⁸²² Rosenshine examined studies on observable teacher behavior and found them to be unstable.⁸²³ Rosenshine went further to suggest that continued investigation of observable behavior was meaningless.⁸²⁴ Popham concluded that the

⁸²⁰ Shulman, Lee S. "Paradigms and Research Programs in the Study of Teaching: A Contemporary Perspective." In *Handbook of Research on Teaching*, edited by Merlin C. Wittrock. New York: MacMillan, 1986.

⁸²¹ Bay, Jennifer M., John K. Beem, Robert E. Reys, Ira Papick, and David E. Barnes. "Student Reactions to Standards-Based Mathematics Curricula: The Interplay between Curriculum, Teachers, and Students." *School Science & Mathematics* 99, no. 4 (1999): 182-88; Goldsmith, Lynn T., and June Mark. "What Is a Standards-Based Mathematics Curriculum?" *Educational Leadership* 57, no. 3 (1999, Nov): 40-44; Von Secker, C. E., & Lissitz, R. W. (1999). Estimating the impact of instructional practices on student achievement in science. *Journal of Research in Science Teaching*, 36(10), 1110-26.

⁸²² Coleman, James S. "Equality of Educational Opportunity (Coleman) Study." Washington, DC: National Center for Educational Statistics (DHEW/OE), 1966.

⁸²³ Rosenshine, Barak. "Evaluation of Classroom Instruction." *Review of Educational Research* 40, no. 2 (1970, April): 279-300.

⁸²⁴ Id.

difference in teaching practices of experienced teachers versus non-teachers was insignificant.⁸²⁵

In the 1980s, when the court was reviewing the last of the educational malpractice litigation, research surrounding the impact of teacher practices on student achievement began to present different findings. Brophy and Good examined approximately 30 studies in an attempt to identify teaching practices that were consistently and positively correlated with student academic achievement.⁸²⁶ Their review provided a broad illustration of successful teaching practices identified in studies conducted in primary and secondary educational institutions and concluded that quantity of instruction, teaching a whole class versus a small group, questioning students and providing feedback were teaching practices that were positively and strongly associated with high student achievement in all of the studies.⁸²⁷

Since Brophy and Good's study, researchers continue to find teaching practices to be positively linked to student achievement.⁸²⁸ For example, the level of respect teachers have for their students, the amount of feedback provided to student's responses, the level of engagement with their student's academic interests and the openness of the classroom

⁸²⁵ Popham, W. James. "Performance Tests of Teaching Proficiency: Rationale, Development, and Validation." *American Educational Research Journal* 81, no. 1 (1971, Jan): 105-117.

⁸²⁶ Brophy, Jere, and Thomas L. Good. "Teacher Behavior and Student Achievement." In *Handbook of Research on Teaching*, edited by Merlin C. Wittrock, 328-75. New York: MacMillian, 1986.

⁸²⁷ Id.

⁸²⁸ Cohen, David K., Raudenbush, Stephen W., & Deborah Loewenberg Ball. "Resources, Instruction, and Research." *Educational Evaluation and Policy Analysis* 25, no. 2 (2003): 119-42. National Institute of Child Health and Human Development & Early Child Care Research Network [NICHD-ECCRN]. "The Relation of Global First Grade Classroom Environment to Structural Classroom Features and Teacher and Student Behaviors." *The Elementary School Journal* 102, no. 5 (2002, May): 367-87; Pianta, Robert C., Karen M. la Paro, Chris Payne, Martha J. Cox, and Robert Bradley. "The Relation of Kindergarten Classroom Environment to Teacher, Family and School Characteristics and Child Outcomes." *The Elementary School Journal* 102, no. 3 (2002, Jan): 225-238;

environment have all been related to student achievement.⁸²⁹ Furthermore, when the practice of teaching was recognized as the central role of the teacher and the teacher accepted more responsibility for the academic success of their student, the teacher established a classroom culture that fostered student academic achievement.⁸³⁰ In addition, research also found that students who exhibited academic gains in areas such as reading also had teachers who committed more time to that particular educational activity.⁸³¹

PART IV:

The Role, Cost and Status of Remedial Education

One of the factors the courts took into account when deciding not to recognize instructional educational malpractice as a viable cause of action was its inability to identify an appropriate remedy in which to make a student whole after the student was allegedly subjected to an inadequate education. Plaintiffs in the educational malpractice

⁸²⁹ Lotan, Rachel. "Teaching Teachers to Build Equitable Classrooms." *Theory into practice* 45, no. 1 (2006, Feb): 32-39; Connor, Carol McDonald, Frederick J. Morrison, and Leslie E. Katch. "Beyond the Reading Wars: The Effect of Classroom Instruction by Child Interactions on Early Reading." *Scientific Studies of Reading* 8, no. 4 (2004): 305-36; Connor, Carol McDonald, Frederick J. Morrison, and Jocelyn N. Petrella. "Effective Reading Comprehension Instruction: Examining Child by Instruction Interactions." *Journal of Educational Psychology* 96, no. 4 (2004, Dec): 682-98; Green, J., Dixon, C., Lin, L., Floriani, A., Bradley, M., & Paxton, S., et al., Santa Barbara Classroom Discourse Group. (1992). In H. H. Marshall (Eds.), *Redefining student learning* (pp.119-150). Norwood, NJ: Ablex Publishing Corp.

⁸³⁰ Fuchs, Lynn S., Douglas Fuchs, and Norris Phillips. "The Relation between Teachers' Beliefs About the Importance of Good Student Work Habits, Teacher Planning, and Student Achievement." *The Elementary School Journal* 94, no. 3 (1994, Jan): 331-45.

⁸³¹ Connor, Carol McDonald, Frederick J. Morrison, and Leslie E. Katch. "Beyond the Reading Wars: The Effect of Classroom Instruction by Child Interactions on Early Reading." *Scientific Studies of Reading* 8, no. 4 (2004): 305-36; Connor, Carol McDonald, Frederick J. Morrison, and Jocelyn N. Petrella. "Effective Reading Comprehension Instruction: Examining Child by Instruction Interactions." *Journal of Educational Psychology* 96, no. 4 (2004, Dec): 682-98; Taylor, Barbara M., P. David Pearson, Kathleen Clark, and Sharon Walpole. "Effective Schools and Accomplished Teachers: Lessons About Primary-Grade Reading Instruction in Low-Income Schools." *The Elementary School Journal* 101, no. 2 (2000, Nov): 121-65; Wharton-McDonald, Ruth, Michael Pressley, and Jennifer Mistretta Hampston. "Literacy Instruction in Nine First-Grade Classrooms: Teacher Characteristics and Student Achievement." *The Elementary School Journal* 99, no. 2 (1998, Nov): 101-28

cases brought thus far have only sought relief in the form of monetary damages and the courts have consistently denied the requests.

Despite the development of professional teaching standards, the growing status of teaching as a profession, research addressing primary and secondary school educators inability to accurately assess and measure student academic achievement, and empirical research surrounding the correlation between educator performance and student academic achievement, the researcher finds the court's rationale to deny monetary damages as sole compensation for alleged instructional educational malpractice to be a valid concern 32 years later. Calculating lost wages or expected employment opportunities is unrealistic when taking into account the hierarchical structure of higher education, i.e., reputation, credentials and/or academic rigor of two-year institutions versus four-year institutions versus ivy league institutions, the increasingly higher-order skills required by employers in the 21st century and the competitiveness of the job market even for applicants with undergraduate or advanced degrees. As such, the researcher will focus on remedial education as an appropriate alternative remedy.⁸³²

History of Remedial Education

Successfully presenting a case of instructional educational malpractice mandates that a student be made whole – placed in the same position the student would have been in had the injury not occurred. Designed to improve students' basic academic skills, remedial education coursework is an appropriate method of compensating for

⁸³² It is important to note that the researcher is discussing remedial education in the traditional sense of what is being offered in colleges and universities; as such, the following analysis identifying an appropriate remedy brought about by presenting a successful claim of instructional educational malpractice is based on the following premise: educators and their respective educational institutions / systems found liable of instructional educational malpractice should be required to compensate ill-prepared students by paying for remedial education coursework at a postsecondary institution.

deficiencies in prior learning.⁸³³ While the first remedial education program offering courses in reading, writing and mathematics was documented at the University of Wisconsin in 1849,⁸³⁴ students suffering from “defective preparation” were offered remedial studies at Yale University as early as 1828.⁸³⁵ According to the National Center for Educational Statistics, more than three quarters of colleges and universities – public and private – currently offer remedial education course work.⁸³⁶ Even the extremely small number of highly selective colleges and universities provide remedial education course work under one pretext or another. Two-year community colleges tend to host the majority of remedial education programs; most of which carry no academic credit toward degree.⁸³⁷

Cost of Remedial Education: Financial & Human

“Politicians don’t like paying twice for students to take high school mathematics and reading, and students are frustrated by having to repeat high school work.”⁸³⁸

Major policymakers are concerned with who should foot the bill of remedial education. Legislators throughout the United States have taken a public position that taxpayers should not be asked to pay colleges to teach what the public high schools have

⁸³³ Boylan, Hunter R. "Making the Case for Developmental Education." *Research in Developmental Education* 12, no. 2 (1995): 1-4.

⁸³⁴ Wyatt, Monica. "The Past, Present, and Future Need for College Reading Courses in the United States." *Journal of Reading* 36, no. 1 (1992, Sept): 10-20.

⁸³⁵ Pintozzi, Frank. "Developmental Education: Past and Present." Paper presented at the Task Force on the Future, Marietta, GA 1987.

⁸³⁶ National Center for Educational Statistics (2003). *Remedial education at higher education institutions in Fall 2000* (NCES 2004-010). Washington, DC: U.S. Government Printing Office.

⁸³⁷ Blair, Julie. "N.Y., Calif. Cracking Down on College Remediation." *Education Week* 19, no. 15 (1999): 6; Marcus, Jon. 2000, Winter. Revamping Remedial Education: City University of New York Grapples with a Complex Web of Issues Surrounding Programs for Underprepared Students. In, National CrossTalk 8(1), <http://www.highereducation.org/crosstalk/ct0100/news0100-revamp.shtml>. (accessed 2007).

⁸³⁸ Lively, Kit. 1993. States Try to End Remedial Courses at 4-Year Colleges. In, *Chronicle of Higher Education*, <http://chronicle.com/che-data/articles.dir/articles-39.dir/issue-25.dir/25a02801.htm>. (accessed 2007).

failed to teach using previously expended public tax dollars.⁸³⁹ The City University of New York (CUNY) was accused of exhausting too much energy, money and time on teaching students what they should have learned in high school.⁸⁴⁰ Motivated by the supposition that public primary and secondary education systems were responsible for teaching basic math, reading and writing skills, States such as Florida, Montana, New Jersey and West Virginia proposed bills to force public school systems to pay for remedial education courses their high school graduates had to take.⁸⁴¹

Colleges and universities make significant investments towards remedial education programs. In 1994-95, the Louisiana University system spent \$5.2 million, Tennessee spent \$25.2 million and Florida and New Jersey each shelled out approximately \$50 million a year.⁸⁴² The state of Florida has also discussed a proposal to charge the individual student the “true cost” of a remedial course, which could be up to three times as much as “college-level” courses.⁸⁴³

Effectiveness of Remedial Education

Research studies evaluating the effectiveness of remedial education programs are growing. The National Study of Developmental / Remedial Education show that underprepared⁸⁴⁴ students who participated in remedial education programs graduated at

⁸³⁹ Adelman, Clifford. "The Truth About Remedial Work." *The Chronicle of Higher Education* 43, no. 6 (1996): A56.

⁸⁴⁰ Trombley, William. 1998. Remedial Education under Attack: Controversial Plans for the City University of New York. In *National CrossTalk* 6(3), The National Center for Public Policy and Higher Education, <http://www.highereducation.org/crosstalk/ct0798/news0798-remedial.shtml>. (accessed 2008).

⁸⁴¹ Phipps, Ronald. "College Remediation: What It Is, What It Costs, What's at Stake." 35. Washington, DC: The Institute for Higher Education Policy, 1998.

⁸⁴² Narrett, Z. M. "Developmental Education on the College Campus: A Status Report. Kaplan Educational Centers." Kaplan Learning Services, 1997.

⁸⁴³ Arendale, David. 2001. Trends in Developmental Education. In, University of Missouri-Kansas City, <http://www.nade.net/documents/Articles/trends.in.de.pdf>. (accessed 2007), pg.1.

⁸⁴⁴ For purposes of this research, underprepared students are students who do not meet the basic standards of reading, writing and mathematics.

rates equal to or greater than those of better prepared students.⁸⁴⁵ Research comparing the academic achievement of students who need remedial education and complete remedial education courses with students who need remedial education yet do not complete remedial courses find that those who take remedial education course work did better in college level English, history, math, and psychology than those who did not enroll in remedial courses.⁸⁴⁶ The study considered grade point average and achievement in sequential college-level courses (i.e., college-level English and math) as the dependent variables and indicators of academic success.

Research also shows that participating in remedial course work can serve as an academic equalizer and that while the students taking remedial courses may not perform better than students who do not need remedial education, there is still positive impact on academic achievement.⁸⁴⁷ In a comparison of remedial and nonremedial students, Feingold found that students completing remedial courses had comparable success to those students not requiring remedial coursework.⁸⁴⁸ Students who completed all of the recommended remedial courses were more likely to succeed in English and math than those students who only participated in some of the suggested coursework.⁸⁴⁹ In addition, positive relationships were found between student academic achievement and completion of remedial course work.

⁸⁴⁵ Boylan, Hunter R., Barbara S. Bonham, and L. Bliss. "Who Are the Developmental Students?" *Research in Developmental Education* 11, no. 2 (1994): 1-3.

⁸⁴⁶ Id.

⁸⁴⁷ Sinclair Community College. "The Impact of Developmental Education on Student Progress: A Three-Year Longitudinal Analysis." Dayton, OH: Sinclair Community College, Office of Institutional Research and Planning, 1994. (ERIC Document Reproduction Service No. ED 383 382)

⁸⁴⁸ Boylan, supra note 851.

⁸⁴⁹ Sinclair Community College, supra note 851.

SUMMARY

This chapter looked at changes in the field of education in four parts.

PART I

Part I looked at the development of standards for primary and secondary education teachers. From President Johnson's 1965 Elementary and Secondary Education Act to President George W. Bush's 2002 reauthorization of ESEA also known as No Child Left Behind, policymakers – national, state and local – educational associations, national commissions and educators alike have increasingly used educational reform efforts over the years to define and establish standards for teachers. The most prominent and influential of the education reform efforts in the identification of quality teachers and the development of standards for the teaching practice have been the National Board for Professional Teaching Standards and the No Child Left Behind Act.

NBPTS and the standards for teaching the organization have established has been widely adopted as a means of identifying “what teachers should know and be able to do.” NBPTS has earned the support of the federal and state policymakers, national associations centered on education policy, educators and the American public alike.

The No Child Left Behind Act – The 2002 reauthorization of the Elementary and Secondary Education Act – was also examined; particularly, the provision mandating that a highly qualified teacher be made available for every classroom in every school receiving federal funding under the Act. NCLB codified the teacher standards movement. NCLB provided an outline of the credentials and skills a highly qualified teacher had to have in order to teach but also gave individual states the latitude to determine state

certification requirements and mastery of subject area knowledge as long as both were grounded in scientifically based research.

