INSTRUCTIONAL MALPRACTICE AND EDUCATOR LIABILITY: A STUDY TO ANALYZE COURT DECISIONS TO DETERMINE THE ADMINISTRATIVE AND/OR EDUCATIONAL ISSUES OR PRACTICES WHICH LEAD TO LITIGATION

by

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ABSTRACT

INSTRUCTIONAL MALPRACTICE AND EDUCATOR LIABILITY:
A STUDY TO ANALYZE COURT DECISIONS TO DETERMINE
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Instructional malpractice is a recent phenomenon of the last decade and is an issue with which educators must be concerned for the proper implementation of curriculum. This study focuses on instructional malpractice as a form of tort liability. The purpose of this study is to analyze court decisions to determine the administrative and/or educational issues or practices which lead to litigation.

To provide a method of analyzing cases involving instructional malpractice, research questions were developed, including the following aspects of such litigation: general principles, legal concepts, similarities and differences of litigation, conditions and behaviors leading to instructional malpractice, educators' actions and failures to act, court limitations, and future trends and developments.

Following is a list, resulting from the analysis of this study, of actions and inactions of educators leading to instructional malpractice litigation:

1. failing to assess the intellectual capability of a student:
2. promoting students through the system when they are unable to read at an appropriate grade level:
3. failing to diagnose reading disabilities:
4. general misdiagnoses and maldiagnoses:
5. failing to rediagnose:
6. failing to appropriately deal with reading disabilities:
7. not providing an adequate program, thus abandoning (educationally) a student with special needs:
8. failing to continue a prescribed program once it has begun:
9. not placing special education students in maximum contact with regular students:
10. using improperly trained teachers, administrators, or psychologists.

This study was a comprehensive research of the current state of instructional malpractice litigation. Continued legal analysis is necessary to update the body of knowledge in this area which is so critical to educators and school curricula in general. Further research concerning the current state of the Individual Educational Program (IEP) as mandated by federal law P.L. 94-142 is also needed.

Since litigation will continue concerning instructional malpractice, analyzing issues and practices which lead to litigation will assist educators in preventing expensive, time-consuming, and often embarrassing court action. Preventing instructional malpractice litigation will also reserve money expended for attorneys and case research for classroom use and the students for which it was intended.

DEDICATION

To my wife Alison,
with whom I share this accomplishment,
my love and my life.

And to three precious children--
Robin, Ryan, and Stacy--
who make our life complete.

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This research has been enriched by the advice and guidance of many individuals. Directing this dissertation was the former Dean of the College of Education, Dr. Keith Goldhammer. I have the highest respect for Dr. Goldhammer for his personal and professional integrity. He has challenged and directed the development of this research in a manner exemplifying truly professional standards. I will be forever grateful for his numerous competencies, without which this study would not have occurred. Only through his willingness to spend countless hours examining and guiding the development of this research has this contribution been possible. Dr. Goldhammer will remain an example of an educator I desire to emulate.

Director of my academic studies was Dr. Peggy Riethmiller. Dr. Riethmiller provided support and encouragement from the first day of my academic program. Her expertise in curriculum is recognized by many individuals through this state. Over the past four years, she not only provided expertise in academic affairs, but served as counselor, advisor, professor, and listener. Dr. Riethmiller has challenged and led me in a manner which will serve as an example of the finest professional relationship between a professor and student. She was always willing and available

to meet and discuss the everyday difficulties of a graduate student. She considers all concerns as genuine and important and, as a result, served as a catalyst in the resolution of many problems. I deeply appreciate her support and encouragement.

Other members of my committee contributed to this research and my overall academic program. Dr. Eldon Nonnamaker especially provided a unique perspective of educational systems. His expertise in school budgeting and academic affairs has significantly increased by ability to understand the critical area of school finance. Dr. Sigmund Nosow, professor of labor relations, also served as a member of this committee. He has strengthened this research through his guidance from a sociological perspective. His thorough review and recommendations for this study are gratefully appreciated. Dr. Nosow also served as an advisor for studies in labor relations.

Three other individuals assisted in the development of this dissertation. Mrs. Mary Jo Tormey, Legal Research Librarian, was always willing to assist in researching case law and other data. Her extra time in tracking occasionally obscure references is an example of the professionalism she brings to the Michigan State University Library. Mr. Joe Falzon, staff member with the National Education Association, offered much assistance with the original computer searches.

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A major influence in the past year have been my father-in-law and mother-in-law, Lee and Lorraine Anger. They have encouraged my participation in the education process and contributed in ways too numerous to enumerate.

This accomplishment would not have been possible without my companion, friend, confidante, partner, and spouse, Alison. She spent countless hours reading and correcting drafts, typing notecards, offering advise and encouragement. I deeply appreciate the hours she patiently listened and turned "my concerns" into "our concerns" when other

important family pressures existed. Her encouragement and faith in me were the inspiration to complete this study. Our three children, Robin, Ryan, and Stacy, will someday understand their contribution and source of inspiration and support. Their presence was enough incentive to continue when doubts surfaced. I truly admire all of my family's patience, involvement, and understanding. This research was in a large measure a family project.

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Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities . . .

Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

Brown v. Board of Education (1954)

CHAPTER I

STATEMENT OF THE PROBLEM

Background

Instructional malpractice is a recent phenomenon of the last decade. As an issue with which educators must be concerned for the proper implementation of curriculum, it is the focus of this study. Educational malpractice is divided into three general categories: personal liability and injuries, special education, and instructional malpractice.

The first type of educational malpractice is personal liability and injury. Although educators are expected to provide supervision to children during school hours, ensuring the absence of injuries regardless of precautions is not possible. Malpractice suits involving personal liabilities usually refer to charges by a parent that a teacher was not properly supervising his/her child. Often, a teacher's absence from the classroom is at issue. These cases concern the legal principle of in loco parentis, which was developed in Gott v. Berea College (1913) where the court stated that a school could make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. With this confirmation of authority develops a corresponding responsibility to supervise

students. Violations of supervisory responsibilities are the basis for parents' charges of malpractice in terms of personal injuries.

