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COMMENT

Educational Negligence: A Student's Cause of Action for Incompetent Academic Instruction

It is not uncommon today for a student enrolled in a public school to move through the system without acquiring basic skills such as the ability to read and write. In growing numbers, such students are asserting that their nonlearning was caused by incompetent academic counseling and instruction by school board employees. One result has been a number of suits alleging that the student's deficiencies are produced by "educational negligence" in the school systems.¹ The courts have addressed the question whether to recognize a claim based on educational negligence² in three major reported cases³ and several

1. Named defendants in educational negligence actions almost always include the local school board and rarely name individual teachers, counselors or psychologists. A notable exception is *Doe v. Board of Educ.*, No. 48277 (Cir. Ct. Montgomery County Md. July 6, 1979), in which an individual public official was a named defendant. In the reported cases, actions against defendant school boards have not been barred by governmental tort immunity, and it is assumed for the purposes of this note that immunity is not an issue. The national trend, however, is apparently toward a limited application of governmental immunity. See Abel & Connor, *Educational Malpractice: One Jurisdiction's Response*, in *THE COURTS AND EDUCATION* 248, 252-53 (C. Hooker ed. 1978).

2. The scope of this Comment is limited to claims of negligence in academic instruction and counseling alleged by students enrolled in grades one through twelve of the public schools. Issues arising solely in the contexts of private education and higher, noncompulsory public education are not addressed here. For cases illustrative of these issues, see *Beaman v. Des Moines Area Community College*, No. CL 15-8532 (Dist. Ct. Iowa March 23, 1977) (noncompulsory education); *Pietro v. St. Joseph's School*, 48 U.S.L.W. 2229 (N.Y. Sup. Ct., Suffolk County, Sept. 21, 1979) (dismissal of educational malpractice claim against private school by trial court). Also not addressed are several alternative theories of recovery that have been suggested. For example, in *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 827, 131 Cal. Rptr. 854, 862-63 (1976), plaintiff had received several report cards showing satisfactory progress; the court indicated that intentional misrepresentation might be the basis for an acceptable action. Several writers have suggested a contract theory based on the alleged existence of a contract between student and school or between taxpayers and the school system, with the student as a third-party beneficiary. See, e.g., Note, 43 ALB. L. REV. 339, 357 (1979); Note, 14 TULSA L.J. 383, 401 (1978); Comment, *Educational Malpractice*, 124 U. PA. L. REV. 755, 785 (1976). A third view is that a student is denied his constitutional right to due process when he is forcibly confined to the classroom without being offered adequate academic instruction. See, e.g., Comment, *Educational Malpractice: When Can Johnny Sue?*, 7 FORDHAM URB. L.J. 117, 121 (1979); Note, 43 ALB. L. REV. 339, 356-57 (1979). None of these theories has been successfully applied in the public school setting.

3. *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976); *Hoffman v. Board of Educ.*, 64 App. Div. 2d 369, 410 N.Y.S.2d 99 (1978), *rev'd*, 49 N.Y.2d 121, — N.E.2d —, — N.Y.S.2d — (1979); *Donohue v. Copiague Union Free School Dist.*, 95 Misc. 2d 1, 408 N.Y.S.2d 584 (1977), *aff'd*, 64 App. Div. 2d 29, 407 N.Y.S.2d 874 (1978), *aff'd*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).

Closely-related issues also have been litigated. See, e.g., *Pierce v. Board of Educ.*, 44 Ill. App. 3d 324, 358 N.E.2d 67 (1976), *rev'd*, 69 Ill. 2d 89, 370 N.E.2d 535 (1977) (action for "emo-

unreported decisions.⁴ The cause of action was rejected in each of these cases.⁵ This Comment explores some of the legal and policy issues posed by an action for educational negligence and suggests a limited form of recognition that should solve many of the problems caused by the application of the traditional negligence claim in the public school setting.

A summary of the major decisions in the area will provide a basic factual background for closer examination of this novel cause of action. *Peter W. v. San Francisco Unified School District*⁶ was the first reported case involving alleged educational negligence in a public school system. Peter W., an eighteen-year-old high school graduate, claimed that his school was negligent in that it failed to provide "adequate instruction, guidance, counseling and/or supervision in basic academic skills such as reading and writing."⁷ In particular, he alleged that the school failed to diagnose his reading disabilities, assigned him to classes in which he could not read the textual materials, promoted him with the knowledge that he had not acquired skills necessary to comprehend subsequent coursework and allowed him to graduate with only a fifth grade reading ability when the state's education code required an eighth grade level before graduation.⁸ Peter W. asserted that, as a result, he could secure employment only in "labor which requires little or no ability to read or write."⁹ Nevertheless, the California Court of Appeals affirmed the trial court's decision to dismiss the claim for failure to state a cause of action.¹⁰

In the second reported case, *Donohue v. Copiague Union Free School District*,¹¹ Donohue, a high school graduate, had received

tional and psychic injury" caused by school board's failure to place student in special education classes dismissed on appeal; no question of failure to learn basic skills).

4. See, e.g., *Garrett v. School Board of Broward County*, No. 77-8703 (Cir. Ct. Fla. Dec. 5, 1977); *Doe v. Board of Educ.*, No. 48277 (Cir. Ct. Montgomery County Md. July 6, 1979).

5. *Hoffman v. Board of Educ.*, 64 App. Div. 2d 369, 410 N.Y.S.2d 99 (1978), was the only decision to recognize the action and find for plaintiff. The New York Court of Appeals, however, recently reversed and dismissed the action in a 4-3 decision. 49 N.Y.2d 121, — N.E.2d —, — N.Y.S.2d — (1979).

6. 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).

7. *Id.* at 818, 131 Cal. Rptr. at 856.

8. *Id.*

9. *Id.*

10. *Id.* at 828, 131 Cal. Rptr. at 863. The court found that defendant did not owe plaintiff a duty to provide adequate academic instruction, that a workable standard of care was inconceivable, that no tort injury occurred and that proof of cause-in-fact was nearly impossible. *Id.* at 819-27, 131 Cal. Rptr. 857-62.

11. 95 Misc. 2d 1, 408 N.Y.S.2d 584 (1977), *aff'd*, 64 App. Div. 2d 29, 407 N.Y.S.2d 874 (1978), *aff'd*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).

failing grades in several subjects.¹² A New York education statute required the board of education to examine pupils not already in special classes who continuously failed or underachieved.¹³ The purpose of the examination was to determine the cause of the failure or underachievement. Regulations promulgated under the statute defined "continuous failure" as failure in two or more subjects within one school year.¹⁴ The school authorities were aware that Donohue fell within this definition yet did not attempt to diagnose his problem.¹⁵ After graduation, Donohue realized he lacked basic reading and writing skills and found it necessary to seek private tutoring.¹⁶ Relying heavily on the analysis in *Peter W.*, the court dismissed his educational negligence complaint for failure to state a cause of action.¹⁷

The third and most recently reported decision discussing educational negligence is *Hoffman v. Board of Education*.¹⁸ Hoffman was given an IQ test by a school-employed psychologist shortly after enrolling in kindergarten and scored near the top of the retarded range.¹⁹ The psychologist recommended placing plaintiff in special classes for the retarded, but he further requested that his IQ be retested within two years.²⁰ Hoffman attended classes for the retarded until he was eighteen years old but was not retested during that period. At age eighteen he was transferred to an occupational training center for the retarded, given an IQ test, and found to be of at least average intelligence.²¹ The same court that had summarily rejected a claim of educational negligence in *Donohue*²² judged Hoffman's cause on the merits and granted

12. 64 App. Div. 2d at 30-31, 407 N.Y.S.2d at 876.

13. N.Y. EDUC. LAW § 4404(4) (McKinney 1970) (repealed 1976) (current version at *id.* § 4402 (McKinney Cum. Supp. 1979)); see 64 App. Div. at 35-36, 407 N.Y.S.2d at 884 (dissenting opinion).

14. See 64 App. Div. 2d at —, 407 N.Y.S.2d at 884 (dissenting opinion).

15. *Id.*

16. *Id.* at 30-31, 407 N.Y.S.2d at 876.

17. 95 Misc. 2d 1, 408 N.Y.S.2d 584, 585 (1977), *aff'd*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979). The trial court held that defendant did not owe plaintiff a legal duty to act with due care while carrying out its functions of academic instruction. The New York Court of Appeals explicitly refused to recognize the cause of action on public policy grounds.

18. 64 App. Div. 2d 369, 410 N.Y.S.2d 99 (1978), *rev'd*, — N.Y.2d —, — N.E.2d —, — N.Y.S.2d — (1979).

19. 64 App. Div. 2d 369, 371-72, 410 N.Y.S.2d 99, 101-02 (1978).

20. *Id.*

21. *Id.* at 373-76, 410 N.Y.S.2d at 103-04.

22. The first appeals in both *Hoffman* and *Donohue* were heard by the New York Supreme Court, Appellate Division, but only Justice Damiani sat on both panels. He wrote the majority opinion in *Donohue* but was one of two dissenters in *Hoffman*.

a verdict in his favor.²³ The New York Court of Appeals, however, reversed the lower court's decision and dismissed Hoffman's claim.²⁴

An analysis of the judicial reasoning in these reported decisions reveals two difficult tasks confronting the student who seeks to establish a claim for educational negligence. First, he must frame his complaint in terms of the basic elements of negligence—duty, breach, injury and causation. Second, even if he is successful in pleading these basic elements, he must be prepared to show that various policy factors dictate recognition of this new type of action. Pleading problems will be considered first and should provide a helpful background for understanding policy concerns.

I. PLEADING A CAUSE OF ACTION IN EDUCATIONAL NEGLIGENCE

The plaintiff alleging educational negligence must, at the very least, fulfill the formal pleading requirements common to all negligence actions. He must prove that: (1) defendant owed a duty to plaintiff to act in conformity with some standard of care; (2) defendant failed to act in accordance with the appropriate standard of care; (3) a legally compensable injury was suffered by plaintiff; and (4) there was a proximate causal relation between defendant's breach and plaintiff's injury.²⁵ Each of these standard negligence elements must be examined separately in evaluating the propriety of recognizing an educational negligence claim.

A. *School System's Duty to Provide Competent Instruction*

Initially the student must prove that the school system owed him a legal duty to act with care in providing competent academic instruction. The reported decisions in educational negligence indicate that a

23. The court supported plaintiff's right to recovery against the defendant school board in the most emphatic terms:

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 result 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).

64 App. Div. 2d at 380, 410 N.Y.S.2d at 111. The appellate court found that defendant's undertaking to perform a nondiscretionary function—that is, to retest plaintiff to determine the propriety of his retarded classification—created a duty toward plaintiff that was breached by the failure to retest plaintiff within two years and for a number of years thereafter. *Id.* at 378-79, 410 N.Y.S.2d at 109. See note 30 *infra*.

24. 49 N.Y.2d 121, — N.E.2d —, — N.Y.S.2d — (1979). In a 4-3 decision, the Court of Appeals held that the judiciary should not interfere in educational policy determinations except when extreme violations of public policy occur. See notes 152-165 and accompanying text *infra*.

25. W. PROSSER, THE LAW OF TORTS 143 (4th ed. 1971).

court is likely to scrutinize rigorously the student's allegation of duty and that this element may be dispositive of the question whether to recognize the cause of action.²⁶ It is obvious that a student seeking judicial recognition of an educator's duty to use due care in carrying out the function of academic instruction must first convince the court that a legal basis exists for imposing the duty. Two possible origins are general common-law principles and the statutes that govern school systems.

