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EDUCATIONAL MALPRACTICE:
A NEW TORT BASED ON TRADITIONAL
NEGLIGENCE THEORY

By
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A DISSERTATION
Submitted to
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1985

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CHAPTER I

THE PROBLEM

Conceptual Framework of the Problem

Public school systems in the United States have attracted increased scrutiny regarding the end product they are graduating. The general public consumer has become aware of the nation's high percentage of functional illiteracy and low student achievement test scores. Coupled with this knowledge and the fact that a proportionately large amount of tax dollars are spent annually on public education, these consumers are seeking a better return on their dollar spent.¹

Much of this public awareness was first stimulated by the data produced from studies made by national groups and scholars in the early 1970s in their attempt to assess the strengths and weaknesses of the country's public educational system.² The Kettering Commission, the U.S. Office of Education's National Panel on High Schools and Adolescent Education, the National Association of Secondary School Principals, the Panel on Youth, President's Science Advisory Committee, and the Educational Facilities Laboratories Report represent but a few of the groups that

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conducted public educational system studies. All of these studies led to statements calling for sweeping reform and radical alterations in the nation's schools.³ After performing a three-and-one-half year study in accordance with a \$300,000.00 grant from the Carnegie Corporation, Charles Silberman stated in a New York Times article which reviewed his resulting book, Crisis in the Classroom, that he, "sailed up the shallow creek of American education... surveyed the landscape and pronounced it joyless, mindless and barren."⁴ Silberman and the above noted groups were not alone in their disparagement of the structure of American education as other authors followed suit with similar negative pronouncements.⁵

Despite the fact that billions of dollars are spent annually on public education, the United States is still without a totally literate society. A survey conducted in 1970 and repeated again in 1974, exhibited that the 1974 students, ages 13 and 17, used a simpler vocabulary, wrote with a short, "primer-like" style, and had more incoherent paragraphs than their counterparts in schools four years earlier.⁶ In 1977, a similar Congressional survey showed that 13% of this nation's 17-year-olds were barely able to read or write.⁷

The U.S. Navy, due to its advanced technology, now requires many of its new recruits to engage in a six-week Program designated to raise their reading ability to the

sixth grade level.⁸ Many colleges and universities have added minimal entrance requirements for freshmen in the basic skills areas of reading, writing, and mathematics.⁹ Previously, these schools of higher learning relied heavily on Scholastic Aptitude Test scores to evaluate incoming students, but because these scores have steadily declined since 1963, the need for additional entrance criteria was necessitated.¹⁰

Over the last decade, parent dissatisfaction with the public school system has been measured by periodic Gallup Polls.¹¹ These polls consistently reflect the concern of parents that public schools are not providing their children with an adequate education. The adequate education these parents seek lies in the area of basic skill achievement, particularly in the area of reading.¹²

A government commission has defined an inadequate education as one that does not prepare the learner to meet the daily requirements of existence, which in contemporary society include language and mathematical skills.¹³ In the area of reading, these necessary skills would equip the average citizen with the ability to read driving manuals, income tax directions, and "how-to" instructions for home and job projects. A person not able to read these materials has been termed a "functional illiterate."¹⁴

Public awareness of the language and mathematical skill deficiencies of students and the alleged causal link with the education provided by public schools, has initiated multiple responses by parents, educators and legislators. One response to the quest for better public education was the beginning of the "accountability movement." Accountability has been defined as a means of holding an individual or group responsible for a level of performance or accomplishment for specific pupils.¹⁵ Drawing from industrial management performance-based methods, proponents of accountability for educators have promoted the theory that someone must be held responsible for performing to agreed upon terms. This movement was supported by groups of parents, educators and businessmen who found that the direct product of industry is easier to define than that of education, therefore making it difficult to assign definable areas of accountability in public schools.¹⁶

A second response was made by many state legislatures which enacted competency-based testing in an attempt to alleviate the large amount of functionally illiterate students graduating from public high schools. Their intent was to provide a legislative standard for school districts and individual students whereby the level of skills achievement would be increased. This form of legislative intervention has created a new set of

challenges, some of which are legal in nature. Merle S. McClung has stated:

By redirecting educational resources to students with poorly developed literacy and numeracy skills, some competency testing programs have constructive potential to improve student performance in essential basic skill areas. Many competency testing programs, however, have been designed and/or implemented in an inequitable manner, and are likely to have more negative than positive effects. Programs that require a student to pass a minimal competency test as a prerequisite to a high school diploma, in particular, have potential for discrimination against students. Some of these programs may not only be unfair to students they may be illegal as well.¹⁷

A third response to the inadequate education issue involves parents who have opted to leave the public school system unanswered and alternatively removed their children from the public system to enroll them in private schools or resorted to home instruction. As a result, private religious schools are burgeoning at the rate of two new schools a day,¹⁸ and those families involved in home schooling have been estimated to be anywhere from 10,000 to 250,000 in number.¹⁹

Because many parents cannot afford to send their children to private schools or do not have the time or

inclination to teach their children at home, the search for alternative means to ensure adequate education in the public school system continues. For many parents, the cumbersome machinery of educational administrative decision making and legislative enactment does not fulfill the immediate need to upgrade or at least define the present educational system. In fact, if these procedures could be expedited so as to reflect immediate results, they would still only be prospective in nature and would not make "whole" the students who have already been injured by alleged public school academic negligence.²⁰

Therefore, some parents have elected a fourth response by asking the judiciary to answer the adequate education question. Justice Thurgood Marshall has stated that sooner or later "the greater tides and currents which engulf the rest of men do not turn aside in their course and pass judges by."²¹ Certainly a quest for adequate education could today be categorized as one of the "great tides and currents." As Belle Lind Gordon points out: "...finally responsibility for determining the validity of state educational standards and school board rules must lie with the courts if only for the reason that no other recourse exists."²²

Judicial Review

The judiciary was first confronted with the controversy of whether the public school system had a duty to provide adequate educational instruction in the seminal case of Peter W. v. San Francisco Unified School District.²³ At age 18, after graduating from San Francisco's Gallileo Public High School in June, 1972, it was determined by reading specialists that Peter W. was functionally illiterate and could not read materials above the fifth grade level.²⁴ Peter W. brought a negligence action for failure of the school district to provide adequate instruction. The gravamen of the complaint was that Peter W. had been permitted to graduate from high school despite the fact that he could not read at the California statutorily required eighth grade level. He alleged that this reading deficiency was injuriously caused by the negligent failure of the school district to teach him to read.²⁵ The court dismissed this suit holding that a negligence action for failure to provide an adequate education would not be recognized against the public school system and that the failure of educational achievement could not be acknowledged as an injury within the existing parameters of tort law.²⁶

Other cases of first impression with fact patterns similar to that of Peter W. have subsequently been brought

in various states for negligence based on failure to provide adequate instruction. In an effort to establish this form of negligence as a recognized theory of tort law supporting its own cause of action, attorneys for the subsequent plaintiffs have instituted the term "educational malpractice." These cases have also been dismissed for lack of sufficiently alleged facts, and educational malpractice has failed to be established as a legally recognizable cause of action.²⁷

Statement of the Problem

Although the courts have refused to intervene in this area of education, the fact remains that there is a class of victims who have failed to learn and have been left without remedy.²⁸ Consequently, parents and students will continue to seek an answer to the question regarding adequate education in the public school system. Because no other viable alternative has emerged in this area, there is every indication that further litigation will occur.²⁹

Although courts have consistently rejected a cause of action for educational malpractice, hopeful plaintiffs continue to plead this theory. Parents, students and educators need to be mindful that there is a strong caveat emanating from these cases. Though courts have resisted the temptation to become involved in this area of education, they have not ruled out the possibility should the need

become great enough. If that situation should arise, a new area of tort law will be born. As Arlene Patterson has conjectured:

Lawsuits tend to be epidemic; the more the public reads about them the more the right to sue will be directed against the educator...there seems little doubt that somewhere there is a suit that can and will be won by an academically injured student.³⁰

The potential for such a successful suit was the focus of this study.

Purpose of the Study

The purpose of this study was to determine the potential for legal recognition of a cause of action for educational malpractice based on traditional negligence theory. Specific court cases were analyzed to generate the current standards by which courts have rejected recognition of this cause of action. These rejection standards are those to which all future arguments must be directed in order for an educational malpractice suit to become successful. Legal arguments were examined that purport to dismiss or substantiate the validity of these standards. From this examination, conclusions and implications were made regarding the potential success of this new cause of action.

Significance of the Study

As a result of the educational malpractice actions brought during the last decade based on negligence which have alleged failure to provide adequate education, a need prevails for attorneys, educators and consumers to understand clearly the results and future ramifications of this area of litigation.

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

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

dollars spent on costly litigation and excessive liability insurance premiums.

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

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

Procedures and Methodology

Data for this study was gathered by an historical analysis of current documents that pertain to educational malpractice. Information thus acquired formed the basis for predictive results.

Step One

A research of available literature was made to determine the scope of material in the area of educational malpractice. This literature was then examined under

selected topics to prepare a foundation for a narrower study which involved only educational malpractice as a potential cause of action based on traditional negligence theory.

Step Two

Legal literature was searched to develop an understanding of the evolution of tort law, traditional negligence theory and professional malpractice as it has been recognized. Court cases which have prevented the recognition of a new tort cause of action for educational malpractice were examined to extract the judicial holdings and rationale. These holdings and rationale were then combined to formulate an inclusive set of rejection standards.

Step Three

Legal and educational literature was then searched to identify legal arguments, circumstances, occurrences and barriers raised by noted scholars that purport to either permit or preclude a successful attack on the rejection standards utilizing varied forms of negligence theory. These findings were then summarized, conclusions and implications extrapolated, and recommendations for further study promulgated.

Research was completed using the facilities of the Tulsa City-County Library and the O.W. Coburn School of Law Library with searches made using the following resources categorized under general, educational and legal.

General - Topical methods were used to search The Reader's Guide to Periodical Literature and Books in Print.

Educational - The Educational Resources Information Center (ERIC) data base was researched by entering the descriptors: educational malpractice, negligence, reading ability, reading achievement, functional literacy, performance criteria, and educational accountability. Topical methods were used to also search Dissertation Abstracts, Educational Index and Com-Catalog.

Legal - Topical methods were used to search Current Law Index, Index to Legal Periodicals, Lexis, Westlaw, Legal Resource Index, Black's Law Dictionary, Words and Phrases, American Law Reports, American Jurisprudence 2d, Corpus Juris Secundum and the American Digest System.

The West Key number system was used to identify the body of court cases that pertain to the educational malpractice issues in point. Beginning with the American Digest System, the key numbers were applied to trace issues that could be commonly shared with similar court cases. After locating an appropriate appellate legal case and reviewing it in the National Reporter System, the Shepard's

Citations were searched in order to determine other cases that parallel, expand, redefine or reject the central issues of this study. The case study method was applied to these cases to develop the historical evolution of this body of law. Selected cases were analyzed by looking at the comparative allegations, facts, issues of law, holdings and rationale of each case.

Limitations and Scope of the Study

1. This study was limited to reported court cases and ascertainable non-reported court cases asserting allegations that purpose to maintain a cause of action for educational malpractice based on traditional negligence tort theory. Since Peter W. was brought in 1972, approximately 14 other similar cases have followed, seven of which have been reported in the National Reporter System.

2. Data compilation was determined from references to educational malpractice in literature and research originating from 1968 to 1984. Prior to this time period, references to educational malpractice are virtually nonexistent.

3. Application of the literature and research referenced was limited to academic negligence involving normal students (those who fail to qualify under federal, state, or local regulations for special placement or

services) in grades K-12 of the public schools in the United States.

4. The study is predictive in nature based upon existing judicial opinions and the observations made by legal and educational authorities.

5. The results of this study have universal implications for all public school students and educators in our country because of the common law principles utilized which are the inherent basis for the American justice system.

Definition of Terms

For the purposes of this study, the following terms were defined based on universally accepted common law Principles as primarily obtained from Black's Law Dictionary.

1. Cause of action. A situation or state of facts which would entitle a party to sustain an action and give him a right to seek a judicial remedy in his behalf; the right which a party has to institute a judicial proceeding.
2. Common law. As distinguished from law created by the enactment of the legislatures, the common law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts.

3. Defendant. The person defending or denying; the party against whom relief or recovery is sought in an action or suit.
4. Educational malpractice. For the unique purposes of this study only, 'educational malpractice' will represent professional misconduct or unreasonable lack of skill or fidelity in professional or fiduciary duties relating to areas of student instruction, placement, and reporting.
5. First impression. First presentation of an entirely novel question of law to a court for examination or decision.
6. Governmental immunity. The federal, state and local governments are not amenable to actions in tort except in cases in which they have consented to be sued.
7. Malfeasance. A wrongful act which the actor has no legal right to do, or any wrongful conduct which affects, interrupts, or interferes with performance of official duty.
8. Malpractice. Professional misconduct or unreasonable lack of skill. It is any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties.
9. Misfeasance. The improper performance of some act which an educator may lawfully do, i.e., improper usage of instructional techniques, misplacement of students.
10. Misrepresentation. Any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts.
11. Negligence. That legal delinquency which results whenever a man fails to exhibit the care which he ought to exhibit whether it be slight, ordinary, or great.
12. Nonfeasance. Nonperformance of some act which ought to be performed; omission to perform a required duty.

13. Plaintiff. A person who brings an action; a person who seeks remedial relief for an injury to rights.
14. Prima facie evidence. Evidence which, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but which may be contradicted by other evidence.
15. Privity of contract. That connection or relationship which exists between two or more contracting parties who have a legally recognizable mutual interest.
16. Public policy. That principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good.
17. Question of fact. An issue involving the resolution of a factual dispute and hence within the province of the jury in contrast to a question of law.
18. Question of law. An issue which involves the application of a law and hence within the province of the judge and not the jury.
19. Seminal. Pertaining to an original case to be reviewed by a court concerning a cause of action or issues that have never previously been reviewed in such a legal context.
20. Stare decisis. A doctrine that, when a court has once laid down a principle of law as applicable to a certain set of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same.
21. Tort. A private or civil wrong or injury, other than breach of contract, for which the court will provide a remedy in the form of an action for damages. There must always be a violation of some duty owing to the plaintiff, and generally such duty must arise by operation of law and not by mere agreement of the parties.

22. Traditional negligence. That theory of negligence which has historically evolved based on common law principles.

Organization of the Study

"Chapter I: The Problem" contains the conceptual framework of the problem, statement of the problem, purpose of the study, significance of the study, procedures and methodology, definition of terms, and organization of the study.

"Chapter II: Review of Research and Literature" contains a selected review of references that are categorized in three sections pertaining to historical evolution of educational malpractice, preventative measures, and alternative legal theories.

"Chapter III: The Tort of Educational Malpractice: Tort Law, Public Policy and The Court's Reaction" analyzes the development of tort law, traditional negligence theory, the elements of professional malpractice, the development of educational malpractice, and determines the present rejection standards opined by the judiciary regarding the cause of action for educational malpractice.

"Chapter IV: Analysis of Rejection Standards" reviews the multiple arguments propounded by legal and educational authorities that may either permit or preclude the first successful recognition of a cause of action for educational malpractice.

"Chapter V: Summary, Conclusions and Implications" summarizes the set of rejection standards and arguments that may overcome these standards and the apparent obstacles to these arguments, draws conclusions and implications, predicts the potential for future legal recognition of educational malpractice, and recommends further areas of study.

FOOTNOTES

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Public Schools," 61 Phi Delta Kappan 33-48 (September 1979) and George H. Gallup, "The 13th Annual Gallup Poll of the Public's Attitudes Toward the Public Schools," 63 Phi Delta Kappan 43 (September 1981).

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¹⁵William C. Miller, "Accountability Demands Involvement," The Educational Digest vol. 38 (October 1972), p. 14-17.

¹⁶Allan C. Ornstein and Harriet Talmage, "The Promise and Politics of Accountability," NASSP Bulletin (1974), vol. 58, p. 11.

¹⁷Merle Steven McClung, "Competency Testing Programs: Legal and Educational Issues," 47 Fordham Law Review 651, 652 (1979).

¹⁸Paul A. Kienel, Reasons for Sending Your Child to a Christian School (La Habra, California: P.K. Books, 1978), pp. 13-14.

¹⁹John A. Eidsmoe, The Christian Legal Advisor, (Milford, Michigan: Mott Media, 1984), pp. 384-385.

²⁰"Educational Malpractice," 124 University of Pennsylvania Law Review 755, 764 (1976), [hereinafter cited as University of Pennsylvania Law Review].

²¹Thurgood Marshall, "The Federal Appeal," in Charpentier, ed., 14 Counsel on Appeal 143 (New York, 1968), quoting from Benjamin Cardozo, "The Nature of the Judicial Process," (New Haven, 1921), p. 168.

²²Belle Lind Gordon, "Schools and School Districts - Doe v. San Francisco Unified School District: Tort Liability for Failure to Educate," 6 Loyola University Law Journal 462, 479 (1975).

²³Peter W. v. San Francisco Unified School District, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976) [hereinafter cited as Peter W.].

²⁴First Amended Complaint at 817, Doe v. San Francisco Unified School District, Civil No. 653312 (Sup. Ct. of San Francisco, Cal. filed October 31, 1973) [hereinafter cited as Peter W.].

²⁵Ibid.

²⁶Ibid., p. 826.

²⁷Donohue v. Copiaque Union Free School Dist., 407 N.Y.S.2d 874 (1978), rev'd 418 N.Y.S.2d 375 (1979) [hereinafter cited as Donohue]; Hoffman v. Bd. of Education of City of New York, 410 N.Y.S.2d 99 (1978); rev'd 400 N.E.2d 317 (1979) [hereinafter cited as Hoffman]; Garrett v. School Bd. of Broward County, Case No. 77-8703 (Cir. Ct. January 19, 1978); Jack M. v. School Board of Santa Rosa County, Case No. PCA 79-0550 (N.D. Fla., 1980); John Doe v. Montgomery County, 48 USLW 2077 (June 26, 1979); Pietro v. St. Joseph's School, 48 LW 2220 (October 1979); Burton v. Powell School Dist., No. C78-106B (Wyo., 1980); Smith v. Alameda County Social Service Agency, 90 Cal. App. 3d 929, 153 Cal. Rptr. 712 (1979); Boxall v. Sequoia Union High School Dist., 464 F. Supp. 1104 (N.D. Cal. 1979); Hunter v. Board of Ed., Md. App., 425 A.2d 681 (1981), rev'd Md., 439 A.2d 582 (1982) [hereinafter cited as Hunter]; D.S.W. v. Fairbanks North Star Borough School Dist., 628 P.2d 554 (Alaska, 1981) [hereinafter cited as Fairbanks North Star]; Fisher v. Washington, Civil No. 833920 (Super. Ct. King Co., Wash. filed August 31, 1977), [hereinafter cited as Fisher]; Carrasquillo v. Board of Education of Plainfield, Civil No. 81-3503 (D.N.J. November 13, 1981).

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²⁹Ibid., p. 195.

³⁰Ibid.

CHAPTER II

REVIEW OF RESEARCH AND LITERATURE

This study was conducted to determine the potential for legal recognition of a successful cause of action for educational malpractice based on traditional negligence theory. At this time, the law is greatly unsettled in the area. Educational malpractice exists only as it has been defined by educational and legal scholars as a result of unsuccessful court cases brought by plaintiffs alleging academic injury. These unsuccessful court cases have generated a plethora of research and literature, the review of which provides the background for the purpose of this study. In this chapter the literature is arranged and discussed under the following topics: (1) historical evolution of educational malpractice, (2) preventative measures, and (3) alternative legal theories.

Historical Evolution of Educational Malpractice

The decade of the 1970s witnessed the initiation of educational malpractice as a new legal concern for educators. Two key factors paved the way for the first educational malpractice suit to be filed and provided the impetus for legal and educational scholars to consider the

ramifications of this new potential tort area; the abrogation of governmental immunity and the concern of American society with the adequacy of the education provided by public schools.¹ The demise of governmental immunity in the mid-1960s with the advent of the federal and state Tort Claims Acts meant that a governmental entity, such as the public schools, would be responsible for its civil wrongs and those of its employees. Governmental immunity, as was noted by Vacca,² Abel³ and an article in The American Journal of Trial Advocacy,⁴ had been a major obstacle in the consideration of legal action for educational malpractice.

The concern of American society with the product its public schools were producing was the second catalyst which precipitated development of the new tort action. The American Journal of Trial Advocacy,⁵ Klein,⁶ and Miller⁷ reported that dissatisfaction with America's public schools was at an all time high, with students realizing that a high school diploma not only did not guarantee a job, but also did not guarantee an adequate level of basic skills achievement.⁸

In 1970, Stuart Sandow, the Executive Director of the National Committee for Citizens in Education, wrote an article on educational fraud in which he hypothesized a suit brought by a high school graduate who could only function at a second grade reading level. Sandow suggested three

approaches and five possible defenses for such a case and then submitted the hypothetical to a select jury of 200 respondents which included attorneys in private practice, state school officials, federal and state legislators, deans of law schools, and legal counsels for public and private agencies. A clear majority not only found for the plaintiff, but 80% of the jurors who responded predicted that such a case would actually arise with a successful result within five years.⁹

Sadow's study appeared prophetic when Peter W. was brought in 1972. The student plaintiff, a high school graduate, reading on only a fifth grade level, sued the San Francisco Unified School District which had been responsible for his education. He asserted that after 12 years of regular attendance, he remained functionally illiterate. Damages of one million dollars were pleaded, and the plaintiff claimed that as a result of the acts and omissions of the defendants, he had been deprived of an education which included the basic skills of reading and writing. The legal theories for the liability alleged in Peter W. were based on traditional negligence, misrepresentation, and breach of statutory duties. Although the California Court of Appeals dismissed this case in 1976 for lack of a recognizable legal cause of action, Peter W., without ever mentioning educational malpractice, established the

framework on which subsequent educational malpractice cases have been based.¹⁰ Following Peter W., similar cases of first impression were brought in Washington (Fisher, 1977) and in New York (Donohue, 1978) which also contained allegations of educational malpractice asserting negligent instruction. In 1978, Hoffman, a New York case alleging negligent diagnosis and placement and not negligent instruction, was also labeled by the Court as an educational malpractice case, thus expanding the previous definition. Hoffman alleged that he had failed to achieve necessary basic skills due to a negligent diagnosis which resulted in inappropriate placement into special education classes for almost his entire duration in public school. Following Hoffman, were cases in Alaska (Fairbanks North Star, 1981) and Maryland (Hunter, 1981) which alleged educational malpractice asserting negligent diagnosis, placement and instruction.

The above cited cases were all dismissed by the courts premised upon public policy factors, with the resulting consequence that no cause of action for educational malpractice has ever been recognized. Several authors such as Woods,¹¹ Cohen,¹² Braverman,¹³ and Gordon¹⁴ have responded to these cases by tracing the historical evolution of this potential new area of tort law.

One thrust of the resulting research and literature traced the historical development of school litigation up to and including educational malpractice. Rabold studied reported cases from 1950 through 1976 which dealt with negligent instruction, failure to prescribe and provide necessary remediation, failure to help the student achieve the minimal level of academic proficiency and inappropriate educational placement.¹⁵ Another study made by Silk built a developmental hierarchy of negligence cases in education. Silk began with early negligence cases in areas of safety and physical injury, and then progressed historically to areas of supervision, counseling and testing. From this analysis there was then projected another hierarchial level of litigation that alleged negligent instruction of basic skills. The observation was made that the last level does not yet exist, although educators should be on notice that this area could be successful in the near future.¹⁶ Strickland¹⁷ and Connors¹⁸ have authored books covering the entire area of potential tort liability for teachers in the classroom. Sections of their works refer to possible liability for educational malpractice and suggest preventative measures for teachers.

Although a precise legal definition of educational malpractice has neither been codified nor articulated by any of the courts, this has not hindered authors from composing

their own. Harris and Carter define it as:

...alleged professional negligence or a situation in which services rendered by a person or agency for the benefit of another, are considered less than what is generally expected of a person in that position, much like that sometimes charged against medical doctors.¹⁹

Patterson chose to define educational malpractice as, "an intentional or negligent act or failure to act which constitutes a breach of duty to properly educate or place a student which results in injury to that student."²⁰ Klein adopts a definition for educational malpractice from language in Peter W.:

the failure to demonstrate the skill and knowledge of a reasonable educator under similar circumstances,... [and further states that] an educational malpractice claim is intended to redress the injuries suffered by serious students - those who have made bonafide efforts to meet the demands of the course work and the expectation of school officials, who have been led by annual promotions and graduation to believe that they have, in fact, performed in a satisfactory manner, and who have discovered that they are grossly undereducated according to the demands of a contemporary society.²¹

Notwithstanding the fact that the term educational malpractice has neither been defined legally nor precisely by scholars, Wallison contends that the term educational malpractice has been so misused that it appears to have

become a generic term describing any plaintiff's questioning of a public school's administrative decisions.²²

Educational accountability theory and the malpractice literature of other professions have been cited by both authors and researchers as the two sources from which educational malpractice theory has been developed. Darnell reviewed the related literature and determined that there was a direct relationship between the educational accountability movement and citizen interest displayed in the area of educational malpractice.²³ Engh talks about the enactment of minimum competency legislation and discusses the relationship between minimum competency and the theories supporting educational malpractice.²⁴ Various references to accountability and minimum competency and their effect on the development of educational malpractice were also made by Klein,²⁵ McClung,²⁶ Harris,²⁷ Lessinger,²⁸ and Hentoff²⁹.

The malpractice literature of other professions readily lends itself to the development of educational malpractice theory. Sepler studied the growth of medical and legal malpractice litigation and compared it with educational malpractice. He makes the observation that educational malpractice is growing at the same rate as medical and legal malpractice and that educators should be wary in the future.³⁰ Cohen,³¹ Elson,³² and Tracy³³ also see the developmental process of negligence in

education as similar to that in medicine. Courts first allowed recovery for physical injuries under medical malpractice and later recognized mental injuries with the advent of psychiatric malpractice. Some authors point out that courts have recognized negligent supervision by teachers which has resulted in physical injury and predict that the next step will be the recognition of mental injury for negligent instruction. Lynch, presenting a contrasting opinion, asserts that he feels that medical malpractice is not a good model for education because it deals with individuals, whereas education usually deals with a group.³⁴ Connors,³⁵ Abel,³⁶ Gordon³⁷ and Jerry³⁸ also mention the effect of other professional malpractice literature on the field of education.