The second type of educational malpractice is in special education. Malpractice charges in the area of special education frequently involve charges that a student was not provided the proper standard of care. These cases have increased since the adoption of federal law P.L. 94-142 (see Appendix C), which guarantees every student the right to an "appropriate" education. P.L. 97-142 includes the following objective.

> The fundamental element of P.L. 94-142 is the right to a free appropriate public education for every handicapped child who needs special help. As noted, Congress stated that its purpose in passing the law was "to assure that all handicapped children have available to them . . . a free appropriate (emphasis added) public education which emphasizes special education and related services designed to meet their unique needs . . .
>
> The entire thrust of the law is based on the right of all children, with no exceptions, to an education. Its intent is to give all children, including the most severely handicapped, the learning opportunities they need to achieve their potential and become as self-sufficient as possible . . .
>
> The paramount goal of the U.S. Congress in enacting P.L. 94-142 was to make a free appropriate public education available to every handicapped child in the nation. The act required that an appropriate education be available to all handicapped children aged 3 to 21 by September 1, 1980. (Shrybman, 1982, p. 14)

The third type of educational malpractice is instructional malpractice. Instructional malpractice includes charges that the school system failed to train a student

properly in the basics of instruction associated with a diploma. In effect, school officials and teachers may be charged with "malpractice" because children fail to learn. This concept, which will be called "instructional malpractice" (for this study), will significantly affect the education profession if litigation is successful. Both administrators and teachers may be unwilling to test new educational methods and practices. As with the medical profession, administrators may become more concerned with charges of malpractice than implementing creative techniques in the curriculum.

Purpose of the Study

The purpose of this study is to analyze court decisions to determine the administrative and/or educational issues or practices which lead to litigation.

Significance of the Study

This study of issues and practices in education, which led to malpractice cases, will provide a basis for the evaluation of educational programs to determine the potential liability in terms of instructional malpractice. This study will assist educators and boards of education in making curricular decisions which may avoid costly and unnecessary litigation. Litigation of this type adversely affects the school system and the professionals implementing educational programs. Litigation affects them in terms of financial penalties, personal and professional disfavor, and their

ability or willingness to provide a creative and innovative curriculum.

Since the first major instructional malpractice suit, Peter W. v. San Francisco Unified School District (1976), other cases have surfaced, and their numbers are increasing. Medical malpractice suits and other forms of misrepresentation litigation have provided a model for plaintiffs to pursue similar charges in the educational setting.

The importance of instructional malpractice is illustrated in a discussion of its effects on school districts, including school operations, teachers, administrators, and school boards. Financially, schools could incur heavy penalties for successful malpractice suits. School board members often will not personally pay fines levied by court action. For example, in Michigan, boards of education may adopt resolutions holding them personally harmless from monetary liability. As a result, financial penalties for instructional malpractice would be deducted from general fund expenditures, which otherwise would be spent on educational needs in the classroom. These financial penalties could be sizable. In addition, both the teacher (individually) and the board (collectively) may experience the burden of purchasing expensive malpractice insurance.

The threat school districts could face regarding potential malpractice suits might result in a reluctance to adopt creative and innovative curricular designs. The teacher may likewise be forced to stifle creativity due to a threat of

malpractice charges. Teachers might be forced to teach "to the test," regardless of the educational needs of the child, especially if competency standards become an umbrella of protection for the school district.

Educationally, both teachers and administrators could be forced to negate parental input. At the present time, parents often make the final decision concerning the promotion of their child. In certain cases they may also determine the curricular needs of their child. With the threat of malpractice, administrators and teachers may be unable to continue to provide parental input in decisions of promotion. A test could be the sole determinant of promotion and retention.

Value of the Study

Instructional malpractice is a new area of study in the field of educational law. Personal liability litigation has been the most common suit of educational malpractice. Special education forms of educational malpractice are becoming more common with the adoption of P.L. 94-142. Instructional malpractice was not considered until the case of Peter W. v. San Francisco United School District in 1976.

The decade of the 1970s developed into a period of increased litigation in the area of tort liability. Educators have not been immune from this phenomenon. School officials find themselves in courts over various issues: as

a result, the legal budget is a substantial part of total school expenditures.

At the same time, calls for "excellence in education" permeate the educational community. Many administrators, K-12 teachers, and professors of higher education feel the pressure to increase professional standards. The Nation at Risk committee (1984), which was commissioned by President Reagan, addressed many problems concerning standards among students and educators. These two developments, excessive expenditures and calls for excellence, bring successes in instructional malpractice suits to the forefront of the educational profession.

Educators are concerned about the potential for litigation. Whether successful or not, litigation is viewed as a negative influence on the profession. Because of this type of pressure, educators have been developing techniques for improving the curriculum and the general image (public perception) of education. Avoiding instructional malpractice litigation is an important part of this endeavor.

Pressured by recent demands for increased educational excellence, many legislators are considering adopting competency standards which complicate the decision making process for educators. These standards can impose obligations upon school districts to meet established criteria prior to awarding diplomas. Even in states where these standards have not been adopted, local school boards are taking the initiative as a result of public reaction to The Nation at

Risk. An analysis of current trends in judicial opinions concerning instructional malpractice should assist administrators and teachers in developing these standards. Determining curriculum, personnel assignments, evaluation techniques, examination procedures, and other basic educational responsibilities is affected by judicial opinions of instructional malpractice litigation.

Past studies of educational malpractice seem general and include an overview of other types of tort liability, such as supervision and personal injuries' litigation. A few of these include Educational Malpractice (Branson, 1981), Malpractice to Education: A Legal Study (Silk, 1981), The Development of Law Concerning School District and School Personal Liability in New Jersey (DiPatri, 1981), Charting and Projecting Medical, Legal, and Educational Malpractice Litigation Decided in the U.S. (Sepler, 1980). This study will not repeat these findings by overviewing general aspects of instructional malpractice. Rather, it will compare cases by focusing on judicial opinions concerning trends and practices which may lead to successful litigation in terms of instructional malpractice. This delimitation and the study of educational malpractice are necessary before "performance standards" can be developed to prevent successful litigation and charges of malpractice.