That there is no direct precedent for a common-law duty²⁷ in this situation is a severe handicap, but not insurmountable. For example, the theory of an undertaking—the idea that an action voluntarily assumed creates a duty to non-negligently bring it to completion²⁸—might be successfully argued. The *Peter W.* court rejected this theory when the undertaking consisted of the broad assumption of the function of general instruction.²⁹ In *Hoffman*, however, the lower court recognized a duty created by the undertaking of specific acts directed toward the plaintiff individually.³⁰ Although the undertaking theory normally requires plaintiff's reliance on defendant's affirmative actions,³¹ the lower court's decision in *Hoffman* did not place defendant's duty squarely within any established legal theory and did not discuss reliance. In anticipation of the reliance requirement, a student might argue that he relied by foregoing alternative instruction.³² Presenting proof of such reliance may be difficult because education is compulsory and a minority of students are privately tutored.

26. The *Peter W.* and *Donahue* courts concentrated on the "duty" element and a major ground for dismissal was their conclusion that defendant owed no legal duty to plaintiff. 60 Cal. App. 3d at 820-25, 131 Cal. Rptr. at 857-61; 64 App. Div. 2d at 32-35, 407 N.Y.S.2d at 877-79. See notes 10 & 17 *supra*.

27. For citation of analogous precedent, see *Peter W. v. San Francisco Unified School District*, 60 Cal. App. 3d at 820-21, 131 Cal. Rptr. at 858. The court distinguished the precedent and found it inapplicable in each instance. *Id.*

28. See W. PROSSER, *supra* note 25, at 343-48.

29. 60 Cal. App. 3d at 820, 131 Cal. Rptr. at 858. The theory was rejected summarily due to plaintiff's failure to offer dispositive precedent.

30. Defendant's affirmative act in placing plaintiff in a CRMD [Children with Retarded Mental Development] 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
64 App. Div. at 378-79, 410 N.Y.S.2d at 109.

31. W. PROSSER, *supra* note 25, at 347.

32. A clinical psychologist testified in *Hoffman* that "one of the reasons [plaintiff's] 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." 64 App. Div. 2d at 376, 410 N.Y.S.2d at 106.

Plaintiff may also argue that the long-recognized duty of care for the physical safety of students should apply by analogy to academic instruction. In physical injury cases, educators have been held to a duty of supervision and a duty of instruction.³³ Negligent instruction leading to physical injury is clearly an actionable tort.³⁴ Further, a teacher acting in a supervisory capacity may be liable for either misfeasance or nonfeasance resulting in physical injury.³⁵ Thus, there is ample precedent that would directly apply to the situation under discussion if not for the different types of injuries involved. The complaining student might argue that there is no legally significant distinction between physical injuries and the kinds of non-physical injuries caused by inadequate academic instruction. For example, Peter W. asserted that academic injury is no less foreseeable and no less real than physical injury, and analogized the comparison of academic and physical injuries to the relationship between injuries arising in medical and psychiatric malpractice.³⁶ Medical malpractice involves physical injury, while psychiatric malpractice results in nonphysical harm, yet both are viable causes of action.³⁷

There is, however, an important argument against extending an educator's duty by this analogy. When a teacher is charged with the duty to act non-negligently in caring for the physical safety of pupils, he is held to the usual reasonable person standard of care.³⁸ If, however, the educator is to be charged with a tort duty in his academic instruction he should be held to a professional, or at least a "reasonable teacher," standard.³⁹ The origins of these two standards of care are quite different. A professional standard is imposed when an individual chooses to offer certain services to the public and holds himself out as possessing certain skills.⁴⁰ The reasonable man standard may be imposed even though the defendant has made no conscious choice to

33. Ripps, *The Tort Liability of the Classroom Teacher*, 9 AKRON L. REV. 19, 25 (1975).

34. See, e.g., *Bellman v. San Francisco High School Dist.*, 11 Cal. 2d 576, 81 P.2d 894 (1938); *La Valley v. Stanford*, 272 App. Div. 183, 70 N.Y.S.2d 460 (1947).

35. Proehl, *Tort Liability of Teachers*, in PROFESSIONAL NEGLIGENCE 185, 190 (T. Roody & W. Anderson eds. 1960). "Misfeasance" is the improper doing of an act that might be lawfully performed; "nonfeasance" is the omission of an act that one ought to perform. BLACK'S LAW DICTIONARY 902 (5th ed. 1979).

36. Abel & Connor, *supra* note 1, at 259 (citing plaintiff's appellate brief in *Peter W.*).

37. Although plaintiff apparently presented this argument in his brief, see Abel & Connor, *supra* note 1, at 259, the *Peter W.* opinion did not address the issue.

38. Ripps, *supra* note 33, at 25.

39. See note 79 and text accompanying notes 73-78 *infra*.

40. W. PROSSER, *supra* note 25, at 161-65.

affect the lives of others and does not claim even ordinary abilities.⁴¹ This basic distinction between standards of care applicable to physical supervision and academic instruction⁴² significantly weakens any attempt to analogize the two. Thus the creation of a duty of academic instruction simply by analogy to the duty of physical supervision is without a solid logical basis.

The strongest legal argument for recognition of an educator's duty to provide competent academic instruction is based on analogies to certain types of professional negligence—notably legal, medical and psychiatric malpractice.⁴³ The New York Court of Appeals decision affirming the *Donohue* dismissal lends support to this argument by acknowledging that the concept of educational malpractice is closely related to malpractice doctrines recognized in other professions.⁴⁴ Recognition of a professional duty of care for educators, however, poses two immediate problems. First, it must be established that public school educators are indeed professionals, at least for the purpose of litigating allegations of negligent academic instruction. A student seeking to substantiate a claim of educational malpractice should point out that educators classify themselves as professionals for a variety of purposes and that many state statutes expressly recognize educators as professionals.⁴⁵ Although sociologists may argue that educators are borderline professionals at best,⁴⁶ neither the courts nor the defendants

41. *Id.* at 152-53 (individual not relieved of liability because he "did not stop to think" or "did the best he knew how").

42. For a detailed discussion of the standard of care issue in this context, see notes 74-78 and accompanying text *infra*.

43. When a negligence action seeks to hold a professional liable for breach *as a professional*, the action is commonly referred to as "malpractice." Therefore, it is only in the context of the educator as a professional that a negligence action is properly called "educational malpractice."

44. 47 N.Y.2d at 441-42, 391 N.E.2d at 1353, 418 N.Y.S.2d at 377:

It may very well be that even within the strictures of a traditional negligence or malpractice action, a complaint sounding in "educational malpractice" may 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 the law precludes similar treatment of professional educators.

45. Elson, *A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching*, 73 NW. U. L. REV. 641, 724-27 (1978); Note, *Educational Malpractice: Can the Judiciary Remedy the Growing Problem of Functional Illiteracy?*, 13 SUFFOLK U. L. REV. 27, 41-42 (1979).

An example of a statutory recognition of the professional status of teachers is the following: "Teaching is hereby declared to be and is recognized as a profession. The members of such profession shall accept responsibilities in development and promotion of high standards of ethics, conduct, and professional performance and practices of persons engaged in the practice of such profession in this state." TEX. EDUC. CODE ANN. tit. 2, § 13.201 (Vernon 1972).

46. Elson, *supra* note 45, at 729-30.

have questioned the placement of educators in that category by plaintiffs alleging educational malpractice.⁴⁷

Second, assuming the court acknowledges educators as professionals, a plaintiff must show that an educator's functions are sufficiently analogous to other professional functions so that his conduct may be reasonably analyzed in terms of established malpractice principles. The primary justification for allowing a negligence action against a professional is that the professional, by his occupation, holds himself out as possessing certain skills and knowledge and, as a result, people who utilize his services have a right to expect him to use that skill and knowledge with some minimum degree of competence.⁴⁸ The special training demanded of educators and the requirement that they be certified by the state as a prerequisite to employment indicate that they do hold themselves out as having skills and knowledge not shared by non-educators. Educators are also like other professionals in that they must often make educated judgments in applying their knowledge to specific individual needs.⁴⁹ The professional educator, however, probably does not possess well-defined technical knowledge comparable to that held by legal or medical professionals.⁵⁰ Further, the "special knowledge" of educators is probably perceived by laymen as more readily comprehensible than legal or medical skills. Nevertheless, it is reasonable to conclude that educators do hold themselves out as possessing special skills and knowledge and that the general public expects them to perform accordingly.

The only remaining distinction between public school educators and other professionals that suggests a legally significant barrier to recognizing an analogous duty is that public school educators are em-

47. See, e.g., *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d at 818, 131 Cal. Rptr. at 856 (plaintiff alleged that defendant "failed to exercise that degree of professional skill required of an ordinary prudent educator under the same circumstances").

48. See W. PROSSER, *supra* note 25, at 161-65; note 67 *infra*.

49. The professional's use of judgment distinguishes him from other skilled persons whose knowledge is nearly always mechanically applied to frequently recurring situations; his services are a blend of mechanical and judgmental applications of special knowledge. See W. PROSSER, *supra* note 25, at 161-65. Given the lack of established certainties in the educational field, see note 80 and accompanying text *infra*, educators probably perform more judgmental functions than mechanical ones.

50. See note 80 *infra*. In this respect, educators are perhaps most closely analogous to psychiatrists. See D. DAWIDOFF, *THE MALPRACTICE OF PSYCHIATRISTS* 2-3 (1973) (characterizing psychiatry as "an area of medicine where innovation is widespread and the fixed pattern of treatment relatively uncertain, i.e., the treatment called for in any instance"). But see Proehl, *supra* note 35, at 215 ("[M]ethods of teaching and of maintaining classroom discipline have been so standardized and regulated that the teacher who departs from the standard is as likely to find himself censured by his principal or his board as by a truculent parent.").

ployed in a tax-supported system while other professionals typically offer their services to individuals on a private contractual basis. Although this distinction clearly gives rise to policy arguments,⁵¹ its significance in terms of legal theory is diminished to the extent tort immunity of public employees has been abrogated.⁵² Thus it would seem that the functions performed by educators could be evaluated within the existing framework of common-law principles of professional duty.

In addition to common-law theories of duty, plaintiffs have argued for the recognition of a statutory duty. There is ample precedent in tort law for the adoption of a statute by a court as a basis for finding duty in a negligence action such that violation of the statute is treated as a breach of tort duty.⁵³ Plaintiffs alleging educational negligence have argued for the recognition of statutory duties based on (1) provisions in state constitutions and on broad enabling legislation providing for the creation and maintenance of public school systems,⁵⁴ and (2) statutes or regulations requiring specific actions in defined situations involving students with identifiable learning problems.⁵⁵

In *Donohue*, for example, plaintiff alleged a statutory duty based on the state constitution's provision that "[t]he 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."⁵⁶ Plaintiff claimed to be a third-party beneficiary of this duty. In analyzing the purpose of the constitutional provision and legislation enacted thereunder, the court found that the intent was 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 experience."⁵⁷ It

51. See notes 143-146 and accompanying text *infra*.

52. The national trend is toward at least partial abrogation of immunity. Abel & Connor, *supra* note 1, at 252-53.

53. W. PROSSER, *supra* note 25, at 190-97. As a general rule, a court will find a statutory tort duty only when it determines that the underlying purpose of the statute is the protection of individuals. Usually the statute will be one that prohibits or demands specific acts in particular situations and will be held applicable if the plaintiff is a member of the class of protected persons and the injury incurred is of the type covered by the statute. *Id.*

54. *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976); *Donohue v. Copiague Union Free School Dist.*, 64 App. Div. 2d 29, 407 N.Y.S.2d 874 (1978).

55. *Doe v. Board of Educ.*, No. 48277 (Cir. Ct. Montgomery County Md. July 6, 1979); *Donohue v. Copiague Union Free School Dist.*, 64 App. Div. 2d 29, 407 N.Y.S.2d 874 (1978).