Most authors predict that the field of education will soon recognize a cause of action for malpractice, and therefore caution educators to develop appropriate preventative measures. Pabian emphasizes the pressure for such recognition by pointing out that, "educators are the last of the professional groups to face malpractice."³⁹

Preventative Measures

In response to the threat of legal action for educational malpractice revealed in Peter W., many authors have subsequently written articles that prescribe

preventative measures for teachers and schools. This literature, written mostly by educators, discusses strategies that teachers and school districts can implement to avoid litigation.

Patterson, whose research leads the major contributors in the area of preventative measures, states:

If malpractice suits have the effect on educators that they have had on other professions, and there is much evidence that this may very well be so, the choices for educators become limited. They can sit by and wait for a more sophisticated plaintiff to appear and win his suit or educators can accept the message of the courts thusfar, renew their faith in themselves as being the best authorities on education and make some changes that will eliminate many of education's bad practices.⁴⁰

Patterson suggests that educators should first take the initiative and define good educational practices. They then should closely analyze actual practices, with a special emphasis on those which tend to be suit producing activities. Finally, it must be determined what, if any, impediments exist within the law or elsewhere that preclude changing these practices. Patterson enumerates various "guidelines for avoidance" of liability for academic negligence which were generated from an analysis of court decisions, the laws of the State of Florida, and

recommendations made by professionals to improve professional practices. Patterson also adapts suggestions from many experts in the areas of law and medicine who have published materials for those wishing to avoid malpractice in their respective professions.⁴¹

Epley's study affirms Patterson's recommendation that standards be created by educational professionals which correct inappropriate teacher practices. He further makes the observation that teachers are not aware of the high expectations parents and students have concerning their professional services. Epley believes that the discrepancy between these expectations and a teacher's realistic view of what can be accomplished, has been a major cause of misunderstanding between teachers and parents.⁴²

Silk, in addition to working with hierarchies of litigation, examines teacher competency. She mentions that the methods and procedures of teacher hiring and evaluation should be improved so that only the most qualified and skillful educators are allowed to teach. Teachers should also be made aware of their potential tort liability in all areas of the educational process. Silk cites the imbalance between theory and practice prevalent in teacher preparation programs in the nation's educational institutions and the need to graduate teachers who are skilled in both pedagogy and subject matter. Finally, she encourages state and local

education boards to clearly and specifically state the objectives of educational programs, because ambiguous statutory language is a bar to professionalism.⁴³

Rabold's study furnishes observations for educators in the area of civil rights. School districts, their officers and their agents can and will be held liable in civil rights actions which charge deprivation of rights, privileges and immunities under the Civil Rights Act of 1871 or other federal laws. To avoid liability, Rabold advises that the planning and financing of programs should be done in a manner which avoids charges of discrimination by any group of students with regard to unequal funding, assignment or privilege. Such planning should be based on the underlying premise that education is a right guaranteed to all children and that it is protected by federal laws such as the Civil Rights Act of 1871.⁴⁴

Rabold also sees implications for educators stemming from judicial rulings which require school districts to provide equal educational opportunities for all students, regardless of their handicaps. As a result of these rulings, courts may cause school districts to make efforts to remediate all the academic deficiencies of students. To minimize potential liability, school districts and teachers should: (1) ascertain the student's most effective learning style; (2) diagnose academic achievement, remediate

weaknesses and keep accurate records of remediation; and, (3) frequently review, evaluate and reassign students based on educational needs, using due process procedures when appropriate. Finally, Rabold cautions against continuing the practice of "social promotion" in the public schools. Progress, or lack of it, must be accurately reported to the parents to avoid charges of fraud.⁴⁵

Branson's study illustrates the value of nurturing the lines of communication between teachers and parents. Accurate recordkeeping by the teachers, as well as regular reviews of each student's academic progress, is suggested. She mentions the utility of competency testing and recommends a legal forum whereby teachers can keep abreast of the latest legislative, administrative and legal news and its effect upon them personally and as a school district.⁴⁶

Vacca addresses the subject of teacher negligence and the duty to avoid it. His article goes beyond analyzing the usual legal ramifications and discusses an educator's ethical and moral obligation to perform in a non-negligent manner.⁴⁷ In the same spirit of concern for student development, Dunn, Dunn, and Price exhort educators to develop "diagnostic tools" to determine "how the student best learns." These "tools" will maximize a student's learning potential, and create a solid defense to an educational malpractice action.⁴⁸

Connors' work was written to inform educators about the complexities of educational tort law. He includes a discussion of malpractice insurance as a possible safeguard for educators presenting both advantages and disadvantages. He concludes with the caveat that such insurance while shifting the economic risk to the insurer may encourage aggrieved plaintiffs to sue in view of the larger recovery insurance would provide.⁴⁹

An article by Kurker-Stewart and Carter focuses on specific federal legislation dealing with the educational rights of the handicapped. Their analysis suggests that this legislation ascribes specific educational responsibility to the individual educators of the handicapped, which may more readily overcome the major historical obstacles to recovery in educational malpractice cases. The authors advise special educators to develop their own guidelines and recordkeeping and to increase parental involvement in special education programs and activities. The suggestion is made that the bureaucracy and paperwork with which special education teachers must presently deal are in desperate need of improvement. The authors conclude by warning all educators that liability for special educators may be the, "first crack in the porcelain wall of teacher insulation from liability."⁵⁰

Harris urges school administrators to develop a more uniform policy on instruction, documentation, and classroom presentation which will be legally defensible in malpractice actions. He also recommends that educators work with parents and students in a cooperative effort to solve the problems which they currently face. It is his position that educators need to "clean their own house," before the courts and legislatures do it for them.⁵¹ Hentoff affirms the position of Harris and suggests that teachers and administrators look to themselves for real standards of accountability before the public takes this responsibility upon themselves.⁵²

Alternative Legal Theories

Many authors, most of whom are legal scholars, have reviewed the educational malpractice cases and subsequently proposed a myriad of alternative legal theories. After an analysis of the facts, issues, holdings and rationale of the unsuccessful cases, they have advanced legal theories that, if pleaded properly, could furnish the theoretical basis for recognition of the first successful cause of action for educational malpractice.

Negligence, a tort theory which is the commonly used basis for pleading malpractice suits in other professions, was one of the theories utilized in all of the unsuccessful

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educational malpractice cases brought to date. A body of literature exists from authors who have analyzed different aspects of negligence theory as they pertain to educational malpractice. No previous study has been made to assimilate the pertinent data from this body of literature as it relates to the strengths and weaknesses of pleading negligence to establish malpractice in education. An inclusive analysis of this literature has been provided in Chapter IV of this study.

Alternative legal theories that authors have discussed are divided into four areas: torts, contracts, Constitutional rights, and miscellaneous. The tort area consists of intentional misrepresentation (fraud), negligent misrepresentation and intentional invasion of another's interest. The contract area contains breach of implied contract, third party beneficiary, and the equitable doctrine of promissory estoppel. The constitutional area includes due process and equal protection. The miscellaneous area involves statutory breach and the writ of mandamus. Each theory will be discussed separately below.

Tort Theories

Three theories have been discussed by authors in the area of torts: intentional misrepresentation, negligent misrepresentation and intentional invasion of another's interests. Intentional misrepresentation, commonly called fraud or deceit, is a theory of tort law that is reviewed by many of the authors. Most of the authors rely on William Prosser's definitions for the various terms used in tort law. Prosser has written the authoritative guide in the field, Handbook of the Law of Torts, and is considered this area's leading scholar. Prosser defines intentional misrepresentation as a cause of action consisting of five elements: (1) a false representation made by the defendant; (2) a knowledge or belief on the part of the defendant that the representation is false or, what is regarded as equivalent, or that he does not have a sufficient basis of information to make a decision; (3) an intention to induce the plaintiff to act or refrain from acting in reliance upon the misrepresentation; (4) a justifiable reliance upon the representation on the part of the plaintiff, in taking action or refraining from it; and, (5) damage to the Plaintiff resulting from such reliance.⁵³

Carter and Harris provide the following fact pattern to illustrate the above definition. A teacher being fully aware of a student's gross deficiencies in a certain subject area, nonetheless, awards an excellent grade. The parents,

after noticing their child's deficiency, contact and seek advisement from the teacher, but receive false assurances that the child needs no further assistance. The authors suggest that this example demonstrates the five elements of intentional misrepresentation.⁵⁴

Jorgensen mentions intentional misrepresentation in the context of student progress reports, interviews with parents, and the award of a diploma to an educationally deficient student. He notes that at least one court has intimated that an action for intentional misrepresentation, if properly pleaded, would not be dismissed.⁵⁵

An article in the University of Pennsylvania Law Review ponders whether a student's progress report is a statement of fact or merely the teacher's opinion. If it is an opinion, then it is outside the scope of intentional misrepresentation. The article suggests that this general rule gives no consolation to the educator because there are exceptions where special circumstances make it reasonable for the plaintiff to accept and act in reliance upon an opinion. The article quotes Prosser stating that the circumstances are: (1) where reliance is justifiable, and (2) where the opinion implies that the defendant knows of no facts which would preclude the opinion and knows of facts which justify it, or (3) where the defendant holds himself out as having special knowledge which is not available to

the plaintiff.⁵⁶ The article concludes that a student's progress report, written by a teacher, fits these exceptions.⁵⁷

Pabian discusses intentional misrepresentation as it relates to the doctrine of "social promotion." He defines social promotion as, a "philosophy which maintains that the psychological consequences of leaving a student behind outweigh the benefit of learning."⁵⁸ He observes that although social promotion protects a student from the immediate trauma of failing, it allows this trauma to amass and compound until the day of his graduation. He views this as not only harmful to the student, but also as legally dangerous for the educator in the 1980s. Later in his article, Pabian rebuffs the court in Peter W. for its handling of the element of reliance in the plaintiff's case. The author points out that reliance does not mean that the misrepresentation must be the "sole cause" of the damages to the plaintiff, and therefore it is not critical that many other factors were involved. He suggests that the element of reliance is satisfied if the student was justified in taking or refraining from taking action based upon the misrepresentation.⁵⁹ Other writers also mentioning intentional misrepresentation in their works were Braverman,⁶⁰ Carter,⁶¹ Weeks,⁶² Jorgensen,⁶³ and Masner.⁶⁴

A second theory in the tort area is negligent misrepresentation. Blackburn lists the four elements as follows: (1) the defendant's knowledge, or its equivalent, of a serious purpose in the plaintiff's request for information; (2) an intent on the part of the plaintiff to rely on the information sought; (3) the injury to the plaintiff caused by this reliance; and, (4) a relationship between the parties which justifies both the reliance by the plaintiff and the defendant's duty to impart the information with reasonable care. Blackburn emphasizes that a special relationship of trust and confidence must be present.⁶⁵ It should be noted that negligent misrepresentation, which was pleaded in Peter W., differs principally from intentional misrepresentation in the fact that scienter, an intent to deceive, is not required.

The University of Pennsylvania Law Review suggests that the duty to impart information with reasonable care can easily be found in the student-teacher relationship. In this context, teachers have a duty to give accurate evaluations of student achievement and should be aware of the fact that parents will rely on such representations. The reliance by parents on such information would complete the necessary elements for negligent misrepresentation.⁶⁶ Pabian discusses this tort in his analysis of the Hoffman case. He believes that the school's conduct in giving an

I.Q. test and then failing to re-test in light of the borderline scores satisfies all the elements of negligent misrepresentation.⁶⁷ Other authors who discuss negligent misrepresentation include Weeks,⁶⁸ Masner,⁶⁹ and Braverman.⁷⁰

The final tort theory to be considered is the intentional tort for invasion of another person's interest. This theory is akin to the intentional infliction of mental distress. Braverman has noted that it should be called the "intentional denial of an educational benefit."⁷¹ Although she observes that this intentional tort is presently outside the parameters of tort law, she believes that it is a concept which may be more elastic than "negligence" in recognizing and compensating educational injury. Braverman presents two hypotheticals to illustrate how this tort could be committed. The first, presents a teacher who stereotypes his class of ghetto students as "low-potential" learners and, as a result, passes out comic books instead of a literature textbook. In a second illustration, a chemistry teacher, by making a similarly low appraisal of his students decides not to teach chemistry, but instead emphasizes good behavior, passivity and deference. In both cases, the teacher's liability would depend on his state of mind, if he intentionally planned to deny the students an educational benefit.⁷² The

University of Pennsylvania Law Review adds that the teacher's motive need not be harmful or malicious as long as it is intended to bring about a certain result that will invade this interest of another. The denial of an educational benefit would fit this criteria. The position is also taken that analogizing this kind of educational practice with intentional infliction of mental distress would bring an air of familiarity to the courts, and thereby improve its chances of success.⁷³ Masner also discusses this tort in his article.⁷⁴

Contract Theories

The area of contract law is discussed by commentators under three theories of recovery. These theories consist of breach of implied contract, third party beneficiary and the equitable doctrine of promissory estoppel. Jorgensen defines breach of implied contract, "as an obligation imposed by law to do justice, even though no promise was ever made or intended."⁷⁵ Because the primary function of this theory is to prevent unjust enrichment, he questions whether a school that graduates functional illiterates has been unjustly enriched.⁷⁶

The University of Pennsylvania Law Review regards the implied contract as being between the teacher and his students and the school district and the students. The consideration element of the contract, offered by the

teacher or school district, is non-negligent instruction. Consideration is defined in Black's Law Dictionary as some right or benefit accruing to one party or some forbearance or detriment given by the other.⁷⁷ The consideration offered by the student would consist of either refraining from seeking education elsewhere, or if the student is past 16 years of age, continuing in school instead of dropping out. By continuing in school beyond the age of 16, any student could claim his loss of financial income as consideration for remaining in school. Consideration for refraining from seeking education elsewhere is strengthened by the individual student's financial capability to elect alternative private education.⁷⁸ The University of Pennsylvania Law Review offers two examples where an implied contract theory might be applicable. The first situation involves a student's decision to continue schooling past age 16 based on a teacher's advisement of educational benefit. In reliance upon this advice, the student stays in school and is then negligently instructed while losing the aforementioned income. Another example deals with a family who after moving into town wishes to investigate all the schools in the area both public and private. They are particularly concerned about each school's reading program. They first examine the public school system, ask about their reading program, and are reassured of its quality and

proficiency. Relying on the public school system's representation, they then stop searching for alternative schools.⁷⁹ The author suggests that these examples may be more fertile for litigation than educators realize. Other writers who discuss implied contract are Weeks,⁸⁰ Harris and Carter,⁸¹ and Masner.⁸²

The second contract theory, third party beneficiary, involves a claim which can be brought by a third party if he can show that it was the primary intention of the contracting parties to benefit him. In Jorgensen's opinion, the payment of local property taxes pursuant to state mandate under the state constitution could be viewed as establishing a contractual relationship between the taxpayer and the state to which the student is a third party beneficiary of non-negligent instruction from the school district. It is pointed out that the plaintiff's main burden would be to establish that the parties intended him to be the primary beneficiary of the contract.⁸³

The University of Pennsylvania Law Review suggests that the third party beneficiary contract is between the teacher and the school district. Once again, the contracted benefit to be received by the student would be non-negligent instruction. The observation is made that the "intent to benefit" element can also be achieved if the contracting parties could foresee that a third party would reasonably

rely on the promise between them.⁸⁴ Masner also touched upon third party beneficiary as a form of recovery.⁸⁵

The third contract theory reviewed is the equitable doctrine of promissory estoppel. Promissory estoppel, according to Black's Law Dictionary, results when: (1) there is a promise which the promisor should reasonably expect to induce action, (2) the promisee does act on the promise, and (3) injustice can only be avoided by enforcement of the promise.⁸⁶ Masner notes that, "It could be argued that the teacher's implied promise to teach non-negligently or the school district's implied promise to provide non-negligent teachers was made binding by the student's detrimental reliance on the promise."⁸⁷

Blackburn believes that another form of estoppel, termed equitable estoppel, can be utilized when the plaintiff is suing in negligence or some tort where causation is a necessary element. Black's Law Dictionary defines equitable estoppel as a doctrine by which a person may be precluded by his previous acts or representations from asserting a right which he otherwise would have had.⁸⁸ Blackburn provides the example of a teacher who represents inaccurately to a student or his parent that the student's reading is at a normal grade level. If as a result, the plaintiff then brought suit in tort, the defendant would be equitably estopped from denying that he

was the proximate cause of the plaintiff's injury.⁸⁹ The University of Pennsylvania Law Review also discusses equitable estoppel.⁹⁰

Constitutional Law Theories

The area of constitutional law is reviewed by authors who advocate theories based on due process and equal protection. The Due Process Clauses of the Fifth and Fourteenth Amendments to the Federal Constitution serve as one basis for a legal theory in the Constitutional law area. They provide both procedural protection which is reasonable notice and a right to be heard, as well as substantive protection which is assurance from arbitrary and unreasonable action.⁹¹ An education has been viewed as a property right entitled to procedural and substantive due process.⁹² Jorgensen cites a U.S. Supreme Court decision, Goss v. Lopez,⁹³ which states that the property right afforded protection is a student's entitlement to a public education.⁹⁴ Pabian adds, that the courts have established that before a student can be deprived of this right, procedural due process requires that the student must at least be provided adequate notice and a chance to be heard. Pabian further discusses due process in its substantive sense by suggesting that if a student is not afforded an opportunity to achieve educationally because of

teacher negligence, the student has been deprived of his property right. Hence, educational malpractice could be both a procedural and substantive due process violation.⁹⁵

A student's compulsory attendance at school can also be regarded as involving a liberty interest which is entitled to protection under the Due Process Clauses. Jorgensen believes an argument could be made by a student that the time spent in school is "confinement," which deprives him of his liberty.⁹⁶ Masner articulates a student's deprivation of liberty argument in this way: substantive due process means that the state must provide a quid pro quo or something in return for the liberty deprivation. This quid pro quo is the educational benefit to which the student is entitled, in return for his loss of liberty during school hours.⁹⁷

Masner compares a student's substantive due process right to an education with a mental patient's right to treatment. As the mental institution cannot operate legally for custodial purposes unless it provides an opportunity for treatment, neither can the state run a school system without affording students the opportunity to receive an education.⁹⁸ Jorgensen points out an inherent weakness in this analogy, which is that even the worst public schools do provide some "treatment." Furthermore, the student attends school for only a portion of the day, unlike the mental patient who lives in the institution.⁹⁹

The Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution is also discussed by commentators as basis for another theory in the constitutional law area. Jorgensen hypothesizes that an equal protection argument could be framed by a student who has graduated without the basic minimum skills. Because the student has graduated without the skills possessed by other students, his right to equal protection under the Fourteenth Amendment to the Constitution has been abridged.¹⁰⁰ The strength of this argument has been severely curtailed by the Supreme Court's decision in San Antonio Independent School District v. Rodriguez, which explicitly denied that education is a fundamental right.¹⁰¹

Van Zandt discusses equal protection as it relates to handicapped children. Although this subject matter is outside the scope of this study some of his comments are relevant in light of the passage of Public Law 92-142.¹⁰² He maintains that equal protection means more than just equal educational opportunity or equal access to an education, and that for education to be meaningful, it must provide for each student's individual needs equally.¹⁰³

Miscellaneous Theories

Two additional theories are proposed by the commentators consisting of the writ of mandamus and

statutory breach. Elson purports that a writ of mandamus is the most effective remedy available to compel a public official to perform a nondiscretionary or ministerial duty which is imposed upon him by law. A writ of mandamus, as defined by Black's Law Dictionary, is an order issued by a court to a public official mandating that he perform a ministerial duty imposed by law.¹⁰⁴ The plaintiff must show that, "...he has the legal right to have the duty performed and that the defendant has violated that duty after having been requested to perform it."¹⁰⁵ In addition, the plaintiff must show that the remedy available at law is inadequate. Elson observes that use of the writ is severely limited because the duties of educators, set by statute, are for the most part discretionary as opposed to ministerial in nature. The University of Pennsylvania Law Review also discusses mandamus.¹⁰⁶

A number of authors discuss statutory breach which consists of a violation of a statute promulgated by the state legislature or the State Board of Education, by a teacher or school district. Engh draws an analogy between statutory breach and minimum competency legislation. Engh believes that this legislation places an affirmative duty on teachers and school districts to withhold diplomas from students who have not achieved the minimum requirements.¹⁰⁷ Beckham, although stating that at the

present time public policy arguments appear to favor the defendant school district, believes "a sufficiently gross breach of legally mandated duties could result in a judicial tipping of the scales toward school district liability."¹⁰⁸ Lynch, however, notes that statutes which are not intended to protect against injury, but rather are designed to confer a benefit upon the general public, do not give rise to a cause of action by an individual to recover damages for their breach.¹⁰⁹ Other commentators who have dealt similarly with this subject are Blackburn,¹¹⁰ and Braverman.¹¹¹

Summary

This chapter reviewed the research and literature which has been generated by educational and legal scholars as a result of the educational malpractice cases. The research and literature was discussed under three areas: (1) historical evolution of educational malpractice, (2) preventative measures, and (3) alternative legal theories.

The literature relating to the historical evolution discussed the factors leading up to the first educational malpractice action in 1972. Various authors traced the historical development of school litigation up to and including educational malpractice. Other authors traced the history of educational malpractice to the educational

accountability movement and the malpractice literature of other professions.

The literature pertaining to preventative measures responded to the threat of legal action for educational malpractice. Authors discussed the strategies teachers and school districts could implement to avoid a successful lawsuit.

Finally, literature presenting alternative legal theories for pleading educational malpractice was reviewed.

FOOTNOTES

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²⁰Arlene H. Patterson, Educational Malpractice: Guidelines For School Districts To Avoid Liability For Academic Negligence, (Tallahassee, Florida: Patterson Associates, January 1981), p. 2.

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²⁴Christopher Herrick Engh, "Implications of Minimum Competency Legislation: A Legal Duty of Care?" 10 Pacific Law Journal 947, 952-957 (1979).

²⁵Klein, pp. 43-45, 61.

²⁶Merle Steven McClung, "Competency Testing Programs: Legal and Educational Issues," 47 Fordham Law Review 651 (1979).

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⁷⁹Ibid., pp. 784-789.

⁸⁰Weeks, p. 36.

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⁸⁶Black's Law Dictionary, p. 1093.

⁸⁷Masner, p. 564.

⁸⁸Black's Law Dictionary, p. 483.

⁸⁹Blackburn, p. 136-137.

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⁹¹The Fifth Amendment to the U.S. Constitution states, in part, "No person shall...be deprived of life, liberty or property, without due process of law." The Fourteenth Amendment mirrors the Fifth Amendment's due process clause, but applies it against the States, as opposed to the federal government.

⁹²Black's Law Dictionary, p. 449.

⁹³Goss v. Lopez, 419 U.S. 565 (1975) [hereinafter cited as Goss].

⁹⁴Jorgensen, p. 348.

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⁹⁷Masner, pp. 567-571.

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¹⁰⁰Ibid., p. 355.

¹⁰¹San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) [hereinafter cited as Rodriguez].

¹⁰²"Education For All Handicapped Children Act of 1975," P.L. 92-142, 89 Stat. 1-8 (1975). This federal statute gives handicaps a right to a "meaningful education". See also, Kurker-Stewart and Carter at Footnote 50 of this Chapter.

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¹⁰⁵Elson, p. 763.

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¹⁰⁸Joseph Beckham, "Educational Malpractice: Breach of Statutory Duty and Affirmative Acts of Negligence By a School District." Journal of Education Finance (Winter, 1979), vol. 4, p. 377.

¹⁰⁹Patrick D. Lynch, "Education Policy and Educational Malpractice," Contemporary Legal Issues in Education, (Topeka: National Organization on Legal Problems of Education, 1979), pp. 221-223.

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CHAPTER III

THE TORT OF EDUCATIONAL MALPRACTICE: TORT LAW, PUBLIC POLICY AND THE COURT'S REACTION

This study was conducted to determine the potential for a successful cause of action for educational malpractice based on traditional negligence theory. To develop an understanding of educational malpractice, fundamental concepts of tort law have been examined. This chapter discusses the historical foundations of tort law and its nature, as well as how both interact with public policy. The theory of negligence, one category of tort law, has been reviewed to provide an appropriate foundation for a discussion of professional malpractice in general and educational malpractice in particular. Selected cases where courts have confronted a potential educational malpractice cause of action have been reviewed to establish the existing parameters of this new area of law. From these cases, the public policy factors used by courts to deny recognition of this cause of action have been analyzed from which rejection standards have then been generated.

Historical Developments of Tort Law

A concise, satisfactory definition of a "tort" has eluded the grasp of lawyers, judges and textbook writers

since the advent of the American legal system.¹ Black's Law Dictionary defines a tort as a legal wrong committed upon the person or property independent of contract.²

Prosser describes a tort in this way:

In its broadest sense, a tort is a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages.³

One common denominator is present in all attempts to define a tort, someone has sustained a loss or injury as the result of some act or failure to act by another.⁴

The law of torts is a creation of the common law. Assault, battery, negligence and other theories of tort law have their origin in the writ system of England. Writs gave the local and royal courts jurisdiction to do justice in a given case. Writs were of two types: trespass writs and case writs. The trespass writ was the first to develop and pertained only to certain distinct types of civil action. The plaintiff could recover in trespass for direct injuries such as assault, battery, false imprisonment, trespass to chattels, and trespass to land. As time passed the writs became inflexible and rigid barring injured plaintiffs from remedy if they could not fit their case into one of the prescribed writs.

To mitigate this harshness, there developed in the common law a practice of issuing and honoring writs for wrongs which did not fit within the confines of the designated trespass actions. These new writs, created to fill the gaps left by the trespass writs, became known as case writs. They were developed to remedy indirect injury which a plaintiff suffered personally or to his property as opposed to the direct injury already remedied by the trespass writ. Examples of case actions include nuisance, defamation, interference with economic relations, malicious prosecution, strict liability, and negligence.⁵

Today, although the names "trespass" and "case" have disappeared, the individual torts, each with their own unique set of rules, have remained and are a vital part of modern tort law.