Although some of the broader studies have provided operational definitions for instructional malpractice, this research will assess trends in judicial opinions which may

lead to successful suits and hinder an educator's ability to perform. A comprehensive study to analyze major court opinions of instructional malpractice based on the specific criteria will also provide information for those adopting "standards of care" for professionals in educational institutions. These professional standards are not presently imposed on the teaching profession. The only area which approaches setting standards is in legislation regarding P.L. 94-142 which provides a process to adopt standards of care. This study will provide a basis for understanding practices and trends which may lead to the adoption of such generally accepted professional standards.

Contributions to the profession will be threefold. First, as a result of the research, this study will provide an awareness of practices and trends which place educators in positions of greater vulnerability in terms of instructional malpractice. Second, judicial opinions which may impact the current developments of competency standards by state legislatures across the country will be analyzed. Third, this analysis will provide a basis for the development of professional standards related to "duty of care."

Professionals in the field of education must become aware of practices and trends which develop from judicial opinions in the area of educational malpractice. The trends and practices which lead to vulnerability in this area cannot be based on opinions of administrators or teachers. The trends must be understood on the basis of careful

objective analyses of precedents evolving from actual opinions and awards of the judicial system. This understanding is necessary as tort law (instructional malpractice suits) is a result of common law and not established from statutes. An understanding of these trends and practices which place educators in vulnerable positions may prevent ignorance of laws which apply to one's profession. Conversely, it may also prevent an overcautious reaction on the part of school boards and administrators in developing curriculum on the basis of unsubstantiated trends. If certain desirable creative practices in the curriculum are known to be exempt from probable success in litigation, it would not, then, be necessary to avoid them. An overcautious attitude in adopting curricular programs may simply be unnecessary.

Many of these court opinions in educational malpractice will address the second contribution of this study, i.e., standards from which legislators may develop competency criteria for students, teachers, certification requirements, or teacher education criteria. The data and conclusions resulting from this study will provide "preventive standards" for universities, state boards of education, and local educational agencies. Specific competencies through evaluation plans or certification requirements may prevent instructional malpractice litigation. Writers of these standards may also desire to become aware of judicial opinions. These standards, which are established from

instructional malpractice litigation, will become the responsibilities of educators in school districts.

The results of this analysis (third contribution) will provide a basis for the development of professional standards for administrators and teachers. As a response to public pressures for reform in education, some educational institutions (and legislators) may consider the development and adoption of professional standards. Teaching is one of the few professions which does not have a recognizable and enforceable "code of ethics." Many believe that a "code of ethics" universally accepted in K-12 education would enhance the perception of the public (which finances education) concerning educator competency. Regardless of one's opinion on this subject, data resulting from this study are imperative prior to the adoption of such professional standards.

In addition the above three contributions to the profession, this research will provide standards to judge future decisions in the area of instructional malpractice. As suggested by Connors (1981), when successes in malpractice charges become commonplace, a flood of litigation will follow.

> Competency-type malpractice suits seem to have the potential for creating the most litigation in this new tort area of education. Once the door opens, an avalanche of litigation will probably ensue, with founded as well as unfounded actions. If every pupil who fails to master all of the survival skills of society should bring suit against his (sic) school district and its teachers for educational malpractice, the country's courtrooms would be immediately overwhelmed. (p. 149)

Consequently, a study of this type needs periodic review to maintain a body of literature which provides accurate data for administrators and teachers regarding practices and issues leading to vulnerability in malpractice litigation.

Research Questions

Primary Question

The central focus of this study will be on the following question. What are the educational issues or practices which have led to litigation in instructional malpractice suits and have established precedents which provide the basis for future lawsuits?

Subsidiary Questions

To arrive at data which will help answer the research question, this study will seek to determine answers to the following questions.

1. What general principles have emerged in instructional malpractice suits?
2. Is it possible from the review of cases to define concepts and legal principles which teachers and administrators should be aware of to deal more effectively with the issues of instructional malpractice?
3. Is it possible to detect similarities and differences in major court opinions to which judges give credence and may have implications for future court decisions?
4. On the basis of the analysis of legal cases, is it possible to define conditions, practices, or behaviors which might have high potential for resulting in instructional malpractice suits?

5. What actions or failures to act on the part of administrators and teachers have led to instructional malpractice suits?

6. What conditions over which teachers and administrators have some control tend to place them in positions of greater vulnerability?

7. Do court decisions suggest some limitations, caveats, or prescriptions for administrator and teacher behaviors to remain cognizant of the risk of instructional malpractice suits?

8. What cases should administrators and teachers be aware of to be able to assess and make judgments regarding malpractice?

9. On the basis of these trends, what future developments are likely?

10. To what extent is competency testing or another educational development creating a potential liability for Michigan school districts?

Research Design

Conceptual Framework

This study is proposed as an analysis based on standard legal case study methods modified through the use of predetermined evaluative criteria. The research is grounded in techniques of legal research using case studies of judicial opinions regarding significant cases in educational malpractice. The nine subsidiary questions formed the basis for the criteria used in the analysis. Based on these data, conclusions were developed on the educational issues and/or practices which lead to instructional malpractice.

Methodology

Malpractice in general includes a thorough review of all recent malpractice litigation, i.e., medical, educational, and professional. Other malpractice litigation is developed around different concepts and practices which often are not directly applicable to instructional malpractice. However, principles of other types of malpractice litigation form the basis for all professional instructional malpractice suits. A standard library and computer search was conducted to determine a list of secondary sources in order to review the body of literature regarding educational malpractice and malpractice in general. These sources include Dissertation Abstracts, ERIC, and Law Information (Lockheed-Dialog Database). Law reviews were also selected through numerous legal and educational indices, some of these including Law Review Digest, Index to Legal Periodicals, and Index to Periodical Articles Relating to Law. American Law Review. These secondary sources provided an historical basis for all case citations.