56. 64 App. Div. 2d at 32-33, 407 N.Y.S.2d at 877 (quoting N.Y. CONST. art. 11, § 1).

57. *Id.* at 35-36, 407 N.Y.S.2d at 880.

is clear that the constitutional provision asserted in *Donohue* was a general mandate to provide a broadly-defined public service to a very extensive class of persons and therefore was not of a type generally thought to create a tort duty.⁵⁸ Moreover, the historical understanding of such provisions appears almost uniformly to support the *Donohue* court's conclusion.⁵⁹ Thus, it seems unlikely that constitutional or statutory provisions calling for the establishment and maintenance of a public school system can furnish a basis for an educator's duty of academic instruction.

The second type of statutory duty that has been asserted by plaintiffs is based on statutes or regulations detailing procedures for evaluation of, and remedial aid to, students with specific learning problems. An example of such an assertion can be found in *Doe v. Board of Education*,⁶⁰ a case in which plaintiff Doe alleged that affirmative duties to act were created by several state statutes, including the following provision:

The State Board of Education shall . . . adopt standards for the identification, diagnosis, examination, and education of all children in this state through age 20 who are found to be in need of special educational services. . . . The standard shall include . . . (2) procedures for identifying, testing, and diagnosing children in need of special educational services. . . .⁶¹

The court, apparently agreeing with defendant that the statutes identified by plaintiff were not intended to protect specific students or give rise to private causes of action,⁶² granted defendant's motion for summary judgment.⁶³

58. See note 53 *supra*.

59. The free public school movement, from its earliest beginnings in America had as its goal the promotion of the general welfare through the development of a literate and productive population and generally was not viewed as a benefit conferred upon the individual child. N. EDWARD, *THE COURTS AND THE PUBLIC SCHOOLS* 24 (3d ed. 1971); Koenig, *The Law and Education in Historical Perspective*, in *THE COURTS AND EDUCATION* 1, 10 (C. Hooker ed. 1978). See also E. KUNZI, *THE CALIFORNIA EDUCATION CODE* 17 (1978) (stating that many of the education statutes enacted in the 1960s reflect attempts to deal with social and economic problems through adaptations in the educational system).

60. No. 48277 (Cir. Ct. Montgomery County Md. July 6, 1979). The court neglected to set out the factual circumstances giving rise to the suit.

61. Defendant's Motion for Summary Judgment at 5, *Doe v. Board of Educ.*, No. 48277 (Cir. Ct. Montgomery County Md. July 6, 1979) (quoting Mo. CODE ANN. art. 77, § 106d (1975)).

62. *Id.* at 9-12. Defendant alternatively argued that the statutes did not become effective until implementing regulations were adopted, which did not occur until after plaintiff's alleged injury. *Id.* at 6.

63. *Doe v. Board of Educ.*, No. 48277, slip op. at 2 (Cir. Ct. Montgomery County Md. July 6, 1979). It is not clear whether the court specifically relied on the no-individual-protection argument because the opinion adopts defendant's motion for summary judgment in its entirety. *Id.*

Even though a statute of the type cited in *Doe* appears by its language and specificity to be aimed at the protection of individual students from the harmful results of being denied an adequate opportunity to learn,⁶⁴ the "individual protection" argument is contrary to the theory that the public educational system was designed to benefit the public in general.⁶⁵ Nevertheless, a complaining student should strongly urge the court's recognition of a statutory tort duty when a defendant has violated a detailed procedural regulation framed in protective language. When a student alleges such a statutory duty, however, he must be prepared to face the argument that a special class of students—for example, those with learning problems—should not be offered statutory protection while the normal or average student is provided with no judicial remedy for injuries suffered by exposure to incompetent instruction.

The court's acceptance of a statutory duty will depend upon its willingness to recognize the student's legal right to an adequate educational opportunity. Although the United States Supreme Court has declined to recognize a fundamental right to a public education,⁶⁶ nearly all state constitutions provide for public education and numerous state statutes guarantee an education either to all children generally or to all children having special capabilities or deficiencies.⁶⁷ The issue becomes whether recognition of a student's right to an "educational op-

64. If educators are ever to be held liable for negligent academic instruction, one would expect them to be liable for violations of detailed procedural statutes—for example, misclassifications of students due to improper identification and evaluation of student disabilities pursuant to statutory procedures such as those present in *Doe*. See text accompanying note 61 *supra*. This is very close to the situation in *Hoffman* except that the procedure violated by defendant in that case was not embodied in a statute or regulation but rather in a psychologist's report. The lower court found that defendant's failure to follow procedure constituted educational negligence, but the New York Court of Appeals reversed, citing the policy favoring judicial noninterference in educational policies. See notes 18-24 and accompanying text *supra*.

65. See note 59 and text accompanying notes 56-58 *supra*.

66. *E.g.*, *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").

67. See, *e.g.*, N.C. GEN. STAT. § 115-1.1(b)(4) (1978) ("a program must actually benefit a child or be designed to benefit a particular child in order to provide such child with appropriate educational and service opportunities"); Turnbull, *Legal Aspects of Educating the Developmentally Disabled*, in *CONTEMPORARY LEGAL PROBLEMS IN EDUCATION* 174, 187-88 (1975); text accompanying note 56 *supra*.

Compulsory attendance laws appear to argue against a right to education for the benefit of individual students; the right would seem to belong to the party with the power to enforce it—the state, as representative of the general public. On the other hand, a federal court has said, "[t]he Court need not belabor the fact that requiring parents to see that their children attend school under pain of criminal penalties presupposes that an educational opportunity will be made available to the children." *Mills v. Board of Educ.*, 348 F. Supp. 866, 874 (D.D.C. 1972).

portunity" should include any more than a seat in the classroom. The last decade has seen considerable litigation concerning the rights of the physically handicapped and the mentally retarded to an adequate educational opportunity,⁶⁸ and commentators have extracted from this litigation a judicial and legislative trend toward providing pupils with differing needs an educational opportunity appropriate to those needs.⁶⁹ A student will obviously be more likely to succeed in establishing a statutory tort duty if the court is willing to recognize a more need-oriented view of "educational opportunity" and to analogize learning problems to retardation and physical handicaps.⁷⁰

The creation of a statutory duty based on a narrowly defined provision addressing specific learning problems is consistent with existing general tort principles. Whenever feasible, the student should propose such a statutory duty as well as a common-law professional duty. These two types of duty are the most appropriate for an educator's functions and the most likely to gain judicial acceptance.

*B. Adoption of an Appropriate Standard of Care*⁷¹

In addition to establishing that an educator has a duty to provide competent instruction, a student seeking to maintain a cause of action for educational negligence must develop a standard of care that can be used by a court to determine whether an educator has breached his

68. See, e.g., *Mills v. Board of Educ.*, 348 F. Supp. 866, 808 (D.D.C. 1972) (children cannot be excluded from public school because "they have been labelled as behavioral problems, mentally retarded, emotionally disturbed or hyperactive"); *Pa. Ass'n for Retarded Children v. Commonwealth*, 343 F. Supp. 279 (E.D. Pa. 1972) (injunction issued to prohibit denial of access to free public education and training to any mentally retarded child).

69. E.g., *Turnbull*, *supra* note 67, at 183-84; *Zettel & Abeson, The Right to a Free Appropriate Public Education*, in *THE COURTS AND EDUCATION* 188, 191-92 (C. Hooker ed. 1978).

70. It is important to note, however, that judicial recognition of the rights of a special student class does not necessarily result in judicial recognition of an individual cause of action by a member of the class to remedy an injury caused by denial of his special need. Furthermore, even a complaint by the class as a whole may not be recognized. As one court stated in granting a preliminary injunction to improve conditions dangerous to the physical safety of residents of a state school for the retarded, "If there is no constitutional infirmity in a system in which the state permits children of normal mental ability to receive a varying quality of education, a state is not constitutionally required to provide the mentally retarded with a certain level of special education." *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752, 763 (E.D.N.Y. 1973).

71. Both the California Supreme Court in *Peter W.* and the New York Supreme Court, Appellate Division, in *Donohue* held that in a suit for educational negligence a workable standard of care is not conceivable. 60 Cal. App. 3d at 825, 131 Cal. Rptr. at 861; 64 App. Div. 2d at 33-34, 407 N.Y.S.2d at 878-79. The New York Court of Appeals, however, while affirming the Appellate Division's holding in *Donohue*, modified this position: "Nor would creation of a standard with which to judge an educator's performance of that duty necessarily pose an insurmountable obstacle." 47 N.Y.2d at 443, 391 N.E.2d at 1353, 418 N.Y.S.2d at 377.

duty.⁷² Initially the plaintiff should choose between proposing a reasonable person or a professional standard of care.⁷³ The reasonable person standard is typically applied to a teacher's duty toward the physical safety of students.⁷⁴ This standard is clearly workable in physical injury cases because supervision of the physical activities of children is a function frequently experienced by the general public and readily comprehended by jurors without expert testimony. Nevertheless, adaptation of a reasonable person standard to the area of academic instruction is questionable.

Unlike supervision of the physical safety of children, academic instruction in the public schools has no close analogy in the experience of most laymen. It has been suggested that, because most laymen lack exposure to the realities of the educator's task, and because there is no consensus on acceptable teaching methods,⁷⁵ the use of a reasonable person standard would inevitably result in arbitrary decisions.⁷⁶ The possibility of arbitrariness is most obvious in jury trials because virtually every potential juror has been a student and frequently has formulated definite ideas on the propriety of certain behaviors based on his one-sided and highly personal view of the process.⁷⁷ Therefore, although there probably would be consensus on the unacceptability of certain clearly egregious forms of conduct, the reasonable person standard of care is generally unsatisfactory in educational negligence actions. If a statutory duty is proven, however, potential arbitrariness might be largely averted due to the embodiment of a definitive standard in a statute that a reasonable person would, absent extenuating circumstances, attempt to obey.⁷⁸

Assuming the educator's duty as a professional is recognized, use of a reasonable person standard would be avoided. A professional

72. Note that the workability of a standard of care is one factor a court may consider in determining whether a duty exists, so that consideration of these two elements does not actually proceed in two wholly distinct stages.

73. The plaintiff should clearly differentiate the two and suggest the one that is more appropriate for the theory of duty alleged. Failure to make this differentiation will only support the argument that no workable standard of care exists. For example, the professional standard of care is only applicable when a professional duty is established. See text accompanying notes 38-41 *supra*.

74. *E.g.*, Proehl, *supra* note 35, at 201-02; Ripps, *supra* note 33, at 25.

75. See note 80 *infra*.

76. Elson, *supra* note 45, at 700-02.

77. The court in *Peter W.* said: "The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might—and commonly does—have his own emphatic views on the subject." 60 Cal. App. 3d at 824, 131 Cal. Rptr. at 860-61.

78. See notes 53-70 and accompanying text *supra*.

standard of care could be constructed within the theoretical framework that has developed in support of previously recognized malpractice actions.⁷⁹ The principal difficulty in formulating a workable standard for a professional educator is the determination of a minimum level of skill and knowledge common to members of the profession in good standing.⁸⁰

It has been suggested that a student's performance on a standardized achievement test could be used as a measure of a teacher's professional competence. This suggestion was implicitly supported in *Scheelaase v. Woodbury Central Community School District*,⁸¹ a case involving a school board's attempt to dismiss a teacher for alleged incompetence. The trial court held that a teacher's "professional competence cannot be determined solely on the basis of her students' achievement on [standardized tests], especially where the students maintain normal educational growth rates."⁸² The appellate court, however, reversed on other grounds and in the process tacitly supported the school board's use of the tests as a measure of competency.⁸³

79. A professional is presumed to possess the minimum common skill and learning of members of his profession in good standing. By undertaking to render professional services, he holds himself out as having standard professional skills and knowledge and is judged accordingly. Absent a contract to accomplish a particular result, however, the professional is not a warrantor of success and is not liable for an honest mistake in judgment when there is room for reasonable doubt about the proper course of action. W. PROSSER, *supra* note 25, at 161-65.