PART II

In addition to taking a look at the history of assessments and measurements in education and the prevalence of tests to measure student academic proficiency, Part II examined how educators are not prepared to appropriately assess student academic achievement. Standardized academic achievement tests and other student assessments are benchmarks of learning, educational effectiveness and teacher quality. With school accountability being increasingly legislated, achievement tests take on extreme importance in the eyes of the federal government, state and local education agencies, school districts and the American public. Unfortunately, research has continually shown that the educators who prepare students for the test and subsequently analyze, interpret and apply the results of the tests to students' academic abilities are not qualified to effectively do so.

PART III

Part III looked at teacher impact on student academic achievement. Research addressing teacher variables of education level, subject content area knowledge, license / certification standing, years of experience and pedagogical knowledge was examined. An educator's subject area knowledge positively impacted student academic achievement; much more so if the educator had an advanced degree in the subject being taught. Teaching credentials was also found to have strong, positive relationship with student academic achievement. As can be expected, the relationship was strengthened if subject area knowledge was combined with the credentials. Years of experience, however, was

an area of contention that researchers attributed to factors including research analysis techniques, context of the research study, and distribution of the data or errors in measurement.

PART IV

Part IV discussed how remedial education is an appropriate method of compensating for deficiencies in prior learning. Remedial education is a staple of higher education institutions but colleges and universities as well as legislators and taxpayers are increasingly hesitant to pay for students to take courses in postsecondary institutions they should have successfully completed in high school. Some states have even proposed that public school systems pay for remedial education courses their high school graduates had to take at the postsecondary education level. Despite the expense, however, research shows that remedial education is an effective means of supplying a student with basic academic skills.

CHAPTER VI

MAKING A CASE

Overview

Chapter VI seeks to connect or demonstrate how the development of standards of care and changes in public policy surrounding public education have changed since the 1976 Peter W. case potentially validating a negligence cause of action claiming instructional educational malpractice. The chapter starts with a brief recap of the definition of malpractice and how it is applied to the field of education for the purposes of this study. The chapter progresses with a restatement of the primary research question and the four (4) sub-questions that guided the study; included in the restatement, the researcher incorporates questions revealed by the courts and legal scholars in Chapter IV as it relates to each research sub-question. The Chapter closes with an analysis of the how changes in public policy and the field of education address the court's conditions for validating a negligence cause of action claiming instructional educational malpractice.

Black's Law Dictionary defines malpractice as the "[f]ailure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss or damage to the recipient of those services or to those entitled to rely upon them."⁸⁵⁰ For the purposes of the study, the researcher applied the concept of malpractice to the field of education; thus educational malpractice, more specifically, instructional educational malpractice. Set in the

⁸⁵⁰ Black, Henry Campbell. *Black's Law Dictionary*. 6th ed: West Publishing Co, 1990, pg. 959.

framework of education, instructional educational malpractice was illustrated as a student spending his/her entire primary and secondary education in the same school system; successfully graduating but that school system failing to assess the student's reading, writing and mathematic capabilities; assigning the student to classes above the student's ability; allowing the student to pass from grade to grade and advance course levels with the knowledge that the student had not achieved either its completion or the necessary skills; assigning the student to classes in which the instructors were unqualified; and allowing the student to graduate from high school although the student could not read above the eighth grade level.

In Chapter I, the researcher very briefly pointed out that there were multiple factors that could influence student achievement (and failure). Taking into account the personal, social, environmental, financial and other variables involved in a student's learning process, the basis of the study was to identify the influence, responsibility, and role of the educator on student academic achievement in order to validate a claim of instructional educational malpractice. Closer examination of case law and other legal scholarship informed the researcher that in order to state a claim of instructional educational malpractice that the courts would recognize the argument could not be based on a student's failure to learn but on an educator's failure to teach; thus, changing the perspective of the research based on emerging evidence. The purpose of the study as well as the theoretical framework did not change to examine the underlying legal relationship between educators and students.

FINDINGS

The purpose of this study was to address the research question of how the development of standards of care and changes in the public policy surrounding public education have changed since the 1976 Peter W. case potentially validating a negligence cause of action claiming instructional educational malpractice. The researcher used the legal theory of negligence to examine standards of care and changes in public policy by first, reviewing the legal literature addressing educational malpractice and identifying how the judicial system and legal scholars conceptualized the issues of negligence in the field of education and second, by reviewing the education literature as it related to the court and legal scholar's assessment of how a plaintiff would meet the elements of negligence in order to present a valid claim of instructional educational malpractice. The researcher reviewed legal and education literature to answer the following questions:

1. **What legal duty of care, if any, do educators have toward students in providing competent instruction?** The researcher discovered that in order for the courts to establish a legal duty on an educator to provide an adequate education to a student, the student first had to have a legally protected interest in that education. The researcher suggests that compulsory education laws across the country confirm and public policy supports granting students a legally protected interest in an adequate education. *The question presented by the courts, however, is by what standards do the courts measure the educator's duty to provide competent instruction to legally recognize that duty.*

2. **If there is a legal duty of care on the educator toward the student, (a) did the educator breach that duty to the extent that the student suffered actual harm or injury and (b) can the student demonstrate the existence of that injury?**

The researcher finds that in an allegation of instructional educational malpractice, the injury claimed is lack of basic academic skills, i.e., functional illiteracy, as a result of an inadequate education. Research has uncovered that legal scholars propose functional illiteracy as the best injury to present to the courts because it can be measured by student competency or achievement assessments; thus the researcher was presented with the issue of identifying *what significant breach of duty by the educator would contribute to a student's functional illiteracy.*

3. **Was the educator's conduct the legal and proximate cause of the injury**

suffered by the student? The injury alleged in this study is functional illiteracy as a result of an inadequate education. Prior litigation focused on a student's failure to learn as the substantial factor in the student's inadequate education. The researcher concludes that recent studies (incorporating proper research analysis methods) investigating teacher impact on student academic achievement, prescriptive federal education policy and widely accepted standards in the practice of teaching makes educators a material element and a substantial factor on student academic achievement and lend credence to the position that courts' should examine an educator's failure to teach.

4. **If the student is able to present a valid claim of instructional educational malpractice, what would be the appropriate remedy?** Principles of common law dictate that if a student is entitled to relief by successfully presenting an action in negligence, the remedy should place the student in the same position he/she would have been in had the injury not occurred. The researcher identified the appropriate remedy for a successful allegation of functional illiteracy as a result of an inadequate education to be subsidized remedial education because remedial education has historically proven to correct deficiencies in basic academic skills.⁸⁵¹

ANALYSIS OF FINDINGS

Thirty-two years ago a fact pattern emerged that became the impetus for this study. A student spent his entire primary and secondary education in the same public school system and received a high school diploma. The student's teachers, however, failed to accurately assess his reading, writing and mathematic capabilities and the school system assigned the student to classes above the student's ability. Teachers continued to promote the student from one grade to another and consecutively higher course levels with full knowledge that the student had achieved neither grade or course completion nor the necessary skills to advance to the next level. The school system assigned the student to classes where the teachers were unqualified; and subsequently presented the student with a high school diploma although the student could not read above the eighth grade level. This is the fact pattern of Peter W. v. San Francisco Unified School District⁸⁵² -- the case which set the context for this study and the first case presented to the judicial

⁸⁵¹ Boylan, *supra* note 839.

⁸⁵² Peter W. v. San Francisco Unified School District, 60 Cal. App. 3d 817, 131 Cal Rptr. 854 (1976).

system arguing what has been defined in this study as instructional educational malpractice. Unfortunately, while the field of education and the practice of teaching have made significant strides in theory and practice, the Peter W. fact pattern is ever present in public primary and secondary educational institutions in the United States. If Peter W.'s case were presented to the courts today, where would he as well as the numerous public school students currently in Peter W.'s position stand? What follows is an analysis of the Peter W. fact pattern examined utilizing the legal and education literature examined by the researcher as it relates and responds to the research questions that guided this study.

Duty of Care

One of the claims Peter W. made was that a special relationship existed between him and his teacher; that teachers had a legal duty of care towards students in their classroom. He further argued that as a student in the public education system, he had a right to expect his teachers and the school district to exercise their authority, responsibility and ability with a degree of professional skill to provide him with an adequate instructional education program that involved the utilization of reasonable competence in teaching, student evaluation and assessment and academic placement.

After examining Peter W.'s claim, the court was reluctant to acknowledge a legally recognizable duty of care on educators toward students. The court could not determine whether the characteristics of a qualified classroom teacher were best evaluated by the "reasonable man of ordinary prudence" [hereinafter "reasonable man"] code of conduct or the "professional" code of conduct. Furthermore, the court held that they were unable to measure the skill and knowledge of the classroom teacher or the practice of teaching because there was no public or professional consensus readily

available that outlined what constituted a good teacher. Over the years, public policy and research surrounding the field of education have put the court in a better position to apply the appropriate code of conduct to the actions of the classroom teacher and understand the standards that outline the practice of quality teaching.

At no point in the history of American education would a teacher, in carrying out their duty in molding the minds of the country's future, be adequately measured by the "reasonable man" code of conduct. The "reasonable man" code of conduct is the lowest level of care required of an individual. Simply put, the "reasonable man" code of conduct presents the question, would a reasonable educator in a similar situation act in the same manner? From the educator's high moral standing as a member of the clergy during the pre-colonial days of the country, to the nurturing characteristics identified as inherent in young women who served as teachers when the school system became available to the masses,⁸⁵³ to the college educated and subject area competent prerequisites of today's teachers in the compulsory education system, the reasonable man standard is inappropriate for educators because it does not take into account the special knowledge, skill, or intelligence the educator may hold in carrying out the duties of their role as an educator.

If Peter W. were presenting his case today, the researcher posits that the level of negligence being claimed by Peter W. against his teachers and school system would warrant the courts to use the "professional" code of conduct to evaluate the teaching practices of the public school teacher. The "professional" code of conduct requires the use of professional judgment as well as the possession and application of a minimum

⁸⁵³ McClellan, B. Edward. *Moral Education in America: Schools and the Shaping of Character from Colonial Times to the Present*. Williston, VT: Teachers College Press, 1999.

standard of special knowledge and skill commonly possessed by members of the profession in good standing; characteristics and qualities not taken into account when applying the “reasonable man” standard of care. The educator’s college degree and possibly advanced degree as well as state license and certification meet the criteria of qualities requisite of the “professional” code of conduct.

In addition to determining the code of conduct, the courts were concerned about the lack of agreement on and definition of the standards of the teaching practice by which to gauge the skill and knowledge of an educator; thus creating an educator’s duty of care towards students. Legal scholars have identified five sources from which professional standards could be derived, if met, they would provide the courts with a workable standard of care in which to assess the conduct of educators in primary and secondary education. The five sources are a certification standard, a community standard, a self-imposed standard, a school of thought standard, and a statutory standard. The researcher argues that the National Board for Professional Teaching Standards and National Board Certification as well as the 2002 reauthorization of the Elementary and Secondary Education Act exemplify the principles of the five sources from which the court can derive workable standards of care for educators and acknowledge a legal duty of care towards students.

National Board for Professional Teaching Standards

The National Board for Professional Teaching Standards [NBPTS] and National Board Certification [NBC] exemplify the certification, community, and school of thought standards of care that legal scholars identify as methods of formulating uniform standards of care that courts can utilize to not only assess the skill and knowledge of an educator in

primary and secondary education but also acknowledge a legally recognizable duty of care on educators toward students.

Certification is a traditional indication of professional status and a verification of acquired knowledge to participate in a chosen field.⁸⁵⁴ The NBPTS has developed standards of practice that, even if NBC is pursued or not, address how educators should be adequately prepared according to the current knowledge about teaching and learning and able to continually search for the most responsible course of action as knowledge about teaching and learning expands; thus, achieving National Board Certification is a declaration that the certified educator has mastered the standards of practice that are fundamental to the educators' growth as a professional and the academic achievement of students under the educator's tutelage. In achieving certification, teachers are expected to continually think about what they are doing in the classroom, why they are doing it, the outcomes they expect and how they can change and/or improve.⁸⁵⁵ The standards exhibited by National Board Certified Teachers has been acknowledged by federal and state policymakers and every state in the country as evidence of consensus in the practice of teaching of what teachers should know and be able to do.

The Community standard of care is commonly accepted principles and procedures that are customarily followed in the professional community. These standards are achieved by "socialization to the professional standard that incorporates continual

⁸⁵⁴ Darling-Hammond, Linda, Arthur E. Wise, and Stephen P. Klein. *A License to Teach: Raising Standards for Teaching*. San Francisco, CA: Jossey-Bass Publishers, 1999; Elson, John. "A Common Law Remedy for the Harms Caused by Incompetent or Careless Teaching." *Northwestern University Law Review* 73, no. 4 (1978): 641, 739.

⁸⁵⁵ McEntee, Grace Hall, John Appleby, JoAnne Dowd, Jan Grant, Simon Hole, Peggy Silva, and Joseph Check. *At the Heart of Teaching: A Guide to Reflective Practice*. New York: Teachers College Press, 2003.

learning, reflection, and concern with multiple effects of one's actions on others."⁸⁵⁶ The principles of the NBPTS emphasize reflection, inquiry, and collaboration and are developed "by a committee of outstanding educators who are broadly representative of accomplished professionals in their field. While the majority of each committee is made up of classroom teachers, other members may include experts in child development, teacher education and relevant disciplines."⁸⁵⁷ Once standards for the 24 certification areas are developed, the standards are disseminated across the education community for public comment. The committees of educators meet again after public comment and revise the standards, if necessary, before submitting the standards to the NBPTS Board of Directors for adoption. The standards exemplify how an educator's skilled way of thinking is demonstrated in action and articulate how quality teaching is exhibited in different settings.

The School of Thought standard of care is recognized as having definite principles, and must be the line of thought of at least a respectable minority of the profession.⁸⁵⁸ NBPTS and National Board certification has been identified as a symbol of teaching excellence with consensus among the broader education community.⁸⁵⁹ The certification process is the aggregate of the five core propositions of what teachers should know and be able to do. The five core propositions of the NBPTS are indicative of a school of thought standard of care because they identify the values, beliefs, and

⁸⁵⁶ Darling-Hammond, Linda. "Policy and Professionalism." In *Building a Professional Culture in Schools*, edited by Ann Lieberman. New York: Teachers College Press, 1988.

⁸⁵⁷ National Board for Professional Teaching Standards. 2007. National Board for Professional Teaching Standards. In, http://www.nbpts.org/about_us/mission_and_history/mission. (accessed 2007).

⁸⁵⁸ Prosser, William L., W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, and David G. Owen, eds. *Prosser & Keeton on Torts*. 5th ed. St. Paul, MN: West Group, 1984, 163.

⁸⁵⁹ Barringer, Mary-Dean. "How the National Board Builds Professionalism." *Educational Leadership* 50, no. 6 (1993, Mar): 18-22. National Board for Professional Teaching Standards. 2004. Questions and Answers About National Board Certification. In, <http://www.nbpts.org/events/qabrochure.cfm>. (accessed 2007).

assumptions underlying good teaching.⁸⁶⁰ These five core propositions incorporate the philosophy of quality teaching and the practice of teaching and have gained the support of education groups, policymakers and just about every national organization involved with education policy. An example of this support includes the various incentives given to board certified teachers by all 50 states and over 700 districts of the primary and secondary education system.⁸⁶¹ Furthermore, achieving national board certification is a declaration to the teaching profession that as a National Board Certified Teacher your peers deem you to be an accomplished teacher who is capable of making sound professional judgments and acts in accordance with those judgments for the betterment of students and the practice of teaching.⁸⁶²

No Child Left Behind – 2002 Reauthorization of the Elementary and Secondary Education Act

No Child Left Behind legislation embodies the Statutory Standard of Care and Self-Imposed Standard of Care that legal scholars identify as methods of formulating uniform standards of care that courts can utilize to not only assess the skill and knowledge of an educator in primary and secondary education but also acknowledge a legally recognizable duty of care on educators toward students.