A comprehensive legal search included use of the entire Legal Reporting System and other legal reference sources. All of these cases were analyzed and updated through the use of Shepard's Law Review Citations. For each case, an analysis through the use of a matrix was completed. The primary cases formed one axis of the matrix, and the other axis was formed by the following criteria:

1. background of case.
2. decision.
3. case references (citations in decision).
4. remedy,
5. arguments.
6. educator actions cited. and
7. legal principles and/or concepts.

The matrix provides data (horizontal axis of matrix) on trends resulting from instructional malpractice litigation. To analyze the data properly and satisfy the requirement of reliability. it was necessary to sectionalize each decision and opinion based on the criterion measures. This provided a method of comparing and contrasting similar decisions among cases. For example. "administrators' actions cited" as a criterion is extrapolated from the opinion for each of the cases as a method of analyzing data regarding only administrators' actions. These data are used to determine similarities and differences between cases and also to note if any trends appear which establish precedents providing the basis for future lawsuits.

The implications of these decisions for future litigation were analyzed through specific recommendations and discussions from judicial opinions. These are listed in an historical fashion to determine developing trends. Examining the applicable constitutions and/or statutes relating to instructional malpractice litigation was also necessary.

Delimitations

Instructional malpractice will be the only part of educational malpractice considered for this study. Educational malpractice has developed to the extent that a study of the term in general is too broad for proper analysis. In addition, the concept of instructional malpractice is a relatively new area in tort liability which provides extensive professional implications for educators. Distinguishing instructional malpractice from other educational malpractice litigation, such as that dealing with supervision and injuries, is necessary since both belong under the same general category (educational malpractice). Analyzing current trends for competency standards and the resulting liability accommodate the purposes of this study.

Primary source research used was the National Reporting System as the body of data to be analyzed. This method is used in all legal case study research.

Limitations

The National Reporting System and its attendant digest system was the basis for data in this research: pending cases were not included. However, a modified legal research method was employed to temper this effect. The legal reference, Shepard's Citations, was utilized to update current law and was a source of reference for all cases.

As judges' opinions will be the basis for review, many arguments presented in briefs not only evade the court's

summary but also elude a legal study. Briefs do not become part of the published court record and have limited value. Briefs can be used to consider "new directions" to approach arguments or repeating mistakes in presenting a future case.

Legal research and content analysis call for subjective interpretation of data. Subjective analysis is inherent in legal research and should not negate conclusions.

All data will be obtained from court decisions. There is no reporting system for every court decision, so there is no basis for discerning how many cases are dealt with on a local level. Judges predicate their research and decisions on this same limitation, i.e., relying on the reporting system.

Definition of Terms

Following are terms of common use in discussions of instructional malpractice.

Instructional malpractice involves charges that a school system failed to instruct a student properly in the basics of educational instruction which is associated with a diploma. The term educational malpractice is usually defined in two different manners. First, there are those cases which are based on the Education for All Handicapped Children Act (P.L. 94-142). These cases are founded on violations in the Act relating to concepts of an "appropriate education." They may also rely on court decisions which set standards in this area of tort

liability. Second, are those cases which involve charges that a student was not provided adequate instruction and as a result cannot gain meaningful employment.

Standard of care (or duty of care) is the obligation to provide an appropriate level of achievement for students. In terms of supervision, elementary teachers are responsible for a higher standard of care than high school teachers. Standards of care regarding tort liability are determined by common law (judicial decisions).

Professional standards or codes of conduct are universally accepted by a governing body of the profession. Professional standards referred to are those which are enforceable by a recognized licensing organization of the profession.

Negligence is the omission to do something which a reasonable person would do or the doing of something which a reasonable and prudent person would not do.

Malfeasance refers to the "commission of some act which is positively unlawful" (Black's, 1968, p. 1109). It is the unjust performance of an act and is broadly defined to include any wrongful conduct which hinders the performance of official duties.

Misfeasance is the improper performance of an act which is otherwise lawful. "'Nonfeasance' means the omission of an act which a person ought to do. 'Misfeasance' is the improper doing of an act which a person might lawfully do.

and 'malpractice' is the doing of an act which a person ought not to do at all" (Black's, 1968, p. 1151).

Tort is a private or civil wrong which is independent of a contract, a violation of a duty imposed on an individual through common law or other regulation. The violation must be based on general law obligations as opposed to contractual agreements.

Common law is that body of law which affects the entire population. This body of law is derived from usages, customs, and judgments of courts. Common law is related to the government and security of persons and property.

Constitutional law is that which relies on the specific provisions of the United States Constitution or federal court decisions interpreting the Constitution, and is the foundation of our government. A constitutional law is one which is consistent with and not in violation of any provision of the Constitution.

P.L. 94-142 legislation is statute 20 U.S.C. 1411-1420, as amended by P.L. 94-142 (see Appendix C). The Education for All Handicapped Children Act (EHA) as adopted by Congress sets forth guidelines for dealing with handicapped children. The act was signed as law on November 29, 1975, under the administration of President Gerald Ford. It assures handicapped children of obtaining a "free" and "appropriate" education.

The purpose of P.L. 94-142 is to make free and appropriate education a fundamental right for all

handicapped children. These rights are intended to assure fairness in evaluation with implementation through due process hearings. Hearings under this legislation establish standards through the development of an Individualized Educational Program (IEP). The teacher, parents, and child (where appropriate) participate in this decision.

Stare decisis is a policy of the courts to confirm the status quo, stand by precedent, and not disturb a settled point. Once a policy or principle has been given, the court will sustain such policy if the facts are substantially the same. The court may decide to alter such policy or decision and is not bound to prior decisions. However, the reluctance of courts to overturn prior decisions is documented by relative consistency among court decisions.