80. Education is characterized by widespread disagreement among members of the profession concerning the most appropriate behavior in any given situation. See, e.g., Elson, *supra* note 45, at 689 ("there is no empirical evidence, no agreement among practitioners or experts, no social or moral consensus"); Comment, *Educational Malpractice: When Can Johnny Sue?* *supra* note 2, at 127 (conflicting theories of education makes agreement impossible). A paucity of conclusive scientific studies in the field forces experts to draw on their own experience and intuition when evaluating alternatives. See M. SORGEN, P. DUFFY, W. KAPLIN & E. MARGOLIN, STATE, SCHOOL AND FAMILY § 11-2 (1973) ("[O]ur knowledge of the diverse needs of children is remarkably primitive."). Furthermore, there is apparently no common core of customary teaching behaviors. Elson, *supra* note 45, at 713-15.

81. 349 F. Supp. 988 (N.D. Iowa 1972), *rev'd*, 488 F.2d 237 (8th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974).

82. 349 F. Supp. at 990. Apparently a substantial percentage of the teacher's students failed to achieve acceptable test scores. Several witnesses from the educational field appearing on behalf of plaintiff argued that student test scores were inadequate measures of teacher competency. 488 F.2d at 244 (Bright, J., concurring). It is possible that the expert testimony was motivated not only by the inadequacy of the standard, but also by a protective attitude toward professional liability and a reluctance to testify against fellow professionals.

83. On appeal, the United States Court of Appeals for the Eighth Circuit reversed the trial court's reinstatement of the teacher, citing a policy of judicial non-interference with state and local school administrations:

It is our holding that the administration of the internal affairs of the school district before us has not passed by judicial fiat from the local board, where it was lodged by statute, to the Federal Court. Such matters as the competence of teachers, and the standards of its measurement are not, without more, matters of constitutional dimensions. They are peculiarly appropriate to state and local administration.

Nevertheless, when the plaintiff is an individual student it is doubtful, given the multiplicity of possible causes of student failure,⁸⁴ that mere proof of poor performance on an achievement test, without affirmative evidence of negligent teacher conduct, would be sufficient to support a claim of educational malpractice. Otherwise, any student who failed an achievement test would, by virtue of his failure alone, have a cause of action against his teacher—clearly a capricious and unfair result.⁸⁵

A professional standard of care based on student performance on achievement tests might also be formulated by comparing an entire class's performance with other classes that are similar in all respects except for the teacher.⁸⁶ Obviously a class standard would be helpful to a complaining student only if the educator's alleged negligence also affected other students. This standard offers more protection to the teacher by eliminating at least some possible alternative causes of individual student failure, but it does not seem appropriate for a professional negligence standard of care.⁸⁷ Like individual failure on student achievement tests, class comparisons represent an attempt to prove breach without ever detailing the nature of the negligent action. The reasoning is akin to *res ipsa loquitur*—an inference of negligence from an unexplained injury that does not commonly occur without negligence; but here there is no sufficiently reliable basis for concluding that

488 F.2d at 243-44.

Two points may be drawn from the development of this case. First, courts often subordinate their own judgments of fair and proper educational procedures to the judgment of school administrators. Thus schools may be allowed to define for themselves the significance of student achievement tests with respect to teacher competence. Second, the court of appeals' affirmation of the school board's action implicitly supports the use of student achievement tests as a standard of teacher competence in a context somewhat analogous to a student's suit for educational negligence.

84. See note 123 *infra*.

85. Absent a contract to accomplish a particular result, no professional is a warrantor of success nor is he liable for an honest mistake in judgment when there is room for reasonable doubt about the proper course of action. W. PROSSER, *supra* note 25, at 162. To judge a teacher negligent merely because his students did not succeed on achievement tests would be to make the teacher a warrantor of student success.

86. For a comprehensive analysis of the comparative method of proof, see Comment, *Educational Malpractice*, 124 U. PA. L. REV. 755 (1976). The following standard is proposed: "A teacher is negligent if it is proven that his or her performance falls significantly below the average worst performance of teachers in comparison classes identical in all essential respects with the plaintiff class." *Id.* at 797.

87. Since the class-comparative standard focuses on group performance, it is closely analogous to the use of student standardized test scores by school boards in assessing teacher incompetence in dismissal actions. Incompetency sufficient to support dismissal does not necessarily constitute a breach of tort duty with respect to either the school board or a student, although the same conduct could give rise to both causes of action. It is reasonable to apply a lower standard, requiring greater incompetence to constitute breach, when a tort duty is involved, given the potential personal liability for damages to compensate an injury should a breach of that duty be found.

teacher negligence is more likely than not the cause of student failure.⁸⁸ Further, because no standard of teacher conduct is defined, no professional guidelines are provided for teachers to adhere to in the future if they wish to avoid liability for negligence.⁸⁹

More suitable professional standards of care are those that focus on teacher behaviors. By analogy to other malpractice actions, appropriate standards could be drawn either from customary conduct or from a theoretical consensus on appropriate behaviors.⁹⁰ Generally, the more clearly and narrowly defined a standard of conduct is, the more fairly and consistently it can be applied, although a narrow rule may also limit flexibility to consider extenuating circumstances. Standards most likely to be well-defined are those that are already embodied in written form for the purpose of guiding educator conduct. Sources for written standards include state statutes, administrative regulations and Competency Based Teacher Education (CBTE) programs.⁹¹

Statutes implementing CBTE programs for teacher training and

88. Given the broad range of individual abilities, it is probable that the percentage of certain ability levels within a group will fluctuate from class to class even though the average percentages for the entire student body may remain relatively constant. Further, the same kinds of cultural and environmental factors that may operate upon an individual student to impede learning may also, in particular circumstances, affect the learning of an identifiable subgroup whose members comprise a substantial portion of the teacher's class.

89. Clearly defined guidelines for the avoidance of liability are not, however, a prerequisite to a workable standard of care. "The whole theory of negligence presupposes some uniform standard of behavior. Yet the infinite variety of situations which may arise makes it impossible to fix definite rules in advance for all conceivable human conduct." W. PROSSER, *supra* note 25, at 149-50. The "reasonable person" concept adds some structure to the infinite possibilities, but when professional conduct is being judged common experience frequently is not helpful. Since the professional standard is ultimately derived from the claimed possession of certain skills and knowledge, it is necessarily more narrowly defined than the reasonable person standard. The professional standard is actually the lower of the two because usually it requires only that the defendant comply with a minimum level of customary behavior as opposed to the ideal of a hypothetical reasonable person. Perhaps this additional protection afforded the professional defendant reflects the need for more well-defined behavioral guidelines for professional educators.

90. As stated earlier, however, the educational field is characterized by a lack of custom and consensus. Either agreement is nonexistent or the concepts agreed upon are so broadly stated that they could never serve as reliable measures of breach. See note 80 *supra*. But this is not necessarily fatal to formulating an educator's standard because a professional may be judged according to the standards of a subgroup to which he adheres if there is substantial theoretical consensus or accepted behavior within the subgroup. W. PROSSER, *supra* note 25, at 163.

91. CBTE programs have been developed in the last decade in an attempt to improve teaching skills and to hold teachers accountable for the quality of instruction. Elson, *supra* note 45, at 715-16. The competencies developed under the programs are used as measures of success in teacher training programs and may constitute statutory qualifications for certification. See, e.g., FLA. STAT. ANN. § 231.17(2) (West Cum. Supp. 1979) (requiring written exam and other procedures to show successful mastery of particular competencies before five-year extendable teaching certificate may be issued by department of education).

certification usually have a twofold purpose. First, they often list specific teaching behaviors (competencies) that are deemed necessary for effective teaching.⁹² Such a list may be based either on an analysis of what teachers actually do or on concepts of how they should perform.⁹³ Second, the statutes often suggest a standard that can be used to measure the competency of teachers in their classroom performance.⁹⁴ Given sufficiently specific and required teaching behaviors in a CBTE statute, a court might be willing to use the statute to formulate a professional standard of care for educators.⁹⁵ A court, however, might refuse to use CBTE standards as a measure of professional competence on the ground that the proper persons to determine the meaning and use of the standards are legislators or educators.⁹⁶ CBTE standards that have not been enacted by state legislatures but are only used, for example, as part of teacher training programs, would presumably carry less weight with the courts but might still be helpful as indicators of minimum professional skills and knowledge.⁹⁷

92. Elson, *supra* note 45, at 716.

93. *Id.*

94. *Id.*

95. This is to be distinguished from the situation in which a statute is found to create a duty and supply a standard by which to measure breach. See notes 53-70 and accompanying text *supra*. A CBTE statute would probably not be viewed as creating a duty to provide competent instruction to an individual student because its generally acknowledged purpose is to upgrade the overall quality of teachers for the benefit of the school system as a whole. See Elson, *supra* note 45, at 715-16.

An example of a CBTE statute with fairly detailed competencies is the following:

[E]ach applicant for initial certification shall demonstrate . . . the mastery of . . . minimum essential generic and specialization competencies . . . including, but not limited to, the following:

(a) The ability to write in a logical and understandable style with appropriate grammar and sentence structure;

(b) The ability to comprehend and interpret a message after listening;

(c) The ability to read, comprehend, and interpret orally and in writing, professional and other written material;

(d) The ability to comprehend and work with fundamental mathematical concepts; and

(e) The ability to comprehend patterns of physical, social, and academic development in students and to counsel students concerning their needs in these areas.

FLA. STAT. ANN. § 231.17(2) (West Cum. Supp. 1979).

96. *Cf. Scheelhaase v. Woodbury Cent. Community School Dist.*, 349 F. Supp. 988 (N.D. Iowa 1972), *rev'd* 488 F.2d 237 (8th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974), discussed in notes 81-83 and accompanying text *supra* (circuit court refused to interfere in school board's dismissal of teacher based on student scores on standardized achievement tests, thereby allowing board to determine proper use of tests).

97. The attempt to use teacher training standards without statutory recognition as tort standards of care probably will be thwarted in those states in which legislators have expressed a policy of noninterference in the nature of teacher training programs. An example is the following: "The [State Board of Education] may not require an institution to teach a particular doctrine or to conduct instruction on the basis of, or in accordance with, any particular pedagogical method,

Another written source of professional standards are state educational statutes and school administrative regulations enacted thereunder. Courts have uniformly rejected education statutes and regulations as creating tort duties,⁹⁸ but administrative regulations developed by educators to set out the procedures for identification, evaluation, testing, placement and remedial instruction of students with specific learning problems appear well-suited for application as tort standards to measure breach of an educator's duty.⁹⁹ It seems reasonable and fair to expect an educational system to behave in accordance with self-imposed procedures¹⁰⁰ and to provide judicial remedies for its failure to do so.

Finally, a court may base a professional standard of care on a source that is even less authoritative than an administrative regulation. In *Hoffman*, the lower court formulated a standard of care based on the self-imposed procedures of the school system, even though they were not expressed in the governing regulations.¹⁰¹ Hoffman's teachers failed to follow the written recommendation of a school-employed psychologist to retest the plaintiff, and the lower court found that it was not within the educators' discretion to reject the recommendation.¹⁰² The court suggested that such negligence was not likely to recur because of the subsequent enactment of regulations requiring more fre-

whether expressed in terms of behavioral or performance-based objectives, competencies, or other explicit assessment devices." TEX. EDUC. CODE ANN. tit. 2, § 13.032(c) (Vernon Cum. Supp. 1980).