Under the statutory standard of care, statutes that define specific teaching behaviors may be adopted by courts to formulate a professional standard; the more prescriptive the statute, the higher the possibility that the statute will establish a workable standard of care for educators.

⁸⁶⁰ Harrison Berg, Jill. *Improving the Quality of Teaching through National Board Certification: Theory into Practice*. Norwood, MA: Christopher Gordon Publishers, Inc., 2003.

⁸⁶¹ National Board for Professional Teaching Standards. 2004. State Policies and/or Appropriations Providing National Board Certification Incentives and Supports. In, http://www.nbpts.org/about/images/stateicen_sup.table.pdf. (accessed 2007).

⁸⁶² Shakowski, Nancy. "National Board Certification: Setting High Standards for Teaching, Learning, and Schools: An Administrator's Perspective." *Teaching and Change* 6, no. 4 (1999, Sum): 387-97.

Federal education policy has become increasingly more prescriptive with each education reform effort. Early federal legislation recommended measures of accountability and provided funding in hopes that educators would utilize the resources to adhere to the recommendations. Schools continued to receive federal funding whether or not their students learned to read or performed basic math skills.⁸⁶³ Since 1965, primary and secondary educational institutions have received more than \$321 billion in federal funding while students leaving secondary educational institutions continued to exhibit deficiencies in basic academic preparation. NCLB is the first federal education reform policy to mandate the preparation, training, recruitment and retention of “highly qualified teachers” and condition the disbursement of federal funds on measurable student academic achievement.

Accountability measures found in NCLB legislation are not recommendations but mandates grounded in scientifically-based research. For instance, the “highly qualified” teacher provision of NCLB stems in part from findings suggesting a positive correlation between quality teachers and student academic achievement. NCLB has instructed states that all classroom teachers must have a bachelor’s degree, state certification and the ability to demonstrate subject area competence.⁸⁶⁴ While states have the flexibility to determine state certification requirements and mastery of subject area content, NCLB stipulates that the standards used to define certification prerequisites and assessment of knowledge area be grounded in scientifically based research. In addition, NCLB requires that each school district that receives Title I funds use “at least 5% of its Title I allocation

⁸⁶³ U.S. Department of Education. 2007. No Child Left Behind. In, <http://www.ed.gov/nclb/accountability/ayp/yearly.html>. (accessed 2007).

⁸⁶⁴ U.S. Department of Education. 2003. No Child Left Behind: A Toolkit for Teachers. In, <http://www.ed.gov/teachers/nclbguide/index2.html>. (accessed 2007).

on professional development activities to help teachers become highly qualified.”⁸⁶⁵ The U.S. Department of Education continued by outlining key elements of professional development that meet the NCLB’s Title I professional development funding allocation.

The Self-Imposed standard of care is traditionally developed by school districts in that they institute goals and objectives for each grade level,⁸⁶⁶ however, NCLB strengthened earlier federal education policy by incorporating specificity to academic assessments. The NCLB Act initiates the development of standards of care that school districts impose on their teaching personnel by directly and substantially influencing how school districts establish, measure and achieve academic achievement goals by prescribing Adequate Yearly Progress.

NCLB’s Adequate Yearly Progress provision requires states to “implement statewide accountability systems covering all public schools and students. These systems must be based on challenging State standards in reading and mathematics, annual testing for all students in grades 3-8, and annual statewide progress objectives ensuring that all groups of students reach proficiency within 12 years.” In addition, “school districts and schools that fail to make adequate yearly progress (AYP) toward statewide proficiency goals will, over time, be subject to improvement, corrective action, and restructuring measures aimed at getting them back on course to meet State standards.”⁸⁶⁷

Accountability measures present in federal and state education policy warrant the use of the “professional” code of conduct when assessing the educator in a claim of instructional educational malpractice. Since courts first looked at educational malpractice

⁸⁶⁵ Id.

⁸⁶⁶ Patterson, Arlene H. *Educational Malpractice: Guidelines for School Districts to Avoid Liability for Academic Negligence*. Tallahassee, Florida: Patterson Associates, 1981, p.18.

⁸⁶⁷ U.S. Department of Education. 2002. Executive Summary: The No Child Left Behind Act of 2001. In, http://www.policyalmanac.org/education/archive/no_child_left_behind.shtml. (accessed 2007).

litigation over 30 years ago, the field of education has rectified the conditions the courts rationalized as obstacles to establishing a duty of care on educators towards students. In response to the lack of public or professional consensus regarding a uniform workable standard of care, the researcher presents the standards developed by the NBPTS.

Although National Board certification is voluntary, the standards have been widely accepted in the educational community as the first thoroughly researched standards identifying what teachers should know and be able to do. In addition, NCLB has created a statutory standard of care by placing an affirmative duty on teachers, schools, school districts and state education agencies to educate students with care and prescribing stiff sanctions if the standard of care is not met.

Breach of Duty of Care Resulting in Injury

Peter W. also claimed that because his teachers neglected to perform their responsibilities with the requisite care, they failed to assess his reading, writing and mathematic capabilities which resulted in his injury – functional illiteracy. Peter W. argued that the grades he received did not accurately reflect his academic standing and is evidence of his teachers’ failure to perform their job of instructing him with adequate care. Peter W. was assigned to classrooms where the teacher lacked adequate subject area content in the course being taught; furthermore, Peter W.’s coursework became increasingly more complex as teachers continued to promote Peter W. from one grade to the next despite his inability to adequately comprehend the contents of the previous grade. After moving through San Francisco’s K-12 public education system, Peter W. left high school with a diploma and the status of being functionally illiterate.

The court could not entertain Peter W.'s claim that the teachers neglected their duties to instruct Peter W. with care until it was determined that Peter W. had a legally protected interest in the learning of basic academic skills while a student in the public education system. Furthermore, the court had to decide if being functionally illiterate after receiving a high school diploma was the type of injury the law would supply a remedy. Unfortunately, at the time Peter W. presented his case to the court, the precedent the court had available to determine what property interest, if any, Peter W. had in an adequate education "was not the right to be assured a certain level of education, such as functional literacy. Rather, [Peter W.'s property interest] was the right to attend school and not be deprived of that right without adequate notice."⁸⁶⁸

Over 30 years have since passed and not only has Peter W.'s injury yet to be addressed but public school students continue to be subjected to inadequate education. The researcher concludes that if Peter W. were to present his injury of functional illiteracy today as a result of incompetent teaching, he would be in a better position to address the court's questions; one, if there was a legal duty of care on the educator toward the student, did the educator breach that duty to the extent that the student suffered actual injury, two, can the student demonstrate the existence of that injury?

In the duty of care analysis, the researcher presented widely accepted teaching standards and federal education policy as evidence of changes in public policy that warrant the courts to acknowledge that an educator has a legal duty of care to instruct students with care. The National Board of Professional Teaching Standards and National Board Certification demonstrated a change in public policy in that the standards

⁸⁶⁸ Pabian, Jay M. "Educational Malpractice and Minimal Competency Testing: Is There a Legal Remedy at Last?" *New England Law Review* 15 (1979): 101-127, 126; Goss v. Lopez, 419 U.S. 565 (1975).

developed by the National Board and mastered by teachers who achieved National Certification confirmed that standards now existed that the courts could use to evaluate the teaching practices and qualities of an educator. National Board standards have been adopted and supported by education policy groups, researchers, teachers and federal and state policymakers in every state of the country and are reflective of research findings that show quality teaching makes a difference in student academic achievement; research used by the federal government when including strengthened accountability measures and more prescriptive provisions in the 2002 reauthorization of the Elementary and Secondary Education Act – No Child Left Behind. NCLB legislation not only mandated teacher qualifications in an effort to ensure that primary and secondary education students benefited from highly qualified teachers, particularly in the core academic subject areas, but made continued federal funding contingent on student academic proficiency and growth to be measured by Adequate Yearly Progress.

Prior to identifying a breach of duty of care and the resulting injury, the researcher had to determine if the academic injury being alleged constituted the invasion of a legally protected interest. As a matter of public policy, an educated society is imperative to the continued economic future of the country. Federal, state and local government acknowledges students' legally protected interest in a public primary and secondary education through compulsory education laws and NCLB legislation. Once establishing the legally protected interest, teachers whose instructional practices are in stark contrast to the standards established by the NBPTS or National Board Certified teachers or who are not in compliance with NCLB can be said to have breached their duty of care in instructing public school students.

Peter W. would then have to establish that his was the type of injury the court would supply a remedy be it indirect injuries as a result of not receiving an adequate education or direct injuries as a result of his teacher's failure to teach with care.

Prior litigation alleging indirect injuries stemming from inability to achieve an adequate education included not being able to complete a job application, being unable to advance beyond menial employment and loss of future wages.⁸⁶⁹ Legal scholars, however, have cautioned the use of indirect injuries because acquiring a specific type of employment or expecting a particular economic advantage from a high school education is not a legislated guarantee of the compulsory education system, only an adequate education.⁸⁷⁰

Direct academic injuries have been identified as the type of injury the law would supply a remedy; particularly, the direct academic injury referred to as functional illiteracy.⁸⁷¹ In light of the accountability measures present in 21st century education reform efforts, functional illiteracy is the strongest education injury to present to the court because "it is the most direct and foreseeable result of a breach of duty,"⁸⁷² and it is the type of educational injury that No Child Left Behind legislation was designed to prevent.

Functional illiteracy is the failure to acquire basic academic skills and is measured by student competency or achievement assessments. One method Peter W. can utilize to demonstrate functional illiteracy is by presenting his/her high school diploma and passing scores on academic assessments, yet still being unable to read at grade level proficiency.

⁸⁶⁹ *Peter W. v. San Francisco Unified School District*, 60 Cal. App. 3d 817, 131 Cal Rptr. 854 (1976).

⁸⁷⁰ Jerry, Robert H., II. "Recovery in Tort for Educational Malpractice: Problems of Theory and Policy." *Kansas Law Review* 29 (1981): 195-212; Tracy, Destin Shann. "Educational Negligence: A Students' Cause of Action for Incompetent Academic Instruction." *North Carolina Law Review* 58 (1980): 561-97; Klein, Alice J. "Educational Malpractice: Can the Judiciary Remedy the Growing Problem of Functional Illiteracy?" *Suffolk University Law Review* 13 (1979): 27, 49.

⁸⁷¹ Tracy, *supra* note 874.

⁸⁷² Tracy, *supra* note 874, at 581.

Peter W.'s demonstration of functional illiteracy is evidence of an educator's breach of duty of care to provide competent instruction in that it demonstrates that, if nothing else, the educator is incapable of correctly assessing the academic ability of students in the classroom.

Student academic assessment and measurements is a central and recurring enterprise in American primary and secondary education. Students, parents, educators, federal and state legislators, and the tax paying public all have a stake in the student assessments. Student academic evaluations have been identified as the "most common and pervasive aspect of student instruction"⁸⁷³ because in addition to being the principal means of evaluating student learning, assessments are used for instructional, guidance and administrative purposes. For example, assessments diagnose student strengths and weaknesses and help in student course placement; certify that students are ready for the next grade or to graduate from high school; attest to student competence to employers; and, demonstrate accountability to tax payers.⁸⁷⁴

No other country in the world has as much achievement testing as the United States. School districts routinely test students in Grades 2-12 every year. At one point in time, it was estimated that the equivalent of 20 million school days were spent each year by American children just taking tests (and perhaps 10-20 times that many days were spent in preparation for the tests).⁸⁷⁵ According to the National Center for Fair and Open

⁸⁷³ Gullickson, Arlen R. "The Need for Student Evaluation Standards: A Paradigm Shift for the Evaluation of Students." *Prospects: Quarterly Review of Comparative Education* 35, no. 2 (2005, June): 213-27; Gullickson, Arlen R. 2000, May. The Need for Student Evaluation Standards. In, The Joint Committee on Standards for Educational Evaluation, <http://www.wmich.edu/evalctr/jc/pubs/SESNeed.pdf>. (accessed 2008), pg.4.

⁸⁷⁴ Barton, Paul E. *Assessment in America's Schools*. Princeton, NJ: Educational Assessment Service, 1994.

⁸⁷⁵ National Commission on Testing and Public Policy. *Reforming Assessment: From Gatekeepers to Gateway to Education*. Chestnut Hill, MA: Boston College, 1990.

Testing, approximately 100 million standardized tests are taken annually by primary and secondary education students in the United States. Intelligence and admissions tests account for a little over 40 million of these tests and academic achievement and basic skills examinations make up the remainder.⁸⁷⁶

Public faith in quantitative comparisons fuel the demand for achievement assessments. Test scores present the image of logical merit and thoroughness; as a consequence, parents, business leaders, and state education policymakers demand standardized achievement tests as objective measures of students' academic abilities because they want to know how well students are performing individually and in relation to other students locally, domestically and internationally. Federal education policy is premised on the understanding that academic assessments and purposeful use of the test results measure effective teaching by identifying students' academic abilities. An example of the importance legislators have placed on student academic assessments is the passage of NCLB which reaffirmed national leaders' demands for standardized testing for all students.⁸⁷⁷

Considering the current accountability, data-driven educational climate overshadowing 21st century primary and secondary educational institutions, the focus on student academic assessment is not about to change. Student assessment practices and the competency of educators in applying, interpreting and understanding academic assessments and measurements has been a topic of research for many years.⁸⁷⁸ Most

⁸⁷⁶ deMarrais, Kathleen Bennett, and Margaret D. LeCompte. *The Way Schools Work: A Sociological Analysis of Education*. 3rd ed. New York: Longman, 1999.

⁸⁷⁷ deMarrais, *supra* note 880; Spring, Joel H. *American Education*. 13th ed. Boston, MA: McGraw Hill, 2007; U.S. Department of Education. 2002. Executive Summary: The No Child Left Behind Act of 2001. In, http://www.policyalmanac.org/education/archive/no_child_left_behind.shtml. (accessed 2007).

⁸⁷⁸ Wise, Laress, Robert M. Hauser, Karen J. Mitchell, and Michael J. Feuer. "Evaluation of the Voluntary National Tests, Phase 1." Washington, DC: National Academy Press, 1999.

educators do not understand how tests are designed, how scores are derived, or how data are to be interpreted. Educator assessment literacy is evident in research that has repeatedly shown that student assessments and measurements continue to be performed unsystematically in public primary and secondary educational institutions, often without regard to planning, implementation, or negative consequences to students.⁸⁷⁹

Given the interactive nature of teaching and learning, an educator competent in student assessment and measurement is an essential element of student academic success. While teachers rely heavily on teacher-made tests and classroom observations of student coursework when assigning grades and making decisions on how to group or place students in a specific curriculum,⁸⁸⁰ they continue to enter the classroom with insufficient student assessment and measurement training thus failing to accurately assess student learning.⁸⁸¹

Forty years have passed since Mayo recommended that a measurement course be made a compulsory component of the undergraduate teacher education program. Despite the various education reform efforts American education has undergone over the years and the increasing prevalence of accountability measures directing the classroom curriculum, not much progress has been made in making sure educators are assessment literate. In fact, state certification and licensing requirements continue to fail to identify educators who can adequately “gather dependable and quality information about student achievement ... and use that information effectively to maximize student

⁸⁷⁹ Schafer, William D. "Assessment Literacy for Teachers." *Theory into practice* 32, no. 2 (1993, Spring): 118-26.