Rudiments of Tort Law

Tort law has three major goals which it seeks to accomplish. The first goal is to compensate a victim for losses he has suffered with respect to legally recognizable interests.⁶ A second goal is to determine the relative ability of the respective parties to bear the loss which must necessarily fall upon one or the other and to shift it accordingly.⁷ The final goal is to prevent future harms and losses, while deterring accidents, behavior and conduct thought to be socially unreasonable.⁸

Under our present tort system, liability for tortious conduct is based upon fault. A defendant cannot be held liable for injuries or harm to another unless he was legally at fault.⁹ Fault can be defined as tortious conduct which falls below accepted community standards of behavior or which creates an unreasonable or unacceptable risk of harm.¹⁰ Three general categories comprise the area of tort law based upon differing degrees of fault: intentional torts, negligence, and strict liability.¹¹

The key element of an intentional tort is the actor's intent. If the defendant does not have the requisite intent, there can be no liability. Intent can be defined as a desire to bring about direct results which the law will not sanction. It extends beyond the direct results desired to include those results which are substantially certain to follow from what is done.¹² The intentional torts consist of assault, battery, false imprisonment, intentional infliction of emotional distress, trespass to land, trespass to chattels and conversion.¹³

Negligence, the second category of tort law, is best described as an action falling below an acknowledged standard of care established by law for the protection of others against unreasonable risk of harm that results in injury to another person.¹⁴

The third category of tort law is strict liability. Under this category, liability will be imposed upon a defendant regardless of his fault. Traditionally, strict liability has been imposed for injuries resulting from abnormally dangerous activities carried on by the defendant such as blasting or the storage of dangerous substances, or for injuries which result from wild animals owned by the defendant.¹⁵ Recent developments have extended strict liability to the products liability area.¹⁶

Nature of Tort Law and Public Policy

The nature of tort law, from its creation in the common law to the present, has been portrayed as, "dynamic in adjusting to the changing needs and mores of society."¹⁷ Throughout the development of tort law, courts have continually recognized that certain interests, not previously protected by the law, are worthy of legal protection.¹⁸ Bischoff characterizes torts as an area which is continually redefining justifiable interference with another or his property.¹⁹ Prosser has this to say about tort law:

New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized

before.... The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection, the mere fact that the claim is novel will not of itself operate as a bar to the remedy.²⁰

Although the recognition of new torts is characteristic of this area of law, it must be balanced against the view of many courts and legal scholars that it is not in society's best interest to remedy every wrong.²¹ Courts are thus faced with the decision of determining which wrongs or injuries are in society's best interest to remedy. Once an injury has been recognized legally and accorded an appropriate remedy, tort law will expand and receive the new area.²²

When considering society's best interest, courts and legal scholars examine the prevailing public policy to determine whether an injury should be protected. If a plaintiff can show that he has suffered a wrong and that public policy demands a remedy, courts will disregard the absence of any precedent in the area and grant relief. This will usually be based upon a sound principle of law which can be found to govern directly or by analogy to another area where an injury has been previously accorded legal protection.²³

Public policy evolves as a reflection of social expectations and societal values.²⁴ Eventually, it becomes written as a part of the case law handed down by courts and the statutes passed by legislatures.²⁵

Courts consider many factors to determine whether public policy demands a remedy. They often balance conflicting interests of individuals with the interests of the community as a whole to achieve a desirable social result.²⁶ This balancing of interests has been referred to by Prosser as "social engineering." Prosser explains:

...the law of torts is a battleground of social theory. Its primary purpose, of course, is to make a fair adjustment of the conflicting claims of the litigating parties... The administration of the law becomes a process of weighing the interests for which the plaintiff demands protection against the defendant's claim to untrammelled freedom in the furtherance of his own desires, together with the importance of those desires themselves. When the interest of the public is thrown into the scale and allowed to swing the balance for or against the plaintiff, the result is a form of 'social engineering' that deliberately seeks to use the law as an instrument to promote that 'greatest happiness of the greatest number,' which by common consent is the object of society.²⁷

Prosser lists four public policy factors which affect a court's decision to provide a remedy for an injury. One such factor is the interrelationship between public policy and the doctrine of stare decisis. Under this doctrine, a rule once laid down by a court will be followed when similar fact situations arise until the court finds good reason to depart from it.²⁸ Stare decisis has firm support in policy considerations concerned with the evenhanded application of the law which is essential both to fair and efficient adjudication and to the guidance of private conduct in reliance upon the law.²⁹

A second factor is the convenience of administration. Courts by necessity must have the time to ascertain the real facts of any case and to provide an effective remedy.³⁰ Already congested with extensive case loads, courts fear that fraudulent claims may be brought or that a "flood of litigation" may result if new injuries are recognized which they are not prepared to handle.³¹ Some human wrongs, according to Prosser, "do not lie within the power of any judicial system to remedy."³²

A third factor weighed by the courts is the relative ability of the respective parties to bear the loss of the injury. To determine whether an injury should be legally protected, courts may decide to allocate the loss to the party who is best able to bear it. This decision involves a

consideration of the capacity of the parties to either absorb the cost or avoid it by passing it on to the public or the consumer through rates, prices, taxes or insurance.³³

Two final factors which courts consider is the prevention of future wrongs and punishment of the defendant. Courts may recognize that an injury needs legal protection in order to prevent the occurrence of the harm in the future.³⁴

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

Negligence

One theory of tort law, negligence, is a good example of the flexibility found in the law of torts. Its acceptance came as a result of the recognition by courts that injuries caused by another person's negligent conduct need protection. A common jury instruction used by courts to explain negligence is, "the failure to do something which a reasonably prudent and careful person would do or the doing of something which a reasonably prudent and careful person would not do, under circumstances similar to those shown by the evidence."³⁵ Negligence may therefore

consist of either an act of commission, a positive action done in violation of a duty, or an act of omission, a failure to act in violation of a duty.³⁶ In order for a negligence cause of action to be successful, a plaintiff must plead and prove the following four basic elements:

1. Duty of Care - a duty recognized by the law which a defendant owes to a plaintiff which requires the defendant to conform his conduct to a certain standard of conduct (care);
2. Breach of the Duty - failure of the defendant to conform to the standard of conduct (care);
3. Causal Relation - a reasonably close causal connection between the conduct of the defendant and the plaintiff's injury;
4. Injury - the actual loss, injury or damage to the interest of another.³⁷

Duty of Care

In any negligence action, the plaintiff must initially prove that the defendant owed the plaintiff a duty to use the care which a reasonable man would use under the same or similar circumstances. If the defendant owes no duty to the plaintiff, there can be no cause of action. The duty owed in a negligence action is always the same: the defendant must conform his actions to the legal standard of

reasonable conduct in light of the apparent risk created by his conduct.³⁸

Duty arises from the relationship an individual has with another which imposes a legal obligation for the benefit of the other.³⁹ Whether a duty is owed and whether it should be legally recognized is a question of law to be determined by the court.⁴⁰ A duty may arise from either the common law or from statute. Under the common law doctrine of stare decisis duties already recognized in judicial opinions may be relied upon and carried forward in future cases.⁴¹

When confronted with a new cause of action where no duty has been previously recognized, courts weigh several factors to determine whether or not an existing common law duty could be adopted. Public policy and changing social conditions may call for recognition of a duty in order to protect a particular plaintiff. Courts may find a duty where, in general, a reasonable man would recognize it and agree that it exists.⁴² In addition, a duty may arise if a special relationship exists between the parties. Under most circumstances a person does not have a duty to take affirmative action to protect another from a risk of harm which the person did not create. However, a special relationship between the parties may give rise to such a duty. The doctor-patient relationship is an example of a

special relationship recognized by the courts which gives rise to a duty of care.⁴³ As a general rule, courts will only recognize that a defendant owes a duty to those people who are foreseeably endangered by any risk created by the defendant's conduct. This rule was established by Judge Cardozo in the landmark case of Palsgraf v. Long Island Railroad Co.⁴⁴

Many duties are also created by statute. These statutes are designed to protect classes of persons and to cover classes of acts. In determining whether a statute was designed to create a duty and whether a particular injured party was intended to be a beneficiary of the duty created, courts will deal with two issues. First, the court will question whether the statute was designed to protect the injured party. Second, the court will ask whether the injury sustained was of the type that the statute was designed to protect.⁴⁵

Breach of Duty

If a plaintiff can convince the court that the defendant owed him a duty, the plaintiff, must next prove that the defendant breached this duty by failing to conform his conduct to the standard of care which was required to be utilized under the circumstances. The standard of care traditionally used in a negligence cause of action is that

of the "reasonable man under similar circumstances."⁴⁶ If the defendant did not use the care which a reasonable man would be expected to exercise, the duty is breached, and his conduct is adjudged negligent.⁴⁷

The standard of care to which a reasonable man would be expected to conform his actions may arise from several sources. The Restatement, Second, of Torts states that the standard of care of a reasonable man may be:

1. established by a legislative enactment or administrative regulation which so provides, or
2. adopted by the court from a legislative enactment or an administrative regulation which does not so provide, or
3. established by judicial decision, or
4. applied to the facts of the case by the trial court or jury, if there is no such enactment, regulation, or decision.⁴⁸

If the standard of care required of a reasonable man is set by state statute or administrative regulation, the violation of either may be evidence of negligence, or negligence per se.⁴⁹ Negligence per se is the unexcused violation of a statute which relieves the plaintiff from the burden of proving duty and breach of duty.⁵⁰ A court, however, will not adopt the statute or regulation as the

standard of care unless it finds that the statute or regulation is exclusively directed to a specific purpose. The Restatement, Second, of Torts states these purposes to be:

1. to protect a class of persons which includes the one whose interest is invaded, and
2. to protect the particular interest which is invaded, and
3. to protect that interest against the kind of harm which has resulted, and
4. to protect that interest against the particular hazard from which the harm results.⁵¹

Dooley explains the intention of the four Restatement purposes as follows:

The court will not adopt the statute as the standard of conduct, according to the Restatement, when its purpose 'is found to be exclusively' to protect the interests of the state, or when it protects a class of persons, interests, or harms other than the plaintiff's, ...or when it protects against any other hazard than that from which the harm resulted. The traditional rule provides that a regulatory statute imposes only a duty owed to the public as a whole and does not impose duties owed to a particular individual upon which a tort claim may be based.⁵²

Causal Relationship

If a plaintiff can establish that a duty existed and that this duty was breached he has proven that the

defendant's conduct was negligent. Next, the plaintiff must prove that there existed a causal relationship between the defendant's negligent conduct and the injury or there can be no liability.⁵³ Causal relationship can be divided into two elements, legal cause and proximate cause, both of which must be proven by a plaintiff. Legal cause questions whether the defendant's negligent conduct was in fact the cause of the plaintiff's injury.⁵⁴ In determining whether the defendant's actions actually caused the injuries sustained, courts use such tests as the "but-for" and "substantial factor" tests. The but-for test requires proof that the plaintiff's injury would not have occurred but for the defendant's negligent conduct. This test is used when there are no additional or intervening factors which could have caused the plaintiff's injury.⁵⁵

The substantial factor test is applicable when two or more factors, including the defendant's negligent conduct, occur to bring about the plaintiff's injury when either operating alone would have been sufficient to produce the injury. Under this test, the defendant will be held liable if his actions by themselves were a substantial factor in producing the injury.⁵⁶

Once legal cause is established, the plaintiff must prove that the defendant's actions were the proximate cause of the injuries. Proximate cause seeks to limit the

defendant's responsibility for the consequences of his actions. Prosser explains:

as a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability... this becomes essentially a question of whether the policy of law will extend the responsibility for the conduct to the consequences which have in fact occurred.⁵⁷

In determining whether the defendant's negligent conduct was the proximate cause of the plaintiff's injury, courts have expressed a number of concerns on which they have based their decisions to preclude recovery. These concerns are as follows:

1. The injury is too remote from the negligence;
2. The injury is out of proportion to the culpability of the negligent party;
3. It is too highly extraordinary that the negligence should have brought about the harm;
4. The allowance of recovery would place too unreasonable a burden on the negligent party;
5. The allowance of recovery would be too likely to open the way for fraudulent claims; or,
6. The allowance of recovery would enter a field that has no sensible or just stopping point.⁵⁸

Many courts use the foreseeability test as a test for proximate cause. This test seeks to establish whether an ordinarily prudent person should have foreseen that some injury might occur from his conduct. If the injury would have been foreseeable, proximate cause is met.⁵⁹

The plaintiff in a negligence action has the burden of proving the causation elements of legal cause and proximate cause. He does not have to prove these beyond a reasonable doubt, but he must introduce sufficient evidence from which reasonable men could conclude that it was more probable than not that the defendant's conduct caused the injury.

Injury

Even if the plaintiff can prove the three elements previously discussed, the defendant will escape liability unless the plaintiff also proves that he suffered an injury which is legally compensable. The forms of legally compensable injuries most commonly recognized are actual physical injury or loss to a person or actual damage to or loss of property.⁶⁰ The common law has traditionally disfavored recognizing purely mental or psychological injuries or threat of future injury because of the difficulty of proving their existence or measuring their extent. Courts have only recently recognized that

wrongfully inflicted mental harm may be a legally compensable injury in itself.⁶¹

The theory of negligence is concerned with the relationship between individuals and the duty of care which one owes to another. When one's negligent conduct results in injuries to another because of a breach of the duty of care, the law of negligence affords protection for injury.

Professional Malpractice

Professional malpractice is an area of law which has developed based on a duty relationship between a professional and an individual.⁶²

"Malpractice" has been defined in Black's Law Dictionary as:

Professional misconduct or unreasonable lack of skill. It is any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice or illegal or immoral conduct.⁶³

The law of malpractice seeks to hold professionals liable for their misconduct.⁶⁴ Tracy states that:

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.⁶⁵

The Restatement, Second, of Torts states:

An actor undertaking to render services may represent that he has superior skill or knowledge beyond that common to his profession or trade. In that event he incurs an obligation to the person to whom he makes such a representation, to have, and to exercise, the skill and knowledge which he represents himself to have.⁶⁶

It is the status of membership in a profession which is a fundamental principle of the malpractice action. Two factors distinguish a profession in the legal sense of the term from other nonprofessional occupations. The first is a continual exercise of intellectual judgment by the professional. This exercise of judgment is predicated upon high educational achievement and is relied upon by the professional's clients. The second factor involves historic social status.⁶⁷ Traditionally, the "four learned professions" have included doctors, lawyers, ministers and teachers.⁶⁸ Courts, however, have expanded professional status to include other groups such as dentists, pharmacists, architects, engineers, accountants and title abstracters.⁶⁹

In addition to the status of membership in a profession, a second fundamental principle of malpractice law is the relationship of the professional to the client.⁷⁰ Professionals offer certain services to the public and hold themselves out as possessing certain skills, ability and knowledge upon which the public may innocently and reasonably rely. When injury occurs due to the professional's negligent conduct, the professional can be held liable to those injured persons with whom he has a relationship and who have reasonably relied upon his negligent actions to their detriment.⁷¹

A professional malpractice action may be brought against a professional under either a contract or tort theory. Recovery in contract is limited, however, to those people who are in privity of contract with the professional, or who are third-party beneficiaries of that contract.⁷² Generally, however, courts view malpractice from a tort law perspective.⁷³ Recovery for tort in malpractice may be based on one or more of the following theories: traditional negligence, negligence in the violation of a statute, misrepresentation or intentional tort.⁷⁴ Because educational malpractice founded on a tort theory of traditional negligence forms the basis for this study, other theories were not examined.

Traditional negligence is the theory most often pleaded in a malpractice cause of action. An individual who claims to have suffered injury as a result of a professional's negligent actions must plead and prove the four elements of a negligence cause of action previously discussed. A professional, however, is not held to the standard of care of the reasonable man under similar circumstances but is generally held to a higher standard of care than the ordinary person.⁷⁵

The professional standard of care is stated in the Restatement, Second, of Torts:

Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar circumstances.⁷⁶

The legal standard of care by which a professional's conduct will be judged may be derived from several sources, one of which is general common law principles. Courts may look to these principles to determine the professional standard of care which then becomes embodied in their decisions. Under the doctrine of stare decisis, courts will continue to incorporate the professional standard of care conceived in previous decisions.⁷⁷

In addition to the common law, the professional community itself may set its own standards of care through formal means such as the promulgation of rules by an official organization of the profession. Standards may also be set by the professional community through informal means such as the customary practices of the profession in a local community. Additionally, the professional himself may set his own standard of care. In the course of his dealings with a client, the individual professional can alter the expectations of his client and thus the standard by which the professional's success or failure will be judged.⁷⁸

Once again, state statutes or administrative regulations can set the standard of care for the professional in the same manner as they set the standard by which a reasonable man's actions are to be judged.⁷⁹

In the malpractice action, professionals are held liable for negligence in the performance of their work because of their status as professionals. To date, malpractice actions have been limited to specific professions. A consideration of the history of professional malpractice reveals, however, that:

...'professions' include an ever-increasing roster of individual members ...the law must prepare to adapt to greater numbers of occupational groups demanding the special tort position accorded that status.⁸⁰

Educational Malpractice

With the arrival of educational malpractice claims, the courts have been presented with the novel legal question of whether to expand the area of tort law to include complaints arising from the area of academic negligence.⁸¹ The courts have responded negatively to this question and have refused to extend the umbrella of tort protection to include educational malpractice basing their conclusion on various public policy considerations.⁸²

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

Until the last half of the twentieth century the school was an institution whose officers and employees enjoyed, under the common law, the freedom to treat pupils with a wide latitude of discretion. Rarely challenged and even more rarely checked in courts in the exercise of their duties, the school resembled a primary grouping as much as a secondary organization. The school teachers and administrators, much like parents, were assumed to protect the interests of children even when it hurt the children.⁸³

Students and parents, however, are beginning to question the adequacy of the education being provided by the

public schools. They are turning to the courts with the view that malpractice actions are a recognized and legitimate means of redressing grievances and injuries in other professions, and therefore should also be applied to professionals in the field of education.⁸⁴

Educational malpractice as a cause of action has not been recognized or defined by any court. Its existence is recognized only in the literature generated by educational and legal scholars as a result of the court actions brought by students against their school districts, administrators and teachers. A review of the educational malpractice cases reveals that the students are claiming they have been inadequately educated as a result of the failure of the schools to teach them sufficiently, and to diagnose and place them correctly in an appropriate school environment based upon that assessment and classification.⁸⁵ The students in these actions are seeking to recover for the loss of learning caused by the negligent teaching.⁸⁶

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

At the very least, the plaintiff's case would involve establishing that the student's failure to learn is a 'harm' cognizable in tort, and that the

teacher had a duty to teach the student non-negligently. Proximate cause is self-evidently present under most interpretations of the term. A student's failure to learn is clearly among the foreseeable risks of a teacher's poor classroom methods, thus satisfying one formulation of the term. Under the second major interpretation, proximate cause exists because a student's failure to learn is a direct consequence of the teacher's incompetent teaching. [Citations omitted.]⁸⁷

Various court cases throughout the country have confronted the issue of educational malpractice, but five cases are of primary importance. The following five cases have been selected and reviewed, because they cover the parameters of this new area of law. From these cases, the public policy factors used by courts to deny recognition of this new cause of action have been derived. Based on the analysis of the public policy factors, rejection standards have been generated to which all future arguments must be directed in order to become successful.

Case Analysis

Case One: Peter W. v. San Francisco Unified School District

The landmark case in the field of educational malpractice is Peter W. v. San Francisco Unified School District. The plaintiff was an 18-year-old male who

graduated from a public high school operated by the defendant school district. Throughout the 12 years the plaintiff was enrolled in the defendant's schools, his mother was continually reassured that he was performing at or near grade level in the basic academic skill areas of reading and writing.⁸⁸ After graduation, however, it was determined that his reading ability reflected only a fifth grade reading level. Thereafter, suit was filed against the San Francisco Unified School District, its superintendent of schools, its governing board, and the individual board members for failure to provide the plaintiff, Peter W., with an adequate education.⁸⁹

The plaintiff asserted three causes of action based upon the three tort theories of negligence, breach of a statutory duty, and misrepresentation. The lower court dismissed the suit. On appeal, the appellate court was confronted with the "novel and troublesome" question of:

Whether a person who claims to have been inadequately educated, while a student in a public school system, may state a cause of action in tort against the public authorities who operate and administer the system.⁹⁰

The court answered this question in the negative and affirmed the lower court's decision to dismiss the suit. The court described the plaintiff's case as one involving educational "malfeasance."⁹¹

The plaintiff's first cause of action, based on negligence, alleged the following:

Defendant ...negligently and carelessly failed to provide plaintiff with adequate instruction, guidance, counseling and/or supervision in basic academic skills ...negligently failed to use reasonable care in the discharge of its duties to provide plaintiff with adequate instruction ... failed to exercise that degree of professional skill required of an ordinary prudent educator under the same circumstances.⁹²

The court focused exclusively upon the question of whether the defendants owed the plaintiff a duty of care. The issue of whether a duty of care exists, is a question of law which must be decided by the court. Without a duty of care there can be no recognition of the cause of action. In this case the court found this question to be dispositive of Peter W.'s cause of action.⁹³

The plaintiff argued that his enrollment and attendance at the defendants' schools evidenced the requisite duty of care which the defendant owed based upon three judicially recognized theories. The plaintiff's first theory asserted that once the defendant undertook the responsibility to educate the plaintiff, it owed a duty of reasonable care in the discharge of this responsibility. The second theory alleged that a duty arose because of the

special relationship between student and teacher. The third theory argued that the duty of reasonable care which presently exists in supervising a child's physical safety, could be applied by inference to a student's academic well-being.⁹⁴

The court dismissed the three theories for lack of relevant authority to support them and held that the plaintiff's enrollment and attendance at the defendant's schools did not prove the requisite duty of care relative to his academic instruction. In so holding, the court observed:

no reasonable observer would be heard to say that these facts did not impose upon defendants a 'duty of care' within any common meaning of the term; given the commanding importance of public education in society, we state a truism in remarking that the public authorities who are dutybound to educate are also bound to do it with 'care.'⁹⁵

The court recognized that teachers have an ethical and moral duty to educate with care, but they failed to find a legal duty to fulfill this obligation. The court stated that whether a defendant owes a legal duty of care is a question of law for the court to determine, and whether a duty of care will be judicially recognized is "initially to be dictated or precluded by considerations of public policy."⁹⁶ In their discussion of duty, the court stated:

an affirmative declaration of duty [of care] simply amounts to a statement that two parties stand in such relationship that the law will impose on one a responsibility for the exercise of care toward the other.... Duty is not sacrosanct in itself, but only an expression of the sum total of those policy considerations which lead the law to say that a particular plaintiff is entitled to protection.⁹⁷

The court continued by noting several policy factors to be considered in determining whether a duty of care exists:

Inherent in this simple description are various and sometimes delicate policy judgments. The social utility of the activity out of which the injury arises, compared with the risks involved in its conduct; the kind of person with whom the actor is dealing; the workability of a rule of care, especially in terms of the parties' relative ability to adopt practical means of preventing injury; the relative ability of the parties to bear the financial burden of injury and the availability of means by which the loss may be shifted or spread; the body of statutes and judicial precedents which color the parties' relationship; the prophylactic effect of a rule of liability; in the case of a public agency defendant, the extent of its powers, the role imposed upon it by law and the limitations imposed upon it by budget; and finally, the moral imperatives which judges share with their fellow

citizens ...such are the factors which play a role in the determination of duty. [Citations omitted.]⁹⁸

In addition to these factors, the court listed other factors:

'administrative factors' which involve such considerations as the possibility of 'feigned claims' and the difficulty of proof, of a particular injury; others, as 'socio-economic and moral factors' involving the prospect of limitless liability for the same injury ...the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached

to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.⁹⁹

From these the court elected four policy factors upon which to base its decision not to recognize a duty of care owed by the defendant school district to the plaintiff. First, the court held that no workable standard or rule of care could be found commenting that:

Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might - and commonly does - have his own emphatic views on the subject.¹⁰⁰

Second, the court held that the causal link between the educator's actions and the student's failure to learn involved a "host of factors" outside the classroom, which affect a student subjectively and which are beyond the control of the educators. Among those factors cited were the physical, neurological, emotional, cultural and environmental.¹⁰¹ Third, the court held that there was no reasonable degree of certainty that the plaintiff suffered injury within the meaning of the law of negligence.¹⁰² Finally, the court feared a "flood of litigation" could result in undesirable consequences if the court recognized a duty of care. The court stated:

To hold them [school district] to an actionable 'duty of care,' in the discharge of their academic functions, would expose them to the tort claims - real or imagined ...of disaffected students and parents in countless numbers.... The ultimate consequences, in terms of public time and money, would burden them ...and society ...beyond calculation.¹⁰³

In light of these public policy factors, the court held that there was no requisite duty of care owed to the plaintiff, and the dismissal of the plaintiff's negligence claim was affirmed.¹⁰⁴

The plaintiff also sought to hold the defendants liable under two additional causes of action based upon the theory of breach of a statutory duty and the theory of negligent misrepresentation. The court also affirmed the lower court's dismissal of both of these causes of action. In its decision, the court stated that a cause of action for intentional misrepresentation may exist and could possibly be brought in the future. Consequently, the door to future lawsuits alleging academic injury based upon this theory was not closed.¹⁰⁵

In summary, Peter W. was the first case to be brought in the area of educational malpractice. Although the term "educational malpractice" was not mentioned by the court, Peter W. established the framework on which subsequent educational malpractice cases were brought. The plaintiff alleged that he had been negligently instructed by the defendant school district. The court denied the cause of action based on four public policy factors.

The four public policy factors identified by the court are summarized as follows:

1. No workable standard of care can be found by which to measure a school district's or teacher's actions in light of the dispute among educators and laymen over classroom methodology and how or what a child should be taught.
2. No perceptible causal connection can be recognized between a school district's conduct and a student's injury suffered due to the host of factors which influence a student's achievement of literacy in the schools and which are beyond the control of the school district.
3. No academic injury can be established with a reasonable degree of certainty within the meaning of the law of negligence.
4. Courts fear fraudulent claims and a flood of litigation and the burden in terms of time and money which would be placed upon school districts and society if they were to hold school districts to an actionable duty of care.