98. See notes 53-70 and accompanying text *supra*.

99. Regulations appropriate for this purpose would include those mandated by the Maryland statute quoted in the text accompanying note 61 *supra*. If a court has recognized a common law tort duty, it may be willing to adopt a statutory or regulatory standard as a measure of the duty owed to the individual student. Broadly phrased enactments mandating the creation and maintenance of public education systems, however, clearly are not acceptable as standards for measuring an individual educator's breach.

100. Although state statutes may mandate remedial programs in general terms, educators typically are assigned the responsibility of developing particular procedures to carry out the mandated goals. For example, a statute relied on by the plaintiff in *Doe* included the following: "Standards, rules and regulations to implement this law shall be promulgated by the State Department of Education in cooperation with the State Department of Health and Mental Hygiene." Defendant's Motion for Summary Judgment, at 5, *Doe v. Board of Educ.*, No. 48277 (Cir. Ct. Montgomery County Md. July 6, 1979).

101. The court also found that a *duty* was created in defendants by the same procedures. See note 30 *supra*.

102. *Hoffman v. Board of Educ.*, 64 App. Div. 2d at 378-80, 410 N.Y.S.2d at 108-09 (emphasis by the court):

While it was within the professional judgment of each of plaintiff's teachers as to when to recommend retesting (based on their own observations or on plaintiff's achievement test scores), it was not within their province or discretion to prevent [the psychologist's] recommendation from being carried out, no matter what they might have believed the result of such retesting would be.

quent retesting.¹⁰³ Whether the lower court in *Hoffman* would have been willing to use the new regulations as tort standards in future negligence actions, or would have found that the regulations conclusively passed responsibility for enforcement to the educational system itself, is not clear.¹⁰⁴ Considering the subsequent dismissal of *Hoffman* by the New York Court of Appeals,¹⁰⁵ clarification is unlikely in the near future.

In conclusion, it does not seem proper to impose on educators a professional standard of care that ranks the relative merits of different teaching behaviors when there are no firm bases for such judgments and when educational experts themselves strenuously disagree.¹⁰⁶ It does seem appropriate, however, to hold a professional educator to a clearly expressed, self-imposed standard of behavior.¹⁰⁷ Moreover, there should be no objection to finding a breach of duty when the professional's behavior is clearly outrageous from a layman's point of view.¹⁰⁸

C. Injury

Assuming that the student alleging educational negligence succeeds in establishing duty and breach, he must then show that he has suffered a legally compensable injury. Among the injuries that have been claimed in educational negligence suits are functional illiteracy,¹⁰⁹ inability to obtain other than menial employment,¹¹⁰ and various psy-

103. *Id.*

104. The lower court pointed out that "[o]bviously the liability of defendant cannot be based on this later standard." *Id.* This might be interpreted to mean that the regulations could not be effective standards *only* because they were enacted subsequent to the negligent acts giving rise to the *Hoffman* litigation and that otherwise they could be so used.

105. See note 24 *supra*.

106. It may be appropriate, however, to hold defendant to the minimum standard of a significant and respected subgroup of educators to which he professes adherence if this group displays well-defined customary behaviors or shared beliefs regarding appropriate behaviors. Cf. W. PROSSER, *supra* note 25, at 163 (referring to medical malpractice). It is unlikely, however, that many public school teachers, given the highly individualistic way in which they view themselves, see Elson, *supra* note 45, at 713-15, would consciously adhere to a particular educational school of thought.

107. See note 99 and accompanying text *supra*.

108. No expert testimony is necessary to infer malpractice when the nature of the offense is within the common understanding of laymen. W. PROSSER, *supra* note 25, at 164-65.

109. *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d at 817, 131 Cal. Rptr. at 856 ("plaintiff graduated from high school with a reading ability of only the fifth grade [sic]"); *Donohue v. Copiague United Free School Dist.*, 64 App. Div. 2d at 30-31, 407 N.Y.S.2d at 876 (plaintiff "lacked basic reading and writing skills").

110. *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d at 818, 131 Cal. Rptr. at 856.

chological injuries, including severe depression and loss of self-esteem.¹¹¹ Some courts have said that harms resulting from educational negligence do not conform to any accepted understanding of tortious injury.¹¹² A student's complaint will avoid dismissal only if the court is willing to recognize that the damage suffered is a legally compensable tort injury.

Psychological damages, although now often recognized in the absence of accompanying physical injury, are still treated cautiously by the courts.¹¹³ The circumstances in which damages for mental distress alone may be recovered tend to be highly circumscribed because of an often unwarranted fear of unmanageable claims.¹¹⁴ For this reason, a plaintiff asserting educational negligence would be well-advised to avoid allegations of psychological injuries to the extent he may do so and still obtain an adequate remedy. Claims of psychological injuries may distract the court from plaintiff's stronger arguments and lead to confusion regarding the fundamental issues involved.¹¹⁵

A complaining student should also generally avoid claiming that incompetent instruction resulted in loss of expected employment.¹¹⁶ Given the inevitable range of student ability anticipated to emerge

111. In *Hoffman*, a psychiatrist testified that Hoffman "had a 'defective self-image and feelings of inadequacy.'" 64 App. Div. 2d at 375-76, 410 N.Y.S.2d at 105-06. A clinical psychologist testified that "plaintiff 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 into the world, and even where he fitted into his family.'" *Id.*

112. The *Peter W.* court found "no reasonable 'degree of certainty that . . . plaintiff suffered injury' within the meaning of the law of negligence." 60 Cal. App. 3d at 825, 131 Cal. Rptr. at 861. This finding was quoted with approval in *Donohue v. Copiague United Free School Dist.*, 64 App. Div. 2d at 31-32, 407 N.Y.S.2d at 878.

113. W. PROSSER, *supra* note 25, at 59-60. Usually the distress must result from an intentional act to be compensable. *Id.*

114. See 2 D. LOUISELL & H. WILLIAMS, *MEDICAL MALPRACTICE* § 18.03 (1978): "Limitations of recovery for mental disturbance, thought to be necessary to prevent fictitious claims, actually rest in large part on dubious factual assumptions."

115. Note, however, that great stress was laid on plaintiff's psychological damage in *Hoffman*. See note 111 *supra*. Given the nature of defendants' negligence—misclassification of plaintiff as mentally retarded—and the particularly sympathetic nature of plaintiff's situation, the allowance of psychological damages by the lower court in *Hoffman* is understandable. In similar fact situations, claims of such injury are appropriate, but *Hoffman* does not represent the typical case.

116. There is no strictly legal reason, however, why such recoveries could not be allowed. Impairment of future earning capacity is compensable in medical malpractice actions, 2 D. LOUISELL & H. WILLIAMS, *supra* note 114, § 18.07. There are also precedents for recovery of lost expectancies in other types of negligence actions in which the expectancy is highly probable and the loss follows foreseeably from the infringement of a legally protected right. For example, a beneficiary under a will may sue the person who prepared the will when he negligently commits an error that invalidates the legacy. *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (1958). A plaintiff may also recover full damages for a gift, or specific profit from a transaction, denied due to tortious interference. RESTATEMENT (SECOND) OF TORTS § 912, Comment f (1977).

from a compulsory education system, it is unreasonable for any given student to expect to graduate qualified for a specific type of employment or assured of a certain income level.¹¹⁷ Even though lower-income employment may be a foreseeable consequence of an inadequate education, an expectation of higher income does not conform to the historically accepted notion that the purpose of public education is to create a generally productive and literate citizenry.¹¹⁸ Society requires productive menial laborers to function effectively, yet it also requires those laborers to be publicly educated.¹¹⁹

Plaintiff's best claim for injury is simply his nonlearning—specifically, his inability to read and write at a minimally acceptable level. This educational deficiency, often referred to as functional illiteracy, has not been explicitly recognized as a tort injury, but could be assimilated within the traditional negligence framework. Defined as the lack of a well-defined skill and easily verified by established testing methods, functional illiteracy is far easier to identify and measure than many tort injuries.¹²⁰ The great strength of an allegation of functional illiteracy as an injury, however, is that, if a court is willing to recognize a tort duty of non-negligent instruction, it would be anomalous not to recognize nonlearning, the most direct and foreseeable result of a breach of that duty, as a compensable injury.

Although the difficulty of determining damages for nonlearning may weigh against its recognition as a tort injury,¹²¹ a court could avoid problems of speculative damages by declining to grant monetary awards and ordering that defendant provide plaintiff with remedial instruction in basic skills. This option would be available only when a

117. If plaintiff cannot obtain *any* gainful employment and is forced to accept public welfare, he will have a stronger argument.

118. See note 59 and accompanying text *supra*.

119. Further, in light of the kinds of policy concerns frequently expressed—for example, the potential financial burdens created by a flood of litigation—courts would probably not be receptive to the large financial judgments required to compensate for loss of future earnings.

120. Defendants in educational negligence actions have not disputed the evidence proving that a plaintiff lacks basic skills because the student's school records usually make clear his lack of achievement. *E.g.*, *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d at 820, 131 Cal. Rptr. at 857 (parties did not debate adequacy of allegation of injury). The defendants, however, may misrepresent student achievement by giving false assurances to parents. *Id.* at 827, 131 Cal. Rptr. at 862. When this occurs, a cause of action for misrepresentation is possible.

121. The value of literacy to an individual is in many ways highly personal and speculative, but it does not seem to be any more so than the value of peace of mind compensated for in mental distress cases. While physical injury was once a universal requirement for recovery for mental distress and is still present in the majority of cases, an increasing number of decisions have allowed recovery for mental distress that had no physical manifestations. *W. PROSSER, supra* note 25, at 59. A claim for loss of income resulting from nonlearning might provide a more certain measure of damages and that may be one reason for alleging such an injury.

plaintiff has not been irreversibly disabled by a defendant's negligence. If a plaintiff has already achieved basic skills through private instruction, the court could limit a monetary award to the cost of such instruction, and possibly wages lost during the period of instruction. In any event, relief should be limited whenever possible to compensatory remedial instruction in order to alleviate the financial burdens of adverse judgments and to discourage profiteering plaintiffs.

D. Causation

After a plaintiff has established breach, duty and injury, he must show both a factual and a proximate causal relationship between defendant's breach and the injury suffered. Obviously the educational process would be meaningless if *some* kind of causal relationship between the behavior of teachers and learning by students did not exist. Before a court will be willing to decide for a student in an educational negligence action, however, it must be able to find with sufficient certainty that *particular* instructional behavior has, in fact, caused an identifiable result in a *particular* student. Only if this cause-in-fact is proved will the court proceed to ask whether the causal relation is legally sufficient—that is, whether there is proximate cause.¹²²

One rationale for judicial rejection of educational negligence actions is that the multiplicity of factors affecting the learning process make it extremely difficult, if not impossible, to prove that the educator's breach was a cause-in-fact of the nonlearning.¹²³ In extreme cases

122. Proximate cause limits legal responsibility for conduct that is proven to be a cause-in-fact of the plaintiff's injury; it is a question of law and not a matter of causation in the normal sense. W. PROSSER, *supra* note 25, at 244. Proximate cause could thus become another vehicle for the court's expression of policy concerns that affect recognition of an educational negligence action. See notes 133-134 and accompanying text *infra*. Arguments regarding the difficulty of proving cause-in-fact, see, e.g., *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d at 825, 131 Cal. Rptr. at 861, are probably influenced by policy considerations that should be, strictly speaking, a part of proximate cause analysis.