⁸⁸⁰ Dorr-Bremme, Donald W. "Assessing Students: Teachers' Routine Practices and Reasoning." *Evaluation Comment* 6, no. 4 (1983, Oct): 1-12.

⁸⁸¹ Stiggins, Richard J. "Assessment Literacy." *Phi Delta Kappan* 72, no. 7 (1991, Mar): 534-39; Stiggins, Richard J. "Barriers to Effective Student Assessments." *The Education Digest* 64, no. 6 (1999, Feb): 25-29.

achievement.”⁸⁸² Case in point, just ten years ago, only 15 states with teacher certification standards required competence in assessment;⁸⁸³ approximately a dozen states currently have an assessment competency component as a condition to be licensed to teach.⁸⁸⁴

Assessments and measurements, evolving from the oral examination, to the paper and pencil format to the digital age of automated evaluations, have been a part of America’s education landscape for well over a century. Over the many years and various educational reform efforts, research has found that student assessment is a critical component to teaching effectiveness and teaching effectiveness is critical to increasing student learning.⁸⁸⁵ Adding this knowledge to the increasing emphasis on accountability and importance placed on academic achievement assessments in federal and state education policy, for instance, No Child Left Behind legislation, the ramifications of an educator’s inability to accurately analyze, interpret, understand or even correctly apply the results of a student academic achievement examination include a substantial breach of duty to provide competent instruction to primary and secondary education students.

Legal & Proximate Causation

Peter W. alleged that he was functionally illiterate because of his teacher’s negligent instruction methods; an oversimplification, perhaps, but the core of his argument. Teachers repeatedly promoted Peter W. from one grade to the next and the school system subsequently gave him a high school diploma despite the fact that Peter W.

⁸⁸² Stiggins, Richard J. "The Principal's Leadership Role in Assessment." *NASSP Bulletin* 85, no. 621 (2001, Jan): 13-26, 20.

⁸⁸³ Stiggins, Richard J. "Evaluating Classroom Assessment Training in Teacher Education Programs." *Educational Measurement: Issues and Practice* 18, no. 1 (1999, Spr): 23-27; O'Sullivan, Rita G., and Marla K. Chalnack. "Measurement-Related Course Work Requirements for Teacher Certification and Recertification." *Educational Measurement: Issues and Practice* 10, no. 1 (1991, Spr): 17-19, 23.

⁸⁸⁴ Stiggins, Richard J. "Assessment Crisis: The Absence of Assessment for Learning." *Phi Delta Kappan* 83, no. 10 (2002, Jun): 758-65.

⁸⁸⁵ Black, Paul, Christine Harrison, Clare Lee, Bethan Marshall, and Dylan Wiliam. "Working inside the Black Box: Assessment for Learning in the Classroom." *Phi Delta Kappan* 86, no. 1 (2004, Sep): 9-21.

could not demonstrate proficiency in basic academic skills. Peter W. argued that the conduct of his teachers, or lack thereof, was the cause of his functional illiteracy because they failed to properly assess his educational progress and achievements. The court that heard Peter W.'s case, as well as the courts that heard subsequent educational malpractice cases, focused on the student's ability or failure to learn. The courts dismissed the possibility of a causal connection because of the host of factors which impact the learning process and contribute to a student's ability to learn; failing to even look at what was happening in the formal teaching process. The host of factors "may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified."⁸⁸⁶

When Peter W. first presented his case, research that would have educated the court on student-teacher interactions, i.e., the 1966 Coleman Report, concluded that the impact of teacher characteristics on student academic performance was insignificant. Since Peter W., research addressing teacher impact on academic achievement has developed from a different frame of reference. While early research focused primarily on a student's ability to learn, later research takes a closer look at an educator's ability to teach. The researcher suggests that the advances in research on an educator's impact on student performance coupled with the changes in public policy on quality teaching as an accountability measure will prompt the court to focus on an educator's failure to teach and recognize the substantial impact educator performance has on student academic achievement.

⁸⁸⁶ Peter W. v. San Francisco Unified School District, 60 Cal. App. 3d 814, 824, 131 Cal. Rptr. 854, 861 (1976).

In identifying the direct cause of Peter W.'s allegation of an inadequate education, common law principles "do not require proof that the [educator's failure to teach] was the sole or even dominant factor in bringing about the [inadequate education] to the [student]. Rather, it need only be shown that [the educator's failure to teach] was a substantial factor in causing the [inadequate education]." ⁸⁸⁷ In addition, if the conduct of the educator was a significant factor in causing Peter W.'s inadequate education, the fact that other causes have also contributed to the same result will not remove liability from the educator. ⁸⁸⁸

Klein suggests a two step method of proof by which Peter W. and similarly situated students could prove causation which would account for the host of factors concern. ⁸⁸⁹ The first step is to determine which components of the learning process educators can control. The learning process in today's education system is measured by how well a student performs on an academic achievement test if the tool used is appropriate to the outcome being measured. ⁸⁹⁰ The researcher has identified an educator's qualifications in compliance with federal and state education legislation, instruction practices, and assessment literacy as components of the learning process educators have direct control over.

Federal and state education policy holds educators responsible for the academic achievement of students in public primary and secondary education. The standards developed by the National Board for Professional Teaching Standards and supported by

⁸⁸⁷ Elson, *supra* note 858, at 747.

⁸⁸⁸ Blackburn, Joan. "Educational Malpractice: When Can Johnny Sue?" *Fordham Urban Law Journal* 7 (1978): 117, 131-132.

⁸⁸⁹ Klein, *supra* note 874, at 46-47.

⁸⁹⁰ Walvoord, Barbara E., and Virginia Johnson Anderson. *Effective Grading: A Tool for Learning and Assessment*. San Francisco, CA: Jossey-Bass Publishers, 1998, Chapters 1, 5, and 11.

every state in the country is evidence of consensus in the practice of teaching that standards exist that codify what teachers should know and be able to do. The No Child Left Behind Act and subsequent state education policies enacted to comply with NCLB have unquestionably identified the qualifications of the classroom educator as vital to the academic achievement of American students. So much so, that the presence of a highly qualified teacher in the classroom is acknowledged as a major component of a student's ability to achieve proficiency on state-sanctioned standardized achievement tests.

Federal and state education policies as well as public perception of the important function teacher qualities and practices have on student academic achievement is further supported by longitudinal and cross-sectional research.⁸⁹¹ Students whose teachers have advanced degrees, majored in related subjects, and have at least three years of experience grow academically more than students whose teachers do not possess these attributes.⁸⁹² Research also suggests that teaching practices also have significant effects on student academic achievement. Students whose teachers implement inquiry-oriented, problem-based, and hands-on learning strategies gain higher achievement scores on tests than students whose teachers use more teacher-oriented, lecture-based teaching practices.⁸⁹³

⁸⁹¹ Wenglinsky, Harold. "The Link between Teacher Classroom Practices and Student Academic Performance." *Education Policy Analysis Archives* 10, no. 12 (2002, Feb); Wright, S. Paul, Sandra P. Horn, and William L. Sanders. "Teacher and Classroom Context Effects on Student Achievement: Implications for Teacher Evaluation." *Journal of Personnel Evaluation in Education* 11, no. 1 (1997, April): 57-67; Sanders, William L., and June C. Rivers. *Cumulative and Residual Effects of Teachers on Future Student Academic Achievement*. Knoxville: University of Tennessee Value-Added Research and Assessment Center, 1996.

⁸⁹² Wenglinsky, *supra* note 895; McCaffrey, Daniel F.; Hamilton, Laura S.; Stecher, Brian M.; Klein, Stephen P.; Bugliari, Delia; Robyn, Abby. "Interactions among Instructional Practices, Curriculum, and Student Achievement: The Case of Standards-Based High School Mathematics." *Journal for Research in Mathematics Education* 32, no. 5 (2001, Nov): 493-517; Darling-Hammond, Linda. "Teacher Quality and Student Achievement: A Review of State Policy Evidence." *Education Policy Analysis Archives* 8, no. 1 (2000).

⁸⁹³ Bay, *supra* note 827; Goldsmith, *supra* note 825; Von Secker, *supra* note 825.

An inadequate education is evinced by a student lacking basic academic skills. Academic skills are measured by achievement examinations. Achievement examinations are administered, interpreted, applied and sometimes developed by educators. Research shows that many educators are ill-equipped to appropriately assess student academic achievement. A student alleging functionally illiteracy can safely assert that the educator was a substantial factor in the student's educational attainment because the educator was incapable of properly evaluating the student's competency in basic academic skills.

The second step by which students could prove causation would involve assessing the performance of the educator by showing a relationship between the components determined in the first step with the student's expectations of instructional success and predetermined factors in learning which cannot be controlled by the educator.⁸⁹⁴ Every student has good reason to expect that the classes they are required to attend under compulsory education laws is taught by an educator who (1) is qualified as specified by federal and state education policy;⁸⁹⁵ (2) utilizes instruction methods that are grounded in scientific research shown to promote student academic achievement;⁸⁹⁶ and (3) comprehends student assessment and measurement techniques in order to properly evaluate the student's performance and measure student competency.⁸⁹⁷ In addition, if a student is required to achieve proficiency on a state-sanctioned standardized test, the student's expectation of instructional success is predominately based on the educator's

⁸⁹⁴ Klein, *supra* note 874, at 46-47.

⁸⁹⁵ U.S. Department of Education. 2002. No Teacher Left Behind: Strategies for Improving Teacher Quality. In, <http://www.ed.gov/admins/tchrqual/learn/tqstr/edlite-slide002.html>. (accessed 2007).

⁸⁹⁶ U.S. Department of Education. 2006. No Child Left Behind - Proven Methods: Scientifically Based Research. In, U.S. Dept of Education, <http://www.ed.gov/nclb/methods/whatworks/research/index.html>. (accessed 2008).

⁸⁹⁷ Gullickson, Arlen R. "The Need for Student Evaluation Standards: A Paradigm Shift for the Evaluation of Students." *Prospects: Quarterly Review of Comparative Education* 35, no. 2 (2005, June): 213-27.

ability to teach the student material that is in alignment with the high stakes test that determines the student's academic future. If these factors are not in place, the researcher asserts that nothing short of the student suffering severe learning disabilities – which involves issues of placement educational malpractice – can discount the educator's conduct as being a substantial cause of the student's functional illiteracy. Furthermore, if the educator does not meet the student's expectations of instructional success, the student can present the educator's inadequacies as circumstantial evidence of direct causation of functional illiteracy because the educator failed to meet “the requirements of a statutory or regulatory provision designed to prevent the type of educational injury that has occurred.”⁸⁹⁸

National Board Certified Teachers, members of the National Board for Professional Teaching Standards and researchers that conclude there is a positive correlation between educator performance and student academic achievement can offer expert testimony by attesting to the causal connection between educator performance and student academic achievement. The standards developed and adopted by the NBPTS, the certification process successfully completed by the NBCTs and the empirical studies conducted by the researchers lend credibility to the testimony regarding the usual results of certain types of teaching methods and whether the teacher's conduct was a substantial factor in causing the alleged functional illiteracy.

The second part of the causation question asks whether the educator's conduct was the proximate cause of the student's alleged inadequate education. Proximate cause limits an educator's accountability to situations where educational injuries are a

⁸⁹⁸ Elson, *supra* note 858, at 749.

foreseeable risk of an educator failing to maintain a duty of care towards a student.⁸⁹⁹

After establishing direct causation, the student must demonstrate that the educator's failure to teach produced the foreseeable result of functional illiteracy, i.e., proximate causation. This task is not difficult as the evidence previously presented clearly illustrates.

Damages and Remedy

Peter W. also claimed that as a result of his teachers' incompetent instruction and his resultant functional illiteracy, he was unqualified for any employment opportunities other than menial labor that would require little or no ability to read or write,⁹⁰⁰ thus, his earning capacity was substantially limited by his lack of basic academic skills. Peter W. asked the court to order the school system to compensate him for the cost of tutoring he received in order to improve his basic academic skills.

The court in Peter W.'s case and the cases that came after consistently held monetary damages as inappropriate relief for a successful presentation of a claim of instructional educational malpractice. In every negligence cause of action, if the plaintiff can prove the requisite elements, the court will compensate the plaintiff in a manner that places the injured party in the position the plaintiff would have been in had the injury not occurred. Allegations of instructional educational malpractice require the court to grant a remedy to the student that will put the student in a position of academic proficiency had the student not received incompetent instruction. In the instance of Peter W., the court's rationale was that monetary damages involved the calculation of lost wages, expected

⁸⁹⁹ Collingsworth, Terrence P. "Applying Negligence Doctrine to the Teaching Profession." *Journal of Law & Education* 11 (1982): 479, 501.

⁹⁰⁰ Peter W. v. San Francisco Unified School District, 60 Cal. App. 3d 814, 819, 131 Cal Rptr 854, 857 (1976).

employment opportunities and other speculations surrounding the value of primary and secondary education; none of which would have put Peter W. in a position of academic proficiency. The court's rationale would still hold if Peter W.'s case were presented today. As such, the researcher is in agreement with the court in denying sole monetary damages as relief for functional illiteracy and posits subsidized remedial education as an appropriate remedy to compensate for missing basic academic skills. Research shows that remedial education is a more appropriate remedy than monetary damages for two reasons: one, remedial education is in alignment with the theory of public education; and, two, remedial education was designed to improve students' basic academic skills.

The underlying principle of public education is to create a productive and literate citizenry,⁹⁰¹ not economic wealth or the guarantee of a specific employment opportunity. Federal education policy espousing the importance of student academic achievement, the development of standards in the practice of teaching, and empirical research expounding the impact of educators on student learning all support the objective of public education – ensuring that students, at a minimum, are proficient in basic academic skills; thus, the aim of remedial education is to make certain students are, at a minimum, functionally literate.

Remedial education is a more appropriate remedy than monetary damages alone because research suggests that engaging in remedial education serves as an academic equalizer and has a positive impact on academic achievement. Dating back to the early 1800s, remedial education coursework was designed to compensate for deficiencies in

⁹⁰¹ Tracy, supra note 874, at 580-581.

basic academic skills.⁹⁰² Over the centuries, remedial education has expanded with the development of higher education. In an effort to assist students in pursuing college degrees and achieving basic academic proficiency skills that should have been acquired in secondary education, colleges and universities have offered remedial education coursework at an increasing cost to the institution, taxpayers, and students.

Education is not cheap. Remedial education is even more expensive because someone is essentially paying for the same instruction twice. As such, monetary damages are a viable and necessary component to the remedial education remedy.

Public policy supports limited monetary damages in connection with remedial education as a viable and necessary component to a successful claim of instructional education malpractice. Evidence of this includes various State proposals attempting to require public school systems to pay for the remedial education courses their high school graduates had to take in public colleges and universities. A more immediate and effective example of public support for limited monetary damages is the school choice and supplemental education services provisions of NCLB.

NCLB provides parents the option to remove their children from schools that fail to achieve Adequate Yearly Progress on a repeated basis. The legislation also requires the school district to pay for supplemental education services in an effort to meet academic achievement requirements. If the school choice provision works to mitigate the damage to students still within the primary and secondary education system, the researcher proposes that an argument can be made for courts to order a similar option to former

⁹⁰² Markus, Theodore, and Arthur Zeitlin. "Remediation in American Higher Education: A "New" Phenomenon?" *Community Review* 13, no. 1-2 (1992-93, Fall-Spr): 13-23; Wyatt, Monica. "The Past, Present, and Future Need for College Reading Courses in the United States." *Journal of Reading* 36, no. 1 (1992, Sept): 10-20.

students that have successfully presented a case of instructional educational malpractice and wish to engage in remedial education at the postsecondary level.