Case Two: Donohue v. Copiaque Union Free School District

A second case involving educational malpractice,

Donohue v. Copiague Union Free School District, was brought in New York by a plaintiff who graduated from a high school operated by the defendant school district. The plaintiff was permitted to graduate although he received failing grades in several subjects and lacked basic reading and writing skills. After graduation, it was necessary for the plaintiff to seek tutoring to acquire those basic skills which he had not obtained in school. The plaintiff brought an educational malpractice action against the defendant school district based upon negligence and breach of a constitutional and statutory duty. Here the court was presented with a case of first impression in the State of New York, confronted with whether or not to recognize a cause of action for educational malpractice. They declined the recognition, ruling against both causes of action for public policy reasons.¹⁰⁶

With regard to the plaintiff's first cause of action alleging negligence, the court held that no legal duty of care exists between educators and students for reasons of public policy. In its decision, the court referred to and incorporated the four public policy factors identified in Peter W.¹⁰⁷ The court ruled:

This determination does not mean that educators are not ethically and legally responsible for

providing a meaningful public education for the youth of our state. Quite the contrary, all teachers and other officials of our schools bear an important public trust and may be held to answer for the failure to faithfully perform their duties. It does mean, however, that they may not be sued for damages by an individual student for an alleged failure to reach certain educational objectives.¹⁰⁸

The court continued in saying that the duly constituted educational authorities of New York, not the courts, are the proper officials to determine educational policies and to evaluate how best to educate a child or to administer a public school system. The court stated:

The courts are an inappropriate forum to test the efficacy of educational programs and pedagogical methods ...judicial interference would be the inevitable result of the recognition of a legal duty of care.... It simply is not within the judicial function to evaluate conflicting theories of how best to educate.... The recognition of a cause of action sounding in negligence to recover for 'educational malpractice' would impermissibly require the courts to oversee the administration of the State's public school system.¹⁰⁹

The court next addressed the plaintiff's second cause of action based upon a constitutionally imposed duty to educate. The court held that no duty arises under the

state constitution for the school district to provide the plaintiff with an education and dismissed this cause of action.¹¹⁰

Finally, the court held that no cause of action would be recognized under either a theory of negligence or a breach of a statutorily imposed duty "because of the practical impossibility of demonstrating that a breach of the alleged common law and statutory duties was the proximate cause of his (the plaintiff's) failure to learn."¹¹¹ The court stated that a host of factors, including social, emotional and economic, in addition to a child's innate intelligence, effect the extent to which a child learns.¹¹²

The court, in its failure to recognize a cause of action for educational malpractice based upon negligence or statutory breach did not completely bar the possibility of a successful case in the future. The court noted that if gross violations of defined public policy were found to exist, they would be obliged to recognize these violations and correct them.¹¹³

The plaintiff appealed his case to the New York Court of Appeals which affirmed the lower court's holding for the defendant and agreed with its rationale. The Court of Appeals explained:

It may well be that even within the structures of a traditional negligence or malpractice action, a complaint sounding in 'educational malpractice' may be formally pleaded.... The heart of the matter is whether, assuming that such a cause of action may be stated, the courts should, as a matter of public policy, entertain such claims. We believe they should not.¹¹⁴

The Court of Appeals found that control and management of educational affairs, judgments as to the validity of educational policies, and the day-to-day implementation of these policies are vested in the Board of Regents and the Commissioner of Education and not with the courts. To hold otherwise would "constitute blatant interference with the responsibility for the administration of the public school system lodged by Constitution and statute in school administrative agencies."¹¹⁵

Furthermore, they stated that a cause of action for educational malpractice should not be recognized, because the parents and students have a right to seek review of any school act or decision by the Commissioner of Education under state law, which provides an adequate remedy.¹¹⁶

In summary, the Donohue case was the first to propose the term educational malpractice. The plaintiff used it to refer to the negligent instruction he allegedly received from the defendant school district. The court

denied the cause of action, based on the four policy factors already established in Peter W. and cited one more relevant factor. The new public policy factor identified by the court can be summarized as follows:

The courts are an inappropriate forum to test how best to educate or to administer a public school system. The administrative processes provided by statute are available to the parents and students and are the appropriate means of ensuring that a student receives a proper education.

Case Three: Hoffman v. Board of Education of the City of New York

Subsequent to the Donohue opinion, the New York courts had the opportunity to re-evaluate their position on educational malpractice in Hoffman v. Board of Education of City of New York. The plaintiff, Daniel Hoffman, entered kindergarten in the defendant school system and shortly thereafter was given a Stanford-Binet intelligence test which revealed that he had an intelligence quotient (I.Q.) of 74. At the time, Hoffman had a severe speech defect which made it difficult to assess his mental ability through the use of the primarily verbal test. Because of the effect the speech defect may have had on the I.Q. assessment, Dr. Gottsegen, the psychologist who administered the test,

entered a written recommendation that Hoffman's intelligence be "re-evaluated within a two-year period so that a more accurate estimation of his abilities can be made."¹¹⁷ Based upon the finding of the intelligence quotient of 74 and the fact that normal intelligence is measured at an I.Q. of 75 and above, the defendants recommended that the plaintiff be placed in a class for children with retarded mental development (CRMD). Hoffman was then placed in the CRMD classes where he remained for the next 12 years. At no time during these 12 years was Hoffman's intelligence retested. At the age of 17, Hoffman entered an occupational training center for retarded youths. After one year, his mother requested that her son be given an intelligence test. This test revealed that Hoffman had an I.Q. of 94, which denoted normal intelligence.¹¹⁸ Because of this, he no longer qualified for the program and subsequently was released.

Hoffman then brought suit against the Board of Education of the City of New York alleging, "that the board was negligent in its original assessment of his intellectual ability and that the board negligently failed to retest him pursuant to Dr. Gottsegen's earlier recommendation."¹¹⁹ The jury found for the plaintiff and awarded him \$750,000 for damages. The defendant appealed this judgment.

In the opinion rendered by the first court on appeal, the defendant's actions were categorized as an "affirmative tort" because of its failure to retest the plaintiff's intelligence within two years as recommended by its own psychologist.¹²⁰ The court distinguished the Donohue case by stating that Donohue involved acts of "nonfeasance" while Hoffman involved "misfeasance." The court explained:

If the door to 'educational torts' for nonfeasance is to be opened [Citations omitted.] ...it will not be by this case which involves misfeasance in failing to follow the individualized and specific prescription of defendant's own certified psychologist ...'the thrust of the plaintiff's case is not so much a failure to take steps to detect and correct a weakness in a student, that is, a failure to provide a positive program for a student, but rather, affirmative acts of negligence which imposed additional and crippling burdens upon a student'...¹²¹

Consequently, the court affirmed the judgment for the plaintiff holding that, "it does not seem unreasonable to hold a school board liable for the type of behavior exhibited in Hoffman."¹²² This affirmance was made upon the condition that the plaintiff consent to a reduction of his damages to \$500,000.

The defendants once again appealed, and a divided Court of Appeals reversed both decisions of the lower courts and denied recovery. The Court of Appeals classified the plaintiff's cause of action as "educational malpractice." Following the doctrine of stare decisis, the court reaffirmed the principle laid down in Donohue that, "such a cause of action, although quite possibly cognizable under traditional notions of tort law, should not, as a matter of public policy, be entertained by the courts of this State."¹²³

The Court of Appeals also stated that no distinction was to be drawn between educational malpractice cases of misfeasance and cases of nonfeasance.¹²⁴ The policy considerations referred to in Donohue applied "with equal force to 'educational malpractice' actions based upon allegations of educational misfeasance and nonfeasance."¹²⁵

In summary, Hoffman raised additional issues in the educational malpractice area and served to further expand the definition. The court used the term educational malpractice to apply to the plaintiff's allegations of negligent diagnosis and placement. The New York Court of Appeals reversed the favorable ruling by the lower courts and denied the cause of action for public policy reasons. The court found no new policy factors, reaffirming by

incorporation the policy factors established in Peter W. and Donohue as rationale for its decision.

Case Four: L.A.H. and D.S.W. v. Fairbanks North Star Borough School District

The issue of educational malpractice was also reviewed in the Alaskan case of L.A.H. and D.S.W. v. Fairbanks North Star Borough School District. The plaintiffs, L.A.H. and D.S.W., both suffered from dyslexia. L.A.H. attended defendant's schools from kindergarten through the sixth grade. It was not until the last day of L.A.H.'s second year in the sixth grade that the defendant discovered L.A.H. was dyslexic. The defendant provided L.A.H. with special classes to remediate his disability. The classes were subsequently terminated even though the defendant was aware that the plaintiff had not overcome his dyslexia.¹²⁶

D.S.W. was also enrolled in defendant's schools. He was diagnosed as dyslexic in the first grade, but it was not until the fifth grade that the defendant provided D.S.W. with special courses. Defendant discontinued the special program in the seventh grade although it was aware that D.S.W. had not been adequately trained to compensate for the dyslexia. Both L.A.H. and D.S.W. brought actions against the defendant school district seeking money damages. The

lower court dismissed both plaintiffs' claims.¹²⁷

On appeal, the Supreme Court of Alaska affirmed the dismissals. The issue presented, one of first impression for the Alaska courts, was whether an action for damages could be maintained against a school district for the negligent classification, placement, or instruction of a student.¹²⁸

The court chose not to recognize a cause of action for educational malpractice for public policy reasons. They incorporated the public policy factors stated in Peter W. and Donohue into their rationale,¹²⁹ and added further that the judicial system provided an inappropriate remedy for problems of this kind. The court reasoned:

...the remedy of money damages is inappropriate as a remedy for one who has been a victim of errors made during his or her education. The level of success which might have been achieved had the mistakes not been made will, we believe, be necessarily incapable of assessment which is beyond the ability of courts to deal with in a reasoned way.¹³⁰

The court also stated that the proper remedy available to a student or his parents lay with the administrative and judicial review which was provided by state statute through the administrative processes. This type of remedy was preferable according to the court:

In our view it is preferable to resolve disputes concerning classification and placement decisions by using these or similar procedures than through the mechanism of a tort action for damages. Prompt administrative and judicial review may correct erroneous action in time so that any educational shortcomings suffered by a student may be corrected. Money damages, on the other hand are a poor, and only tenuously related, substitute for a proper education.¹³¹

In summary, Fairbanks North Star further expanded the definition of educational malpractice. Whereas, allegations brought in the previous cases under this cause of action were for negligent diagnosis, placement and instruction, the plaintiffs herein claimed negligent termination of services. The court denied the cause of action, affirming the public policy factors established in Peter W. and Donohue, and incorporated them into the rationale for its decision. In addition, they found one more relevant factor. The new public policy factor identified by the court can be summarized as follows:

Money damages are inappropriate as a remedy for a student who alleges educational malpractice. The proper remedy lies in prompt administrative and judicial review through the administrative processes.

Case Five: Hunter v. Board of Education of Montgomery County

The Maryland courts were also confronted with the opportunity to recognize educational malpractice in Hunter v. Board of Education of Montgomery County. The plaintiff brought suit based upon two causes of action against the defendant school board and several of its employees, including a principal and a teacher. The first cause of action founded in negligence, sought damages for the alleged failure of the school system to properly educate young Hunter. The plaintiff alleged that the "school system negligently evaluated the child's learning abilities and caused him to repeat first grade materials while being physically placed in the second grade." This misplacement and mispromotion continued through grade school.¹³²

The plaintiff's second cause of action was phrased in the language of an intentional tort. The plaintiff alleged that, "the individual educators, acting intentionally and maliciously, furnished false information to them concerning the student's learning disability, altered school records to cover up their actions, and demeaned the child."¹³³

The lower Maryland court denied both of the plaintiff's causes of action deciding that the public policy

of Maryland barred an action for educational malpractice. On appeal, the Maryland Court of Appeals framed the issue presented as, "the troubling but nevertheless important question ...of whether an action can be successfully asserted against a school board and various individual employees for improperly evaluating, placing, or teaching a student."¹³⁴

The Court of Appeals, following the precedent provided by other jurisdictions refused to recognize an educational malpractice cause of action based upon negligence for public policy reasons and affirmed the denial for relief. The court relied on public policy factors already discussed in Peter W., Donohue, Hoffman, and Fairbanks North Star.¹³⁵

With regard to the plaintiff's second cause of action based on intentional tort, the court reversed the lower court's decision.¹³⁶ The court stated that no jurisdiction previously discussing educational malpractice had been confronted with the issue of whether public educators may be held responsible for their intentional torts arising in the educational context.¹³⁷ The court held that the plaintiffs may state a cause of action based upon an intentional tort theory because the court does not intend to shield individual educators from liability for

their intentional torts.¹³⁸ The court expressed this position by saying:

It is our view that where an individual engaged in the educational process is shown to have willfully and maliciously injured a child entrusted to his educational care, such outrageous conduct greatly outweighs any public policy considerations which would otherwise preclude liability so as to authorize recovery.¹³⁹

In summary, the Hunter case further expands the definition of educational malpractice by addressing for the first time the allegation of negligent promotion. The Maryland Court of Appeals denied the cause of action for public policy reasons. The court found no new policy factors, reaffirming by incorporation the policy factors established in Peter W., Donohue, and Fairbanks North Star as rationale for its decision.

In conclusion, the five cases previously analyzed, Peter W., Donohue, Hoffman, Fairbanks North Star, and Hunter, are representative of the body of cases which have alleged educational malpractice. These cases define the parameters where educational malpractice has been alleged in an academic setting. The allegations of malpractice in these cases have encompassed the areas of negligent instruction, diagnosis, placement, termination of services and promotion. The cases also establish the public policy

factors that support decisions by courts to deny recognition of this new cause of action for educational malpractice. These public policy factors are summarized as follows:

1. No workable standard of care can be found by which to measure a school district's or teacher's actions in light of the dispute among educators and laymen as to classroom methodology and how or what a child should be taught.
2. No academic injury can be established with a reasonable degree of certainty within the meaning of the law of negligence.
3. No perceptible causal connection can be recognized between a school district's conduct and a student's injury suffered due to the host of factors which influence a student's achievement of literacy in the schools and which are beyond the control of the school district.
4. Money damages are inappropriate as a remedy for a student as a result of a claim of educational malpractice. The proper remedy lies in prompt administrative and judicial review through the administrative processes.

5. Courts fear fraudulent claims and a flood of litigation and the burden in terms of time and money which would be placed upon school districts and society if they were to hold school districts to an actionable duty of care.
6. The courts are an inappropriate forum to test how best to educate or to administer a public school system. The administrative processes provided by statute are available to parents and students and are the appropriate means of ensuring that a student receives a proper education.

From the previously noted public policy factors the following rejection standards have been postulated:

1. lack of a judicially workable standard of care;
2. no certainty of injury;
3. no causal link;
4. no appropriate remedy;
5. flood of litigation; and,
6. improper forum.

Summary

This chapter has discussed the historical foundations of tort law and its nature, as well as how both interact with public policy. The law of negligence was reviewed to provide a foundation for a discussion of professional malpractice in general and educational malpractice in particular. Selected court cases which have confronted the issue of whether to recognize educational malpractice were analyzed to establish the existing parameters of this area of law. From this analysis, public policy factors were identified which have precluded judicial recognition. These public policy factors form the basis for the rejection standards to which all future arguments must be directed for an educational malpractice cause of action to be successful.

FOOTNOTES

¹"Torts and Delicts," 27 Yale Law Journal 721, 723 (1918).

²Black's Law Dictionary, (St. Paul: West Publishing Co., 5th Ed., 1979), p. 1335.

³William L. Prosser, Law of Torts, (St. Paul: West Publishing Co., 4th Ed., 1971), p. 2.

⁴Stuart M. Speiser, Charles F. Krause, and Alfred W. Gans, The American Law of Torts, Vol. 1, (Rochester: The Lawyers Co-operative Publishing Co.; San Francisco: Bancroft-Whitney Co., 1983) §1.3, p. 12.

⁵Prosser, § 7, pp. 28-29.

⁶Speiser, Krause and Gans, p. 12.

⁷Prosser, § 1, p. 6.

⁸Ralph F. Bischoff, "The Dynamics of Tort Law: Court or Legislature?" 4 Vermont Law Review 35, 44 (Spring 1979); See also, Speiser, Krause and Gans, § 1.32.

⁹Sylvia Law and Steven Polan, Pain and Profit: The Politics of Malpractice, (New York: Harper and Row, 1978), p. 3; See also, Speiser, Krause and Gans, § 1.38.

¹⁰Restatement, Second, Torts § 282, Comment f; Prosser, § 5, p. 26.

¹¹Restatement, Second, Torts § 282.

¹²Prosser, § 8, p. 31.

¹³Ibid., pp. 28-97.

¹⁴Restatement, Second, Torts § 282

¹⁵Prosser, pp. 492-516.

¹⁶Restatement, Second, Torts § 402A

¹⁷Bischoff, p. 35.

- ¹⁸Restatement, Second, Torts § 1, Comment e.
- ¹⁹Bischoff, pp. 42-43.
- ²⁰Prosser, § 1, p. 3; See also, Speiser, Krause and Gans §1.5.
- ²¹Robert H. Jerry, II, "Recovery in Tort for Educational Malpractice: Problems of Theory and Policy," 29 Kansas Law Review 195, 206 (Winter 1981).
- ²²Prosser, § 4, pp. 21-22.
- ²³Speiser, Krause and Gans, p. 19.
- ²⁴Patrick D. Lynch, "Legal Implications of Models of Individual and Group Treatment by Professionals," 9 NOLPE School Law Journal 38, 57 (1980).
- ²⁵Patrick D. Lynch, "Education Policy and Educational Malpractice," Contemporary Legal Issues in Education, (Topeka: National Organization on Legal Problems in Education, 1979), p. 220.
- ²⁶Speiser, Krause and Gans, § 1.26, p. 84.
- ²⁷Prosser, § 3, p. 15.
- ²⁸Ibid., § 4, pp. 19-21.
- ²⁹Speiser, Krause and Gans, § 1.6, pp. 23-24.
- ³⁰Prosser, § 4, p. 21.
- ³¹Ibid., § 4, pp. 21-22.
- ³²Ibid., § 4, p. 21.
- ³³Ibid., § 4, pp. 22-23.
- ³⁴Ibid., § 4, p. 21; Bischoff, p. 44.
- ³⁵James A. Dooley, Modern Tort Law: Liability and Litigation, Vol. 1 (Wilnett, Illinois: Callaghan and Company 1982) § 3.02, p. 17.
- ³⁶Philip Francis, Protection Through the Law, (Dobbs Ferry, New York: Oceana Publications, Inc., 1978), p. 18.

³⁷Prosser, § 30, p. 143; Speiser, Krause and Gans, pp. 18-19.

³⁸Prosser, § 53, p. 324.

³⁹Ibid.

⁴⁰Dooley, Vol. 3 § 45.02, p. 225.

⁴¹Destin Shann Tracy, "Educational Negligence: A Student's Cause of Action for Incompetent Academic Instruction," 58 North Carolina Law Review, 561, 565 (1980).

⁴²Prosser, § 53, pp. 325-327.

⁴³"Educational Malpractice," 124 University of Pennsylvania Law Review, 755, 772-773 (1976); See also, Prosser, pp. 338-350.

⁴⁴Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

⁴⁵Francis, pp. 19-20.

⁴⁶Restatement, Second, Torts, § 283.

⁴⁷Francis, p. 18.

⁴⁸Restatement, Second, Torts § 285.

⁴⁹Dooley, Vol. 1, § 3.32, pp. 70-71; See also, Prosser § 36, pp. 190-204.

⁵⁰Prosser, § 36, p. 200.

⁵¹Restatement, Second, Torts § 286.

⁵²Dooley, Vol. 1, § 3.33, pp. 72-77.

⁵³Francis, p. 20; Restatement, Second, Torts § 281, Comment a.

⁵⁴Thomas G. Shearman and Amasa A. Redfield, A Treatise on the Law of Negligence, (Buffalo: William S. Hein & Co., Inc., 1980), §8.

⁵⁵Prosser, § 41, pp. 238-241.

⁵⁶Ibid.

- ⁵⁷Ibid., § 41, p. 237.
- ⁵⁸Dooley, Vol. 1, § 8.03, pp. 232-233.
- ⁵⁹Ibid., § 9.03, p. 248.
- ⁶⁰Prosser, § 30, p. 143.
- ⁶¹John Elson, "A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching," 73 Northwestern University Law Review 641, 755-756 (1978).
- ⁶²Lynch, NOLPE School Law Journal, p. 41.
- ⁶³Black's Law Dictionary, p. 864.
- ⁶⁴Tracy, p. 567, Footnote 43.
- ⁶⁵Ibid., p. 568.
- ⁶⁶Restatement, Second, Torts § 299A, Comment d.
- ⁶⁷Alice J. Klein, "Educational Malpractice: Can the Judiciary Remedy the Growing Problems of Functional Illiteracy," 13 Suffolk University Law Review 27, 41 (Winter 1979).
- ⁶⁸"Professional Negligence," 121 University of Pennsylvania Law Review 680, 630 Footnote 13 (1973).
- ⁶⁹Prosser, § 32, pp. 161-162.
- ⁷⁰Lynch, NOLPE School Law Journal, p. 41.
- ⁷¹121 University of Pennsylvania Law Review, pp. 655-656.
- ⁷²Ibid., p. 679.
- ⁷³Jerry, p. 195, Footnote 2.
- ⁷⁴121 University of Pennsylvania Law Review, p. 680.
- ⁷⁵Prosser, § 32, p. 161.
- ⁷⁶Restatement, Second, Torts § 299A

⁷⁷Lynch, NOLPE School Law Journal, p. 39; Restatement, Second, Torts § 285 Comment e.

⁷⁸121 University of Pennsylvania Law Review, pp. 645-649.

⁷⁹Lynch, NOLPE School Law Journal, p. 39.

⁸⁰121 University of Pennsylvania Law Review, p. 632.

⁸¹David Abel, "Can a Student Sue the Schools for Educational Malpractice?" 44 Harvard Educational Review 416, 417 (November 1974).

⁸²Cynthia A. Jorgensen, "Donohue v. Copiague Union Free School District: New York Chooses Not to Recognize 'Educational Malpractice'," 43 Albany Law Review 339, 358 (Winter 1979).

⁸³Lynch, Contemporary Legal Issues in Education, p. 209.

⁸⁴June R. Braverman, "Educational Malpractice: Fantasy or Reality?" 2 The Executive Review 1 (January 1982), p. 1.

⁸⁵Peter W., Donohue, Hoffman, Fairbanks North Star, Hunter.

⁸⁶Jerry, p. 195, Footnote 2.

⁸⁷124 University of Pennsylvania Law Review, p. 768.

⁸⁸Peter W., p. 827.

⁸⁹Ibid., p. 817.

⁹⁰Ibid.

⁹¹Ibid., p. 824.

⁹²Ibid., p. 818.

⁹³Ibid., p. 820.

⁹⁴Ibid., pp. 820-821.

⁹⁵Ibid., p. 821.

- ⁹⁶Ibid., p. 822.
- ⁹⁷Ibid., pp. 822, 824.
- ⁹⁸Ibid., p. 822.
- ⁹⁹Ibid., p. 823.
- ¹⁰⁰Ibid., p. 824.
- ¹⁰¹Ibid.
- ¹⁰²Ibid., p. 825.
- ¹⁰³Ibid.
- ¹⁰⁴Ibid.
- ¹⁰⁵Ibid., pp. 826-827.
- ¹⁰⁶Donohue, p. 881.
- ¹⁰⁷Ibid., p. 878.
- ¹⁰⁸Ibid., p. 879.
- ¹⁰⁹Ibid.
- ¹¹⁰Ibid., p. 880.
- ¹¹¹Ibid., p. 377.
- ¹¹²Ibid., p. 378.
- ¹¹³Ibid.
- ¹¹⁴Ibid., p. 880.
- ¹¹⁵Ibid., p. 881.
- ¹¹⁶Ibid.
- ¹¹⁷Hoffman, p. 102.
- ¹¹⁸Ibid., p. 319.
- ¹¹⁹Ibid.
- ¹²⁰Ibid., p. 110.

- 121 Ibid.
- 122 Ibid.
- 123 Ibid., p. 319.
- 124 Ibid., p. 320.
- 125 Ibid.
- 126 Fairbanks North Star, p. 554.
- 127 Ibid., p. 555.
- 128 Ibid., p. 554.
- 129 Ibid., p. 556.
- 130 Ibid.
- 131 Ibid., p. 557.
- 132 Hunter, p. 583.
- 133 Ibid.
- 134 Ibid.
- 135 Ibid., pp. 584-586.
- 136 Ibid., pp. 585, 587.
- 137 Ibid., p. 587.
- 138 Ibid.
- 139 Ibid.

CHAPTER IV

ANALYSIS OF REJECTION STANDARDS

The purpose of this study was to determine the potential for a successful cause of action for educational malpractice based on traditional negligence theory. As a result of the educational malpractice cases, much literature has been generated by educational and legal authors regarding the public policy factors used by the courts in their refusal to recognize this new tort action. They discuss the validity of the public policy factors posing arguments based on traditional negligence theory which either support or refute the reasoning of the courts. In this chapter literature containing these arguments is categorized and discussed under the six rejection standards generated in Chapter III: (1) lack of a judicially workable standard of care; (2) no certainty of injury; (3) no causal link; (4) no appropriate remedy; (5) flood of litigation; and, (6) improper forum.

Rejection Standard One

Lack of a Judicially Workable Standard of Care

The courts have failed to recognize a cause of action for educational malpractice because no workable standard of care could be determined by which to assess an

educator's conduct. This forms the basis for Rejection Standard One. The court in Peter W. announced that, "An affirmative declaration of duty simply amounts to a statement that two parties stand in such relationship that the law will impose on one a responsibility for the exercise of care toward the other. Inherent in this simple description are various and sometimes delicate policy judgments."¹ One element of policy judgment which has frustrated courts in their analysis of the potential educational malpractice action has been the determination of which standard should be used to evaluate the conduct of the defendant educator or educational institution. The standards to which the behavior of an educator can be held are difficult to establish because of vague and undefined principles in the field of education. The court in Peter W. expressed this concern by stating, "unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught."² The diversity of opinion regarding a workable standard of care for educators has caused the courts to rule that a school does not owe a plaintiff any more than as Cohen has phrased it, "a chair in the classroom."³

Klein suggests that this absence of standards has militated against the imposition of liability and must be overcome before a successful cause of action will be recognized by the courts.⁴ Legal scholars have identified two broad categories used to classify standards of conduct. Conduct expected of individuals has been judged by either the "reasonable man" standard of care or the "professional" standard of care to determine potential negligence. It is within this framework that authors analyze potential workable standards of care for educators.