Sovereign immunity states that governmental agencies are historically immune from tort liability unless the legislature specifically abrogates such responsibility. The concepts emanate from England and the sovereign power of the king/queen. As an absolute monarch, the king/queen could enforce his/her will, whether right or wrong. Later, sovereign immunity continued as a privilege for the monarch in view of his/her position. The concept was transferred to America along with the English concept of common law. Every government has an inherent right to protect itself against tort claims. Sovereign immunity is addressed in the U.S. Constitution through the 11th Amendment which states.

> . . . the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

This amendment has been interpreted to prevent a suit against a state by its own citizens. Federal courts can, however, entertain suits to grant relief against a state. A conflict often exists between the 11th Amendment and the 14th Amendment which allows citizens to sue states in certain situations. As with most constitutional rights, the right of sovereign immunity is relative and not absolute.

Precedent is a principle of law which has been declared to serve as a rule for future guidance in a similar case. This principle (or case) is used as an example for other cases.

In loco parentis means "in place of the parent(s)." Teachers and administrators must exercise an adequate standard of care in place of parents during school time. Reasonableness usually becomes the test in determining negligence under this doctrine.

Judicial restraint refers to the willingness or unwillingness of a court to become involved in an issue presented by a plaintiff. A court may choose to defer its decision making process to other agencies. For example, in issues involving P.L. 94-142, the academic program is determined by school officials. If a parent or student questions this program through litigation, a court may defer to the local school system to conduct the appeals process. In this

manner, the court avoids judicial interference in matters which should be preserved for local agencies. Judicial restraint, therefore, is a decision by a court not to become involved in matters best preserved for other (local) agencies.

Judiciary refers to a system of courts of law. Included in this concept are the definitions which result from court decisions and develop standards. Concepts resulting from court decisions are also a part of this term.

Summary

The focus of this study is on instructional malpractice. Instructional malpractice is an allegation against a school district or an individual educator that he/she has not provided an adequate (or appropriate) education. The action or failure to act results in alleged harm to the student in terms of his/her ability to find and retain meaningful employment after graduation.

The purpose of this research is to analyze court decisions to determine the administrative and/or educational issues or practices which lead to litigation. The results will provide a basis for educators to make decisions regarding curriculum, personnel, and other critical decisions which impact the schools.

A standard method of legal research is modified for this study by using specific criteria to evaluate primary cases regarding instructional malpractice. A matrix using

these criteria will provide a method for comparing data among cases. The matrix will also provide a method to analyze future cases regarding instructional malpractice. The central research question will be answered through the results of the matrix and subsidiary questions.

CHAPTER II

THE PRESENT STATUS OF THE ISSUE: REVIEW OF THE LITERATURE

Introduction

The primary objective of this chapter is to review literature which is germane to a study of instructional malpractice. To satisfy this objective, the following subjects will establish a foundation for analysis: (a) a background review of tort liability in education, including accountability and responsibility standards, (b) a synopsis of the elements of negligence which place educators in a position of liability, (c) a concise presentation of the concepts "duty of care" and "standard of care" in terms of their applicability to professional responsibilities, (d) a review of considerations relating to competency testing, (e) an outline of judicial restraint as related to liability in instruction, and (f) a summary of the literature review. These areas pertain to professional malpractice in general and evolve from concepts of tort liability. Special emphasis will be given to negligence and standards of care, which suggest special problems for those pursuing instructional malpractice suits. Although the concepts discussed throughout this literature review apply to any profession,

the discussions are delimited to negligence in educational instruction.

The technique exercised to implement this literature review included a standard computer and manual search for each of the following:

1. ERIC, Lockheed Dialog Information Retrieval Service (LDIRS);
2. INFOTRAC, Michigan State University;
3. Dissertation Abstracts International, Lockheed Information Retrieval Service; and
4. Labor Law, Lockheed Dialog Information Retrieval System.

Although the review of literature for malpractice in education as related to physical injuries and lack of supervision produced many references, a limited amount of pertinent materials was available on instructional malpractice. However, law reviews summarizing primary sources on this topic complemented secondary sources where adequate material was lacking. Primary source reviews are found in Chapters III and IV which amplify findings.

Tort Liability in Education

Educational malpractice is a term which has been gaining increased attention over the last few decades. It is, however, only since 1975 that the trend appears to be increasing at a rate which should concern all professionals in the field of education. Sepler (1983) completed a study which charted medical, legal, and educational malpractice litigation in the United States. He concluded that,

"Educational malpractice litigation is accelerating at a rate of 45% every five years in all levels of state and federal courts in the United States" (p. 18). Figure 2.1 illustrates the rapid rise predicted in educational malpractice suits.