Students and parents who rely on educators to appropriately instruct and assess a students' learning abilities do not feel they should pay for remedial courses if the early instruction was negligent. Moreover, legislators and taxpayers contend that allocating funds to higher education institutions to correct the ills of secondary education is a double expenditure of public tax dollars. In response, colleges and universities concerned with the significant consumption of financial and human resources by students lacking basic academic skills have changed the course work requirements for degree completion. As a result, students in need of remedial education but also wishing pursue a college degree not only have to shell out money for already costly tuition fees but must come up with additional funds to cover the cost of remedial education classes that tend to be outside the coursework requirements needed for degree completion. If such a student successfully pleaded a case of instructional educational malpractice, a monetary award involving reimbursement of the cost of remedial instruction already received (or covering the bill for the remedial education classes needed) would be an appropriate remedy to make the student whole.

Supplementary Analysis: Excessive Litigation & Fraudulent Claims

Excessive Litigation & Fraudulent Claims

While not an element of the negligence framework, the fear of excessive litigation and fraudulent claims also played a role in why the courts have chosen not to recognize a cause of action for instructional educational malpractice. The researcher presents changes in education reform efforts to address the court's fears.

Reauthorization of the Elementary and Secondary Education Act in 2002 serves as evidence that national education policy is in a position to officially recognize instructional educational malpractice in public primary and secondary education. No Child Left Behind legislation has established an atmosphere of accountability that should ease the court's conscious in recognizing a cause of action because the fundamentals of the policy illustrate the public's dissatisfaction with the state of affairs of student academic achievement and the role of educators in student academic success. The highly qualified teacher provision serves as ample warning to the judicial system that the American public has identified standards of care in the practice of teaching. By effectively dictating who can teach in the classroom, NCLB has notified state education agencies that teacher quality is a top national concern and will not longer be overlooked.

No Child Left Behind also speaks to the concern that the quality of education might decrease because school funding would be diverted to litigation. School choice provisions give parents the ability to funnel funding from schools that fail to achieve Adequate Yearly Progress to supplemental educational services in an effort to meet academic achievement requirements. In addition, States are already attempting to siphon funds from school districts to pay for students taking remedial education courses in state institutions of higher education. While the attempts have been unsuccessful so far, it is probably only a matter of time.

The fear of needing excessive funds to compensate successful claims of instructional educational malpractice can also be mitigated by limiting the remedy students are able to receive. Subsidized remedial education will be an adequate remedy in the majority of cases that are fortunate enough to be presented successfully. The other

side of this issue is that the amount of money needed to present the case as well as the limited remedy available will effectively weed out the students whose cases have no merit.

The possibility that competent prospective teachers will avoid entering the practice is a reality but not more so than competent prospective doctors or lawyers entering their respective professions. At issue is adequate compensation. Until teachers are paid a competitive salary which reflects society's expectations and professional expertise, fewer talented individuals are likely to seek out the teaching profession and incur the related risk of malpractice litigation.

Along the same lines is the contention that educators will produce minimal effort and teach very basic skills in an effort to avoid liability of negligent instruction. NCLB legislation prevents the stagnation of the learning process and the quality of education by requiring increasing standards and goals of academic achievement with each passing year.

Supplementary Analysis: Improper Forum

Improper Forum

Improper forum also played a role in why the courts have chosen not to recognize a cause of action for instructional educational malpractice. The court's position was highlighted in Donohue when it declared that:

Courts are an inappropriate forum to test the efficacy of educational programs and pedagogical methods... to entertain a cause of action for 'educational malpractice' would require the courts not merely to make judgments as to the validity of broad educational policies... but, more importantly, to sit in review of the day-to-day implementation of these policies.⁹⁰³

⁹⁰³ Donohue v. Copiague Union Free School District, 407 N.Y.S.2d. 874, 879 (1978).

In Chapter IV, scholars interpreted the court's concerns that the judicial system was an improper forum and identified the appropriateness of court intervention in affairs surrounding education and the availability of an administrative forum already present in the education system as encompassing the substance of the matter in question. In addition to the analysis presented by the legal scholars, the researcher presents recent developments in federal education policy and the field of education in response to the court's position. The researcher concludes that the recent developments make the courts the only viable forum.

Appropriateness of Court Intervention

The courts believed that acknowledging alleged misconduct in the education system would not only require the courts to put itself in the position of supervising the public school system but that on top of the court's lack of expertise in the area of education, judicial involvement would amount to infringing on academic freedom. Federal and state education policy as well as educational research has since materialized that can alleviate the court's concerns. Furthermore, precedent already exists that demonstrate the courts intervention in educational issues without the feared ramifications. Jerry expressed it succinctly in his research on the problems of theory and policy in educational malpractice.

In desegregation cases, courts make judgments about the quality of education in racially unbalanced schools. See e.g., Milliken v. Bradley, 418 U.S. 717, 737 (1974); Brown v. Board of Education, 347 U.S. 483, 495 (1954). Questions of public school financing directly impact upon the quality of education, e.g., San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973). First Amendment issues have forced courts to decide what may or may not be taught in the schools, e.g., Epperson v. Arkansas, 393 U.S. 97 (1968). In considering the statutory rights of handicapped children, courts have evaluated the quality and effect of the efforts of educators, e.g., In re Peter H., 323 N.Y.2d 302 (Family Court

1971). The question of compulsory language programs for non-English speaking students also requires courts to appraise the quality of education, e.g., Lau v. Nichols, 414 U.S. 563 (1974).⁹⁰⁴

The court's fear of day-to-day involvement in school affairs also had to do with the judiciary's discomfort of being accused of questioning the judgment of state education school officials. With NCLB legislation, however, the federal government has overtly intruded on the state's jurisdiction over education and effectively put state education agencies on notice that the manner in which primary and secondary education was being conducted was unsatisfactory. School choice and Adequate Yearly Progress provisions have created accountability measures that state education agencies have avoided putting in place. Although schools have some leeway in determining specific state certification requirements and identifying mastery of subject area content – as long as both are grounded in scientifically based research – NCLB has technically confiscated state control by legislating the credentials and qualifications of educators seeking to engage in the practice of teaching in America's primary and secondary education classrooms.

Lack of expertise in the area of educational issues is another component of the court's rationale not to intervene. However, the concept of malpractice is not new to the judicial system. In fact, an expansive selection of legal rulings involving other areas of malpractice, i.e., medicine and psychiatry, already exist where the court lacks expertise.

In Donohue, the court held that it was not within court's duty to determine if "one teaching method was more appropriate than another, or whether certain tests should have been administered or test results interpreted in one way rather than another, and so on, ad

⁹⁰⁴ Jerry, supra note 876, at 203.

infinitem.”⁹⁰⁵ The researcher has outlined standards of care for the practice of teaching that did not exist when the judiciary was reviewing allegations of educational malpractice. In addition, the courts have already made clear that under the professional standard of care, defendants are liable only for the harm caused by erroneous judgments where they have not followed customary procedures necessary for them to render their best judgments.⁹⁰⁶ In light of the accountability measures being implemented in educational institutions, determining whether or not an educator followed the customary procedures and met the qualifications required to engage in the instruction of students should not be a task requiring extensive speculation by the court or beyond the scope of expert testimony.

Legal scholars have identified the propriety of court involvement in educational policy making as the prime underlying reason for judicial reluctance to recognize a cause of action for educational malpractice. In examining the NCLB Act, other than the discontinuation of federal funds to schools failing to meet Adequate Yearly Progress, the researcher has found no other recourse available to students in primary and secondary education. There is no clear understanding of what happens to schools, school systems or state education agencies if every teacher has not met the highly qualified specifications in the designated time. If a student is able to present the necessary evidence to successfully present a claim of instructional educational malpractice, including the school district or state education agency’s failure to adhere to the statute(s) designed to prevent the injury being alleged, it would undermine the principles of fairness, equality, and individualized justice which are basic to the common law.

⁹⁰⁵ Donohue v. Copiague Union Free School District, 407 N.Y.S.2d. 874, 879 (1978).

⁹⁰⁶ Elson, supra note 858, at 733.

Availability of an Administrative Forum

As an alternative to the traditional judicial system, legal scholars have discussed three administrative forums as potential avenues of relief to handle allegations of instructional educational malpractice: (1) the local school board, (2) the state office of education, and (3) the creation of an administrative court system.

Scholars have discussed the local school board as a viable alternative to reviewing allegations of educational malpractice because the administrators managing the local school system tend to be elected officials presumptively responsive to the will of the community. Ideally, school-community interactions function in such a manner. As observed by Elson, the ideology of school-community relations that has traditionally been shared by the country's middle and upper socioeconomic classes leads courts to believe allegations of instructional educational malpractice can be resolved by the local school board. Unfortunately, as is evident in the District of Columbia, many communities, particularly urban school districts, are having a difficult time getting the school bureaucracy to respond to educational problems in a timely manner, if at all. Furthermore, not all local school boards have taxpayers knowledgeable enough to maneuver the policies and procedures of the school bureaucracy in order to seek change.

The state education agency has been discussed as a viable alternative to the judicial system because as inferred by the 10th Amendment to the Constitution of the United States, it is the state's responsibility to see to the education of its citizens. However, legislative authority does not equate to infallibility of judgment and administration. Educational reform efforts since the courts first addressed educational malpractice allegations have put the courts on notice that the American public is not

opposed to questioning the judgment of state education agency administrators. In response, federal education policy has finally incorporated accountability measures restricting the judgment of state education agencies. If the accountability measures are ineffective, the judicial system is the next logical step.

Legal scholars hypothesize that a system of administrative courts to handle educational complaints is a more feasible option to recognize educational malpractice than the traditional judicial system. But is there something to be said about the threat of being sanctioned by a court of law? The difficulty inherent in putting together a valid claim of instructional educational malpractice will limit the number of complaints presented to the court; however, it only takes one successful complaint to put school systems across the country on notice that the public is paying closer attention to the instruction of the leaders of tomorrow.

CONCLUSION

This study began with an examination of the case Peter W. v. San Francisco Unified School District. In Peter W., the court held that in order to state a claim in instructional educational malpractice upon which relief would be granted, a series of conditions had to be met: first, there had to be consensus – be it public or professional – on the standards of the practice of teaching in order for the court to effectively evaluate the performance of the educator being accused of negligent conduct; and second, public policy had to exist that warranted judicial recognition of an educator’s duty to instruct students with care. The researcher concludes that the standards of the NBPTS and the 2002 reauthorization of the Elementary and Secondary Education Act of 1965 have met the court’s conditions.

Standards for the practice of teaching developed by the NBPTS have been widely accepted by classroom teachers, experts in teacher education as well as other disciplines, policymakers, and about every national organization involved with education policy.⁹⁰⁷ The standards and certification process were developed in order to ensure that the education system was staffed with competent professionals who were capable of increasing student academic achievement levels and prepare the next generation to live in a very complex, ever-changing society and world. The research findings that informed the standards developed by the NBPTS also influenced the federal government's rationale when it decided to regulate the responsibility of the primary and secondary classroom teacher.

Federal education policy has nationally declared that the primary and secondary school educator has a duty to adequately prepare its students to achieve academic proficiency upon high school graduation with the most recent reauthorization of the Elementary and Secondary Education Act of 1965, No Child Left Behind. NCLB has been by far the most authoritarian federal education policy to determine the identity and responsibility of the classroom teacher.

After establishing the educator's duty of care to teach students with competence, the next condition to be met involved determining whether the teacher breached that duty to the extent that the student suffered actual injury and demonstrating the existence of the student's injury. If the teachers' instructional practices are not in compliance with NCLB or not in alignment with the NBPTS, the court can infer a breach of duty. For example,

⁹⁰⁷ Humphrey, Daniel C., Julia E. Koppich, and Heather J. Hough. "Sharing the Wealth: National Board Certified Teachers and the Students Who Need Them Most." *Education Policy Analysis Archives* 13, no. 18 (2005); National Board for Professional Teaching Standards. 2004. State Policies and/or Appropriations Providing National Board Certification Incentives and Supports. In, http://www.nbpts.org/about/images/stateicen_sup.table.pdf. (accessed 2007).

the Highly Qualified teacher provision of NCLB mandates that all of the nation's teachers demonstrate Highly Qualified Teacher status in order to ensure that all of the nation's students reach academic proficiency on high stakes examinations. Functional illiteracy is a foreseeable result of the teacher's breach of duty towards the student if the teacher is not highly qualified as dictated by public policy.

The condition of causation is a difficult provision to meet when taking into consideration the economic, social, environmental, cultural and other factors that influence a student's learning process. In addition to questioning the legal duty of educators towards students, prior education malpractice litigation focused heavily on the condition of causation; even doubting whether the condition could be met. When looking at the causation question, prior litigation also examined the issue from the perspective of a student's inability to learn; however, research concluding the significant impact of an educator's qualifications, instruction practices, and pedagogical knowledge on student academic performance lends credence to the researcher's position that courts should also look at the educator's failure to teach when examining the direct and proximate causation of functional illiteracy. An example of an educator's failure to teach is best illustrated in the development and assessment of high stakes tests.

High stakes testing has become the measurement – the judgment – of student academic achievement. When considering the importance these exams and resulting scores have on the lives of primary and secondary education students, it is wholeheartedly inexcusable for a teacher to not be adept at developing, applying, interpreting and understanding academic assessments. The researcher concludes that it is not a stretch to suggest that a high school graduate's inability to read at grade level is closely

connected to an educator's inability to evaluate that student's academic abilities. Rather than looking at the factors outside the classroom that influence student learning and deciding that there is little the school or teacher can do to affect student academic achievement, this study focused on the educator's qualifications, instruction practices, and pedagogical knowledge, i.e., assessment literacy, as components of the learning process educators have direct control over; variables confirmed by research studies as having a significant impact on student achievement.

Finally, if a student is successful in presenting a claim of instructional education malpractice whereby (a) the court has acknowledged the teacher's legal duty to instruct the student with care, (b) the student can provide proof of his academic incapacity despite passing grades, possibly a high school diploma, and (c) the teacher is unqualified to be in the classroom when measured against federal and state education policy, the student is entitled to be made whole. Considering the purpose of education, subsidized remedial education has been identified as an appropriate method of compensating for deficiency in basic academic skills, thus an appropriate remedy for a student alleging functional illiteracy.

LIMITATIONS

No study is without its limitations and this study has its fair share. The field of education has been in a state of reform for decades. These reform efforts began before Peter W. first appeared before the judiciary and they continue to this day. In the confines of this study, it was virtually impossible to take into account all of the changes in the field of education.

In adherence to the legal research methodology, the researcher decided which changes in education to include in the study – and subsequently, which changes to exclude – by mapping out the substantive issues that troubled the court in the various educational malpractice cases. Understanding the conditions set out by the court as to why it refused to acknowledge a valid claim of educational malpractice, the next step was to identify which educational changes substantively connected to the conditions set by the court as well as the theoretical framework of the study. Once these educational changes were identified, the final step was to examine how the educational research developed and defined these changes since the time the court first addressed the issue of educational malpractice.