The Reasonable Man Standard of Care

The theory of negligence presupposes some uniform standard of behavior. In order to deal with the problem of uniformity, the courts have created a fictitious person, the "reasonable man of ordinary prudence."⁵ The conduct of a reasonable man will vary with the individual circumstances and the situation with which he is confronted. Negligence therefore becomes a failure to do what the reasonably prudent man would do under the same or similar circumstances.⁶

One of the key elements which distinguishes the reasonable man from his professional counterpart is the standard of comparison to be used by a jury. When the reasonable man standard is applied to a set of facts, the

determination of whether or not conduct is negligent resides within each individual juror. Each juror must ask himself what he thinks a reasonable man of ordinary prudence would have done in a similar situation. Collingsworth observes that when applying this standard, "the reasonable man would probably be quite surprised that the courts have thus far held that students are not entitled to protection from teachers' educational malpractice."⁷ The reasonable man standard is the lowest level of care required of an individual once a duty relationship has been established.⁸

Thus far the concern has been to identify a minimum standard below which the individual will not be permitted to fall. Elson recognizes that if the individual has in fact any special knowledge, skill, or even intelligence superior to that of the reasonable man, the law will demand of him conduct consistent with it. As applied to the area of education, this higher standard would require a teacher to exercise the care that a reasonably prudent teacher would exercise under the circumstances, taking into consideration the knowledge, skill or experience the teacher actually has.⁹ This reasonable educator standard was used in Peter W. where the defendant school district was charged with failure to demonstrate the skill and knowledge of a reasonable educator under similar circumstances.¹⁰ Abel, in his discussion of this standard, admits that it is

difficult to form standards of care for teachers. However, he finds critics hard pressed to maintain that the placement of Peter W. into an eleventh grade college preparatory English class, when he read at a fifth grade level, was the act of a reasonable educator.¹¹

Educators have been held to the standard of a reasonable teacher with respect to physical injury and supervision.¹² The California Supreme Court in Bellman v. San Francisco High School District, held that school districts are liable for injuries sustained by pupils resulting from the failure of employees to exercise reasonable care in supervision.¹³ Collingsworth,¹⁴ Gordon,¹⁵ Tracy,¹⁶ and Cohen¹⁷ suggest that if this is an acceptable standard for supervision, it could be adopted for academic injury because there is no legally significant distinction between physical injuries and the kind of non-physical injuries caused by negligent academic instruction. Collingsworth remarks that, "It seems anomalous that teachers have a duty to supervise with care but not to teach with care."¹⁸ Cohen interprets the Bellman decision as finding "liability arising not only out of inadequate supervision but alternatively out of improper instruction."¹⁹ In the case of Mastrangelo v. West Side Union High School District,²⁰ which involved an accident in a chemistry lab, the court found that once a teacher

decides to use a certain method of teaching or study a specific subject matter, he must administer the method without negligence.²¹

Commentators have found a primary flaw when comparing educational malpractice to physical safety. Teachers have been traditionally held to a reasonable man standard with regard to physical safety, but authors suggest that it would be more appropriate to hold them to a professional standard with regard to academic instruction.²²

The Professional Standard of Care

The exercise of professional judgment is the most important characteristic distinguishing the role of the professional from that of the reasonable man. The professional must exercise his best judgment after taking all reasonable measures to gather information and evaluate the situation, but is not liable for "honest errors of judgment."²³ Collingsworth explains this honest error of judgment principle as follows:

If generally accepted methods are correctly implemented in identifying the problem, but there are two or more possible courses of action available to correct it, professional malpractice doctrine does not require the professional to make the right choice, provided there is a reasonable basis for the choice made.²⁴

Elson asserts that courts have found professionals liable only for the harm caused by erroneous judgments where they have not followed customary procedures necessary for them to render their best judgments.²⁵

The standard used to judge the conduct of a professional differs in one significant respect from the reasonable man standard. A professional is required not only to exercise reasonable care in what he does, but he must also possess and apply a minimum standard of special knowledge and skill. Juries are instructed that the professional must have the skill and learning commonly possessed by members of the profession in good standing, and if he does not, he will be liable if injury results from his negligent actions.²⁶ Thus, as the University of Pennsylvania Law Review summarizes, "A professional will be judged not by the 'reasonable man' standard applied in ordinary negligence cases, but by comparison with his professional peers."²⁷

Finding acceptable standards by which to measure the skill and knowledge of an educator is a difficult challenge. Lynch highlights the courts' position regarding this challenge referring to Peter W. and Donohue which dismissed the existence of any professional consensus of what is negligent or non-negligent conduct in the field of

education.²⁸ Pabian claims that the community standard applied in medical malpractice litigation could be utilized, although the teaching profession does not lend itself easily to such a standard.²⁹ Blackburn observes that unlike the medical profession, educators cannot agree on what care and skill is ordinarily required in a given situation.³⁰

The measurement of student learning has been cited as an alternative form of an acceptable standard. Gordon dismisses this form by saying, "It would be unfair for the courts to subject school districts to the crushing burden of tort liability for a student's failure to learn."³¹ Tracy sees no logical basis for blaming the teacher for the failure of the student to learn without proof of the teacher's affirmative negligence. Instead, emphasis should be placed on the responsibility of the teachers to instruct non-negligently and not on the degree of student learning.³²

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

A Statutory Standard - A standard for evaluation of teacher conduct, found in statutory or administrative guidelines, is discussed frequently in the literature.

Lynch states that, "if a statute exists which defines the duty of care, a cause of action should exist and a negligent violation should result in a trial."³³ However, he continues, if the legislature has not made explicit provision for civil suit, the court is not compelled to invoke in a tort action the standard of care provided in the statute.³⁴ Abel surmizes that the trend toward accountability legislation indicates that there is public policy support for holding educators accountable for failure to exercise care in the discharge of their school duties.³⁵ Tracy adds that "Competency Based Teacher Education" statutes that define specific teaching behaviors may be adopted by courts to formulate a professional standard.³⁶ Patterson notes that the potential exists for the legislature to set a high standard of accountability which would leave educators extremely vulnerable, and suggests that educators could respond by lobbying for a return of governmental immunity.³⁷

As statutes become more prescriptive, the possibility increases that they will establish a workable standard of care for educators. Lynch contends that the more prescriptive the law becomes, the more it approaches the likelihood of being construed as a statutory duty of care.³⁸ States such as Georgia, that have Professional Teaching Practice Acts which explicitly recognize teachers

as professionals, may already provide the necessary language needed to hold an educator accountable.³⁹

A Community Standard - A professional standard of care can be derived from commonly accepted principles and procedures that are customarily followed in the professional community. Collingsworth explains that under this community standard, the teacher would not be liable if he used an approach generally accepted by competent members of the profession.⁴⁰ This standard seeks to impose upon teachers the responsibility to use reasonable care in utilizing the tools of the trade in fulfilling their duty to teach students. Klein observes that one of the inherent difficulties with the potential use of the community standard to make a qualitative assessment of educational programs, is the lack of consensus in the profession with regard to the best method of teaching or even the purpose of education.⁴¹ Tracy emphasizes that determining a minimum level of skill and knowledge common to members of the profession is the major hurdle in formulating a workable professional standard.⁴² Alternately, Elson foresees no difficulty in ascertaining a commonality of knowledge because there is an extensive body of pedagogy to which almost all teachers are exposed in their formal training.⁴³ Braverman suggests that it does not seem unreasonable "for an educator to be judged in comparison

with his professional peers, based on his conformity to the norm or minimum of that professional community in which he works."⁴⁴

A Self-Imposed Standard - The self-imposed standards of the school district provide another standard which is reviewed by several authors. Elson maintains that the school system's self-definition of the standard of care it owes individual students comprises an appropriate standard and could become the most significant genesis of educational malpractice litigation.⁴⁵ Patterson recommends that educators should develop and follow guidelines which establish specific goals and objectives for each grade level.⁴⁶ The University of Pennsylvania Law Review cautions that once a teacher and school district undertake to provide education, they assume a duty to educate non-negligently under the general principle of voluntary assumption of duty. If they voluntarily render this assumed duty upon which the parents rely, they can be held to this duty.⁴⁷ Tracy considers it only reasonable and fair to expect an educational system to behave in accordance with self-imposed procedures, and a judicial remedy should be available if it fails to do so.⁴⁸ Braverman notes that evaluations of a teacher by a principal or supervisor might also be useful as evidence of a self-imposed standard of care, especially if the teacher is retained.⁴⁹

A Certification Standard - Teacher competency exams and certification criteria have been suggested as another basis for a standard of care. Pabian observes that Florida's competency test for teachers, which includes 23 generic competencies, could formulate the basis for measuring teacher conduct.⁵⁰ Both Elson and Braverman speak of the importance of teacher certification upon education as a profession and mention that standards could be developed based upon certification criteria. Elson views such certification requirements as a traditional indicium of professional status.⁵¹ Braverman contends that these requirements could be used to evaluate the conduct of the teacher.⁵²

A School of Thought Standard - The final suggested source of a professional standard is similar to that which has developed for psychiatrists. Elson states that, "psychology has no clearly ascertainable routine, procedures or technology for successful psychotherapy, yet psychiatrists are nevertheless judged by a professional standard."⁵³ Although the court in Otero v. Mesa County⁵⁴ concluded that, "the disagreement between educators, when compared with those of psychiatrists, makes the latter appear singleminded," there is merit in using this formula for developing standards in the education area. A psychiatrist will be held to a standard which conforms to

the school of thought he espouses. Courts have determined that disputes between schools of thought cannot be settled by the law. In order for a school of thought to be used as a standard, it must be recognized as having definite principles, and must be the line of thought of at least a respectable minority of the profession.⁵⁵ An application of this standard to the field of education would cause a teacher to be held to the principles of the school of thought upon which he based his teaching.⁵⁶

The standard for psychiatry was developed on the premise that unless modern psychiatry is allowed to explore new methods of treatment, the future growth of the profession and discovery of new cures will be greatly inhibited.⁵⁷ Authors agree that because there exists the need for teachers to implement diverse methods of instruction, this standard is equally applicable to the field of education.⁵⁸

Outrageous Conduct

In addition to the standards proposed for evaluating the conduct of teachers, Blackburn⁵⁹ and Klein⁶⁰ suggest that if the conduct of the defendant is so outrageous, the courts should not dismiss an educational malpractice suit because they cannot find either a workable reasonable man or professional standard of care by which to judge the conduct

of an educator. Blackburn cites social promotion as an example of an outrageous act which is based upon a lack of due care which should not be passed over by the courts.⁶¹ Klein remarks that social promotion is a blatant violation of the legally mandated student-teacher relationship which should result in the recognition of a legal duty.⁶²

Pabian cites a study which concluded that the best way to improve teacher quality is to legally define teachers as professionals. He warns that once this occurs, teachers would have to assume the responsibility of professionals, including the defense of a malpractice suit if one should arise.⁶³ As educators strive for a wider acceptance as professionals, clearer quantifiable standards may emerge. Carter, an educator, advises, "In short we must devote attention to what we must do to move education to professional status in the eyes of the law. I am convinced it is better to develop rules than to be ruled."⁶⁴ Klein further concludes that, "to demean the status of educators while relying on them to shape the future of society is counterproductive to our own best interests."⁶⁵

In summary, the authors have analyzed Rejection Standard One, Lack of a Judicially Workable Standard of Care, under the categories of reasonable man and professional standard of care. They have conjectured in their arguments that a workable standard of care can be

ascertained by which to evaluate teacher conduct in academic areas. They project that this standard can either be the reasonable man or the professional standard of care. They caution that lack of definition and agreement regarding classroom methodology and the science of pedagogy can only be overcome by identifying consistent variables in the field of education.

Rejection Standard Two

No Certainty of Injury

The courts have failed to recognize a cause of action for educational malpractice because no reasonable degree of certainty that the student suffered injury could be perceived. This forms the basis for Rejection Standard Two. The court in Peter W. held that there was "no reasonable 'degree of certainty that... plaintiff suffered injury' within the meaning of the law of negligence."⁶⁶ Later court decisions have affirmed and incorporated this principle into their rationale for denying recognition of this cause of action. Among the injuries that have been claimed in educational malpractice suits within the context of inadequate education are functional illiteracy, inability to obtain other than menial employment, and various psychological injuries which include severe depression and loss of self-esteem.⁶⁷

Authors have remarked that the task of determining the certainty of injury should not deter courts from allowing the jury to decide its compensability. Collingsworth writes that in some cases a quantification of the injury suffered may prove to be difficult, but this is not a sound reason for denying a cause of action.⁶⁸ Prosser states that the type of injury should not be a bar to recovery, noting that, "mental suffering is no more difficult to estimate in financial terms and no less a real injury than physical pain."⁶⁹ It was the view of the Supreme Court in Story Parchment Co. v. Paterson Parchment Co. that the defendant must bear the risk of uncertainty which his harm has created:

Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.⁷⁰

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

A Legally Recognized Injury

Once the plaintiff establishes a duty and breach of that duty in his alleged educational malpractice action, Tracy remarks, that the greatest obstacle remaining for him is to show that he has suffered a legally compensable injury. Two questions must be answered by the court before an academic injury will be legally recognized: (1) Does the academic injury constitute the invasion of a legally protected interest;⁷¹ and, (2) Is the academic injury of the type for which the law will supply a remedy.⁷²

An answer to the first question can be derived from the holding of the Supreme Court in Goss where the court elevated education to the status of a property interest protected by the Due Process Clause of the Fourteenth Amendment.⁷³ Pabian acknowledges that the property interest "involved was not the right to be assured a certain level of education, such as functional literacy. Rather, it was the right to attend school and not be deprived of that right without adequate notice."⁷⁴ However, he poses that the recognition of education as a property interest could be extended to compensate the victim of educational malpractice.⁷⁵ Klein maintains that judicial acknowledgment of academic injury would be congruent with the policy judgment rendered in Goss that the law will protect the right of a student to a minimal level of

education.⁷⁶ In addition, many state statutes extend the right of a child to a free education and may, as the Supreme Court indicated in Goss, give the students a property right in educational benefits.⁷⁷

After establishing that students have a legally protected right to an education, the second question asks whether a failure to receive an adequate education is the type of injury for which the law will provide a remedy. The University of Pennsylvania Law Review states that plaintiffs in educational malpractice suits have claimed that their failure to learn because of teacher negligence is a legally cognizable injury in tort for which the law will provide a remedy. Alternately, defendants in these suits have argued that the student's failure to learn "is not an injury at all, but rather a loss of expectancy or failure to receive a benefit."⁷⁸ Consequently, they argue that it is not the type of injury for which a remedy can be granted by law.⁷⁹ This poses the question of whether an inadequate education is a legally recognizable injury that can be accorded a remedy or merely the loss of a benefit that will receive no compensable recognition under the law.

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

direct academic injury and others have claimed forms of indirect injury. Elson delineates three major types of direct academic injury which can be alleged in educational malpractice suits. First, the injury could be the failure to learn a given quantum of factual information, such as geometry or German. Second, the injury could be the failure to learn certain basic skills, such as elementary reading, writing and arithmetic. Finally, the negligence of the educator could lead to injury in the affective or emotional, rather than cognitive or intellectual domain.⁸⁰

The failure to learn a given quantum of factual information was addressed in the case of Trustees of Columbia University v. Jacobsen, where the court failed to recognize the university's non-fulfillment of its catalog representations to teach, "wisdom, truth, character, enlightenment, understanding, justice, liberty, honesty, courage, and beauty," as a legally sufficient injury.⁸¹

It is Tracy's opinion that the best claim for educational injury is the nonlearning of basic skills. She explains that, "This injury, often referred to as functional illiteracy is much easier to identify and measure than many other tort injuries. It is the most direct and foreseeable result of a breach of duty."⁸² The measurement tools which could be used to determine injury are student competency or achievement tests. Pabian reports that

student competency tests are currently being considered, planned or implemented in nearly every state.⁸³ He proposes that, "the tests should serve two purposes: (1) early identification of students with learning difficulties, and (2) indication of the need for remedial aid to assure that the students possess adequate proficiency in basic skills at graduation."⁸⁴ Pabian foresees a problem with the usage of student competency tests and cautions that, "by implementing such a low standard (minimum competency), concern has arisen whether teachers, especially in the middle to upper income areas, will structure their teaching to the minimal competency exam instead of to their students' abilities."⁸⁵ Lynch explains that proof of injury requires a comparison of pre-achievement test results given before the alleged negligent instruction and post-achievement test results given after the instruction in conjunction with a reliable measurement of ability.⁸⁶

Lynch conjectures that injury to the affective domain is the most difficult of the three academic injuries to prove and perhaps the most devastating.⁸⁷ Such injury may be caused by a teacher who ridicules, berates, totally ignores or excessively criticizes a student which may cause a student to lose the motivation and self-confidence necessary to learn or even to come to school.⁸⁸ This form of behavior by a teacher would approach the intentional

infliction of emotional distress illustrated in Johnson v. Sampson, where a teacher, who bullied a school girl with threats of prison and public disgrace unless she signed a confession of immoral conduct, was found guilty.⁸⁹ Lynch fears that malpractice suits, if successful in obtaining extensive damages for cognitive type injuries, would cause schools to concentrate on basic skill development to the exclusion of affective values or attitude formation.⁹⁰

In addition to the direct academic injuries which have been pleaded, plaintiffs have also complained of indirect injuries. The most common indirect injury is psychological harm which has resulted from the failure to achieve an adequate education. The humiliation of not being able to fill out a job application, the failure to get a job because of the lack of required basic skills, and the inability to advance beyond menial labor, are instances where psychological harm occurs.⁹¹ Although many of these psychological injuries occur outside the classroom, Jerry maintains that this does not justify non-recognition of a duty or cause of action if the injury resulted, in part, from improper classroom instruction.⁹² Tracy cautions plaintiffs that courts are already highly suspicious of psychological injuries due to their fear of the unmanageability of these claims. Because of this fact, Tracy advises plaintiffs to avoid claiming psychological

injuries if they can obtain an adequate remedy for other types of injury. Furthermore she states, the pleading of psychological injuries may divert the courts' attention from the stronger arguments of the plaintiff and lead to confusion of the fundamental issues.⁹³ Another form of indirect injury alleged by plaintiffs has been the loss of future wages. Jerry acknowledges that projecting the lost future earnings because a student "cannot acquire meaningful employment is difficult, but is certainly not impossible."⁹⁴ Klein explains that plaintiffs can offer proof that loss of potential earning power is a recompensable injury. The failure to offer such proof can result in a finding that the loss of potential earning power is not an injury but "a mere expectancy interest - that is, only a probable economic advantage."⁹⁵ Tracy warns that plaintiffs should avoid claiming that incompetent instruction resulted in loss of expected employment. It is her position that it is unreasonable for a student to expect to graduate qualified for a specific type of employment or level of income given the range of student ability anticipated to emerge from a compulsory education system.⁹⁶

When is an Injury Certain?

One concern authors have expressed when addressing the issue of legally recognizable injuries has been the

inability to determine when an academic injury has occurred. Pabian notes that students who are victims of teacher malpractice often get as far as high school before the injury is realized.⁹⁷ Jorgensen observes that education is not an emergency service, but rather an ongoing process that probably will result in damage only if negligently performed over a period of time.⁹⁸ Authors such as Lynch have formulated pre-test and post-test strategies to determine which individual teachers may be negligent.⁹⁹

Lynch expresses this aspect of the injury issue in this way, "At what point in the lifetime of the plaintiff are the opportunities, which would have been present with non-negligent teaching, reduced significantly?"¹⁰⁰ He suggests that when an opportunity to be employed is rendered unobtainable because of negligent teaching or inadequate occupational counseling, is the time when injury becomes certain. This would be a matter for the court to decide on a case by case basis.¹⁰¹ Lynch draws attention to the fact that some students may be able to alleviate the affects of negligent teaching by electing to take G.E.D. examinations or enrolling in junior colleges. Such action could totally mitigate or at least significantly cloud the ability to establish certainty of injury.¹⁰²

In summary, the authors have analyzed Rejection Standard Two, Certainty of Injury, by addressing the issues

of (1) whether the injury claimed is a legally recognizable injury under tort law, and (2) when does the determination of injury become certain. They have conjectured in their arguments that academic injury is legally recognizable and can be determined with certainty. They project that courts could recognize either direct or indirect injuries. They caution that to claim indirect injury could detrimentally bias courts in their analysis of direct injuries and confuse fundamental issues. Additionally, they maintain that the defendant must bear the risk of uncertainty and not the plaintiff.

Rejection Standard Three

No Causal Link

The courts have failed to recognize a cause of action for educational malpractice because no causal connection could be established. This forms the basis for Rejection Standard Three. The courts which have been confronted with the educational malpractice claim have stated that no perceptible causal connection can be established between teaching methods and the failure to learn because learning is "influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers."¹⁰³ In so holding, the courts have failed to

adequately address the causal connection issue.¹⁰⁴

The plaintiff must prove in every negligence action that the injuries he sustained were caused by the defendant's conduct and were a foreseeable or reasonably direct risk of the conduct in which the defendant was engaged. The authors discuss the elements of the causation issue by addressing two questions: (1) whether the defendant's conduct was the legal cause of the plaintiff's injury, and (2) whether the defendant's conduct was the proximate cause of the injury.

Legal Cause

The test frequently discussed by the authors, used to assess whether the defendant's conduct legally caused the plaintiff's injury, is the substantial factor test. Collingsworth frames the language of the test as, "whether the defendant's conduct was a material element and a substantial factor in bringing" about the plaintiff's injury.¹⁰⁵ He contends that the substantial factor test is more appropriate than the but-for test in the educational malpractice case. A host of factors are involved in the educational malpractice situation which all influence the failure of a student to learn. The but-for test is not designed to accommodate multiple factors but rather weighs only one potential cause of the injury.¹⁰⁶

Elson asserts that the court in Peter W. misread the common law principles of causation in negligence cases when it ruled as a matter of law that the plaintiff could not prove under any circumstances that the conduct of the defendant caused his inability to read above a fifth grade level. He further states that the common law principles "do not require proof that the defendant's conduct was the sole or even dominant factor in bringing about the harm to the plaintiff. Rather, it need only be shown that defendant's conduct was a substantial factor in causing the harm."¹⁰⁷

Blackburn refers to the substantial factor test as one that determines the significance of the various causes of the injury. If the conduct of the defendant was a significant factor in causing the plaintiff's inadequate education, the fact that other causes have also contributed to the same result will not remove liability from the defendant.¹⁰⁸

Klein describes this test as one of "substantial cause" and explains that "liability should result if acts and omissions of educators represent a substantial cause of plaintiff's inadequate education."¹⁰⁹

Burden of Proof - The plaintiff has the burden of proof in a negligence cause of action. He must identify the cause of his injury and rule out other possible causes if they could have contributed to the injury. The amount of proof required to prove these elements is discussed by

several authors. Elson¹¹⁰ and Tracy¹¹¹ write that a student need not prove with mathematical precision or scientific reliability that the conduct of the defendant was the cause of his injury, but he must show that it was more probable than not that the conduct was a substantial factor. Pabian¹¹² and Braverman¹¹³ claim that the student must prove causation by a preponderance of the evidence or by clear and convincing evidence depending upon the requirements of the jurisdiction. Abel suggests that causation must be established minimally "beyond a mere possibility," and therefore the student would not be required to prove causation by direct and positive evidence to the exclusion of every other possible cause of his injury.¹¹⁴

Proof of Causation - Proof of causation in the educational malpractice cause of action is difficult because of the "host of factors" concern which was identified in Peter W. The Peter W. court identified physical, neurological, emotional, cultural and environmental factors which affect a student's ability to learn and which are not under the control of the school system.¹¹⁵ Additional factors, identified by Pabian, are self-motivation, socio-economic factors, the influence of television, grade inflation, and any innovative program that may have been instituted by the school or teacher.¹¹⁶

Klein suggests a two step method of proof by which plaintiffs could prove causation which would account for the host of factors concern. The first step is to determine which components of the learning process educators can control. The second step would assess the performance of the educator by correlating the components determined in the first step with the student's expectations of instructional success and predetermined factors in learning which cannot be controlled by the educator. In addition to those factors previously mentioned by the Peter W. court and Pabian, Klein lists home environment, peer pressure and subjective interaction between the teacher and the student. If the uncontrollable factors play a predominant role in causing the inadequate education of the student, the court may determine that the defendant's conduct was not a substantial factor even though the conduct may have been negligent.¹¹⁷

The ability of the student to learn is an important element in the case. Consequently, the student must prove that he has not achieved functional literacy although he has a normal capacity to learn. Klein recommends three ways to prove ability to learn. First, the student can introduce evidence of progress in a remedial program initiated after graduation or after leaving public school. Second, evidence of the student's aptitude test scores, which measure his general scholastic aptitude and task oriented ability, can

be introduced. Third, evidence of normal intelligence test scores may be utilized to draw inferences regarding the ability of the student to learn.¹¹⁸

Klein proposes two methods by which the student can prove that he has not achieved functional literacy although he has a normal capacity to learn. First, the student may introduce his standardized test scores as evidence of his learning deficiencies. These can provide a basis for determining the effectiveness of the educational program and the degree to which the student has reached his expected level of achievement. Second, the inability of the student to accomplish practical and necessary tasks such as completing a job application form can be presented as evidence.¹¹⁹

In addition to the host of factors concern, another difficulty a student faces when proving causation is the length of time which passes before he realizes he has received an inadequate education. A student may not become aware of this deficiency until he has graduated from high school and seeks employment. After this length of time, it is difficult if not impossible, to identify and prove which teacher or teachers were responsible for the failure to learn.¹²⁰

The approaches by which students may prove causation despite the difficulties presented has been a subject of

discussion by the authors. They propose that the following three types of evidence can be used by a student to establish causation: circumstantial evidence, expert testimony and common knowledge.