123. See *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d at 824, 131 Cal. Rptr. at 861:

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

The *Peter W.* position is quoted with approval in *Donohue v. Copiague Union Free School Dist.*, 64 App. Div. 2d at 33-34, 407 N.Y.S.2d at 878. See M. SORGEN, P. DUFFY, W. KAPLIN & E. MARGOLIN, *supra* note 80, § 11-3: "It is exceedingly difficult to evaluate current forms of pupil classification or to accurately determine their effect on scholastic achievement, because one cannot isolate the extent to which the manner in which the school treats children is determinative of their performances."

the causal relationship might be readily acknowledged by common experience and require no expert proof by a plaintiff.¹²⁴ In the typical case, however, causation will be beyond a layman's understanding and expert witnesses will have to be called to testify about the usual results of certain types of teaching behavior. Unfortunately such testimony will often be either unavailable or fiercely disputed due to the lack of scientific evidence and theoretical consensus in the education field.¹²⁵ Thus proof of cause-in-fact will likely be the weakest link in a plaintiff's argument.

Two subsidiary principles of causation-in-fact may be of special interest in an educational negligence action. First, an educator's affirmative act or omission will not be a cause-in-fact of student nonlearning if the nonlearning would have occurred in the absence of the act or omission.¹²⁶ When a student enters the public school system with a certain level of achievement and leaves the system no worse off,¹²⁷ the defending school system may argue that educators did not cause student nonlearning because, in the absence of the negligent instruction complained of, the plaintiff would not have learned any more.¹²⁸

124. For example, if an able student is totally denied access to the written word, common sense dictates that he will not learn to read.

125. See note 80 and accompanying text *supra*. A fact situation in which expert proof of causation might be successful is one in which a student has been misclassified, as in *Hoffman*, see notes 18-23 and accompanying text *supra*, and continues in an inappropriate "track." "Tracking" is a widely used procedure in which students with similar capacities are identified and grouped for the purpose of providing differentiated instruction. M. SORGEN, P. DUFFY, W. KAPLIN & E. MARGOLIN, *supra* note 80, § 11.01. "Such determinations often define not only what the school will try to teach the child and the character of his classmates, but also his role and status in life after he has completed his schooling." *Id.* "[I]f the school reaches the hopeless conclusion that a child is 'dumb' and of limited educability, then surrenders him to a barren, unstimulating environment, the school's action will virtually assure that the initial prognosis proves true." *Id.* § 11-3.

Tracking is also significant in the area of student constitutional rights. Fifth and fourteenth amendment substantive due process issues are more likely to arise when pupils have been misclassified because incorrect or invalid criteria were used to place them in a particular track. Turnbull, *supra* note 67, at 184-85.

126. W. PROSSER, *supra* note 25, at 238.

127. In a related argument, a dissenting judge of the lower court in *Hoffman* argued that plaintiff did not suffer a compensable injury on the ground that his learning problems flowed from a speech disorder that plaintiff had when he entered school and that was no worse when he left:

The failure to reach educational objectives with respect to a particular student does not result in an "injury" since the student commenced his education lacking knowledge, education, experience and, in this case, proper speech patterns. Hence, the failure to teach him how to speak properly has left him no worse off than when his schooling started.

64 App. Div. 2d at 388-89, 410 N.Y.S.2d at 118 (Damiani, J., dissenting opinion).

128. Because a student is born not knowing how to read and write, one could say the failure to teach does not cause a state of illiteracy that would not exist otherwise.

This argument, however, goes too far. 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. Moreover, the assumption of the responsibility for the education of a student by a public school system, which is implicit in the finding of duty in an action for educational negligence, presumably allays to a degree parental concern for the education of that student and thus precludes the exposure of that student to some other educational experience.¹²⁹ Because educational negligence may take the form of either misfeasance—affirmative negligent acts of teaching—or nonfeasance—negligent omission of teaching—only proof of a specific and more probable alternative cause for a student's nonlearning should be sufficient to support the conclusion that the injury would have occurred without the negligence of the defendant.

Second, a defendant will not be excused when his negligent act was a concurring factor that by itself would have caused the nonlearning, even though other factors actually concurred to bring about the injury.¹³⁰ This is not to suggest that proof of defendant's breach in itself creates any presumption that the breach was a cause-in-fact of the injury. A plaintiff must still affirmatively prove that a defendant's act was, more probably than not, the cause of the injury. An essential part of a plaintiff's burden in doing so is the elimination of as many probable alternatives as possible. Most importantly, he will have to prove that he had sufficient intellectual ability to learn in the first place.¹³¹ A plaintiff should also offer proof that environmental and psychological factors influencing him were within the normal range of experience and therefore did not impede learning.¹³²

If a court concludes that a duty exists, and acknowledges a reason-

129. When parents are aware that a public school system is not fulfilling, or has not fulfilled, its educational responsibility it is reasonable to assume that, in today's society, other provisions for the child's education will be made. As indications of parental concern for their children's education, note that Donohue was given private tutoring after graduation, *see* text accompanying note 16 *supra*, and that Hoffman was denied additional stimulation only due to the erroneous conclusion that he was of limited capability, *see* note 32 *supra*.

130. The substantial factor test for cause-in-fact, which says that a defendant's conduct must have been a substantial factor in causing a plaintiff's injury, was developed to determine liability in this type of situation. W. PROSSER, *supra* note 25, at 239-40.

131. Performance on intelligence tests, as well as subsequent success under other instructors, would be strong indicators of native ability as well as further evidence of a defendant's negligence.

132. For example, the court in *Peter W.* was concerned with the unknown effects on learning of "physical, neurological, emotional, cultural, [and] environmental" factors. 60 Cal. App. 3d at 824, 131 Cal. Rptr. at 861.

able basis for measuring breach of that duty and for finding that the alleged breach was a cause-in-fact of plaintiff's injury, then proof of proximate cause should be a relatively slight burden for a plaintiff. The requirement of proximate cause is frequently used by courts to limit liability to those situations in which, all things considered, it is fair and reasonable to hold a defendant legally responsible.¹³³ It is unlikely that a plaintiff who has overcome the major problems in proving the other elements of educational negligence would be denied a remedy by a conservative view of proximate cause.¹³⁴

II. POLICY FACTORS AFFECTING RECOGNITION OF AN EDUCATIONAL NEGLIGENCE ACTION

After the student alleging educational negligence pleads duty, breach, injury and causation within the framework of established tort principles, he must turn his attention toward the various policy factors that affect not only acceptance of these individual elements, but also initial recognition of his novel cause of action. In analyzing the individual elements of educational negligence, courts have been influenced by practical problems that lie more in the realm of policy than legal theory. Thus the court in *Peter W.* concluded that the absence of "readily acceptable standards of care, or cause, or injury" was a policy factor arguing against recognition of an educational negligence cause of action.¹³⁵

Policy factors are often explicitly addressed in conjunction with the discussion of whether a school system has a duty to provide non-negligent academic instruction. A recent development in judicial treatment of the duty element occurred in the New York Court of Appeals' decision upholding dismissal of the student's educational negligence claim in *Donohue*.¹³⁶ The court's approach represents a significant departure from the reasoning in preceding cases in that it abandoned arguments of legal barriers to pleading¹³⁷ and recognized that overriding

133. See note 122 *supra*.

134. Common sense almost inevitably points to the conclusion that nonlearning is a highly foreseeable result of negligent teaching, thus fulfilling the major test for proximate cause. See generally W. PROSSER, *supra* note 25, at 250-70. The more remote the injuries plaintiff claims, the greater his problems will be in establishing proximate cause.

135. 60 Cal. App. 3d at 824, 131 Cal. Rptr. at 860.

136. 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).

137. The creation of a statutory duty was rejected upon the reasoning of the lower court, but the logic of a common law duty was acknowledged. *Id.* at 443, 391 N.E.2d at 1353-54, 418 N.Y.S.2d at 377.

policy objections are in fact the sole basis for dismissal of actions alleging educational negligence.¹³⁸ Some will see the decision as weakening the court's position and marking a turn on the road to the recognition of a new tort. Others may argue that the approach strengthens the court's position because confusing real policy issues with abstract pleading arguments only weakens respect for judicial reasoning and detracts from the importance of the policy analysis. By focusing exclusively on overriding policy objections, the *Donohue* decision directly confronts the point made by the *Peter W.* court when it said:

The assertion that liability must nevertheless be denied because defendant bears no "duty" to plaintiff "begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. . . . It [duty] is a shorthand statement of a conclusion, rather than an aid to analysis in itself. . . . 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 which lead the law to say that the particular plaintiff is entitled to protection."¹³⁹

This statement emphasizes the point that an acceptable formal pleading of duty does not complete the student's argument. He must also be prepared to address the three principal policy arguments against recognition of an educational negligence claim that have developed in the cases: (1) recognition of a cause of action in educational negligence would open the door to countless, and often frivolous, student claims, and would overburden both the courts and the already beleaguered school systems;¹⁴⁰ (2) litigation of such claims would inevitably lead to impermissible judicial interference in educational policymaking and the allocation of scarce resources;¹⁴¹ and (3) feasible alternative procedures exist for the satisfaction of complaints of incompetent instruction.¹⁴²

A. *Excessive Litigation*

The argument that recognition of a new cause of action will cause a flood of litigation is frequently encountered in the development of tort law.¹⁴³ The argument represents a concern with judicial efficiency

138. *Id.* at 443-44, 391 N.E.2d at 1354-55, 418 N.Y.S.2d at 378.

139. 60 Cal. App. 3d at 824, 131 Cal. Rptr. at 860 (emphasis in original) (quoting *Dillon v. Legg*, 68 Cal. 2d 728, 734, 441 P.2d 912, 916, 69 Cal. Rptr. 72, 76 (1968) (quoting W. PROSSER, *LAW OF TORTS* 332-33 (3d ed. 1964))).

140. *See Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d at 825, 131 Cal. Rptr. at 861.

141. *See Donohue v. Capiague United Free School Dist.*, 47 N.Y.2d at 442, 391 N.E.2d at 1354, 418 N.Y.S.2d at 378.

142. *See id.* at 445-46, 391 N.E.2d at 1355, 418 N.Y.S.2d at 378-79.

143. The "flood of litigation" argument has also appeared in decisions recognizing the consti-

that is inimical to basic concepts of justice and should not be decisive when a genuine need for relief is demonstrated. More significant than the potential impact of a flood of litigation on the courts, however, is the possible effect on school systems and, ultimately, on the tax-paying public. Even assuming the availability of liability insurance to ease the financial burden of adverse judgments, the complicated process of preparing and defending suits is itself a significant drain on time and resources. School systems are not strangers to individual claims of various types—students have long been free to sue for school-related physical injuries,¹⁴⁴ and teacher-initiated litigation accounts for a major portion of all suits involving the public education system.¹⁴⁵ Nevertheless, actions addressing individual grievances consume time and money otherwise available for instruction and inevitably conflict with the needs of students as a whole. If recognizing educational negligence suits will result in an enormous volume of litigation, benefits to individual plaintiffs might well be overshadowed by detrimental effects on the overall quality of public education.

One way a court might attempt to limit potential claims would be to confine the availability of the educational negligence cause of action to certain well-defined fact situations. For example, a tort duty might be recognized only when educators expressly demand certain teaching behaviors of themselves,¹⁴⁶ and a standard of care might be deemed workable only when it is based on narrowly defined requirements in statutes or regulations.¹⁴⁷ By restricting the kinds of situations that give rise to the recognition of the elements of negligence, many suits could be dismissed at the earliest possible stage solely on the basis of the pleadings.¹⁴⁸

tutional rights of students. For example, in a case involving the protection of the due process rights of suspended students, a dissenting Supreme Court justice said: "One can only speculate as to the extent to which public education will be disrupted by giving every school-child the power to contest *in court* any decision made by his teacher which arguably infringes the state-conferred right to education." *Goss v. Lopez*, 419 U.S. 565, 600 n.22 (1975) (Powell, J., dissenting) (emphasis in original). At least one commentator, however, has concluded that no empirical evidence shows that *Goss* has resulted in an unmanageable flood of litigation. Elson, *supra* note 45, at 650.