It is important to note the manner in which the researcher identified the educational literature in Chapter V because the search process and subsequent inclusion of literature in that chapter is also a limitation to the study. Four electronic databases were cross-reference searched for the years 1965 through present. The databases searched were the Education Research Complete EBSCO,⁹⁰⁸ ERIC,⁹⁰⁹ PsycINFO,⁹¹⁰ and Social

⁹⁰⁸ Education Research Complete is the definitive online resource for education research. This massive file offers the world's largest and most complete collection of full text education journals. It is a bibliographic and full text database covering scholarly research and information relating to all areas of education. Topics covered include all levels of education from early childhood to higher education, and all educational specialties, such as multilingual education, health education, and testing. The database also covers areas of curriculum instruction as well as administration, policy, funding, and related social issues. Available Online: http://researchport.umd.edu/V/DEJ2DQC8EB263ACD1Y237LKUCP7TJJ6QGTYIM5V18524R3GC3Q-33021?func=meta-1-info&doc_num=000006771

⁹⁰⁹ Provides access to information from over 1000 education and education-related journals as well as a variety of non journal materials, or ERIC documents. It also provides the full text of more than 2,200 ERIC Digests (short reports on topics of current interest in education.) Available Online: http://researchport.umd.edu/V/DEJ2DQC8EB263ACD1Y237LKUCP7TJJ6QGTYIM5V18524R3GC3Q-33024?func=meta-1-info&doc_num=000002303

⁹¹⁰ PsycINFO is the most comprehensive index in psychology and related fields, with more than 1.7 million citations and abstracts of journal articles, book chapters and books, technical reports, and dissertations. Its holdings include material from 1,700 periodicals in over 30 languages. Available Online: http://researchport.umd.edu/V/DEJ2DQC8EB263ACD1Y237LKUCP7TJJ6QGTYIM5V18524R3GC3Q-33033?func=meta-1-info&doc_num=000002344

Sciences Citation Index.⁹¹¹ The terms searched included variations and combinations of the following words: teacher, student, achievement, assessment, measurement, characteristics, license, certification, performance, quality, standards and remediation; i.e., teaching characteristics, teacher certification, and student assessment.

The researcher's objective in identifying literature for inclusion was to produce an explicit analysis for the courts and policymakers to see the development of research surrounding the relationship between teacher qualities and student academic achievement. The researcher did not dismiss the validity of the included studies or the credentials of the journals, but, some books and materials used were not peer reviewed. At the same time, peer review journals and other publication outlets are most interested in studies that present large, if not statistically significant, effects. As such, the collection of articles included in this study and identified with the search process noted above is not a true representation of all the research that has been conducted.

Another limitation to this study is the fact that National Board Certification is a voluntary certification for experienced teachers. New teachers are not qualified to sit for National Board Certification. The researcher introduced the National Board for Professional Teaching Standards as evidence that guidelines exist that outlines what it is a qualified teacher should know and be able to do in and for the classroom. National Board Certification is not required in any state; however, the court's condition of standards of care was not that standards be mandatory but that there be standards in existence to measure an educator's duty; standards that are recognized by a professional

⁹¹¹ Indexes over 17,000 journals by subject keyword, author name, journal title & author affiliation. Search author abstracts when available. Provides cited reference searching. Available Online: http://researchport.umd.edu/V/DEJ2DQC8EB263ACD1Y237LKUCP7TJJ6QGTYIM5V18524R3GC3Q-33036?func=meta-1-info&doc_num=000002722

consensus or public policy. Professional consensus surrounding National Board Certification and the NBPTS is evidenced by incentives and other supports totaling in the millions that have been disbursed by schools, local school districts, federal and state government as well as private corporations in an effort to get teachers to achieve national board certification.

Inclusion of NBPTS is identified as a limitation but so is the exclusion of long-established accrediting agencies, such as the Teacher Education Accreditation Council [hereinafter, TEAC] and the National Council for Accreditation of Teacher Education [hereinafter, NCATE]. The exclusion of the various accrediting agencies is a result of the researcher differentiating between the practices of teaching, i.e., what teachers do in the classroom, and the teacher education program, i.e., what teacher education candidates are learning.

There exists a host of regional and state accrediting agencies whose purpose is not only to ensure the quality of teacher education programs but to act as a gatekeeper for federal financial aid.⁹¹² In order for colleges and universities to continue receiving federal financial aid, they must receive a passing grade from the accrediting agency assigned to the institution. While the accrediting agencies have standards established for teacher education programs, the research question involved the practices of the classroom teacher, not the curriculum or a student in a teacher education program; thus, the legal relationship is not between the K-12 student and the College of Education that conferred a degree on the student's ineffective teacher. As such, agencies such as NCATE and TEAC were not included when investigating standards of the teaching practice because

⁹¹² Association of American Colleges and Universities, and Council for Higher Education Accreditation. 2008. *New Leadership for Student Learning and Accountability*. In, Author, http://www.aacu.org/resources/assessment/documents/New_Leadership_Statement.pdf. (accessed 2008);

neither the accreditation status nor the quality of the teacher education program was a determinative factor in establishing the legal relationship between K-12 student and teacher.

While investigating the quality of the teacher education program is not vital to establishing the legal relationship between the K-12 student and teacher, what teacher candidates are learning and who they are subsequently teaching is important when looking at education in a broader context. Once a legal relationship is recognized, the courts acknowledge a teacher's "failure to teach," and students have the ability to file a claim for instructional educational malpractice, it is important to reflect on the implications for and role of higher education as a result of this study. Working from the premise that the goal(s) of the current study have been met, the next chapter, the final chapter, looks at the task before colleges and universities; specifically, the college admissions process for under-prepared students and the preparation of K-12 teachers, in providing a solid educational experience.

CHAPTER VII

IMPLICATIONS FOR HIGHER EDUCATION

In this study, the researcher investigated how and analyzed why the judicial system would go about recognizing a legal relationship between the public school educator and public school students. Considering the legal nature of the research question(s), theoretical framework and requisite analysis, the legal perspective was the appropriate choice. However, the researcher acknowledges that there are other factors that contribute to a richer understanding of the teacher-student relationship and its impact on student academic achievement that the current study's legal theoretical framework is not suited to examine.

Considering the knowledge-based society in which we currently exist, it could be argued that a college education is rapidly replacing the compulsory high school diploma. The field of education is cognizant of this reality as evidenced by K-16 partnerships, i.e., primary, secondary and postsecondary education institutions working together in hopes of establishing a seamless educational experience to meet America's need for an increasingly sophisticated workforce. Working from the premise that a legal relationship has been established and an opportunity now exists for K-12 public school students to present a case of instructional educational malpractice before the court, what is higher education's role holding up its end of the partnership and ensuring the existence of an educated society? Looking at equity and access and teacher education programs, the goal of this chapter is to touch upon what are the implications for colleges and universities in their attempts to serve under-prepared students and preparing teacher education candidates.

At the onset of this study, the researcher looked at one aspect of the concept of instructional educational malpractice as the continued failure of the public school system to close the achievement gap or bring low-income and minority students to basic minimum competency upon high school completion. After examining and analyzing the legal literature surrounding the phenomenon, the researcher came to two very important understandings. First, the researcher discovered that the instructional educational malpractice argument was not contingent on the class or race of the student alleging receipt of an inadequate education; and second, that the issue being investigated was not a problem involving a student's "failure to learn," but an issue revolving around an educator's "failure to teach." The change from addressing low-income and minority students to all students in public primary and secondary educational institutions as well as the change in focus from a student's "failure to learn" to an educator's "failure to teach" were not arbitrary adjustments but a result of adhering to the theoretical framework of the study as well as the legal research methodology and a thorough examination of court opinions and legal scholarship.

When undertaking the task of stating a claim of instructional educational malpractice upon which relief could be granted, the initial research that directed the formation of the study focused on what every other major study of education reform focused on, the academic achievement of students in the public primary and secondary education system. The researcher used national data from sources such as the National Assessment of Educational Progress (NAEP) to make a point about the inadequate education of students across the country. National studies on the academic achievement of students in American public educational institutions, however, do not just discuss the

education of students overall but center on differences in student achievement by class and race.

The educational inequity issues alleged by low-income public primary and secondary education students has already been acknowledged by the courts in discriminatory school finance practice litigation - a claim upon which relief has already been granted. Allegations of discriminatory school finance practices involve state education agencies not providing equitable resources, i.e., an “adequate education”, to primary and secondary schools in low-income school districts in order to offer similar or equitable courses found in the schools of more affluent school districts of the same state.

The legal theory of negligence does not provide the level of scrutiny necessary to examine the issue of race. Race and nationality are protected classes under Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the 14th Amendment.⁹¹³ The legal theory required to examine the discrimination of protected classes is strict scrutiny. The strict scrutiny test determines “if there has been a denial of equal protection.”⁹¹⁴ Under the Supreme Court’s equal protection jurisprudence, “the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”⁹¹⁵ The legal theory of negligence does not provide the requisite level of scrutiny because it addresses the rule of law that governs activities in human society by identifying a specific person’s rights

⁹¹³ See Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. (“Title VII”); See U.S. Const. amend. XIV

⁹¹⁴ Measure which is found to affect adversely a fundamental right will be subject to “strict scrutiny” test which requires state to establish that it has compelling interest justifying the law and that distinctions created by law are necessary to further some governmental purpose. Black, Henry Campbell. *Black's Law Dictionary*. 6th ed: West Publishing Co, 1990, pg. 1422.

⁹¹⁵ City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985).

and duties towards another from a “reasonable man” standard or a professional standard.

916

While the legal theory of negligence allows the factors of race and class to be removed from the equation to establish a prima facie case of instructional educational malpractice, I am less constrained by the legal analysis when examining race and socio-economic status in connection with the field of education, particularly higher education. Given that a disproportionate number of minority and low-income students are educated in high risk educational environments, the question the researcher is now presented with is, how does a student who successfully filed a claim of instructional educational malpractice pursue a college education in light of the state of affirmative action in higher education? The question is especially pertinent considering the direct impact early educational experiences have on under-prepared students’ access to college and eventual degree completion. Furthermore, if the argument regarding the teacher-student relationship turns on an educator’s “failure to teach,” then what are Colleges of Education and teacher education preparation programs doing or should be doing in order to produce graduates who are identified as “highly qualified” under No Child Left Behind legislation so as be effective in the classroom and not easily susceptible to malpractice litigation?

Affirmative Action in Higher Education: College Admissions

Affirmative action has been used as a tool to address the persistent American problem of inequality due to sex, race/color, age and social class by providing greater opportunities to the economically and educationally disadvantaged.⁹¹⁷ In looking at

⁹¹⁶ Carter, Lief H. *Reason in Law*. 2nd ed: Little, Brown and Company, 1984; Channels, Noreen L. *Social Science Methods in the Legal Process*: Rowman & Allanheld, 1985.

⁹¹⁷ See Kennedy, John F. 1961. Executive Order 10925 - Establishing the President's Committee on Equal Employment Opportunity. In, <http://www.eeoc.gov/abouteeoc/35th/thelaw/eo-10925.html>. (accessed 2008).

educational opportunities, particularly as it relates to minorities entering higher education, affirmative action has been used as a race-conscious academic admissions practice devised with the intention of redressing past racial imbalances and injustices.⁹¹⁸ Such injustices are not specific to college admissions but to the educational process overall that has created an educational advantage to members of the majority over the members of the minority.

Higher education has faced numerous challenges in its effort to serve under-prepared and under-represented high school graduates through use of affirmative action in the college admissions selection process.⁹¹⁹ Affirmative action policies first gained notoriety in the Ivory Tower when the University of California at Davis began adjusting their admission policies to assure a certain percentage of minorities in its medical school.⁹²⁰ Litigation ensued and the United State Supreme Court, in a very controversial opinion, appeared to give colleges and universities permission to take race into account in their admissions process as long as they were not overly blatant about it.⁹²¹ The justices were split with a swing vote in favor of UC-Davis. While the judicial opinion did not have the strength of a true majority vote, colleges and universities also had the strength of academic freedom and used that freedom to maneuver their admission policies as necessary to reach the same goal and stay within the letter and spirit of the law. As such, higher education began to openly take race and ethnicity into account as one of many factors in the selection process and commenced various programs to admit low-income and minority students – many of whom were under-prepared and would not meet race-

⁹¹⁸ Regents of University of California v. Bakke, 98 S. Ct. 2733 (1978).

⁹¹⁹ Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003); Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996); Regents of University of California v. Bakke, 438 U.S. 265 (1978).

⁹²⁰ Regents of University of California v. Bakke, 438 U.S. 265 (1978).

⁹²¹ Id.

neutral college entry requirements. I refer to UC-Davis, otherwise known as the Bakke decision, not only because of its role in defining affirmative action in college admissions processes but also because of the timing of Bakke soon after Peter W.,⁹²² the impetus of this current study.

If you remember, Peter W. was a public school student his entire academic career and was awarded a high school diploma despite the fact that he lacked basic academic competencies. For high school graduates in Peter W.'s predicament, traditional college entry opportunities were very slim. Add on a racial or ethnic minority classification or low socioeconomic standing and a college education was pretty close to non-existent. Although not attributed to situations related to instructional educational malpractice, Bakke made it a little more feasible for under-prepared high school graduates to pursue higher education by making it permissible for colleges and universities to devise more inventive means of admitting and educating under-prepared and under-represented high school graduates who were historically left on the sidelines due to race, ethnicity, or socioeconomic status.

Over the past 20 years, education policy decisions impacting higher education have worked against equality and equity doing a disservice to under-prepared, low-income and minority high school graduates. Public higher education admissions policies suffered blows across the United States with initiatives such as California's 1996 Proposition 209, Washington's 1998 Initiative 200, Florida's 1999 One Florida Initiative

⁹²² Peter W. v. San Francisco Unified School District, 60 Cal. App. 3d 814, 819, 131 Cal Rptr 854, 857 (1976).

and Michigan's Proposal 2 as recently as 2006.⁹²³ Tuition and fees have skyrocketed and financial aid has transitioned from need-based to merit-based awards. Add to that, declining state financial support for public higher education and colleges and universities are left to focus on the financial side of selecting a freshman class thus raising college applicant qualifications. When all is said and done, low-income and minority high school graduates successfully claiming instructional educational malpractice not only have the heightened financial burden of paying for higher education without the benefit of need-based financial aid but lack the academic transcripts to qualify for merit-based financial aid.

The high percentage of under-prepared high school graduates fall disproportionately on low-income and minority groups.⁹²⁴ With the growing trend toward strict, race-neutral admissions policies, the postsecondary educational opportunities of low-income and minority high school graduates successfully claiming instructional educational malpractice will largely consist of access to less selective colleges and universities as evidenced in the state of Texas and California.⁹²⁵ For example, two years after the Hopwood⁹²⁶ decision prohibited affirmative action in college admissions, between 1995 and 1997, the minority enrollment fell from 20.3% to 16% at the

⁹²³ See Prop 209 (<http://vote96.sos.ca.gov/BP/209text.htm>); Initiative 200 (<http://www.secstate.wa.gov/elections/initiatives/text/i200.pdf>); One Florida Initiative (<http://www.fldoe.org/oneflorida/>); Michigan's Proposal 2 (<http://www.michigancivilrights.org/>).

⁹²⁴ National Center for Educational Statistics. "The Condition of Education 2004 in Brief." Washington, DC: U.S. Dept of Education Institute of Education Sciences, 2004, June.

⁹²⁵ Long, Mark C. "Race and College Admissions: An Alternative to Affirmative Action?" *Review of Economics and Statistics* 86, no. 4 (2004, Nov): 1020-33; Bucks, Brian. 2003. The Effects of Texas' Top Ten Percent Plan on College Choice. In, Author, <http://www.utdallas.edu/research/tsp/pdfpapers/paper34.pdf>. (accessed 2008).