Circumstantial Evidence - Through the use of circumstantial evidence, the jury could infer that the defendant school district or the conduct of an individual teacher caused the failure of a student to learn. One form of circumstantial evidence described by Elson suggests that the student's history of academic achievement could be presented to demonstrate the likelihood that a teacher's conduct was a substantial factor in contributing to the academic failure of a student. This history may show a constant level of achievement which suddenly drops off at the same time the student is exposed to a certain teacher or teaching method. If such evidence were to be presented to a jury, a presumption could arise from which they might infer that absent the challenged teacher or teaching method, the student's level of achievement would have continued on the same pattern.¹²¹

A second form of circumstantial evidence which may be presented is discussed by Elson,¹²² Collingsworth,¹²³ Lynch,¹²⁴ Braverman,¹²⁵ and the University of Pennsylvania Law Review.¹²⁶ Through comparison, inferences could be made that an individual student or class

of students failed to learn because of a teacher's negligent conduct or the teaching methods used by a school district. By comparing an individual student or class which did not learn with others similarly situated who did learn, but were not exposed to the teacher's conduct or teaching methods challenged, a presumption could arise that the conduct or methods challenged were the cause of the failure to learn. A prima facie showing of causation therefore would be made, and this evidence would suffice to prove causation until evidence to the contrary was presented by the defendants.¹²⁷

With this form of evidence, it is difficult to hold constant the many variables which affect the learning process in order to determine the effect of the conduct of the teacher or teaching methods on the student's learning.¹²⁸ Collingsworth asserts that this difficulty may be overcome by eliminating the competing variables through proof that the plaintiff has all of the qualities of his more successful peers.¹²⁹

A third form of circumstantial evidence which a plaintiff may present to prove causation can be derived by comparing the defendant's conduct "to the requirements of a statutory or regulatory provision designed to prevent the type of educational injury that has occurred."¹³⁰ Elson¹³¹ and Lynch¹³² cite as an example of this form of

evidence a student who alleges educational negligence due to the failure of the defendant to identify him as a student with a learning disability and to refer him for special education. Elson states that a prima facie case of negligence would be established if a regulation exists which mandates such identification and referral. Proof of violation of the regulation by the defendant "would also presumptively establish that the student's lessened learning achievement, which the regulation was designed to minimize, was caused by the defendant's failure to follow the regulatory requirements."¹³³

Expert Testimony - A second type of evidence which can be used to prove the requisite causal connection is expert testimony. Elson,¹³⁴ Tracy,¹³⁵ and Abel¹³⁶ mention that experts in the field of education could be called to testify regarding the usual results of certain types of teaching methods and whether the teacher's conduct was a substantial factor in causing the student's lack of learning. Tracy foresees weaknesses in utilizing expert testimony because such testimony is often unavailable, and even if it were available, it would be disputed in court due to a lack of scientific evidence and theoretical consensus in the field of education.¹³⁷ Elson identifies another weakness with this type of evidence pointing out that there is little empirical evidence available on the cause and

effect relationship between teaching methods and student performance. As a result, the opinion of the expert "will be based largely on either the witnesses' personal experiences or deductive reasoning from pedagogical theory."¹³⁸

Common Knowledge - A final type of evidence which could be used to prove the causal relationship is suggested by Elson. He states that a commonsense understanding of cause and effect relationships may be critical in proving the student's case, although it is not conclusive evidence of the causal connection. The trier of fact should be able to draw the commonsense conclusion that the conduct of the defendant was a substantial factor in the failure of the student to learn.¹³⁹

Proximate Cause

Proving that the conduct of the defendant in fact is the legal cause of the failure of the student to learn is the first question in the causation issue. After legal cause has been established, the second question is whether the defendant's conduct was the proximate cause of the failure to learn. It is the position of Woods,¹⁴⁰ Collingsworth,¹⁴¹ and the University of Pennsylvania Law Review¹⁴² that proximate cause should not create a major obstacle for the student if he has already proven the legal

cause question. Proximate cause attempts to limit the liability of the defendant to cases where the harm flowing from the conduct is foreseeable. Collingsworth writes that an obviously foreseeable result of incompetent teaching is impaired learning.¹⁴³ The University of Pennsylvania Law Review focuses on the effects of hiring incompetent teachers and suggests that the failure of a student to learn is clearly a direct and foreseeable result of hiring an incompetent teacher.¹⁴⁴ Woods asserts that proximate cause is "undoubtedly satisfied," because "it is unquestionably foreseeable that a school district charged with the responsibility of taking reasonable measures to educate its pupils will damage those students when it breaches this duty."¹⁴⁵

Defenses to a Negligence Action

Defenses which may be pleaded and proven by the defendant school district or teacher are also the subject of discussion of the commentators and present challenges for the student in the educational malpractice case. These defenses are contributory negligence, assumption of risk and third-party defendant.

Contributory negligence is a defense which can be raised by the defendant to bar his liability even though his conduct was negligent. The defendant must prove that the

student was negligent in not taking reasonable steps to learn or to protect himself from the defendant's conduct.¹⁴⁶ Elson observes that the contributory negligence defense may be an obstacle for the student because "the ultimate success or failure of a student to achieve in school depends upon the willingness and ability of the individual student."¹⁴⁷ Klein states that the defendant could introduce evidence of a poor attendance record and a generally negative attitude towards school to prove the student's contributory negligence.¹⁴⁸ Abel¹⁴⁹ and Klein¹⁵⁰ mention that courts are reluctant to attribute contributory negligence to a child and would be lenient when asked to apply it to a student in the educational malpractice case.¹⁵¹

A second defense which is available to the defendant is assumption of risk. The defendant must prove first, that the student knew and understood the risk he was incurring and second, that his choice to incur the risk was entirely free and voluntary. Abel states that it is unlikely any defendant who bases such a defense on a student's attendance will be successful because of the intervening compulsory attendance statute that requires compliance.¹⁵²

A third possible defense exists if the defendants join the student's parents as third-party defendants. Braverman remarks that the defendants may argue that the

parents neglected or failed to supervise their child and as a consequence are jointly liable with the school district.¹⁵³ Abel sees this defense as questionable because historically courts have given protective immunity to the parent-child relationship, and recognition of this defense would be contrary to public policy.¹⁵⁴

Several of the authors¹⁵⁵ discuss the rule of law which holds that the issue of causation is a question of fact for the jury to decide unless the court can conclude as a matter of law that reasonable men could not differ in their finding of causation. Jerry emphasizes that difficulty in proving causation is not a reason for the court to hold as a matter of law that a student cannot prove his case.¹⁵⁶ Collingsworth summarizes this position of the authors:

Causation is for the fact finder to decide based on the merits and courts are therefore not justified in barring all educational malpractice claims because of a feeling that causation is uncertain.¹⁵⁷

In summary, the authors have analyzed Rejection Standard Three, No Causal Link, by addressing the two elements of the causation issue: (1) legal cause and (2) proximate cause. They have conjectured in their arguments

that both legal and proximate cause may be established thus creating the necessary rationale for legal recognition of causation. They project several methods of proof and types of evidence whereby legal cause and proximate cause may be established. They caution that the host of factors and timeliness difficulties that influence the determination of proof should be carefully controlled utilizing the substantial factor test.

Rejection Standard Four

No Appropriate Remedy

The courts have failed to recognize a cause of action for educational malpractice because no appropriate remedy could be identified. This forms the basis for Rejection Standard Four. The courts which have confronted the issue of educational malpractice have held that they can find no appropriate remedy for the student who claims he failed to receive an adequate education in the public schools. The award of monetary damages in the educational malpractice area involves an impermissible speculation by the courts because the extent of academic injury is incapable of precise assessment.¹⁵⁸ The court in Fairbanks North Star expressed this concern:

In particular we think that the remedy of money is inappropriate as a remedy for one who has been a

victim of errors made during his or her education. The level of success which might have been achieved had the mistakes not been made will, we believe, be necessarily incapable of assessment....¹⁵⁹

Furthermore, monetary damages may place an undue financial burden on the school districts and society. Peter W. recognized that, "the ultimate consequences, in terms of public time and money, would burden them and society beyond calculation."¹⁶⁰

If a plaintiff can prove the requisite elements of a negligence cause of action, he is entitled to relief. An appropriate remedy will be granted by the court to compensate the plaintiff for his injury and to place him in the same position he would have been in had the injury not occurred.¹⁶¹ Authors have responded to the position of the courts by analyzing the appropriateness of remedy issue under two categories: (1) the appropriateness of awarding monetary damages, and (2) the appropriateness of awarding alternative remedies.

Monetary Damages

The plaintiffs in the educational malpractice cases brought thus far have sought relief in the form of monetary

damages, which the courts have consistently denied. Jorgensen maintains that monetary damages should be awarded to compensate the student for his disability and for the effect his inadequate education will have on his future earning capacity. She admits, however, that monetary damages are difficult to calculate, are subject to speculation, and are a potential drain on resources of the school district.¹⁶²

Collingsworth suggests that the amount of monetary damages could be ascertained if the student also seeks remedial instruction. The measure of monetary damages would be the wages lost by the student while he is out of the workforce attending remedial instruction to complete his education.¹⁶³

The University of Pennsylvania Law Review claims that a student seeking relief in the courts for educational malpractice could ask for monetary compensation for the diminished future income he would have earned had he received the proper education. The article notes, however, that this remedy would have several disadvantages. First, courts which are already reluctant to award damages based upon speculation would be hesitant to address another speculative area. Second, if the plaintiff had not sought remedial instruction, the defendants could argue that the student had not attempted to mitigate his damages and

therefore is not entitled to relief. Finally, the award of monetary damages could exact a crushing financial burden on the school district.¹⁶⁴

Abel and Tracy also discuss disadvantages of awarding monetary damages. Abel states that the payment of monetary damages neither benefits the school nor remedies the student's inadequate education.¹⁶⁵ Tracy questions the appropriateness of monetary damages for loss of expected employment because it does not conform to the purpose of public education which historically has been to create a productive and literate citizenry.¹⁶⁶

Alternative Remedies

Commentators have suggested various alternative remedies that the plaintiff could seek and the courts could award which would be more appropriate than monetary damages. One alternative remedy available to a student is proposed by the University of Pennsylvania Law Review. It maintains that the student could seek removal and replacement of the incompetent teacher. The removal could be accomplished by means of a court injunction which would be directed against the school officials to remove the teacher. It could alternately be directed only against the teacher to enjoin him from teaching. This remedy has the advantage of being relatively inexpensive. Although it would eliminate

potential injury that the teacher may cause in the future, it would not make whole the student who has been subjected to incompetent teaching.¹⁶⁷

A second alternative remedy suggested by several of the authors would require the schools to provide or pay for remedial instruction for the student. This form of remedy has several advantages which have been identified by the authors. Pabian proposes that it would not only compensate the plaintiff for his injury, but would punish the school district and/or the teacher, thus affecting a deterrence for future negligent conduct.¹⁶⁸

Jorgensen cites other advantages. First, the payment or provision of remedial instruction would cost the school district less than the payment of monetary damages. Consequently, the threat of placing an undue financial burden on the schools would be alleviated. Second, the student would receive the education he allegedly failed to receive while enrolled in the public school system. Third, it would discourage lawsuits brought by the insincere plaintiff who is seeking a windfall through an award of monetary damages.¹⁶⁹

Another advantage mentioned by Tracy is that the award of remedial instruction would eliminate the problem of speculative monetary damages.¹⁷⁰ Klein suggests that requiring schools to provide an appropriate remedial program

for a student would enable him to enhance his academic competencies, increase his chances for higher earnings and better jobs, and repair his emotional injuries by improving his self-image through scholastic success.¹⁷¹ The University of Pennsylvania Law Review states that the award of remedial instruction will make the student whole in the majority of cases.¹⁷²

Klein alternately asserts that remedial instruction by itself can never make a student whole, fully compensate him for losses incurred or deter future harm. She suggests a third alternative remedy which, in addition to providing remedial instruction, would grant a limited monetary award in the form of a salary for attending the remedial program. The amount of the salary could be equivalent to the earnings lost by the student while he is attending the remedial program. Alternatively, the student could receive the earnings lost over a designated period of time, the length of which would be determined without reference to the time required for the student to gain the necessary skills. This method of allocating a fixed monetary amount would limit the court's need to speculate.¹⁷³

Jorgensen and the University of Pennsylvania Law Review remark that remedial instruction coupled with monetary damages may be ideal for the student who has been out of school for several years and has suffered diminished

earnings because of his lack of skills or reading ability.¹⁷⁴

Tracy advises that the court should limit the monetary award to reimbursement for the cost of remedial instruction if a student has already received this instruction and under certain circumstances, allow for reimbursement for wages lost during the remedial period. Tracy further states that relief should be limited to remedial instruction whenever possible both to alleviate the financial burdens which large monetary awards would bring to schools, and to discourage students from filing suit to receive such awards.¹⁷⁵

Several authors have commented on the potential long-term effect created by the courts' position that an appropriate remedy cannot be found to compensate the student who claims academic injury. Collingsworth summarizes this effect by observing:

Denial of the suit makes the plaintiff, who... may be a victim of clear negligence, bear the loss himself... the state benefits when an individual receives an education. It enables the individual to fend for himself and not be a burden to the state. However, in a case where an individual is negligently injured by the state, the entire populace should bear this burden at the outset rather than place it entirely upon the innocent party who may eventually become a burden to the entire populace anyway.¹⁷⁶

In summary, the authors have analyzed Rejection Standard Four, No Appropriate Remedy, by addressing the categories: (1) the appropriateness of awarding monetary damages, and (2) the appropriateness of awarding alternative remedies. They have conjectured in their arguments that monetary damages could be detrimental to the recognition of a successful cause of action. They project that alternative forms of remedial instruction for the allegedly injured student is an appropriate remedy. They caution that claims for large monetary awards will be rejected by courts due to the speculative nature of calculating a proper amount.

Rejection Standard Five

Flood of Litigation

The courts have failed to recognize a cause of action for educational malpractice because they fear that excessive litigation and fraudulent claims would result. This forms the basis for Rejection Standard Five. The Peter W. court feared that recognition of a new cause of action to remedy academic injury could bring a flood of litigation which would overwhelm the already congested court system. The court also feared that recognition could attract opportunistic plaintiffs bringing fraudulent claims. Finally, they feared that recognition could place an undue

financial burden upon the schools and society. The court expressed this concern by stating:

To hold them to an actionable 'duty of care', in the discharge of their academic functions, would expose them to the tort claims - real or imagined - of disaffected students and parents in countless numbers... The ultimate consequences, in terms of public time and money, would burden them - and society - beyond calculation.¹⁷⁷

When a court is asked to recognize a new cause of action, it will consider what effect the recognition will have upon the court system and upon society. Later court decisions have reaffirmed the fears announced in Peter W., and much discussion on the subject has appeared in the legal and educational literature. The authors have responded to the fear by analyzing: (1) the effects of recognition or non-recognition of the cause of action, (2) the possible measures which could be taken by the courts to limit the undesirable consequences recognition could bring, and (3) the inconsistency of the courts' rationale.

Effects of Recognition of an

Educational Malpractice Cause of Action

Many of the authors have discussed the potential flood of litigation which the courts fear. Pabian observes

that the fear is exaggerated because malpractice suits would be too time consuming and expensive to be brought without good cause. He points out that the flood of litigation argument, "seems a convenient way for the courts to avoid becoming involved in educational matters."¹⁷⁸ Tracy writes that the fear of excessive litigation "represents a concern with judicial efficiency that is inimical to basic concepts of justice and should not be decisive when a genuine need for relief is demonstrated."¹⁷⁹ Elson emphasizes that the courts should not bar all students with educational grievances because of the fear that some teachers may be forced to defend themselves in court against unjustified claims. This would undermine the principles of fairness, equality, and individualized justice which are basic to the common law.¹⁸⁰

The courts have stated that recognition of a cause of action for educational malpractice would result in excessive litigation and fraudulent claims which the court system would be unable to handle. In addition to these alleged negative effects of recognition, authors have identified other positive and negative results. Jorgensen believes that the fear of lawsuits by dissatisfied students would serve as an incentive to school systems to improve the quality of their education.¹⁸¹ Gordon remarks that

holding school districts liable would provide a deterrent to the indiscriminate and arbitrary exercise of judgment by an employee of the school district regarding a student's educational needs.¹⁸²

Several authors discuss negative effects of recognition. Blackburn predicts that the quality of education may decrease because large amounts of money originally intended for financing public education would be channeled into large recoveries for students.¹⁸³

Tracy foresees that these actions for individual grievances would consume time and money otherwise available for instruction and would therefore take away from the overall quality of the education provided. She also states that recognition could discourage competent prospective teachers from entering the profession and inhibit individualized experimental teaching methods that adapt to the individual needs of students. Tracy believes that educators might "voluntarily retreat to a safe, minimal position to reduce vulnerability to suits."¹⁸⁴ Such a position could be interpreted by courts as minimal standards of teacher competency and accordingly cement educational theories into tort standards, thus inhibiting flexibility in the teaching process. Tracy concludes that the quality of education would not improve in all likelihood if educational malpractice causes of action were recognized.¹⁸⁵

Measures to Limit the
Undesirable Consequences of Recognition

Various measures have been recommended by the commentators that could be utilized by the courts to limit the undesirable consequences which could result if legal recognition were accorded the educational malpractice cause of action. One approach which would enable courts to keep the floodgates closed and the fraudulent claims out of court is through the quality and quantity of proof which the court requires the student to present. Jorgensen maintains that if the courts can effectively distinguish the false claims from the legitimate ones, excessive litigation will not result. The court can make this distinction by requiring all students alleging educational malpractice to prove actual injury.¹⁸⁶

Abel proposes that the court invent by way of precedent, a procedure for establishing proof for screening educational malpractice actions that would serve to deter all but the most meritorious of suits. This procedure would be followed whenever a student were to seek damages for educational malpractice. Such a procedure would eliminate those suits where damages are sought only because jobs are unavailable, and not because a job is unobtainable due to the student's inadequate education. The student would be required to produce evidence of probable educational

deficiency as part of this procedure. Abel suggests the usage of tests and other instruments that evaluate educational achievement to indicate the presence of educational deficiencies. He further states that proof of proximate cause will provide an inherent screening mechanism that, in conjunction with the court determined procedure, would permit only the most meritorious of claims. Abel concludes that a flood of litigation would not result if courts were to adopt such a procedure of proof.¹⁸⁷

A second approach which would limit the undesirable consequences is presented by the University of Pennsylvania Law Review¹⁸⁸ and Braverman.¹⁸⁹ They suggest that "holding teachers to only a community norm or minimum, should keep the number of educational malpractice suits within reasonable limits."¹⁹⁰ By utilizing this professional community standard, teachers would only have to conform their conduct to what is required minimally to teach with competence, which could be readily determined before frivolous claims would be filed. In the alternative, if the courts were to invoke a reasonable man standard, no preconceived minimum level of conduct would be assumed, and therefore by necessity the level of conduct would be subjected to jury discretion.¹⁹¹

The University of Pennsylvania Law Review¹⁹² and Klein¹⁹³ present a third approach by asserting that

excessive and fraudulent litigation and the ensuing financial burden on schools could be controlled by courts through the type of remedy which they allow a student to demand and receive. If the remedy is limited to provision of or payment for remedial instruction, coupled with limited monetary relief under certain circumstances, the number of suits will be kept to a minimum. This in turn would reduce the financial burden placed upon the school systems. The University of Pennsylvania Law Review proposes that courts which allow dismissal of incompetent teachers as a remedy will minimize the monetary cost to schools and discourage students from filing suits just to seek large monetary awards.¹⁹⁴

It has been recommended by several commentators that malpractice insurance could be purchased by schools to subrogate their liability for educational malpractice. Blackburn states that schools can use insurance to spread the loss they may suffer if courts allowed monetary awards to students.¹⁹⁵ Abel asserts that it would be "unlikely that any sizeable diversion of educational dollars from public school coffers to individual plaintiffs" would result if insurance were made available for educational malpractice.¹⁹⁶ He further observes that courts have looked to the availability of insurance as a means of relieving the financial liability placed upon a defendant

when they have been asked to abrogate traditional immunities. The University of Pennsylvania Law Review comments that school districts and individual teachers should be able to purchase insurance at a reasonable price because the possibility of a successful educational malpractice lawsuit is slight under the standards of negligence. If school districts were to purchase insurance, the fear that a large monetary award would place an undue financial burden upon the schools would be alleviated.¹⁹⁷

Klein¹⁹⁸ and Pabian¹⁹⁹ suggest the defense of contributory negligence as a viable response to the floodgate argument. This defense, available to both school districts and teachers, could "curb the appetite of litigious individuals and thereby protect school systems from extreme claims."²⁰⁰

The time and expense involved in bringing an educational malpractice suit has also been discussed in response to the courts' fear of a flood of litigation. Elson contends that the cost of a lawsuit to challenge negligent educational practices would be expensive, and the chance of success highly speculative. Consequently, attorneys who handle these cases will require a large retainer fee as opposed to taking cases on a contingency fee arrangement. Based on these reasons, Elson does not believe a flood of litigation will occur. If parents use the courts

to press claims against teachers for "vexatious or malicious reasons," the court may require the parents to pay the teacher's litigation costs and attorneys' fees.²⁰¹

Elson²⁰² and Pabian²⁰³ further contend that excessive and fraudulent litigation would not result because most jurisdictions do not allow minors to sue in their own names. Elson explains, "such requirements ensure that a student's immature impulses are not the sole motivating force behind the lawsuit."²⁰⁴

Inconsistency of the Courts' Rationale

Several authors comment that the fear expressed by the courts are an unpersuasive ground for denying a student his day in court. This argument, they note, has been rejected in other areas of the law when courts have been asked to recognize a new tort. Collingsworth insists that this argument should not be considered by the courts because the various state legislatures settled debate on this when they removed blanket governmental immunity from state agencies. Protection of the state treasury was a primary argument in favor of governmental immunity from private lawsuits. When the states removed the immunity with full knowledge of this concern, the issue was settled. Collingsworth further states that the courts should not use the very rationale discarded by the legislature to

indirectly reinstate immunity by denying a cause of action.²⁰⁵ Collingsworth claims that the courts which advance this argument have been "extremely inconsistent in applying it."²⁰⁶ They have refused to invoke this argument and have recognized liability when school districts are negligent in supervision or when doctors or employees of city-owned hospitals are negligent. Collingsworth maintains that the state treasury should be able to withstand an educational malpractice lawsuit if it can withstand these other types of suits.²⁰⁷

Woods²⁰⁸ and Blackburn²⁰⁹ state that the California and New York courts had previously addressed the flood of litigation argument before Peter W. and Donohue were brought, and that it was rejected in both states as grounds for denying recognition of a new cause of action. The California Supreme Court in Dillion v. Legg²¹⁰ held that the facts of each case must be weighed alone to determine the viability of a cause of action, and fear of similar suits should not be considered as a legitimate factor in refusing to hear the action. The New York courts confronted the argument in Buttalla v. State of New York,²¹¹ and declared, "Although fraud, extra litigation and a measure of speculation are, of course, possibilities, it is no reason for a court to eschew a measure of its jurisdiction."²¹² Blackburn concludes that the right to

bring an action was enforced in this case and it was recognized that problems of proof were for the court and the jury to decide.²¹³

In their discussion of the floodgate argument, the University of Pennsylvania Law Review cites the observation made by the Pennsylvania Supreme Court in Doyle v. South Pittsburgh Water Co.:

Throughout the entire history of the law, legal Jeremiahs have moaned that if financial responsibility were imposed in the accomplishment of certain enterprises, the ensuing litigation would be great, chaos would reign and civilization would stand still. It was argued that if railroads had to be responsible for their acts of negligence, no company could possibly run trains; if turnpike companies had to pay for harm done through negligence, no roads would be built; if municipalities were to be financially liable for damage done by their motor vehicles, their treasuries would be depleted. Nevertheless, liability has been imposed in accordance with elementary rules of justice and the moral code, and civilization in consequence, has not been bankrupted, nor have the courts been inundated with confusion.²¹⁴

Finally, several of the authors suggest that courts should not refuse to recognize this new cause of action based on the potential volume of litigation. Tracy

encourages courts to limit potential claims by requiring students to exhaust all administrative remedies before seeking relief in the courts.²¹⁵ Pabian recommends that an administrative court system could be developed to handle all educationally related disputes. If excessive and fraudulent litigation were to result, he remarks that the present court system would be available for appeal of the decisions of the administrative court. He contends that administrative courts have succeeded in the area of tax law where they have been able to efficiently and expertly handle a large volume of cases.²¹⁶

Many alternative measures are suggested by authors which would limit the undesirable consequences of recognition of an educational malpractice cause of action. They have questioned the wisdom of the courts' floodgate argument, and as Pabian concludes, the argument "seems a convenient way for the courts to avoid becoming involved in educational matters."²¹⁷

In summary, the authors have analyzed Rejection Standard Five, Flood of Litigation, under the following three categories: (1) the effects of recognition or non-recognition of the cause of action, (2) the possible measures which could be taken by the courts to limit the undesirable consequences, and (3) the inconsistency of the courts' rationale. They have conjectured in their arguments

that recognition of an educational malpractice cause of action would not be as undesirable as the courts fear. They project that there are a number of measures that would limit excessive amounts of lawsuits, fraudulent claims and financial burdens on schools. They caution that recognition of a cause of action could lead to minimal teaching efforts and a distraction of public school funds away from the development of quality educational programs.

Rejection Standard Six

Improper Forum

The courts have failed to recognize a cause of action for educational malpractice because they have held that the courts are an improper forum in which to resolve educational disputes. This forms the basis for Rejection Standard Six. The court in Donohue declared that:

courts are an inappropriate forum to test the efficacy of educational programs and pedagogical methods... to entertain a cause of action for 'educational malpractice' would require the courts not merely to make judgments as to the validity of broad educational policies... but, more importantly, to sit in review of the day-to-day implementation of these policies.²¹⁸

Tracy poses four reasons why courts have abstained due to this factor, (1) the longstanding historical pattern

of judicial non-intervention, (2) the lack of judicial expertise in the field of education, (3) better service of educational issues by political solutions, and (4) the delegation of education matters to administrative bodies via constitution and statute.²¹⁹ Commentators have divided the area of improper forum into two major concerns which are as follows: (1) the appropriateness of court intervention, and (2) the availability of an administrative forum.