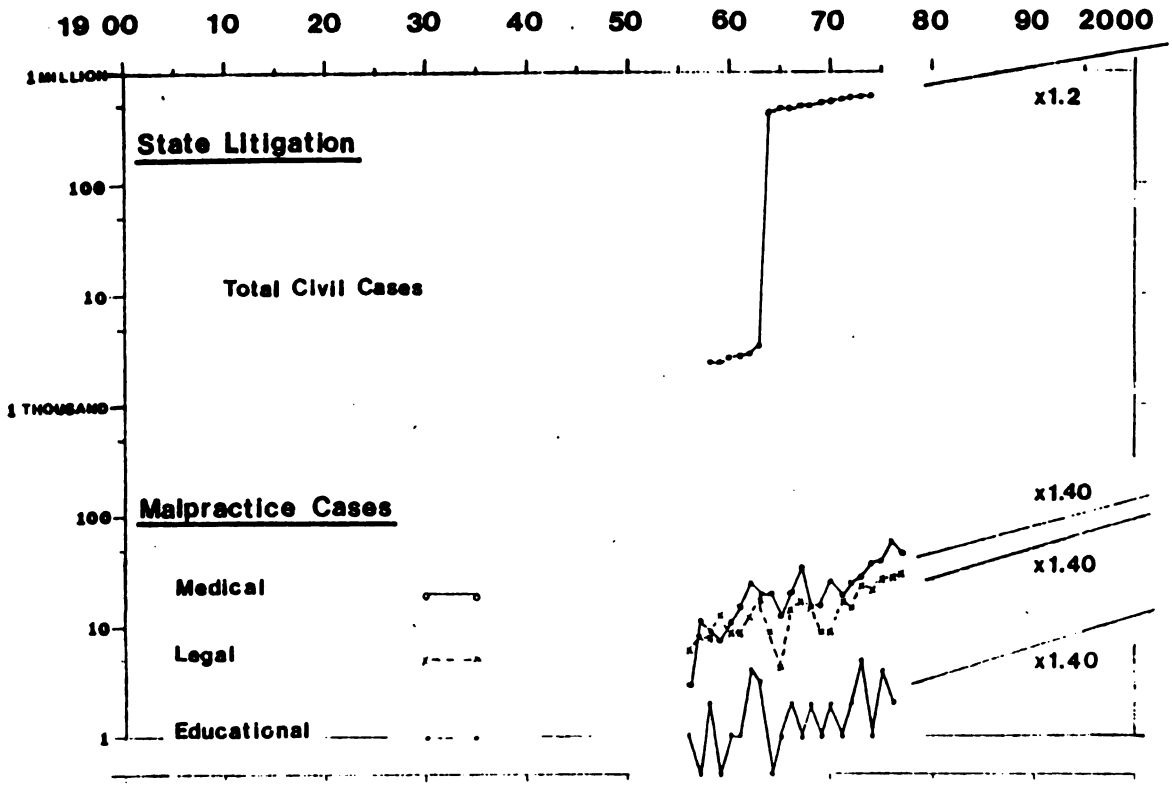

Figure 2.1

Figure 2.1. Prediction of malpractice suits.

A tort is a civil wrong which does not result from a contract breachment. Torts are negligent acts resulting from a violation of a duty of care which is imposed on an individual through general law provisions, professional

obligations or responsibilities, policies, or rules and regulations. In Corpus Juris Secundum (C.J.S., 1984), malpractice is defined broadly, incorporating aspects of professional responsibilities as follows.

> "Malpractice," sometimes called "malpraxis," is a term of broad significance. It is defined as any professional misconduct or any unreasonable lack of skill fidelity in the performance or professional or fiduciary duties: illegal or immoral conduct: improper or immoral conduct: misbehavior: wrongdoing: evil, bad, objectionable: or wrong practice: evil practices, acts, or doings: illegal or unethical practice: practice contrary to established rules: contrary to rules. (p. 54)

The professional services performed by a teacher or administrator are not defined by a standard, universally accepted code of ethics. Nor is there a generally accepted standard of practice recognized throughout the profession. Codes of ethics for educators are produced by individual associations and local governing bodies but are not embraced by the profession-at-large (see Appendix A). Professional services performed by educators result from a student-educator relationship and follow the precedents set in other professions, i.e., medicine and law. The term malpractice indicates that there is a "breach of duty" by a person who performs a professional service in this student-teacher relationship which is similar to the physician-patient relationship found in the medical profession (Rogers v. Horvath, 1975). This relationship is defined broadly (Sepler, 1981) as ". . . any professional misconduct or any unreasonable lack of skill or fidelity in the performance of

professional or fiduciary duties . . ." (p. 191). Malpractice in relation to care has been defined as a failure of a member of the medical profession to treat a case professionally.

An individual who is a member of the medical profession maintains expectations to provide services with a certain ". . . degree of skills, care, and diligence exercised by members of the same profession" (Richard v. Doe, 1964, p. 879). Determining the appropriate degree of skill is critical to the establishment of a professional standard. Minimal levels of skill begin with acceptable standards within the same field of study. These standards are often limited to certain localities or regions. Factors such as these, i.e., geography and state of the art, would also become considerations in determining a standard of care for educators.

Educational malpractice is a type of tort liability. In education, three general classes of tort liability exist (Connors, 1981). The first area concerns physical injuries and problems regarding improper supervision. Most instructional malpractice cases share similar experiences to those in the private sector. Injuries resulting from accidents which occur on school premises or perhaps during athletic events provide numerous opportunities for litigation. Professional responsibilities relating to injuries resulting from lack of supervision evolve from the concept of in loco

parentis. This was defined by the court in Richardson v. Braham (1933) as follows:

> . . . general education and control of pupils who attend public schools are in the hands of school boards, superintendents, principals, and teachers. This control extends to health, proper surroundings, necessary discipline, promotion of morality and other wholesome influences, while parental authority is temporarily superseded.

In loco parentis, simply stated, means "in the place of parents." Black's Law Dictionary (1968) defines in loco parentis as, "In the place of a parent, instead of a parent: charged, factitiously, with a parent's rights, duties, and responsibilities" (p. 896). This concept is extremely important to educators and exists even in states where it is not specifically stipulated in the statutes (Connors, 1981).

As with most privileges or rights, a corresponding responsibility exists. Although the concept of in loco parentis gives the administrator authority over students, there is a corresponding obligation to provide proper care for them. This doctrine not only gives educators the right to enforce regulations, i.e., through disciplinary techniques, but also provides a reciprocal obligation to apply reasonable standards of supervision.

The second type of tort liability in education is defamation of character, libel, slander, and privacy. Libel is a legal term associated with a defamatory written statement. Slander is a legal term which refers to the action of an individual who defames or maligns the character of another person (Strickland, Phillips, and Phillips, 1968,

1976). The first is when a student or parent sues an educator for releasing private information. Often a case of this nature evolves from the inability of a student to gain employment as a result of comments found in the student's files. The second instance occurs when an educator brings suit against a former student or parent for disparaging statements.

The third type of tort liability in education is "educational malpractice." Two forms of educational malpractice prevail in school litigation (Connors, 1981). First are those cases relating to special education, often dependent on federal law P.L. 94-142, or other federal or state laws or school policies. Cases of this type allege a violation of federal special education laws in evaluation processes, due process, inadequate specialized programs, or other such issues (Shrybman, 1982). Second are those litigious accusations which result from allegations of negligent instructional behavior. Instructional malpractice controversies embody the indictment that the educational system, or individuals within the system, are responsible for deficient instructional behavior resulting in personal harm.