⁹²⁶ Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

University of Texas-Austin.⁹²⁷ California witnessed a similar drop in college applications from minority high school graduates, 1270 to 1159, the first year after the Board of Regents voted to end affirmative action in the state higher education system.⁹²⁸ It can be argued that attending a less selective institution is better than having no access to higher education at all but research shows that low-income and minority students that are concentrated in lower-quality, less prestigious colleges and universities – institutions that tend to confer less distinct advantages in the labor market – also demonstrate lower levels of attaining a college degree.⁹²⁹ I am not suggesting that all low-income and minority students are under-prepared high school graduates or capable of successfully presenting claims of instructional educational malpractice, but the ability of colleges and universities to admit and educate this population of students is becoming more difficult with the attack on affirmative action, particularly the latest decisions from the United States Supreme Court in 2003.

While not the intention of the Court, when the justices ruled against the undergraduate admissions policy at the University of Michigan⁹³⁰ and supported the “narrowly tailored” use of race by the University of Michigan law school,⁹³¹ it is the researcher’s contention that not only did the justices neglect to fully clarify the role of affirmative action in higher education admissions,⁹³² but they inadvertently provided ample justification for educators and policymakers to take a closer look at the K-12

⁹²⁷ Long, Mark C. "Affirmative Action and Its Alternatives in Public Universities: What Do We Know?" *Public Administration Review* 67, no. 1 (2007): 311-25.

⁹²⁸ See, <http://osr.berkeley.edu/public/staffweb/tc/trends/ethf01tblaver.html>

⁹²⁹ Thomas, Scott L., & Perna, Laura W. "The Opportunity Agenda: A Reexamination of Postsecondary Reward and Opportunity." In *Higher Education: Handbook of Theory and Research*, edited by John C. Smart, 43-84. Dordrecht, The Netherlands: Kluwer Academic Publishers, 2004.

⁹³⁰ Gratz v. Bollinger, 539 U.S. 244 (2003).

⁹³¹ Grutter v. Bollinger, 539 U.S. 306 (2003).

⁹³² Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003).

teacher-student relationship and the need for greater educator accountability in the academic achievement of primary and secondary public school students. Society is calling on higher education to tighten the reigns on the college admissions selection process and focus on race-neutral college entry requirements; however, low-income and minority students are disproportionately subjected to unqualified teachers and high school curriculums that are lacking the rigor of an affluent school districts' college preparatory curriculum.⁹³³ Furthermore, if the low-income or minority student persists through high school graduation, chances are (1) the student is under-prepared, (2) while the student may be "qualified" for a seat in the college freshman class, he may not be "as qualified" as the student whose educational opportunities were in alignment with traditional college requirements; (3) the college or university the student is admitted to is a lower-tier institution; with implications that could potentially result in under-prepared, low-income and minority college graduates.

During the 2003 attack on affirmative in higher education admissions, a little over 3 million students graduated from high school; of that, about 900,000 were minority students, many of whom with hopes of attaining a college degree.⁹³⁴ While I am cannot say with certainty what percentage of these students were low-income or could present a valid claim of instructional educational malpractice, statistics reveal that urban school

⁹³³ Darling-Hammond, Linda, and Barnett Berry. "Highly Qualified Teachers for All." *Educational Leadership* 64, no. 3 (2006, Nov): 14-20; Darling-Hammond, Linda, and Gary Sykes. "A Teacher Supply Policy for Education: How to Meet the 'Highly Qualified Teacher' Challenge." In *Who's in Charge Here? The Tangled Web of School Governance and Policy*, edited by Noel Epstein, 164-227. Washington, DC: Brookings Institution Press, 2004.

⁹³⁴ National Center for Educational Statistics Digest of Education Statistics. 2007. Table 194: Estimated Rate of 2003-2004 High School Graduates Attending Degree-Granting Institutions. In, http://nces.ed.gov/programs/digest/d07/tables/dt07_194.asp. (accessed 2008).

districts, high-poverty school districts⁹³⁵ and minority-populated school systems are greatly affected by the referendum against affirmative action and the call for race-neutral admissions policies due to the persistent achievement gap by race and class, low standardized test scores and a high percentage of out-of-field or unqualified teachers in primary and secondary public education classrooms.

Preparing the Public School Teacher and not Educating: The language in the field is teacher preparation.

The educator's "failure to teach" was identified as a substantial cause of the high school graduate's inadequate education. Research over the years found that classroom teachers lacked sufficient competence in appropriately assessing student academic achievement.⁹³⁶ Other studies showed that the teacher's subject area knowledge, advanced degree and teaching credentials positively impacted student academic achievement.⁹³⁷ Moreover, statistics revealed that unqualified or out-of-field teachers are disproportionately assigned to schools and classrooms consisting of low-income and minority students.⁹³⁸ Cognizant of the reality that family, peer groups, psychological variables and other factors come into play when examining student learning, what happens in the classroom – what the teacher has direct control over – is the component of student learning and achievement that was central to the study. Working from the premise

⁹³⁵ Schools were considered high poverty if 75 percent or more of their students were eligible for free or reduced-price lunch, and low poverty if less than 15 percent of their students were eligible.

⁹³⁶ Gullickson, Arlen R. "The Need for Student Evaluation Standards: A Paradigm Shift for the Evaluation of Students." *Prospects: Quarterly Review of Comparative Education* 35, no. 2 (2005, June): 213-27; Mertler, Craig A. "Teacher-Centered Fallacies of Classroom Assessment Validity and Reliability." *Mid-Western Educational Researcher* 13, no. 4 (2000): 29-35.

⁹³⁷ Darling-Hammond, Linda. "Teacher Quality and Student Achievement: A Review of State Policy Evidence." *Education Policy Analysis Archives* 8, no. 1 (2000); Laczko-Kerr, *supra* note 822.

⁹³⁸ Murnane, Richard J., and Jennifer L. Steele. "What Is the Problem? The Challenge of Providing Effective Teachers for All Children." *The Future of Children* 17, no. 1 (2007, Spr): 15-43; Darling-Hammond, Linda, and Gary Sykes. "A Teacher Supply Policy for Education: How to Meet the 'Highly Qualified Teacher' Challenge." In *Who's in Charge Here? The Tangled Web of School Governance and Policy*, edited by Noel Epstein, 164-227. Washington, DC: Brookings Institution Press, 2004.

that the causal link of an educator's "failure to teach" is accepted by the courts and claims of instructional educational malpractice are allowed to move forward, what is higher education's role in producing teacher candidates who are highly qualified and can bring low-income and minority students to high levels of academic success?

For the last decade or so, the field of education has modified the school curriculum, introduced a variety of standardized tests and revamped education policy initiatives, including raising high school graduation requirements, all in the hopes of raising student academic achievement levels.⁹³⁹ The main reason the reform efforts failed is because the teachers' central to implementing the innovations lacked the knowledge necessary to make the changes work, much less stick. In other words, why attempt to re-create the wheel, i.e., school curriculum and standardized tests, when the axle supporting the wheel, i.e., the classroom teacher, is not strong enough to support it?

In Chapter 5, the National Board of Professional Teaching Standards and National Board Certification was evaluated as a means of establishing the existence of a national consensus of standards for the practice of teaching. The researcher's decision to focus on NBPTS, however, was not meant to imply that NBPTS was the only educational organization in existence concerned with teaching standards. The National Council for Accreditation of Teacher Education (NCATE), Teacher Education Accreditation Council (TEAC) and a host of regional and state accreditation organizations also engage in the business of assessing and measuring teacher education. NBPTS was highlighted in Chapter 5 above the other long-established educational organizations such as NCATE because, first, with the study's central issue being investigated changing from "failure to

⁹³⁹ Houston, Paul D. "Changes in the Educational Landscape." In *Best Practices, Best Thinking, and Emerging Issues in School Leadership*, edited by William A. Owings and Leslie S. Kaplan, 255-59. Thousand Oaks, CA: Corwin Press, Inc, 2003.

learn” to “failure to teach,” NBPTS’s standards focusing on ‘What Teachers Should Know and Be Able to Do’ was better suited to address an educator’s “failure to teach” considering the standards were developed by subject area associations, teachers noted for excellence in the classroom, state and higher education officials as well as business leaders.⁹⁴⁰ Second, the other educational organizations had thus far been accrediting the institutions that were producing the ineffective teachers – some before Peter W. was in elementary school.⁹⁴¹ It is not a stretch to say they were doing a questionable job at ensuring the quality of teacher education programs.⁹⁴² Finally, where accrediting agencies such as NCATE evaluated the education of the teacher prior to their service in the classroom, the NBPTS certification process is based on the experience acquired while in the classroom and the knowledge developed since attending the teacher education program⁹⁴³ whose accreditation, as mention earlier, may be suspect.

It is important to note that while the use of NBPTS was noted as a limitation to the study because National Board Certification is voluntary, NCATE accreditation and teacher education accreditation, in general, is also voluntary. One reason teacher education programs choose to submit to the accreditation process such as NCATE is because while the goal of accreditation is to ensure that teacher education programs meet

940 National Board for Professional Teaching Standards. 2007. National Board for Professional Teaching Standards. In, http://www.nbpts.org/about_us/mission_and_history/mission. (accessed 2007).

941 See, Neal, Anne D. 2008, Sep-Oct. Seeking Higher-Ed Accountability: Ending Federal Accreditation. In, *Change: The Magazine of Higher Learning*, <http://www.changemag.org/September-October%202008/full-seeking-higher-ed.html>. (accessed 2008); American Council of Trustees and Alumni. 2007, July. Why Accreditation Doesn't Work and What Policymakers Can Do About It. In, Author, <https://www.goacta.org/publications/downloads/Accreditation2007Final.pdf>. (accessed 2008); Ewell, Peter. "The 'Quality Game': External Review and Institutional Reaction over Three Decades in the United States." In *Quality Assurance in Higher Education: Trends in Regulation, Translation and Transformation*, edited by Don F. Westerheijden, Bjorn Stensaker and Maria Joao Rosa, 119-54. The Netherlands: Springer, 2007.

942 Id.

943 National Board for Professional Teaching Standards. 2007. National Board for Professional Teaching Standards. In, http://www.nbpts.org/about_us/mission_and_history/mission. (accessed 2007).

acceptable levels of quality,⁹⁴⁴ to be without the accreditation stamp of approval, is to lose out on potential state and federal government program monies.

Teaching as a Profession: Professional Development Schools & Practical Experience

What do you get when accredited teacher education programs produce ineffective K-12 educators? How should society respond to under-prepared teacher education graduates in school systems that produce under-prepared high school graduates? Colleges of Education are responsible for educating student teachers and preparing them for not only the realities of the classroom but knowing how to measure what it is they do in the classroom. Strengthening the practical applications of the teacher education program is one way of fulfilling that responsibility.

For many years, the concept of professional development for teachers consisted of “in-service training” or “staff development” taking place in one-shot workshops that presented new information on particular aspects of the teacher’s job;⁹⁴⁵ however, education reform efforts of the past decade or so have come to see the evolution of Professional Development Schools. Professional Development Schools involve a close cooperation between colleges of education and primary and secondary educational institutions including the use of master K-12 teachers as mentors for student teachers.⁹⁴⁶

Done correctly, if not logically, Professional Development Schools provide practical

⁹⁴⁴ See, U.S. Department of Education. 2008. Financial Aid for Postsecondary Students: Accreditation in the United States. In, Author, <http://www.ed.gov/admins/finaid/accred/accreditation.html#Overview>. (accessed 2008).

⁹⁴⁵ Walling, Brenda, and Mark Lewis. "Development of Professional Identity among Professional Development School Pre-Service Teachers: "Longitudinal and Comparative Analysis"." *Action in Teacher Education* 22, no. 2A (2000, Sum): 63-72; Cochran-Smith, Marilyn, and Susan L. Lytle. "Beyond Certainty: Taking an Inquiry Stance on Practice." In *Teachers Caught in the Action: Professional Development That Matters*, edited by Ann Lieberman and Lynne Miller. New York: Teachers College Press, 2001.

⁹⁴⁶ Darling-Hammond, Linda. *Professional Development Schools: Schools for Developing a Profession*. 2nd ed. New York: Teachers College Press, 2005.

training – similar to teaching hospitals in medicine – for student teachers as well as practicing educators through extended, hands-on, clinical experiences.⁹⁴⁷ Research surrounding the effectiveness of Professional Development Schools, however, has neglected to examine the student teacher’s ability to actually teach or increase student academic achievement as a result of the participating in a Professional Development School. Studies show student teachers who participate in PDS are more likely to remain in the teaching profession,⁹⁴⁸ exhibit higher confidence levels in themselves as teachers,⁹⁴⁹ and believe that as a result of the PDS they are better prepared to disseminate knowledge and engage their students;⁹⁵⁰ but, in terms of the impact of field experiences on student teacher’s ability to teach, the research is inconclusive.⁹⁵¹

Despite the inconclusive research findings regarding the impact of Professional Development Schools and practical field experience on accurately assessing teacher quality and a teacher’s ability to increase student academic achievement, I still recommend that teacher education programs integrate a medical-school type residency

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Id.

⁹⁴⁸ Reynolds, Anne, Steven M. Ross, and Jeanine H. Rakow. "Teacher Retention, Teaching Effectiveness, and Professional Preparation: A Comparison of Professional Development School and Non-Professional Development School Graduates." *Teaching and Teacher Education* 18 (2002, Apr): 290-303.

⁹⁴⁹ Connor, Kathy R., and Nadine Killmer. "Cohorts, Collaboration, and Community: Does Contextual Teacher Education Really Work?" *Action in Teacher Education* 23, no. 3 (2001, Fall): 46-53; Sandholtz, Judith Haymore, and Kathleen Wasserman. "Student and Cooperating Teachers: Contrasting Experiences in Teacher Preparation." *Action in Teacher Education* 23, no. 3 (2001, Fall): 54-65.

⁹⁵⁰ Rock, Tracy C., and Barbara B. Levin. "Collaborative Action Research Projects: Enhancing Preservice Teacher Development in Professional Development Schools." *Teacher Education Quarterly* 29, no. 1 (2002, Winter): 7-21; Connor, Kathy R., and Nadine Killmer. "Cohorts, Collaboration, and Community: Does Contextual Teacher Education Really Work?" *Action in Teacher Education* 23, no. 3 (2001, Fall): 46-53.

⁹⁵¹ Cobb, Jeanne. "The Impact of a Professional Development School on Preservice Teacher Preparation, Inservice Teachers' Professionalism, and Children's Achievement: Perceptions of Inservice Teachers." *Action in Teacher Education* 22, no. 3 (2000): 64-76; Wilson, Janelle D. "An Evaluation of the Field Experiences of the Innovative Model for the Preparation of Elementary Teachers for Science, Mathematics and Technology." *Journal of Teacher Education* 47, no. 1 (1996, Jan/Feb): 53-59; Metcalf, Kim K., M. A. Ronen Hammer, and Pamela A. Kahlich. "Alternatives to Field-Based Experiences: The Comparative Effects of on-Campus Laboratories." *Teaching and Teacher Education* 12, no. 3 (1996, May): 271-83.

program for teacher education candidates because I would be hard-pressed to find empirical evidence disputing the importance of practical experience in learning to teach. In other countries, many of whom the United States considers its peer or competitor, completion of a teacher education program includes a rigorous internship or practicum in the student's content area.⁹⁵² For example, in Germany, teacher education candidates must complete a two-year internship and prepare 25 lessons that is supervised, observed and graded by members of both the program faculty and school.⁹⁵³ In France, undergraduates interested in becoming teachers must apply for a highly competitive two-year graduate degree program for teacher education.⁹⁵⁴ A component of France's teacher education programs, as well as many other European and Asian countries, is similar to a U.S. medical residency program in that in the last year of the teacher education program, the candidate participates in a supervised teaching position.