The Appropriateness of Court Intervention

In Donohue, the New York Court of Appeals was concerned that the recognition of a cause of action for educational malpractice based on negligence would impermissibly require the courts to oversee the administration of the public school system of the state.²²⁰ Pabian reports that, "many courts adhere to a doctrine of academic freedom, a philosophy which stresses that teaching and learning must be free of outside interferences."²²¹ The Hoffman court apparently believed, according to Collingsworth, that all educationally related actions were beyond judicial scrutiny.²²² This attitude is incongruous with the position of other courts, including that of the Supreme Court. Jerry details a number of areas in which the courts have intervened in educational issues:

In desegregation cases, courts make judgments about the quality of education in racially unbalanced schools. See e.g., Milliken v. Bradley, 418 U.S. 717, 737 (1974); Brown v. Board of Education, 347 U.S. 483, 495 (1954). Questions of public school financing directly impact upon the quality of education, e.g., San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973). First Amendment issues have forced courts to decide what may or may not be taught in the schools, e.g., Epperson v. Arkansas, 393 U.S. 97 (1968). In considering the statutory rights of handicapped children, courts have evaluated the quality and effect of the efforts of educators, e.g., In re Peter H., 323 N.Y.2d 302 (Family Court 1971). The question of compulsory language programs for non-English speaking students also requires courts to appraise the quality of education, e.g., Lau v. Nichols, 414 U.S. 563 (1974).²²³

Klein comments on the impropriety of the court's reasoning stating that, "the courts have already expanded judicial review to include students rights, liability of school boards, financial policies and education of the handicapped and delinquent."²²⁴ As a result, she sees no real barrier to extending school liability to educational malpractice.²²⁵

Authors that espouse the appropriateness of court intervention regarding educational issues have had to

overcome the following concerns of the courts: (1) the court's lack of expertise in the area of educational issues; (2) the fear that the courts will become involved in a day-to-day monitoring of the public schools; and, (3) the propriety of judicial involvement in administrative policy making.

The first court concern, the lack of judicial expertise, is summarized by the Donohue court in the following statement:

The courts are an inappropriate forum to test the efficacy of education programs and pedagogical methods. That judicial interference would be the inevitable result of the recognition of a legal duty of care is clear from the fact that in presenting their case, plaintiffs should, of necessity call upon jurors to decide whether they should have been taught one subject instead of another, or whether one teaching method was more appropriate than another, or whether certain tests should have been administered or test results interpreted in one way rather than another, and so on, ad infinitum. It simply is not within the judicial function to evaluate conflicting theories of how best to educate.²²⁶

The Donohue court did however, as Collingsworth distinguishes, "leave the door open a crack by saying that teachers could be held liable for negligence in administering policy."²²⁷ Although some critics suggest

that a lack of judicial expertise in the field of education justifies restraint, a look at the wide scope of judicial decisions encompassing medicine, psychiatry, and industry refutes that contention.²²⁸ Klein notes that by appointing "Masters" in complex situations as courts do in other professional malpractice cases, courts would be able to offer relief to injured plaintiffs in the educational malpractice situation.²²⁹ Tracy recommends the use of educational expert testimony to make up for the lack of court expertise in the area.²³⁰

Gordon addresses the second court concern by reporting that courts have been reluctant to interfere with the day-to-day decisions of schools for fear that such interference might be viewed as a challenge to the professional competency of school officials.²³¹ This reasoning is usually based on vague and general state education statutes which delegate state control of education to an administrative agency. Elson proposes what he believes is the proper relationship between the courts and schools in stating:

Courts naturally cannot be expected to conduct general supervisory programs over teachers and, therefore, should not be looked to by policy makers as a primary means for eliminating substandard teaching. But, intervention does help alleviate the gross imbalance of power in the student-school relationship.²³²

Klein maintains that the third court concern, the propriety of court involvement in educational policy making, is perhaps the prime underlying reason for judicial reluctance to recognize a cause of action for educational malpractice.²³³ Pabian stresses that the public school systems, like administrative agencies, have full-time administrators and elected school board officials to manage their affairs and set administrative policy.²³⁴ A stronger argument against judicial involvement in educational decision making, as Elson contends, is that the processes by which courts reach decisions are inappropriate for the affirmative educational policy decisions that are involved in educational malpractice suits. The court is designed to work best in a narrow fact finding capacity, whereas educational policy considerations often require broad inquiry and deliberation.²³⁵ Woods finds it difficult to comprehend why a court would not become involved with the problem of graduating illiterates when they have not hesitated in the past to become involved in internal decision making in other areas.²³⁶

Authors express that the greatest disservice done by the use of the improper forum argument is the loss of the courts as a deterrent to negligent acts and a check on the administrative agencies. Woods comments that, "the national

publicity surrounding such an action would put school districts nationwide on notice that they will be held accountable for their teaching."²³⁷ Tracy also acknowledges that the courts play an important role in the check on administrative agencies regarding matters which have been delegated to them by the constitution or statutes.²³⁸ Elson observes that the failure of the courts to provide a judicial remedy in this area removes the pressure on school districts to develop effective internal procedures. Consequently, the likelihood and severity of injury has been increased because of the lack of a deterrent.²³⁹ Elson comments further:

A Court that refuses to interfere with a school official's decision because of its belief in the safeguards against abuse that are inherent in the democratic system of American public school governance is ignoring the realities of social class in America and is perpetuating some of its inequities.²⁴⁰

Availability of an Administrative Forum

The second major concern raised by courts in their improper forum argument relates to the availability of various administrative forums to handle legal problems in the field of education. Three primary administrative forums have been discussed in the literature as potential avenues of relief for students harmed by educational malpractice:

(1) the local school board, (2) the state office of education, and (3) an administrative court system.

Pabian discusses the fact that public school systems are similar to administrative agencies with their full-time administrators and elected school board officials to manage their affairs.²⁴¹

Elson theorizes that the philosophy which presently guides the courts is the "historic hands-off attitude towards educators which may be found in the ideology of school-community relations that has traditionally been shared by the country's middle and upper socioeconomic classes, from which the judicial leadership in the United States has been predominately selected."²⁴²

Elson contends that the local school board follows the democratic principles of government. These principles embody the basic tenets that the elected school board is responsive to the will of the community and the community will always have ultimate recourse to the school board if they have grievances with the decisions of the board. Elson maintains that the current reluctance of courts to intrude into the area of educational decision making would be warranted in light of these principles and the court's recognition of the undemocratic nature of judicial review, if the local community participation were really there. However, as Elson states, "Unfortunately, [the local community participation model of school governance] is

contradicted in almost every respect by the reality that the urban populace faces in trying to move the public school bureaucracy to respond to its grievances."²⁴³

Many courts have acknowledged the state educational agency's role in dealing with these problems. Collingsworth points to the New York Court of Appeals in Donohue and Hoffman where it declared that policy formation was vested in the State Board of Education and that the court should not substitute its judgment for that of the judgment of the Board.²⁴⁴ Tracy contends that although the legislature may delegate authority to administer a particular area, judicial response to individuals injured should not be precluded by incompetent administrative functioning.²⁴⁵

Elson warns that:

to accept the principle that a public agency controlling a certain activity has the exclusive competence to understand and evaluate the facts peculiar to that activity would have the ultimate effect of sacrificing what judicial safeguards there now are against arbitrary governmental violations of individual rights for a faith in the beneficence and omniscience of the agency official. Such faith is as unfounded for the public school official as it is for the policeman, local zoning board or Immigration and Naturalization Service.²⁴⁶

Several authors have suggested the need for a system of administrative courts to handle educational complaints. Pabian comments that an administrative court system could be developed which is similar to the tax court system, with the civil courts available if an appeal is taken.²⁴⁷ The University of Pennsylvania Law Review recommends a system of review boards which would be a less expensive and more efficient way of enforcing professional standards and compensating individuals than the civil lawsuit.²⁴⁸ Lynch favors an administrative court system and proposes the following ten advantages of these courts with special administrative judges:

1. These judges would have an expertise in assessing the relationship of educational service to the law.
2. Their judicial expertise would consist of hearing and judging complaints in the educational system.
3. Such a system will reduce the number of cases going to courts, helping to lighten a very heavy case burden.
4. Those cases proceeding from the administrative legal system to the courts would likely present better definitions of issues for the courts than at present.
5. The expense to litigants would be considerably lessened. The cost would be part of the state's education or justice budget.

6. A clearer focus on educational problems with the objective of improving the educational opportunities for students would exist than in the courtroom where the discussion of remedy shifts to monetary damages.
7. Administrative judges would make decisions which would be equal to those of court judges.
8. A body of administrative law concerning malpractice would emerge, to which school officials and plaintiffs could refer.
9. The proceedings over which they presided would be less likely to be found faulty by courts on appeal, because of their formal and correct proceedings.
- 10 . Administrative hearings conducted by officers of a district too often lead to confusion in roles of prosecutor and judge. This creates difficulties in the administration of schools in that plaintiffs or would-be plaintiffs feel threatened by facing administrators in another quasi-judicial role.²⁴⁹

There presently exists in our public school system an imbalance of power in the student-school relationship. The American court system was established to be a check on executive and administrative agencies to remedy just such an imbalance. There may be administrative forums which are capable of functioning in the role of forcing educators to accountability for the quality of their work product, but at present, they have been ineffective. The recognition that

the courts may be a proper forum for an educational malpractice cause of action may be just the stimulus needed to get the system operational.²⁵⁰

In summary, the authors have analyzed Rejection Standard Six, Improper Forum, by addressing the concerns of the appropriateness of court intervention and the availability of an administrative forum. They have conjectured in their arguments that court intervention is appropriate and administrative forums may present an alternate avenue for relief. They project that courts have the capabilities of rectifying their lack of expertise in the area of educational disputes and could become involved without monitoring the day-to-day affairs of schools. They caution that if courts allow public schools to operate without judicial restraint, there is a likelihood that academic injuries would increase.

Summary

This chapter has analyzed the six rejection standards which have been generated from the public policy factors identified by the courts in their refusal to recognize an educational malpractice cause of action. Literature propagated by educational and legal scholars regarding the validity of the public policy factors and postured in arguments based on traditional negligence theory

was applied to each rejection standard. The literature was reviewed to reveal the strengths and weaknesses of the rejection standards and to provide predictive data from which to determine the potential for recognition of a successful cause of action for educational malpractice based on traditional negligence theory.

FOOTNOTES

¹Peter W., p. 822.

²Ibid., p. 824.

³Judith H. Berliner Cohen, "The ABC's of Duty: Educational Malpractice and the Functionally Illiterate Student," 8 Golden Gate University Law Review 293, 313 (1978).

⁴Alice J. Klein, "Educational Malpractice: Can the Judiciary Remedy the Growing Problems of Functional Illiteracy?," 13 Suffolk University Law Review 27, 40 (Winter 1979).

⁵William L. Prosser, Law of Torts, (St. Paul: West Publishing Co., 4th Ed., 1971) § 32, pp. 149-150.

⁶Ibid.

⁷Terrence P. Collingsworth, "Applying Negligence Doctrine to the Teaching Profession," 11 Journal of Law and Education 479, 490 (October 1982).

⁸Prosser, § 32, p. 61.

⁹John Elson, "A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching," 73 Northwestern University Law Review 641, 698-699 (1978).

¹⁰Peter W., p. 856.

¹¹David Abel, "Can a Student Sue the Schools for Educational Malpractice?," 44 Harvard Educational Review 416, 435 (November 1974).

¹²Elson, p. 726.

¹³Bellman v. San Francisco High School District, 11 Cal. 2d 576, 81 P.2d 894 (1938).

¹⁴Collingsworth, p. 490.

¹⁵Belle Lind Gordon, "Schools and School Districts - Doe v. San Francisco Unified School District, Tort Liability for Failure to Educate," 6 Loyola University Law Journal 462, 474 (1975).

¹⁶Destin Shann Tracy, "Educational Negligence: A Student's Cause of Action for Incompetent Academic Instruction," 58 North Carolina Law Review 561, 566 (1980).

¹⁷Cohen, p. 302.

¹⁸Collingsworth, p. 490.

¹⁹Cohen, p. 302.

²⁰Mastrangelo v. West Side Union High School District, 2 Cal. 2d 540, 42 P.2d 634 (1935).

²¹Collingsworth, p. 482.

²²Tracy, North Carolina Law Review, p. 566.

²³Elson, p. 733.

²⁴Collingsworth, p. 497.

²⁵Elson, p. 733.

²⁶Prosser, § 32, p. 161.

²⁷"Educational Malpractice," 124 University of Pennsylvania Law Review 755, 770 (1976).

²⁸Patrick D. Lynch, "Education Policy and Educational Malpractice," Contemporary Legal Issues in Education, (Topeka: National Organization on Legal Problems of Education, 1979), p. 212.

²⁹Jay M. Pabian, "Educational Malpractice and Minimal Competency Testing: Is There a Legal Remedy at Last?," 15 New England Law Review 101, 111 (1979).

³⁰Joan Blackburn, "Educational Malpractice: When Can Johnny Sue?," 7 Fordham Urban Law Review, 117, 126 (1978).

³¹Gordon, p. 469

³²Tracy, North Carolina Law Review, pp. 574-579.

- 33Lynch, pp. 215-216.
- 34Ibid., p. 221.
- 35Abel, p. 426.
- 36Tracy, North Carolina Law Review, p. 577.
- 37Arlene H. Patterson, Educational Malpractice: Guidelines for School Districts to Avoid Liability for Academic Negligence, (Tallahassee, Florida: Patterson Associates, January 1981), p. 22.
- 38Lynch, p. 222.
- 39Georgia Code Annotated § 32-838 (1967).
- 40Collingsworth, p. 497.
- 41Klein, p. 39.
- 42Tracy, North Carolina Law Review, p. 574.
- 43Elson, p. 730.
- 44June R. Braverman, "Educational Malpractice: Fantasy or Reality?," 2 The Executive Review 1 (January 1982), p. 2.
- 45Elson, p. 739.
- 46Patterson, p. 18.
- 47University of Pennsylvania Law Review, p. 774.
- 48Tracy, North Carolina Law Review, p. 578.
- 49Braverman, p. 2.
- 50Pabian, p. 112
- 51Elson, p. 725.
- 52Braverman, p. 2.
- 53Elson, pp. 723-724.
- 54Otero v. Mesa County Valley, School District No. 51, 408 F. Supp. 162 (D.C. Colo. 1975). Vacated on procedural grounds, 568 F.2d 312 (10th Cir. 1978).

- ⁵⁵Prosser, § 32, p. 163.
- ⁵⁶Elson, p. 724.
- ⁵⁷St. Helaine Maze v. Henderson, 496 F.2d 973 (CA 8 1974).
- ⁵⁸Elson, pp. 723-724.
- ⁵⁹Blackburn, p. 127.
- ⁶⁰Klein, p. 40.
- ⁶¹Blackburn, p. 127.
- ⁶²Klein, p. 40.
- ⁶³Pabian, pp. 112-114.
- ⁶⁴David G. Carter, Sr., "The Educator and the Liability Law of Professional Malpractice: A Historical Analysis," (Paper presented at the Annual Meeting of the Amer. Educ. Research Assoc., San Francisco, Ca., April 1979), p. 18.
- ⁶⁵Klein, p. 43.
- ⁶⁶Peter W., p. 825.
- ⁶⁷Tracy, North Carolina Law Review, pp. 579-580.
- ⁶⁸Collingsworth, p. 902.
- ⁶⁹Prosser, § 54, pp. 327-328.
- ⁷⁰Story Parchment Co. v. Paterson Parchment Co., 282 U.S. 555, 563 (1931).
- ⁷¹Klein, P. 48.
- ⁷²University of Pennsylvania Law Review, p. 775.
- ⁷³Gordon, p. 480, citing Goss, p. 574.
- ⁷⁴Pabian, p. 126.
- ⁷⁵Ibid.
- ⁷⁶Klein, p. 48.
- ⁷⁷Goss, p. 565.

- ⁷⁸University of Pennsylvania Law Review, p. 775.
- ⁷⁹Ibid.
- ⁸⁰Elson, p. 755.
- ⁸¹Trustees of Columbia University v. Jacobsen, 53 N.J. Super. 574, 576, 148 A.2d 63, 64 (1959).
- ⁸²Tracy, North Carolina Law Review, p. 581.
- ⁸³Pabian, p. 115.
- ⁸⁴Ibid., p. 116.
- ⁸⁵Ibid., p. 119.
- ⁸⁶Lynch, p. 231.
- ⁸⁷Ibid., p. 233.
- ⁸⁸Elson, p. 755.
- ⁸⁹Johnson v. Sampson, 167 Minn. 203, 208 N.W. 814 (1926).
- ⁹⁰Lynch, p. 233.
- ⁹¹Tracy, North Carolina Law Review, p. 579.
- ⁹²Robert H. Jerry II, "Recovery in Tort for Educational Malpractice: Problems of Theory and Policy," 29 Kansas Law Review 195, 211 (Winter 1981).
- ⁹³Tracy, North Carolina Law Review, p. 580.
- ⁹⁴Jerry, p. 203.
- ⁹⁵Klein, p. 49.
- ⁹⁶Tracy, pp. 581-582.
- ⁹⁷Pabian, p. 104.
- ⁹⁸Cynthia A. Jorgensen, "Donohue v. Copiague Union Free School District: New York Chooses Not to Recognize Educational Malpractice," 43 Albany Law Review 339, 349 (Winter 1979).

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¹⁰⁰Ibid., p. 226.

¹⁰¹Ibid.

¹⁰²Ibid.

¹⁰³Peter W., p. 824.

¹⁰⁴Nancy L. Woods, "Educational Malfeasance: A New Cause of Action For Failure to Educate?," 14 Tulsa Law Journal 383, 396 (1979).

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¹⁰⁶Ibid.

¹⁰⁷Elson, p. 747.

¹⁰⁸Blackburn, pp. 131-132.

¹⁰⁹Klein, p. 45.

¹¹⁰Elson, p. 747.

¹¹¹Tracy, North Carolina Law Review, p. 584.

¹¹²Pabian, p. 109.

¹¹³Braverman, p. 2.

¹¹⁴Abel, p. 430.

¹¹⁵Peter W., p. 824.

¹¹⁶Pabian, pp. 104-107.

¹¹⁷Klein, pp. 46-47.

¹¹⁸Ibid., pp. 49-51.

¹¹⁹Ibid., pp. 51-52.

¹²⁰Pabian, p. 106.

¹²¹Elson, p. 749.

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- 124 Lynch, pp. 235-236.
- 125 Braverman, p. 2.
- 126 University of Pennsylvania Law Review, pp. 790-796.
- 127 Elson, p. 748.
- 128 Ibid.
- 129 Collingsworth, p. 500.
- 130 Elson, p. 749.
- 131 Ibid., pp. 749-750.
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- 134 Ibid., p. 749.
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- 137 Tracy, School Law Bulletin, p. 7.
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- 140 Woods, p. 399.
- 141 Collingsworth, p. 501.
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- 143 Collingsworth, p. 501.
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- 146 Elson, pp. 750-751.

- ¹⁴⁷Ibid., p. 751.
- ¹⁴⁸Klein, p. 52.
- ¹⁴⁹Abel, p. 430.
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- ¹⁵³Braverman, p. 3.
- ¹⁵⁴Abel, p. 431.
- ¹⁵⁵Woods, p. 399; Collingsworth, pp. 500-502;
Blackburn, p. 121; Jerry, p. 211.
- ¹⁵⁶Jerry, p. 211.
- ¹⁵⁷Collingsworth, p. 502.
- ¹⁵⁸Pabian, p. 108.
- ¹⁵⁹Fairbanks North Star, p. 556.
- ¹⁶⁰Peter W., p. 825.
- ¹⁶¹Jorgensen, p. 355.
- ¹⁶²Ibid.
- ¹⁶³Collingsworth, p. 502.
- ¹⁶⁴University of Pennsylvania Law Review, p. 759.
- ¹⁶⁵Abel, p. 427.
- ¹⁶⁶Tracy, North Carolina Law Review, pp. 580-581.
- ¹⁶⁷University of Pennsylvania Law Review, p. 757.
- ¹⁶⁸Pabian, p. 108.
- ¹⁶⁹Jorgensen, p. 355.
- ¹⁷⁰Tracy, North Carolina Law Review, p. 581.

- ¹⁷¹Klein, p. 57.
- ¹⁷²University of Pennsylvania Law Review, p. 758.
- ¹⁷³Klein, p. 58.
- ¹⁷⁴Jorgensen, p. 355; University of Pennsylvania Law Review, p. 758.
- ¹⁷⁵Tracy, North Carolina Law Review, p. 582.
- ¹⁷⁶Collingsworth, p. 504.
- ¹⁷⁷Peter W., p. 825.
- ¹⁷⁸Pabian, p. 105.
- ¹⁷⁹Tracy, North Carolina Law Review, pp. 586-587.
- ¹⁸⁰Elson, pp. 653-654.
- ¹⁸¹Jorgensen, p. 351.
- ¹⁸²Gordon, p. 476.
- ¹⁸³Blackburn, p. 141.
- ¹⁸⁴Tracy, School Law Bulletin, pp. 8-9.
- ¹⁸⁵Ibid.
- ¹⁸⁶Jorgensen, p. 351.
- ¹⁸⁷Abel, pp. 428-430.
- ¹⁸⁸University of Pennsylvania Law Review, p. 770.
- ¹⁸⁹Braverman, p. 2.
- ¹⁹⁰University of Pennsylvania Law Review, p. 770.
- ¹⁹¹Ibid.
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- ¹⁹⁵Blackburn, p. 141.

- 196 Abel, p. 427.
- 197 University of Pennsylvania Law Review, p. 763.
- 198 Klein, p. 54.
- 199 Pabian, p. 109.
- 200 Klein, p. 54.
- 201 Elson, pp. 652-653.
- 202 Ibid., p. 652.
- 203 Pabian, p. 108.
- 204 Elson, p. 652.
- 205 Collingsworth, p. 503.
- 206 Ibid.
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- 208 Woods, p. 395.
- 209 Blackburn, p. 142.
- 210 Dillion v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) involved negligent infliction of emotional trauma and physical injury from witnessing daughter's death.
- 211 Buttalla v. State of New York, 10 N.Y. 2d 237, 176 N.E. 2d 729, 219 N.Y.S. 2d 34 (1961) involved a cause of action for physical or mental injury where the injury was not caused by impact, but rather by fright negligently induced.
- 212 Ibid., 10 N.Y. 2d at 240-241; 176 N.E. 2d at 731; 219 N.Y.S. 2d at 37.
- 213 Blackburn, p. 142.
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- 223 Jerry, p. 203.
- 224 Klein, p. 38.
- 225 Ibid.
- 226 Donohue, p. 879.
- 227 Collingsworth, p. 485.
- 228 Klein, p. 38.
- 229 Ibid.
- 230 Tracy, North Carolina Law Review, p. 589.
- 231 Gordon, p. 479.
- 232 Elson, p. 657.
- 233 Klein, p. 37.
- 234 Pabian, p. 103.
- 235 Elson, p. 671.
- 236 Woods, p. 394.
- 237 Ibid.
- 238 Tracy, North Carolina Law Review, p. 590.
- 239 Elson, p. 657.
- 240 Ibid., p. 666.

²⁴¹Pabian, p. 103.

²⁴²Elson, p. 663.

²⁴³Ibid., pp. 663-664.

²⁴⁴Collingsworth, p. 486.

²⁴⁵Tracy, North Carolina Law Review, p. 591.

²⁴⁶Elson, p. 679.

²⁴⁷Pabian, p. 108.

²⁴⁸University of Pennsylvania Law Review, p. 764.

²⁴⁹Patrick D. Lynch, "Legal Implications of Models of Individual and Group Treatment by Professionals," 9 NOLPE School Law Journal 38, 59 (1980).

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CHAPTER V

SUMMARY, CONCLUSIONS AND IMPLICATIONS

This chapter contains a summary of findings, conclusions and implications for educators and further study.

Summary

Introduction

There remains in the United States a segment of society that can be termed functionally illiterate. It is characterized by a lack of proficiency in the basic skills of reading, writing and mathematics. Evidence of this fact has been documented in studies which implicate public school systems as directly responsible for the situation. Concerned parents have pressured educators and legislators to rectify the problem of inadequate education. They in turn have responded with the accountability movement and legislative enactment of competency based testing. Some parents have elected to seek adequate education in private and home schooling alternatives.

Despite these efforts to improve the quality of education, there still remains those students who have already been injured by alleged public school academic

negligence. Some parents have turned to the courts to obtain direction and redress regarding their concerns. Peter W. was the first case of its kind where a student sought to bring suit against a public school system for failure to provide him with an adequate education. The court denied recognition of a cause of action holding that there existed no duty for educators to provide students with an adequate education. Similar cases have followed with the same results; yet the fact remains that there is a class of victims who have failed to learn and have been left without remedy. Although courts have resisted legal recognition of a cause of action for educational malpractice, they have not ruled out the possibility for future recognition.

The purpose of this study was to determine the potential for a successful cause of action for educational malpractice based on traditional negligence theory. This study analyzed court cases, literature, and research to determine implications and directions for educators in the future regarding this potential cause of action. Court cases were searched to determine the extent to which educational malpractice has been pleaded and various academic injuries alleged. In addition, a detailed investigation was made of the courts' holdings and rationale. Literature and research was investigated to determine the scope of material in the area of educational

malpractice. This was subsequently examined to extract the arguments of authorities based on traditional negligence theory which are responsive to the court's renditions in this area. Literature was also analyzed to provide a conceptual background for the study and a basis for an understanding of tort law, negligence, and malpractice as it exists in other professions.

The results of this study were presented in the first four chapters. Chapter I provided background information and a framework for the study. Chapter II contained a review of the literature and research categorized under the three topics of historical evolution of educational malpractice, preventative measures, and alternative legal theories. Chapter III developed a conceptual legal basis for educational malpractice by tracing the development of tort law, negligence theory and malpractice as it has been legally recognized in other professions. In addition, specific court cases were scrutinized which determine the parameters of academic injuries alleged and the public policy factors held by the courts as a basis for their rationale to deny recognition of a cause of action. From these public policy factors were derived rejection standards which must be overcome by future plaintiffs seeking successful legal recognition. Chapter IV analyzed the rejection standards formulated in Chapter III

by reviewing arguments of authors who have commented on the validity of the courts' public policy rationale.