Jerry (1981) defined instructional malpractice in terms of the harm which a student suffers. The harm he refers to is the loss that is incurred by a student because he is "prevented from learning as much as he would have learned" (p. 105). This type of definition focuses on standards of care as presented in Richardson v. Doe (1964), discussed

earlier. If one is to determine how much a student would have learned, a comparison must be made with similar students in similar educational conditions (as is necessary in comparing professionals to determine a minimum degree of care). This comparison becomes a difficult problem in establishing harm for instructional malpractice cases. Harris and Carter (1980) defined educational malpractice as ". . . improper, injurious, or negligent instruction and/or action which has a negative effect on a student's academic standing . . ." (pp. 252-253).

Academic Negligence

Although a tort is a civil wrong, often based on considerations of public policy, which is not dependent on a contract, it is a result of either intentional or unintentional actions. "Social norms have provided the basis for legal precedent in the determination of that which is considered unacceptable or unreasonable conduct" (Alexander, 1980). The basis for a tort is considered in three different categories: (a) charges of intentional interference, (b) strict liability, and (c) negligence.

According to Alexander, the first category of tort, intentional acts, are those which "result from an intended act whether accompanied by enmity, antagonism, maliciousness, or by no more than a good-natured practical joke." McCarthy (1981) defined intentional acts as those torts ". . . committed with the desire to inflict harm, and

include assault, battery, false imprisonment, trespass, and defamation" (p. 167). Often staff personnel are not aware of such broad definitions. The key determination of whether or not a negligent act was intentional is the extent to which an individual is aware of potential harm from the result of certain deeds. Assault and battery conform to this category. Alexander applied this concept of assault and battery in education to corporal punishment as a disciplinary technique.

Although the courts generally give wide latitude to educators in fulfilling their responsibilities, their actions are not without limit. "The teacher's prerogatives are, of course, limited to the jurisdiction of the school and are not unlimited" (p. 691). These limitations result from state and local regulations and the restrictions inherent in defining the doctrine of in loco parentis. Often educators are not aware of these limitations and are placed in a position of greater liability.

Strict liability is an alleged civil wrong charged to an individual who may be the closest in terms of responsibility but may not be accountable for the harm directly. Examples of this in school tort liability would include a principal's liability in cases of laboratory accidents, industrial shop injuries, and field trips.

Negligence, the second strategy of tort, may be the most vulnerable area of legal liability for educators. Instructional malpractice is based on the concept of

negligence. As a form of liability, negligence differs from intentional torts in that the harm is not anticipated, nor is it intended (Black, 1968; Alexander, 1980). Negligence can also be extended to a third party (e.g., administrator) who allows individuals under his/her supervision to engage in activities when he/she should have foreseen that his/her incompetent action might invoke harm on another individual. In the Pennsylvania Law Review (1976), the following description of this extended liability (to a third person) for unintentional negligence was described.

> It is negligence to permit a third person to . . . engage in an activity which is under the control of the actor, if the actor knows or should know that the person intends or is likely . . . to conduct himself (sic) in the activity in such a manner as to create an unreasonable risk of harm to others. Under this standard, a school official would be liable for hiring a teacher he (sic) knew or should have known was incompetent or likely to teach negligently. Adoption of the known or should have known standard for school officials would likely have the beneficial effect of closer supervision of the classroom and the results produced in the classroom. (p. 773)

Certain elements must be present for an educator to be found guilty of tort liability. Extensive literature exists on this subject and provides similar definitions. Alexander (1980) summarized the prerequisite necessary for negligence. He contended that a duty must be incumbent on the educator and established before specific criteria are considered. Providing that there was a failure to perform in compliance with appropriate standards of care is dependent on an established duty of care. Following the establishment of duty

and standards of care, a plaintiff must show that there existed a "proximate cause or legal cause of the injury" (p. 695). For injury to be present, a harm must be ascertainable from specific educational standards. These four criteria--duty of care, standard of care, cause, and injury--reappear throughout the literature as standards for determining negligence.

The duty that one generally maintains when in a professional role exists because of an inherent professional-client relationship. When an obligation of this nature is established, the professional service must be performed in a non-negligent manner.

> Moreover, where a municipality assumes a duty to a particular person or class of persons, it must perform that duty in a non-negligent manner, notwithstanding that absent its voluntary assumption of that duty, none would have otherwise existed. As Chief Judge Cardozo succinctly stated: "the hand once set to a task may not always be withdrawn with impunity though liability would fail if it had never been applied at all." (Florence, 1978, p. 766)

Connors (1981) developed the obligations of educators to comply with this duty and to provide expected services adequately. The author stated that there are generally three types of obligations, including adequate supervision, proper instruction, and proper maintenance of equipment. The first, adequate supervision, infers that a teacher stands in loco parentis. When students are in school, educators are expected to exercise the same standard of care

as reasonably prudent parents would. The stringency of this care depends on the situation involved.

The concept of in loco parents does seem to take on a "one sided" view in the literature in favor, and in protection, of educators. Although educators are supposed to act in place of parents, they seem to maintain a liability of supervision and often are prohibited from "normal" disciplinary measures. Strickland (1976) considered this relationship in which "the teacher is not the parent and courts do not give the same leeway to the educator (as parents)" (p. 39). He stated that as a practical matter, legal authorities, including school districts, will not normally bring suit against teachers for corporal punishment. The reason for this reluctance is that governmental agencies do not focus on the problem of child abuse. Such cases are, however, litigated by parents on behalf of their children. When allegations of excessive corporal punishment are initiated, courts have rendered decisions for both plaintiff and defendant. Strickland (1976) noted this tendency.