Teaching as a Profession: Subject Area Knowledge

Another way the study demonstrated educators 'failed to teach' involved their lack of subject area knowledge. Colleges of Education, teacher education programs and accrediting organizations must do a better job of ensuring that student teachers entering the classroom can demonstrate subject area competency. To be fair, it has yet to be determined how many college credits in a particular discipline at the undergraduate or graduate level are needed in order for a teacher to be identified as "highly qualified" or able to demonstrate a high level of competency in a given subject area. The importance of

⁹⁵² Organization for Economic Co-operation and Development [OECD]. "Attracting, Developing and Retaining Effective Teachers - Final Report: Teachers Matter." 240. Paris: Author, 2005; National Commission on Teaching and America's Future. 1996. *What Matters Most: Teaching for America's Future*. In, Author, <http://www.nctaf.org/documents/WhatMattersMost.pdf>. (accessed 2007).

⁹⁵³ Waldrop, Teresa. "Before You Lead a German Class, You Really Must Know Your Stuff." *Newsweek*, December 1991, 62-63.

⁹⁵⁴ OECD, *supra* note 956.

subject area knowledge and the number college credits taken should not be taken lightly because research shows that in states where K-12 educators were teaching subject areas in which they lacked even a degree minor, the average NAEP score was adversely impacted.⁹⁵⁵ Likewise, there was a positive link between NAEP scores and the percentage of K-12 educators who had state certification and a degree in the subject area they taught.⁹⁵⁶

No Child Left Behind requires K-12 teachers to demonstrate subject area knowledge as a means of measuring teacher competency. The task for teacher education programs and Colleges of Education is to find a way to measure student teacher subject area knowledge without assuming content has been mastered because objective degree requirements have been met. The researcher recommends that in order to obtain an undergraduate degree in teacher education, the teacher candidate successfully complete an oral, comprehensive subject-matter examination. The evaluation must also measure the teacher candidate's mastery of state content standards for the education level(s) the candidate is seeking certification. At the graduate level, the teacher candidate should complete an extensive portfolio along the lines of the portfolio experienced teachers present for National Board Certification.

Teaching as a Profession: Knowing Your Students

The National Council for Accreditation of Teacher Education (NCATE) definition of diversity includes differences based on race, ethnicity and socioeconomic

955 Darling-Hammond, Linda. "Teacher Quality and Student Achievement: A Review of State Policy Evidence." *Education Policy Analysis Archives* 8, no. 1 (2000).

956 Id.

status among groups of people and individuals.⁹⁵⁷ Teacher education programs seeking NCATE accreditation must adhere to this definition. At a time when primary and secondary education public school classrooms are becoming more racially and socioeconomically diverse, the diversity of the educator at the head of the class is sorely lacking and steadily maintaining the status quo -- White, female, and middle class;⁹⁵⁸ which raises the question, how are Colleges of Education, including teacher education programs outside the higher education system, preparing teacher education candidates to understand teaching in ways different from what they have learned from their own experience as students? Studies have found that through their own prior educational experiences, teacher education candidates have experiential knowledge of teaching and thus their conceptual ideas about diversity are shallow and limited.⁹⁵⁹

I recommend that colleges of education and teacher education programs adhere to the NBPTS's Five Core Propositions and incorporate, as feasible, NBPTS's National Board Certification process into undergraduate and graduate teacher education programs in an effort to strengthen teacher education candidate's abilities to instruct low-income and minority students in elementary and secondary public education. The first core proposition of NBPTS, "Teachers are Committed to Students and Learning," is

⁹⁵⁷ National Council for Accreditation of Teacher Education. 2002. Professional Standards for the Accreditation of Teacher Preparation Institutions. In, <http://www.ncate.org/documents/standards/NCATE%20Standards%202008.pdf>. (accessed 2007).

⁹⁵⁸ Trent, Stanley C, and Alfredo J. Artiles. "Today's Multicultural, Bilingual, and Diverse Schools." In *Exceptional Lives: Special Education in Today's Schools*, edited by Rud Turnbull, Ann Turnbull, Marilyn Shank and Sean J. Smith, 56-79. Upper Saddle River, NJ: Pearson Princeton Hall, 2007; Banks, James A., and Cherry A. McGee-Banks, eds. *Multicultural Education: Issues and Perspectives*. 6th ed. Hoboken, NJ: Wiley / Jossey-Bass education, 2007; Children's Defense Fund. *The State of America's Children 2004*. Washington, DC: Author, 2004.

⁹⁵⁹ Ward, Michael J., and Carol J. Ward. "Promoting Cross-Cultural Competence in Preservice Teachers through Second Language Use." *Education* 123, no. 3 (2003): 532-36; Taylor, Sheryl V., and Donna M. Sobel. "Addressing the Discontinuity of Students' and Teachers' Diversity: A Preliminary Study of Preservice Teachers' Beliefs and Perceived Skill." *Teaching and Teacher Education* 17, no. 4 (2001): 487-503..

particularly important in that teachers must “respect the cultural and family differences students bring to their classroom.”⁹⁶⁰

One of the biggest challenges of the United States public education system is how to increase the student academic achievement of students in high-poverty and high-minority school districts that have even higher teacher turnover rates. The National Center for Educational Statistics indicated that 23% of all public school students are enrolled in the 100 largest public school districts.⁹⁶¹ Of the 23%, nearly 70% of those students were members of a racial or ethnic minority and approximately 55% would be classified as low-income in that they were eligible for free and reduced-price lunches.⁹⁶² Considering the fact that racial, ethnic and socioeconomic demographics are reshaping the face of America and the public education system at an ever growing rate with no signs of slowing down,⁹⁶³ it is of the highest importance that teacher education programs take significant measures in preparing teacher candidates with dispositions, knowledge, and skills to successfully instruct the increasingly diverse K-12 student population.

When a teacher stands before a class of students, the information being disseminated to the students is not only the teacher’s subject area knowledge but the teacher’s personal values and beliefs.⁹⁶⁴ “If teachers and students are to engage in an

⁹⁶⁰ National Board for Professional Teaching Standards. 2007. Five Core Propositions. In, http://www.nbpts.org/the_standards/the_five_core_propositio. (accessed 2007).

⁹⁶¹ Garofano, Anthony, and Jennifer Sable. 2008. Characteristics of the 100 Largest Public Elementary and Secondary School Districts in the United States: 2004-05 (NCES 2008-335). In, National Center for Education Statistics, Institute of Education Science, U.S. Dept of Education, <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2008335>. (accessed 2008).

⁹⁶² Id.

⁹⁶³ See, Davis, Jessica W., and Kurt J. Bauman. 2008, Aug. School Enrollment in the United States: 2006 Population Characteristics. In, U.S. Census Bureau, <http://www.census.gov/prod/2008pubs/p20-559.pdf>. (accessed 2008).

⁹⁶⁴ Allen, James D., and Olivia F Porter. "Teaching About Diversity Issues." *Kappa Delta Pi Record* 38, no. 3 (2002, Spr): 128-33; Clandinin, Jean D., and Michael F. Connelly. "Teachers'personal Knowledge: What Counts as Personal in Studies of the Personal." *Journal of Curriculum Studies* 19, no. 6 (1987, Nov-Dec): 487-500.

effective teaching-learning exchange, then preservice teachers must learn about these differences and reflect on their personal behaviors, beliefs, and values and how they influence their interactions with others.”⁹⁶⁵ Along the same lines, college faculty instructing the teacher educator candidates’ should incorporate similar teaching-learning methodologies in their interactions with their own diverse student populations as a means of ensuring that personal observation and reflection is occurring.⁹⁶⁶ “Teachers [and educators, in general] need to become conscious of their own cultural values and beliefs, of how these affect their attitudes and expectations toward students from different ethnic groups, and how they are habitually exhibited in school behaviors.”⁹⁶⁷ In addition, teacher education programs must ensure that student teachers develop an understanding of the diverse cultural patterns and the historical and future impact of diverse populations on the development of the United States.

RECOMMENDATIONS

Persons who engage in the practice of teaching, particularly at the primary and secondary education level, deserve the recognition and deference we bestow upon our doctors, lawyers, scholars, entertainers and professional athletes. For too many years, the identity of the educator has been neglected. No profession or industry in existence would flourish or continue to exist if it were not for the school teacher. This study was not an attempt to further weaken the tenuous credibility of the K-12 teacher but was conducted as a preventative measure in hopes of strengthening the profession.

⁹⁶⁵ Allen, *supra* note 970.

⁹⁶⁶ Wasonga, Teresa A., and Joyce A. Pival. "Diversity and the Modeling of Multicultural Principles of Education in a Teacher Education Program." *Multicultural Perspectives* 6, no. 3 (2004): 42-47.

⁹⁶⁷ Gay, Geneva. "Educational Equality for Students of Color." In *Multicultural Education: Issues and Perspectives*, edited by James A. Banks and Cherry A. McGee-Banks, 211-41. Hoboken, NJ: John Wiley & Sons, Inc, 2005.

The evidence in the study suggests that instructional educational malpractice is occurring. This study should raise awareness to the teaching profession and educational policymakers that the climate is ripe for judicial intervention. As parents become better advocates for their children, the profession should take action to mitigate external regulations. For starters, student assessments at the class, school, school district and state level need to be better aligned with the curriculum. At the same time, more attention needs to be paid to the design and implementation of student assessments and making sure the examinations are actually measuring what is taught in the classrooms and not what some state agency administrator believes students are learning.

Teacher recruitment and retention, particularly in low-income school districts is another area of concern. With the highly qualified teacher provision in NCLB, there is an imminent threat of losing more teachers in school districts that are already under staffed; a bittersweet result considering teachers are desperately needed in these districts yet the teachers negatively impacted by NCLB may be the instructor's promoting students academically unprepared to advance course levels.

Financially, teacher salaries need to reflect the level of professional performance we expect from our educators. Teacher salary was not addressed in the current study but an important area of research that needs to be conducted is the rate of functional illiteracy in low-income school districts looking at teacher salary in comparison to salary and functional illiteracy in more affluent school districts. Such a study may serve as an alternative method of examining educational malpractice focusing on the variables of race and socioeconomic status.

In addition, “pay for performance” structures for K-12 teachers are being considered or established in school systems across the country.⁹⁶⁸ Washington, DC, Schools Chancellor, Michelle Rhee, for example, was in negotiations with the Washington Teacher’s Union proposing a system whereby teachers could receive thousands of dollars in bonuses and raises in exchange for increased student academic achievement and voluntarily relinquishing the rights to seniority or tenure.⁹⁶⁹ Negotiations in Washington, DC, fell through, but “pay for performance” structures should continue to be considered and studied because the potential is there to place the teaching profession on similar footing with the other established professions. Such an opportunity to heighten the status of the profession may be a more pliable incentive to recruit better candidates for classroom teaching.

The federal government needs to take a more productive role in the education of K-12 students. The No Child Left Behind Act was identified in the study as a source from which the court could derive workable standards of care for educators and acknowledge a legal duty of care towards students but like earlier iterations of the Elementary and Secondary Education Act, federal education policy has been inconsistent, if not unfulfilling. The money the federal government has issued to fight the war on Iraq can be used to improve teacher education programs by providing mentors to all the new teachers

⁹⁶⁸ Dillon, Naomi. "The Merit Scale." *American School Board Journal* 195, no. 4 (2008, April): 28-30; University of Missouri-Columbia. 2007, Sept 6. Performance-Based Pay for Teachers? In, ScienceDaily, <http://www.sciencedaily.com/releases/2007/09/070904072843.htm>. (accessed Sept 28, 2008); See also, Guthrie, James W., and Matthew G. Springer. 2006, April 4. Teacher Pay for Performance: Another Fad or a Sound and Lasting Policy? In, Education Week, <http://www.edweek.org/login.html?source=http%3A%2F%2Fwww.edweek.org%2Ffew%2Farticles%2F2006%2F04%2F05%2F30guthrie.h25.html%3Fquerystring%3DTeacher%2BPay%2Bfor%2BPerformance&destination=http%3A%2F%2Fwww.edweek.org%2Ffew%2Farticles%2F2006%2F04%2F05%2F30guthrie.h25.html%3Fquerystring%3DTeacher%2BPay%2Bfor%2BPerformance&levelId=2100&baddebt=false>. (accessed 2008).

⁹⁶⁹ See, Haynes, V. Dion. "Rhee Seeks Tenure-Pay Swap for Teacher: Giving up Seniority Would Boost Salary If Benchmarks Met." *The Washington Post*, July 3, 2008.

in the public school system, provide incentives for National Board Certified teachers to serve in school districts with greater need and fund extensive teacher education practicum programs similar to how other countries train and prepare their teacher candidates.

The federal government can also do more in way of increasing lines of access to higher education. Our knowledge-based economy requires a higher education. Gone are the days where a high school education is the minimum measure of an educated society. According to the Bureau of Labor Statistics, 80% of the fastest-growing jobs in America require a college degree or post-secondary education training.⁹⁷⁰ Even jobs that require an associate's degree is expected to grow over 10% in the very near future.⁹⁷¹ Pell grants and direct lending have fallen by the wayside during this past administration. In an effort to promote a continuous educational experience, money needs to be readily available to students who are prepared to pursue a college degree but need financial assistance to make it happen.

Finally, I recommend year-round K-12 education. Early arguments against instructional educational malpractice focused on the social, environmental, financial and personal variables involved in the student's learning process. The learning lost over the months of summer vacation has been linked to students losing math and spelling skills as well as some reading skills.⁹⁷² Which students actually lose out and to what extent depends on the educational opportunities that are made available in the household. For

⁹⁷⁰ See, U.S. Dept of Labor Bureau of Labor Statistics. 2007, Dec. Table 1. The 30 Fastest Growing Occupations Covered in the 2008-2009 Occupational Outlook Handbook. In, <http://www.bls.gov/news.release/ooh.t01.htm>. (accessed 2008).

⁹⁷¹ See, Dohm, Arlene, and Lynn Shniper. "Occupational Employment Projections to 2016." *Monthly Labor Review* 130, no. 11 (2007, Nov): 86-125.

⁹⁷² Cooper, Harris, Jeffrey C. Valentine, Kelly Charlton, and April Melson. "The Effects of Modified School Calendars on Student Achievement and on School and Community Attitudes." *Review of Educational Research* 73, no. 1 (2003, Spr): 1-52; Cooper, Harris, Barbara Nye, Kelly Charlton, James Lindsay, and Scott Greathouse. "The Effects of Summer Vacation on Achievement Test Scores: A Narrative and Meta-Analytic Review." *Review of Educational Research* 66, no. 3 (1996, Fall): 227-68.

example, parents of means – financial or educational – more than likely did well in school themselves; thus, they exhibit the value of education in the household. Less affluent parents or functionally illiterate parents may have difficulty promoting the necessary educational values in their children because they may be incapable of demonstrating the skills to their children.⁹⁷³ A year-round educational program, with effective teachers and quality curriculum, can help alleviate the pressures of community and family that are alleged to hold low-income and minority students from reaching their true potential.

⁹⁷³ Chin, Tiffani, and Meredith Phillips. "Social Reproduction and Child-Rearing Practices: Social Class, Children's Agency, and the Summer Activity Gap." *Sociology of Education* 77, no. 3 (2004, July): 185-210.

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