Findings

This study found that a body of literature exists which has been generated by educational and legal scholars as a result of the unsuccessful court cases alleging educational malpractice. The literature discussed generally three aspects of educational malpractice. One aspect reviewed was the historical evolution of the educational malpractice action. Various authors traced the history of educational malpractice to other areas of school litigation, the accountability movement and the malpractice literature of other professions. A second aspect of the literature pertained to preventative measures which teachers and school districts could implement to avoid a successful lawsuit. Authors cautioned that educators need to initiate the development and adoption of preventative measures before the courts and the legislatures assume this responsibility. The final aspect in the literature presented alternative legal theories in the areas of torts, contracts, constitutional law and miscellaneous which could be pleaded in future educational malpractice actions. Commentators claimed that these theories, if properly pleaded, could furnish the theoretical basis for recognition of the first successful cause of action for educational malpractice.

It was found that no educational malpractice case brought thus far has met with success in the courts. Five of the cases, Peter W., Donohue, Hoffman, Fairbanks North Star, and Hunter, are a significant representation of the body of cases which allege educational malpractice. They define five areas where educational malpractice has been alleged in the academic area of education. Allegations of malpractice in these cases have asserted injuries in areas of instruction, diagnosis, placement, termination of services, and promotion. These cases also embody the public policy factors established by the courts in their rationale to support their decisions to refuse legal recognition of an educational malpractice cause of action. These public policy factors rendered by the courts are summarized as follows:

1. No workable standard of care can be found by which to measure a school district's or teacher's actions in light of the dispute among educators and laymen as to classroom methodology and how or what a child should be taught.
2. No academic injury can be established with a reasonable degree of certainty within the meaning of the law of negligence.

3. No perceptible causal connection can be recognized between a school district's conduct and a student's injury suffered due to the host of factors which influence a student's achievement of literacy in the schools and which are beyond the control of the school district.
4. Money damages are inappropriate as a remedy for a student as a result of a claim of educational malpractice. The proper remedy lies in prompt administrative and judicial review through the administrative processes.
5. The courts fear fraudulent claims and a flood of litigation and the burden in terms of time and money which would be placed upon school districts and society if courts were to hold school districts to an actionable duty of care.
6. The courts are an inappropriate forum to test how best to educate or to administer a public school system. The administrative processes provided by statute are available to parents and students and are the appropriate means of ensuring that a student receives a proper education.

These public policy factors form the basis for the rejection standards which were generated in this study. The

rejection standards which reflect the public policy factors are as follows:

1. lack of a judicially workable standard of care;
2. no certainty of injury;
3. no causal link;
4. no appropriate remedy;
5. flood of litigation; and,
6. improper forum.

Because of the doctrine of stare decisis, courts in the future will continue to rely upon previous court decisions and rationale when deciding whether or not they should grant legal recognition to the educational malpractice cause of action. Arguments asserted by students alleging educational malpractice should be designed to refute these rejection standards in order for a cause of action to be successful.

Although each of the cases reviewed consistently held that for public policy reasons no cause of action would be recognized, the courts issued the caveat that if gross violations of public policy were found to exist, they would be obliged to recognize these violations and correct them. While the court in Peter W. suggested that a cause of action for intentional misrepresentation may exist, in Hunter the court allowed a cause of action based on intentional tort

theory, stating that outrageous conduct by the defendant educators greatly outweighed any public policy considerations which would otherwise preclude liability. Additionally, the courts in Donohue and Hoffman strongly implied that the appropriate elements of traditional negligence and malpractice could be and had been formally pleaded.

This study found that commentators have analyzed the validity of the public policy factors used by the courts in their refusal to recognize this new tort action. They pose arguments based on traditional negligence theory which have been applied in this study to the analysis of the rejection standards.

The authors have analyzed Rejection Standard One, Lack of a Judicially Workable Standard of Care. They have responded to the courts' opinion by proposing two standards of care by which to evaluate the conduct of educators.

It was found that the reasonable man standard of care is one standard recommended by the authors. Negligence under this standard becomes a failure to do what the reasonably prudent man would do under the same or similar circumstances. It is the lowest level of care which could be imposed upon an educator or educational institution.

In conjunction with the reasonable man standard, the authors also suggested the reasonable educator standard.

This higher standard would require a teacher to exercise the care that a reasonably prudent teacher would exercise under the circumstances, taking into consideration the knowledge, skill or experience the teacher actually has. This standard is the acceptable standard in physical injury and supervision cases involving teachers. Authors suggested that it could be equally applicable in cases alleging academic injury.

The professional standard of care is a second standard presented by the authors. A significant characteristic of this standard is the exercise of professional judgment. The teacher is required to use due care in what he does and must possess and apply a minimum standard of special knowledge and skill. Five sources from which professional standards may be derived have been proposed. These sources consist of a statutory standard, a community standard, a self-imposed standard, a certification standard, and a school-of-thought standard. It was suggested that if conduct is so outrageous, the courts should not dismiss an educational malpractice suit because they cannot find a workable standard of care.

The authors have analyzed Rejection Standard Two, No Certainty of Injury. They have responded to the courts' opinion by proposing that the task of determining the certainty of injury should not deter courts from allowing

the jury to decide its compensability. This study shows that both direct and indirect academic injuries exist within the meaning of negligence and should be legally recognized by the courts. An obstacle to the recognition of certainty of injury raised by the authors, is the inability to determine the exact time when injury occurred. Several authors suggested that pre-tests and post-tests be administered to generate student achievement scores that could be evaluated in order to approximate the time of the alleged injury.

The authors have analyzed Rejection Standard Three, No Causal Link. They have responded to the courts' opinion by acknowledging that proof of causation would be difficult for a student to prove, but would not be an insurmountable barrier. They propose that the host of factors cited by the courts may be isolated by applying certain methods of proof and utilizing the substantial factor test. The authors suggested that legal cause can be proven by obtaining circumstantial evidence, expert testimony and common knowledge. Once legal cause is established they contend that the student would be able to prove proximate cause without difficulty. In addition to the proof of causation problem, several defenses were mentioned that could be raised by educators, none of which the authors considered significant. Many of the authors concluded that proof of

causation is for the jury to decide based upon the merits of the facts. Consequently they maintain, that courts were not justified in barring all educational malpractice claims because causation is uncertain.

The authors have analyzed Rejection Standard Four, No Appropriate Remedy. They have responded to the courts' opinion by acknowledging that monetary damages may not be the most feasible remedy to award because of the speculative nature of monetary assessment. They proposed that courts could award limited amounts of monetary damages and grant various forms of remedial instruction to be provided by the defendant educator. Courts could also award reimbursement for monies already paid for remedial instruction and order school districts to remove incompetent teachers.

The authors have analyzed Rejection Standard Five, Flood of Litigation. They have responded to the courts' opinion by refuting the courts' fears of excessive litigation, fraudulent claims, and the potential financial burden to schools. It was found that there are numerous safeguards that would preclude all but the most meritorious of claims due to the burden placed upon the student to prove his case and the time and legal fees involved in so doing. Authors acknowledged that awards of excessive monetary damages could burden schools but claimed that adequate malpractice insurance would alleviate this concern. In

addition, they perceived that remedies awarding minimal monetary damages would discourage students from filing suits in order to seek large monetary awards.

The authors have analyzed Rejection Standard Six, Improper Forum. They have responded to the courts' opinion by stating that a minimal amount of judicial intervention is necessary in order to provide checks and balances for state educational agencies. They refuted the contention of the court that judicial intervention would place courts in the position of dictating educational policy and monitoring day-to-day activities of public schools although they lack the requisite expertise. The authors cited legal precedent where the judiciary has been involved in other areas of public education and consequently contended that the academic area is not significantly immune from legal intervention. It was found that several suggestions were provided whereby various administrative forums could be implemented to bear the burden of excessive litigation, but no significant logic was presented to support total abrogation by the courts from involvement in the academic area of education.

It was found that the commentators agree that the rejection standards can be overcome by properly pleading procedural and substantive elements of a traditional negligence cause of action. They assert that the courts'

rationale for denial based on public policy factors was conveniently adopted to avoid further entanglement in educational matters. The authors urge that cases alleging academic injury be reviewed on a case by case basis, minimizing previous legal precedent, with emphasis on the need for legal intervention as a deterrent to negligent acts in the student-school relationship.

Conclusions

The review of specific court cases and literature in this study focused on the educational malpractice cause of action based on traditional negligence theory where students alleged academic injury due to teacher negligence. Although educational malpractice has never been accorded legal recognition by a court of law, conclusions have been drawn regarding its potential for success in the future. The conclusions address the potential for success under both present circumstances and those circumstances which may occur in the future which could affect legal recognition.

Present Circumstances

First, there is a growing body of court cases which deny recognition of a cause of action for educational malpractice based on traditional negligence theory.

Ever since the court in Peter W. held in 1976 that it would not recognize a legal duty to educate flowing from public school educators to their students based on public policy factors, courts in other states, which have also faced educational malpractice claims, have relied on the Peter W. precedent, thus invoking the common law doctrine of stare decisis to reaffirm denial of recognition for public policy reasons. In so doing, the combined courts have amassed a total of six public policy factors that present a substantial barrier of rejection standards which all future educational malpractice causes of action must overcome. No legal definition has been granted to the alleged area of educational malpractice. Complaints of negligent instruction, diagnosis, placement, termination of services and promotion have been pleaded, with no realization of legal remedy for related injuries.

Second, although courts have consistently denied an educational malpractice cause of action, they have not precluded the possibility of future recognition.

Each court failed to acknowledge legal acceptance of a duty flowing from educators to cause students to learn or to provide the opportunity to learn through non-negligent teaching. Yet, several courts commented that it is a common assumption that there is an ethical and moral "duty" requiring educators to teach students with "care".

Furthermore, they stated that legal acceptance would be granted if gross violations of public policy were found to exist. In Hunter, although a cause of action based on traditional negligence theory was refused, the court did recognize a cause of action for intentional tort. In this case they pronounced the trust relationship between educator and child to be so outrageously violated that it outweighed any public policy considerations which would otherwise preclude legal recognition.

In addition to reserving the opportunity to provide legal relief under certain circumstances, the courts noted that an educational malpractice cause of action based on traditional negligence theory is quite possibly cognizable and may be formally pleaded.

Third, there is a sizeable body of research and literature that has been generated by educational and legal scholars in response to the court cases alleging educational malpractice.

This literature has furnished definition and substance to this unrecognized area of law through analysis and study of the historical evolution of legal liability for educators, developed preventative guidelines for school districts and teachers, and hypothesized the probability for future success of educational malpractice pleaded under various legal theories, including traditional negligence.

From their research and analysis, authors have theorized that a successful cause of action for educational malpractice can be pleaded utilizing traditional negligence theory to overcome the public policy rejection standards opined by the courts. Each public policy factor rendered by the courts in their rejection rationale was scrutinized and refuted by comparative arguments.

In addition, authors have reinforced the Donohue and Hoffman courts' strong implication that a cause of action for educational malpractice founded in traditional negligence theory can be pleaded with procedural success. Many authors contend that courts have used public policy rationale to conveniently avoid further involvement with public education. They maintain that such involvement is necessary to provide a balanced check on potential abuses and predict that at some time in the future, legal recognition will occur.

Fourth, there are trends in contemporary society which may contribute to future recognition of an educational malpractice cause of action, which are as follows:

1. Our society continues to increase the number of claims filed in courts annually. Public schools have not been excepted from this increase in litigation. Since 1970 there have been at least 14 reported educational malpractice cases brought in

10 different states. It would seem that the trend toward increased litigation would enhance the possibility for future educational malpractice claims;

2. Tort law is ever increasing its acceptance of new areas of professional malpractice. Whenever a body of practicing professionals hold out to the public that they offer skills and services based upon informed judgment and knowledge, the courts entertain expansion of legal relief for injured victims. Recognition of a new area of malpractice often embodies innovative theory pleading. In the area of professional medicine a corporate approach to pleading negligence has gained wide acceptance. A corporate negligence theory is pleaded when an injury has been sustained but no particular physician or staff member can be found blameworthy. The result is to pronounce the hospital or clinic liable for providing the environment wherein the alleged injury occurred. The trend for new areas of professional malpractice to be recognized often accompanied by acceptance of new or hybrid theories, could expand to include professional educators. One method of pleading traditional

negligence successfully may be derived from the corporate negligence medical model utilizing those elements which would accord liability to school districts;

3. Opinion polls continue to reflect parental concern about the quality of education provided for children in public schools. Although this trend has reached a plateau, this concern will not decrease until confidence is restored in public education. Court intervention to remedy alleged injuries may come as a result of this insistent quest for reassurance;
4. State legislatures have reacted to public pressure by enacting statutes which purport to increase the quality of public education by establishing minimal achievement standards for students and teachers. In several states, students must pass minimal competency exams as a prerequisite for obtaining an unconditional high school diploma. State statutes are also prevalent which require minimal competency exams for teachers who wish to receive a teacher's license or to retain one in existence. As this trend grows for state legislatures to promulgate definitive standards for education, it may be interpreted as a shift in

public policy which could cause public schools and their teachers to be held legally responsible for non-negligent teaching to affect student achievement at a minimal level.

5. There also continues to be a trend among educators to promote their occupation as a professional endeavor. For years, local teachers organizations have sought professional status recognition by local school boards and the general public. This trend may contribute to the enunciation of a professional standard of care which would form a sound basis for legal recognition of a duty to teach non-negligently;
6. Finally, local school districts continue to represent in writing their minimal professional expectations for employed teachers. They also continue to write minimal expectations for student achievement and provide statements of goals and objectives with a scope and sequential development of such to reflect how students will be processed. This trend toward making written representations about professional requirements for teachers and minimal curriculum expectations of students, may contribute to a minimal standard to which local school districts would be held legally liable.

In summary, it may be concluded that under present circumstances any future case brought alleging academic injury and pleading educational malpractice based on traditional negligence theory, has the potential to be granted legal recognition. Despite the firm stance taken by previous courts to refuse recognition based on public policy factors, this is subject to change as dictated by the demands of society. Courts have already indicated that outrageous situations may overcome public policy as well as any previous legal precedent. The research and analysis of authors examined in this study, trends in society, legislative enactments and local school board policy all suggest that someone be held legally accountable for a minimal standard of academic achievement for students. The potential for courts to modify their interpretation of public policy to reflect these social indicators becomes stronger with each new case that is brought.

Therefore, the first successful recognition of a cause of action for educational malpractice based on traditional negligence is highly probable under present circumstances.

Future Circumstances

Conclusions have also been drawn suggesting future circumstances which may occur that would increase the

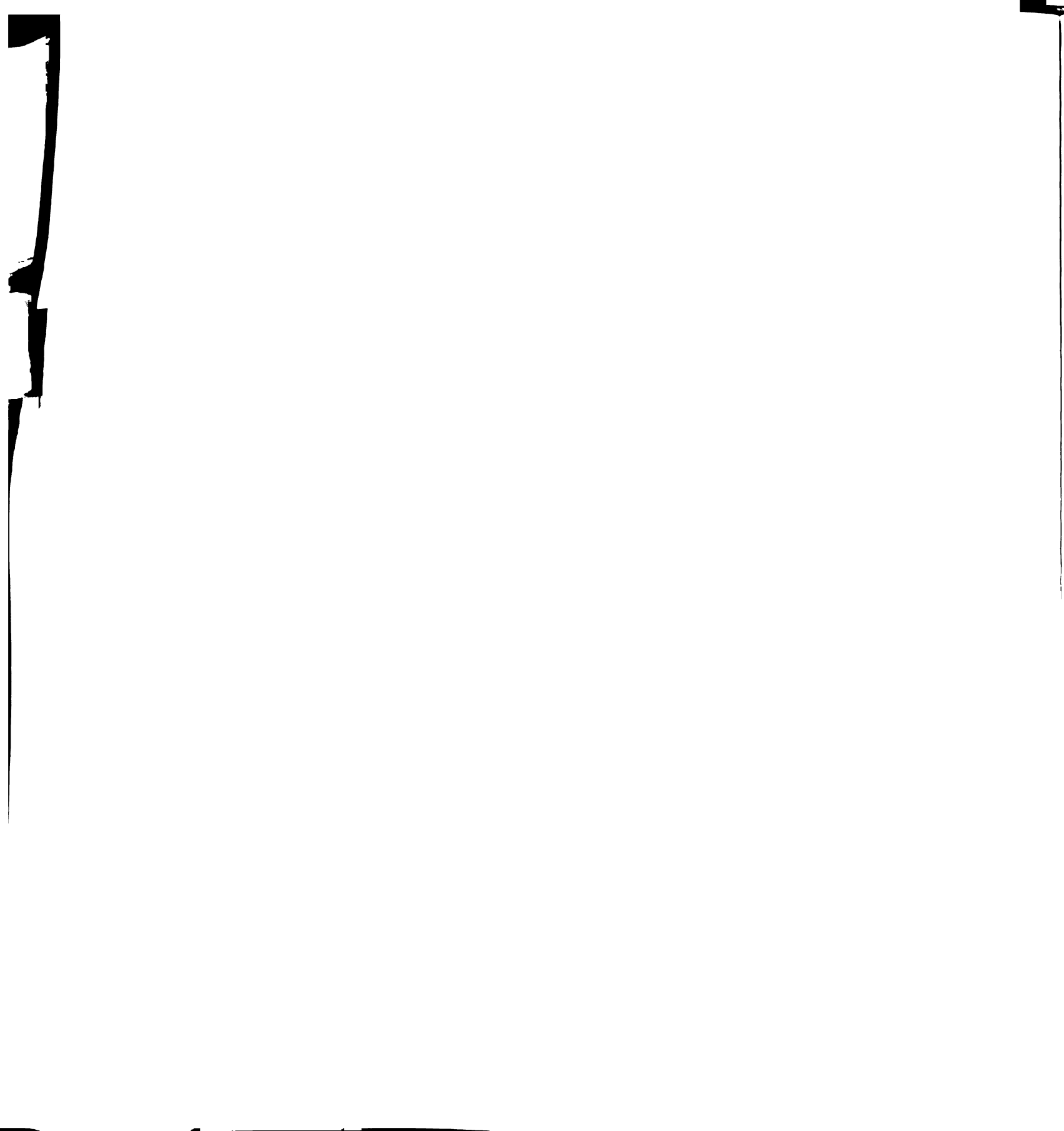
potential for successful recognition.

First, a claim may be brought in the future based on an educational malpractice cause of action with supporting facts that would cause a court to grant legal recognition either because the situation was so outrageous that it outweighed any public policy restraints, or because changes in public policy demanded a legal remedy. The fact pattern in such a case would probably suggest on its face that someone negligently caused the alleged injury. Following is a hypothetical illustration of such a fact pattern.

1. The plaintiff is an eighteen (18) year old youth who has recently graduated with a high school diploma from a public school system in which he was enrolled for thirteen (13) years.
2. Results from tests taken after graduation reveal that he has normal intelligence, no physical handicaps, but is reading on a third grade level and has some indication of a learning disability.
3. He has not been able to pass minimal competency college entrance exams because of his inferior reading skills and has not been able to gain employment where minimum reading capabilities are required.
4. A review of his school files revealed that a learning disability had been indicated as early as

kindergarten by appropriate test results but the school system did not have a special program at that time in which to place him. During the next 12 years he was never tested again regarding this indicated deficiency even though the school system did develop special instructional programs to accommodate others with similar deficiencies.

5. The youth's parents have always been supportive of his involvement at school and regularly attended school functions including parent-teacher conferences. At these conferences their questions concerning their son's progress were always met with the reassurance that he was doing fine.
6. During the third, seventh and tenth grades, state endorsed minimal competency exams were administered by the school system which indicated that the youth was deficient in reading skills. No subsequent remediation was prescribed and he continued to receive average and above grades in all classes with promotion annually to the next grade level.
7. The youth did not have a record of either misbehavior in school or truancy. His teachers stated that he was always happy and a joy to have in their classes.



8. Because the parents were consistently reassured by teachers and the supporting grades given for classes taken, they were shocked to find out that after 13 years in the public school system their son was functionally illiterate. In reliance upon the teacher's representations they had made plans to send their son to an elite university hoping that such formal education would enhance his employment opportunities.
9. It was obvious to them that thirteen (13) years of public school education had not adequately prepared their son to read well enough to fulfill their goals for his future. Their resulting action was to file a lawsuit against the school system claiming educational malpractice based on traditional negligence theory.

This illustrative situation contains elements that singularly or corporately could stimulate a court to prescribe a legal remedy.

Second, a well pleaded case by the plaintiff utilizing sound malpractice and negligence theory could overcome previous courts' public policy factors and rejection standards.

Courts have stated that a cognizable cause of action for educational malpractice may be formally pleaded.

Authors maintain that all the elements of negligence can be pleaded both procedurally and substantively to refute the courts' public policy factors. Plaintiffs could argue for recognition by citing areas and trends that indicate that public policy does in fact demand a legal remedy.

Additionally, new approaches to pleading malpractice based on traditional negligence theory may be attempted. *Res ipsa loquitur*, a theory attributing liability to the defendant in exclusive control of the instrumentality causing the injury, has been used successfully in personal injury actions against school districts in the past. A form of pleading drawing from *res ipsa loquitur* and the corporate negligence model utilized in medical malpractice cases may enable plaintiffs to prove that their obvious academic injuries must be the fault of a school system.

Third, public policy may change as social engineering prevails and is represented in certain areas and trends.

In the future the present adamant position of the courts based on public policy factors may weaken if several indicia of public policy suggest legal recognition. They are as follows:

1. Courts will adopt interpretations of public policy from other court rulings involving the same issue or issues which involve children and education.

In a jurisdiction where courts are according more protection to children and becoming more involved with other areas of public education, a court confronted with an educational malpractice cause of action may interpret a need to expand public policy to include protection from negligent teaching.

2. The trend toward more legislative involvement in minimal standards for students and teachers may be cumulatively viewed as public policy requiring minimal legal remedies for failure to achieve minimal competency. The more active legislators become in promoting statutory standards to implement quality education, the stronger the indication becomes to courts that public policy demands their intervention. Legislatures may, in fact, enact statutes that would prescribe public policy regarding legal recognition for academic injuries by defining the cause of action, the public school's responsibility, and the ensuing remedy if injury can be proven.
3. Public opinion may become more pronounced through the news media, opinion polls, special interest groups and local school board policies. Each of these areas may promote minimal legal protection

from negligent teaching. Judges share a common citizenry with the vocal public and are influenced by public opinion when declaring public policy.

4. Authors continue to refute the public policy rationale that courts have used as their denial basis. Their consistent agreement that public policy does not preclude court recognition may influence the opinion of future courts to lower the public policy barrier.

Each of these areas that could affect a change in public policy may lead to a new public policy regarding non-negligent teaching in public schools. The new policy would provide that legal recourse for academic injuries would be available if negligent teaching caused a student to not have a minimal opportunity to learn at a minimal competency level.

Fourth, courts in the future may overcome legal precedent to provide a legal remedy to victims who have failed to learn.

At any time on a case by case basis a court may rule that present circumstances dictate a necessary legal remedy. Previous court holdings and the doctrine of stare decisis can be overcome and distinguished if a court determines that a wrong must be corrected. As already indicated, an

outrageous situation could provide the basis for court intervention. In addition, a well pleaded case based on sound negligence theory which incorporates prevailing public policy rationale to suggest recognition, could also influence a court to admit a cause of action. Courts also would be compelled to recognize such a cause if legislatures were to so provide.

In summary, it may be concluded that there are circumstances that if they were to occur would greatly increase the potential for the first successful cause of action for educational malpractice. This would involve various degrees of the right fact pattern, proper pleading, shift in public policy and the court's receptiveness to initiating a new area of tort law.

Implications

The information gained through this study, represented in the above findings and conclusions, suggests the following implications for the benefit of educators and further study.

Implications for Educators

1. School districts, administrators and teachers should make reasonable attempts to furnish each student with the opportunity to learn. Taking

into consideration the five areas where academic negligence has been previously alleged by plaintiffs, educators should fortify their teaching practices by implementing better procedures for documentation, reporting, placement, and promotion of students, and overall communication with students and parents.

2. Educators must be aware that students and parents will continue to demand non-negligent teaching and will not dismiss the availability of bringing their grievances before the courts.
3. Educators should participate in legal seminars and workshops that will acquaint them with and prepare them for potential liability situations.
4. School districts should obtain a legal audit to determine their potential for educational malpractice.
5. Universities and colleges should address screening procedures for potential teachers and should assess professional standards for teachers and attempt to define the schools of thought from which various teaching methodology is derived.
6. School districts should fortify their hiring and evaluation procedures and continue to encourage professional improvement and awareness.

7. State departments of education should become affirmatively involved in defining professional standards for teachers and in reinforcing certification requirements.
8. Professional teacher organizations should take an active role in determining their professional status and police their peers before state legislatures, local school districts, and courts assume this responsibility.
9. If a successful cause of action were to be recognized by a court or prescribed by a legislature, educators and schools would henceforth be subject to personal or corporate liability for negligent teaching. Public policy would dictate that such negligence would be recognized at that time when a student could show injury sustained as a result of not having been provided the opportunity to learn at a minimal achievement level. As a result educators would have to articulately document their efforts to teach in a manner that ensures all students of at least access to minimal learning opportunities.

Negative effects of such recognition could be the increased cost of providing malpractice

insurance, the additional time and expense necessary to document non-negligent teaching properly and the reluctance of potential teachers to enter the field of education. Positive effects could include better communication with parents and students and a more professional approach to training teachers and teaching children based upon the knowledge that a minimal standard of accountability is legally required.

10. Because of the difficulty in determining time of injury, educators should remain exempt from personal liability except for gross or wanton conduct. However, they may be implicated along with a public school system under some form of a corporate negligence action.

Implications for Further Study

1. A study should be attempted to determine the positive effects which the threat of educational malpractice suits have had on local school districts. Attention should be focused on the preventative measures that have been instituted and the resulting improvement in student learning.
2. Another study should be initiated to determine if local school districts have represented to the public in their documents a legal duty to educate

and an appropriate standard of care by which to determine teacher negligence.

3. A study of state educational statutes should be completed to identify public policy implications regarding areas of education.
4. Alternative legal theories should be studied to determine their potential as a basis for pleading a successful educational malpractice cause of action.
5. Teacher education departments at universities and colleges should study data that would clarify accepted methods of teaching and appropriate professional standards for educators.
6. A study should be attempted to analyze approaches by which parents and students may successfully address the adequate education question without court intervention.

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