144. See text accompanying notes 33-35 *supra*.

145. Delon, Moran & Wedlock, *The 1974 Yearbook of School Law: A Review of Recent School Law Decisions*, in CONTEMPORARY LEGAL PROBLEMS IN EDUCATION 109, 113 (1975) (most teacher-initiated litigation involves employment and conditions of employment).

146. See text accompanying notes 90-108 *supra*.

147. See note 95 and accompanying text *supra*.

148. The lower court in *Hoffman* was concerned with limiting the precedential value of its decision to recognize an action for educational negligence and thus characterized defendant's negligence as misfeasance, expressly declining to recognize suits for nonfeasance. The court said that its decision

Two other factors may tend to limit litigation. First, it is probable that many potential plaintiffs will be from socially and economically deprived backgrounds, and thus unlikely to bring suit because of their limited resources and relative alienation from the judicial system. This observation raises serious questions about the morality of recognizing a remedy that might be unavailable, as a practical matter, to the group of citizens most in need of relief.¹⁴⁹ Second, litigation may be limited by the availability of administrative grievance procedures¹⁵⁰ if the courts were to require that such procedures be exhausted before judicial relief may be sought.¹⁵¹

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 . . . , it will not be by this case which involves *misfeasance*

64 App. Div. 2d at 379-80, 410 N.Y.S.2d at 110. A dissenting opinion persuasively pointed out the ambiguity in the application of the categories of misfeasance and nonfeasance to the facts of the case:

[T]he main thrust of the plaintiff's case at bar was that the defendant failed to retest plaintiff within two years after his placement in a CRMD class as recommended by its own psychologist. This act of omission is one of nonfeasance, which is defined as the failure to perform an act which a person should perform. . . . In *Donohue*, the gist of the plaintiff's cause of action was that although the defendant had given him instruction in reading, it had not done so properly or effectively and therefore he could not read upon graduation. This was an act of commission or misfeasance, which is defined as the improper performance of a lawful act. . . .

Even if the majority had assigned the alleged misfeasance and nonfeasance to the proper case, the distinction it seeks to draw is immaterial. Negligence exists when injury results from the violation of a legal duty that one owes to another, whether the act in violation be active or passive, of commission or omission, of misfeasance or nonfeasance. . . .

Id. at 388-89, 410 N.Y.S.2d at 118 (Damiani, J., dissenting).

The misfeasance distinction was not a sound basis for restricting future negligence actions because it can be easily manipulated to cover fact situations that the lower court in *Hoffman* presumably would not have recognized as actionable. The alleged negligence in both *Donohue*, see text accompanying notes 11-17 *supra*, and *Peter W.*, see text accompanying notes 6-10 *supra*, for example, could be reasonably classified as misfeasance in that defendants affirmatively undertook to educate plaintiffs and did so negligently. The primary reason for the lower court's decision in *Hoffman*'s favor was the failure to follow a specific request not subject to discretionary refusal, see note 102 *supra*; to distinguish it on this basis would have more effectively limited future litigation.

149. Such limited access to judicial remedies is not, however, unique to educational negligence. It has been suggested that judicial refusal to interfere in the educational system has a "covert class bias" and perpetuates the inequality created by the significantly lesser opportunity for community participation in poor urban systems as compared with the greater involvement and responsiveness in rich suburban systems. Elson, *supra* note 45, at 666.

150. See, e.g., *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d at 441, 391 N.E.2d at 1355, 418 N.Y.S.2d at 379 ("The Education Law . . . permits any person aggrieved by an 'official act or decision of any officer, school authorities, . . . or any other act pertaining to common schools' to seek review of such act or decision by the [state commissioner of education].")

151. See, e.g., *Church v. Board of Educ.*, 31 N.C. App. 641, 230 S.E.2d 769 (1976), *cert. denied*, 292 N.C. 264, 233 S.E.2d 391 (1977) (dismissed school principal refused cause of action for

B. *Judicial Interference in Educational Policymaking*

Turning to the argument that recognition of an educational negligence action would result in undesirable judicial interference with the public education system, it should be noted that courts addressing issues arising in an educational context frequently express reluctance to assume the role of policymakers and sometimes dismiss actions for this reason,¹⁵² thus presenting a substantial obstacle for a student seeking recovery for alleged negligent instruction. Several reasons have been offered for judicial restraint. Some courts hesitate to become involved because of their perception of a longstanding historical pattern of judicial noninterference.¹⁵³ Despite a history of decisions favoring judicial noninterference, courts have at times become involved in educational issues,¹⁵⁴ especially when a constitutional right is allegedly infringed.¹⁵⁵ There is admittedly little direct precedent, however, for the kind of detailed involvement required when a student complains about the quality of academic instruction he has received.¹⁵⁶ Thus the historical record does appear to favor judicial noninterference, and courts relying on this justification have firm support.

damages and injunction due to failure to exhaust administrative remedies); K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 20.01 (1976).

152. See, e.g., *Scheelhaase v. Woodbury Cent. Community School Dist.*, 488 F.2d 237 (8th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974), discussed at note 83 *supra*.

153. For example, the court in *Donohue* said, "[t]o entertain a cause of action for 'educational malpractice' would require the courts . . . to make judgments as to the validity of broad educational policies—a course we have unalteringly eschewed in the past." 47 N.Y.2d at 442, 391 N.E.2d at 1354, 418 N.Y.S.2d at 378.

154. Decisions have been rendered on school desegregation, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967); bussing, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); needs and rights of special student groups, such as the mentally retarded, e.g., *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973); *Pa. Ass'n for Retarded Children v. Commonwealth*, 343 F. Supp. 279 (E.D. Pa. 1972); rights of non-English speaking students, *Lau v. Nichols*, 414 U.S. 563 (1974); and discipline, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975).

Although the courts have interfered in a variety of situations, breadth of involvement should not be mistaken for depth of involvement. In many respects the courts have restrained themselves, placed sharp limits on how far they are willing to go in executing these various roles . . . Also, judicial involvement in assuring that the educational program is minimally adequate is still at an early stage of development.

T. GEEL, *AUTHORITY TO CONTROL THE SCHOOL PROGRAM* 42 (1976).

155. For example, in *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), the court noted that when political response to educational problems is ineffective, "the judiciary must bear a hand and accept its responsibility to assist in the solution *where constitutional rights hang in the balance*." *Id.* at 517 (emphasis added).

156. Intervention on behalf of individual students to protect against interference with rights that do not reach constitutional status has largely been confined to instances of tortious physical injury, in which the role of educational policy is minimal and the layman can easily grasp the impropriety of defendant's behavior. See text accompanying notes 33-35 & 74 *supra*.

A further justification often offered for judicial noninterference is that courts lack expertise in the educational field,¹⁵⁷ though judicial expertise in educational policies is probably equal to that in accepted areas of litigation such as medical malpractice.¹⁵⁸ Although educational issues are complicated by the frequent absence of reliable data or acceptable theory upon which to base a judicial determination,¹⁵⁹ courts may draw on the understandings of educational experts to assist them in formulating decisions.¹⁶⁰

Judicial noninterference also has been supported on the ground that the social importance of educational issues is better served by political solutions.¹⁶¹ Those areas of policymaking involving the identification of the ultimate values and goals of society, however, as opposed to methods of effective implementation of those values and goals, are suitable areas for judicial decisionmaking.¹⁶² Thus, the courts should

157. In *Hobson v. Hansen*, 269 F. Supp. 401, 517 (D.D.C. 1967), a lengthy opinion involving complex issues of segregation of students and personnel, unequal distribution of resources, and tracking and testing, the court made the following statement: "It is regrettable, of course, that in deciding this case this court must act in an area so alien to its expertise."

158. See, e.g., 2 D. LOUISELL & H. WILLIAMS, *supra* note 114, § 14.02:

Courts have always recognized that the practice of a profession involves intangibles and many unknown quantities. The existence of uncertainties in the practice of medicine has received specific recognition in the judicial doctrine that the degree of skill and the standard of care required of a physician may be evaluated only by others in the profession.

159. The following is from the decision in *Peter W. v. San Francisco Unified School Dist.*: "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." 60 Cal. App. 3d at 824, 131 Cal. Rptr. at 860-61.

160. One author has suggested a twofold approach in dealing with judicial lack of expertise. First, the courts should be keenly aware of what they cannot do. When educators disagree on how to achieve a desired goal the courts should not expect to be able to arrive at an effective theory. Second, in areas in which there is sufficient expert agreement, courts should employ the aid of social scientists to evaluate potential costs, educational impact, effects on other programs, the availability of supporting services, and the impact of alternative remedies. B. LEVIN, *THE COURTS AS EDUCATIONAL POLICYMAKERS AND THEIR IMPACT ON FEDERAL PROGRAMS* 92-94 (1977).

161. In *Hobson v. Hansen*, 269 F. Supp. 401, 517 (D. D.C. 1967), a case involving desegregation, allocation of resources and testing, the court noted that "[i]t would be far better indeed for these great social and political problems to be resolved in the political arena by other branches of government."

162. See Elson, *supra* note 45, at 670:

Although the technology of teaching has made significant strides and offers far greater promise for the future, the goals of the technology, the direction of the behavioral changes educators would bring about in their students, are irreducible value questions that must be determined by reference to the cultural values of society. . . . [T]he question of the legal significance of a violation, of whether it warrants the censure of the law and, if so, how far-reaching the sanctions should be for the protection of the victim and society, must be determined ultimately in reference to the judge's or jury's own conception of what should be the personal, social, and moral consequences of education. . . . [I]t is the layman [*i.e.*, the juror], and not the educator, who must determine the ultimate legality of substantive educational practices.

not automatically defer to political action when the student alleges negligent educational conduct in direct conflict with ultimate social values.

A final rationale offered for judicial noninterference is the constitutional and statutory delegation of educational matters to state and local administrative bodies.¹⁶³ That the legislature may delegate authority to administer a particular area should not, however, preclude judicial response to individuals injured by incompetent administrative functioning. The courts clearly have an important role to fulfill as a check on administrative malfunctions and abuses.¹⁶⁴

On balance, judicial reasoning supporting noninterference in educational policymaking does not logically *demand* unqualified restraint, and a complaining student should argue that the nature of his injury justifies the limited degree of interference necessary to adjudicate his claim. If a court is unwilling to interfere in educational policies to any degree, it could refrain from policy interference by hearing only those cases in which it is not called upon to make policy judgments—for example, by recognizing a cause of action only when defendants have allegedly failed to comply with self-imposed policies.¹⁶⁵

C. *Alternative Procedures for Dealing with Negligent Instruction*

It has been asserted that existing, intrasystem methods for dealing with incompetent educators are sufficient, therefore obviating the need for judicial intervention. Although each of the internal procedures generally available—for example, the school board's power to dismiss incompetent teachers,¹⁶⁶ certification procedures that impose minimum

163. *E.g.*, *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 445, 391 N.E.2d 1352, 1354, 418 N.Y.S.2d 375, 378 (1979) ("Recognition in the courts of this cause of action would constitute blatant interference with the responsibility for the administration of the public school system lodged by Constitution and statute in school administrative agencies.").

164. *See, e.g.*, *Donohue v. Copiague Union Free School Dist.*, 64 App. Div. 2d 29, 36-37, 407 N.Y.S.2d 874, 881 (1978) (quoting *James v. Board of Educ.*, 42 N.Y.2d 357, 366, 366 N.E.2d 1291, 1297, 397 N.Y.S.2d 934, 941 (1977)):

Although the determinations of the Commissioner of Education are now specifically subject to review . . . , in the same fashion as those of other administrative officers or bodies . . . , the statutory alteration is of limited impact for, even under prior law, the courts possessed the authority to set aside the commissioner's decisions if arbitrary or illegal.

165. Such was the case in *Hoffman*, the lower court used the following reasoning to justify its involvement: "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." 64 App. Div. 2d at 380-81, 410 N.Y.S.2d at 110. The Court of Appeals, however, rejected judicial interference in all but the most severe deviations from public policy and dismissed Hoffman's claim. 49 N.Y.2d 121, — N.E.2d —, — N.Y.S.2d — (1979).

166. *E.g.*, S.C. CODE § 59-25-430 (1976 & Cum. Supp. 1978) ("Any teacher may be dismissed at any time who shall fail, or who may be incompetent, to give instruction in accordance with the directions of the superintendent . . .").

qualifications,¹⁶⁷ the use of supervisors who exercise direct control over teaching behaviors¹⁶⁸ and the presence of a system of professional review for educators analogous to that established by doctors and lawyers¹⁶⁹—works to eliminate incompetence from the system, none of them offers relief to the student who is actually injured by incompetence.

Internal grievance procedures may also be available to parents who question the instruction their children are receiving.¹⁷⁰ If a parent becomes aware of his child's problem while the child is still enrolled and is informed of the availability of the grievance procedure, a resolution may be obtained in time to correct or ameliorate any injury already inflicted, or to preclude further injury. If, however, no satisfactory resolution can be achieved through the grievance procedure, or if the injury is not discovered until after removal from the system, a court action might be the only appropriate method for securing adequate relief.

Whether a court is willing to step in when alternative procedures fail to remedy an individual injury will depend in large part on whether the individual's need for relief is great enough to justify going beyond alternative procedures designed to maintain quality instruction for all students. It has been suggested that recognizing individual causes of action will pressure educators into developing more effective alternatives or more effectively enforcing existing ones.¹⁷¹ If this is correct, it would make recognition of the action more acceptable by spreading the benefit among a larger number of students.

167. *E.g.*, WIS. STAT. ANN. § 118.19(1) (West 1973 & Cum. Supp. 1979) ("Any person seeking to teach in a public school . . . shall first procure a certificate or license from the department."); *id.* § 118.19(5) ("[A]ny certificate or license to teach . . . may be revoked . . . for incompetency.").

168. *E.g.*, WIS. STAT. ANN. § 120.12(2) (West 1973) (The school board shall "[v]isit and examine the schools of the school district, advise the school teachers and administrative staff regarding the instruction, government and progress of the pupils and exercise general supervision over such schools.").

169. *E.g.*, TEX. EDUC. CODE ANN. tit. 2, §§ 13.201-.218 (Vernon 1972 & Cum. Supp. 1978) (establishing a "professional practices commission" composed of educators who shall adopt a professional code of ethics and standard practices to regulate members of the profession).

170. *E.g.*, *Hoffman v. Board of Educ.*, 64 App. Div. 2d 369, 379-81, 410 N.Y.S.2d 99, 108-09 (1978) (parents of plaintiff could have requested retesting for their son); *Donohue v. Copiague Union Free School Dist.*, 64 App. Div. 2d 29, 36-37, 407 N.Y.S.2d 874, 881 (1978) (plaintiff had right to request special testing and to appeal a refusal to state commissioner of education).

171. *E.g.*, *Elson*, *supra* note 45, at 657.

D. Additional Policy Considerations

Two policy factors not specifically discussed by courts addressing the issue bear significantly on the social impact of recognizing educational negligence actions. The first consideration derives from the historical evolution of tort law to meet the needs of a changing society. The courts do not operate in a vacuum, and public demand for change is one factor influencing judicial decisions to recognize new causes of action. In this respect it is important to note increasing public dissatisfaction with the quality of education and growing demands for accountability.¹⁷² All would agree that courts should not bend with every vicissitude in the public mood; yet if and when there is a significant and predictably long-lasting shift in the public attitude toward educational goals and values, the courts must adapt to remain vital.¹⁷³

Second, since the ultimate purpose in allowing educational negligence suits should not only be to provide individual relief, but also to maximize social benefits, the potential deterrent effect of litigation must be considered. Although suits for educational negligence might encourage more care in instruction, they also might discourage even the most competent teachers from entering the profession. Fear of suits could inhibit an individualized, experimental approach to teaching that adapts to individual students' needs. Enforcing minimal standards may freeze educational theories into tort standards¹⁷⁴ and preclude flexibility. Finally, educators may voluntarily retreat to a safe minimal position to reduce vulnerability to suits. Therefore, while recognizing that educational negligence suits may create more uniformity in the quality of education, the average level of quality might not be improved and in some instances may actually decline to the minimum acceptable level. Thus, it is important that educational negligence suits be recognized only to the extent necessary to provide injured students with just and adequate relief in order to minimize the negative social impact.

172. See generally T. GEEL, *supra* note 154, at 85. Examples of demands for accountability include CBTE statutes, see text accompanying notes 97-98 *supra*, and mandatory minimum competency testing programs for high school graduation, now proposed or implemented in one-third of the states, Clague, *Competency Testing and Potential Constitutional Challenges of "Every Student"*, 28 CATH. U. L. REV. 469, 469 (1979).

173. *Contra*, Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 825, 131 Cal. Rptr. 854, 861 (1976) (court cited increasing public pressure on educators as reason not to impose extra burden of litigation).

174. Turnbull, *supra* note 67, at 191.

III. SUGGESTED PARAMETERS OF AN EDUCATIONAL NEGLIGENCE CAUSE OF ACTION

The courts should give limited recognition to a cause of action in educational negligence, and this tort duty to act with due care while engaging in academic instruction could be created under either of two theories. First, when educators hold themselves out as possessing special skills and knowledge, the student has a right to expect them to use their special skills and knowledge non-negligently. This reasonable expectation demands the creation of a professional educator's duty to the extent that special skills are claimed. Second, a statutory duty of care can properly be recognized on the basis of detailed statutes and regulations that speak to particular student problems and that do not call for the discretionary exercise of judgment. By limiting a public educator's tort duty of competent academic instruction to these two situations, the courts will avoid significant interference in educational policymaking. A professional duty only requires educators to act with care while performing functions for which they themselves claim expertise; it does not involve the courts in a determination of the functions in which educators *should* have expertise. Similarly, a statutory duty is derived from a legislative expression of public policy that has already been imposed on the educational system from without; the role of the judiciary in applying such a statutory duty is not to determine policy but merely to enforce a policy already in effect. Regulations promulgated pursuant to a statute are frequently formulated by educators themselves. When these are the source of a statutory duty, the court is merely demanding that educators act in conformity with their own expressed policies.

Moreover, it is possible to formulate a workable standard of care corresponding to each suggested source of duty. A professional standard of care may be drawn from customary behaviors of the profession generally, when widespread conformity exists, or from conduct common to the defendant's local educational system. Alternatively, a professional standard may be derived from definitive statutory expressions of desirable teaching behaviors and from regulations developed by educators to achieve these desired goals. When a statutory duty is created, a statutory standard of care is embodied in the requirements and prohibitions of the statute on which the duty is based.

Both the professional and statutory standards of care outlined above avoid the need for judicial interference in educational policymaking. The proposed standards measure breach either by the educators' own determinations of proper behavior, self-imposed through

custom or regulations, or by public policy judgments of appropriate behavior implicit in statutory requirements to which educators have already been subjected.

The complaining student should be free to plead any injury for which a cause-in-fact relationship with the alleged incompetent teaching can be proved. The use of proximate cause to limit the types of injuries for which the plaintiff may recover is not desirable because the same result may be effected by explicitly invoking the vital policy concerns that would otherwise be obscured by the rhetoric of proximate cause. The courts must preserve the flexibility to provide the kind and degree of relief necessitated by the nature and extent of the student's particular injuries. In determining the appropriate remedy, the courts must balance the needs of the individual plaintiff against the potential effect on the ability of the educational system to serve the needs of students collectively. Toward this end, remedies with potentially far-reaching detrimental effects, such as substantial compensatory or punitive monetary awards, should be rejected in favor of alternative remedies with the potential for benefiting more students, such as remedial education for the plaintiff or dismissal of incompetent teachers. By carefully limiting remedies pursuant to this balancing process, the courts will support the policy favoring nonjudicial solutions to the maximum extent possible consistent with satisfying a genuine need for individual relief.

The combined effect of these suggested limitations on an educational negligence cause of action would be to greatly reduce the number of cases that could be successfully litigated, thereby reducing the feared flood of excessive litigation.

IV. CONCLUSION

No plaintiff to date has succeeded in gaining recognition of a cause of action in educational negligence. A student who alleges that incompetent academic instruction is tortious conduct will find himself in uncharted territory, but he will be guided by the principles that support established negligence actions. Four elements of negligence must be pleaded: duty, standard of care, injury and causation. A tort duty to use due care in academic instruction may have either a common law or statutory origin. Possible theories for the creation of a common-law duty include the defendant's undertaking to educate the plaintiff; an extension by analogy of the established duty of due care in the supervision and instruction of students' physical activities; and a professional

duty arising from the educator's self-representation as a person possessing special skills and knowledge. An allegation of professional duty is the strongest of the three since useful analogies are found in the large body of malpractice principles developed for the medical profession.

A statutory duty to use due care in academic instruction may be derived from broad legislative mandates to provide public education, or from provisions addressing specific educational problems. The latter are more suitable as sources of tort duties insofar as they focus on individual student needs and thus justify liability for injury to a particular student.

If a common-law, non-professional tort duty is alleged, plaintiff must plead a reasonable person standard of care that brings dangers of arbitrary jury verdicts. A professional standard of care will offer more protection to the educator, but may be difficult to formulate due to conflicting theories of education. The best sources for a professional standard are statutes defining generally competent teaching behaviors and those requiring specific teaching responses to identifiable student problems. An allegation of a statutory duty implies its own standard of care defined by the requirements of the statute on which the alleged duty is based and provides protection against arbitrariness to the extent of its specificity.

A plaintiff must allege a legally compensable injury. Allegations of mental distress should be avoided because many courts view these claims with suspicion in even well-established contexts. Loss of future earnings should not be claimed because specific economic expectations are inconsistent with the generally accepted purposes of public education. Claims of injury should be restricted to the most direct results of incompetent instruction, particularly nonlearning. The remedy granted should be limited to remedial instruction whenever doing so will result in a just balance between the needs of the injured individual and the needs of all students collectively.

Proof of cause-in-fact may be plaintiff's most difficult task because a confusion of multiple factors will frequently necessitate testimony by experts, among whom there is widespread disagreement. Proximate cause, on the other hand, should present relatively few problems.

Assuming a successful pleading of the four elements of negligence, a plaintiff will be confronted with three major policy arguments that, in the final analysis, have been the fundamental grounds for rejecting the educational negligence cause of action. First, the courts fear that excessive litigation will overburden both courts and schools. The potential

effect on the courts should not be decisive when relief is genuinely needed. The threatened burden on the time and resources of the educational system is very real but can be contained by carefully limiting potential causes of action.

Second, courts stress the importance of avoiding unnecessary judicial interference in educational policymaking. Precedent may tend to disfavor interference on behalf of academically injured students, but it does not demand judicial noninterference. In any case, it is possible to recognize a limited form of educational negligence resulting in only negligible interference with educational policies.

Third, it is said that procedures within the educational system adequately deal with incompetent teaching and obviate the need for judicial relief. Most internal procedures, however, provide no relief to the individual student who is injured, and those that do may be inadequate or unavailable. The courts should step in on behalf of injured students in genuine need of relief when internal procedures fail to provide a just remedy.

An inevitable conflict has emerged between the increasing public demand for educational competency and the potentially harmful social effects of unlimited recognition of an educational negligence cause of action. An appropriate balance of these conflicting factors could be achieved by judicial recognition of a cause of action for educational negligence that is carefully limited in scope for the protection of both educators and society.

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