> A federal district court has recently held that the infliction of corporal punishment on a child by school authorities against the express wishes of a parent is violative of a fundamental right of parental liberty. Other courts, however, uphold school authorities. School districts should and would honor a parental request not to spank.
>
> The United States Supreme Court has affirmed a United States District Court decision from North Carolina which upheld the constitutionality of reasonable corporal punishment designed to maintain discipline in the schools. The court noted that Fourteenth Amendment liberty generally protects the right of parents to restrict forms of

> discipline used upon their children but that the primary state interest of maintaining order was an important and controlling countervailing consideration that might justify reasonable corporal punishment. (p. 39)

Proper instruction, which relates to instructional malpractice, is the second obligation of an educator. Connors (1981) stated that in this area there are two kinds of negligence suits. The first is the failure of an educator or educational system to provide proper "rudiments of reading, writing, and arithmetic." Cases which relate to this area of negligence will be analyzed in Chapters III and IV. The second occurs when proper instruction fails to provide a safe environment, thus allowing unnecessary injuries.

Educators are responsible to provide a safe environment for students. Cases regarding the allegation that a safe environment was not provided involve the concept of reasonable care (McCarthy, 1981; Fisher, 1981). According to these authors, a reasonable standard of care is expected in situations which involve inherent dangers. Educators are not totally responsible for all accidents which occur as a result of equipment failure. Two examples were considered by Fisher (1981). Even though a bus driver in Louisiana failed to fix a hole in the floor of a bus which resulted in a student's injury, he was not found liable. The students had been warned of the danger, and a child deliberately placed her foot in the hole which caused the injury. As a result of this action, the student was held "contributorily

negligent." and the driver maintained no liability for the damage.

In a similar situation, a custodian left a chemical closet unlocked, and, as a result, a student was injured. However, the student carelessly experimented with the chemicals which were stolen from the closet. "Thus, if students fail to exercise that degree of care usually expected of their age, knowledge, and experience, their contributory negligence might prevent or reduce recovery from a negligent teacher" (p. 73).

Failure to provide instruction in basic skills is the essence of the term "instructional malpractice" used in this study. This type of negligence is similar to other forms of malpractice. According to Collingsworth (1982), "Unlike other new causes of action such as intentional infliction of emotional distress, educational malpractice is not conceptually different from other well-recognized forms of malpractice" (p. 485).

Professional Standards of Care

Whether educators should be required to provide a standard of care which is enforceable through the legal system is a topic of considerable debate. In addition, there remains disagreement concerning the propriety of awarding damages to a plaintiff in the form of remedial instruction or monetary compensation. In an analysis of negligence in education, the authors proposed that the courts should

consider accountability standards to prevent incompetent teachers form entering the profession (Pennsylvania, 1976). They did caution that easy access to the courts for malpractice in education "may also discourage people from becoming teachers" (p. 579). Financial considerations might become another consideration for a new teacher. "Although the availability of malpractice insurance may substantially eliminate fear of financial responsibility, it would not eliminate the 'chilling effect' on entry" (p. 570).

Future analyses should consider the effects of such litigation on the profession. In the medical profession, excessive litigation seems to have major effects. High costs are passed on the customer (patient), resulting in discrimination for those who cannot afford medical care. Some physicians are discouraged from entering specific areas of medical practice, i.e., obstetrics, because of high costs for malpractice insurance. If these effects were also experienced in education, the taxpayer would bear the cost of successful litigation, as the patient does in the medical profession. This trend could be experienced in education especially in areas which place educators in positions of greater liability. Some of these areas are shop, physical education, and science. These areas are already in a crisis situation in terms of staffing. If professionals are not discouraged from entering the profession, they may be reluctant to practice experimental techniques which lead to educational progress.

Clear (1983) commented on the reciprocal obligation of educators to provide an appropriate education for students legally required to attend school. Students who pass all the criteria developed by a school system to obtain a diploma should expect that the content required for obtaining that diploma will provide them with basic skills necessary to compete in society. Clear stated that this expectation of an appropriate education is directed at the institution and system rather than individual teachers or administrators. Graduation criteria will be assessed regarding their validity in achieving minimal competency in basic skills. By directing this responsibility toward the system rather than individuals, and programs,

> This leads directly away from a plaintiff ultimately asking a court to rule on the validity of a particular professor's decisions (which courts are very reluctant to do) and into the more justifiable realm of asking a court to determine whether a particular program of studies met all known standards for completeness, recency, and scientific validity. (p. 20)

Masner (1982) noted the necessity of allowing parents and students proper redress through monetary compensation in order to preserve their statutory rights. These liberty interests as well as the "independent rights" of students (recognized in other suits, i.e., Tinker v. Des Moines Independent School District, do not have much value in actual awards or as a deterrent if there remains no compensation for the harm. "The recognition of a substantive due process right to education, and a cause of action

for educational malpractice, would give parents and students an opportunity to seek compensation in court when the public schools fail" (p. 579).

This obligatory nature placed on the educator develops a "contract theory" of recovery and thus a duty of care. Funston (1981) illustrated the possibility of developing the argument that the student was a third party beneficiary of a contract. First, the contract between the educator and the school district implied a guarantee of competent instruction. Second was the implied contract between the student and the school district. A district is responsible for adequate education since a student is without choice regarding attendance (state constitution). The district, therefore, "promises to educate the students committed to its care" (p. 761).

Legal Standards of Care

Black's Law Dictionary (1968), in a discussion of the term "negligence offense," defined duty of care in the following manner. ". . . one which ensues from a defective discharge of a duty, which defect could have been avoided by the exercise of that care which is usual, under similar circumstances, with prudent persons of the same class" (p. 1187).

Wallison (1980) defined duty of care in more specific terms. His research demonstrated that there must first be an establishment of duty of care. This is similar to the

previous discussion of voluntary and involuntary assumptions of risk. To prove that there exists a duty of care in a charge against an educator, a parent must argue properly that appropriate instruction was not followed. Once both of these concepts are overcome by a plaintiff, Wallison determined that the court must be willing to place the educator and district in a position of liability. The courts will usually assume that charges of negligence in instructional malpractice are not appropriate because of "considerations of public policy" (p. 819). These aspects of duty of care serve as a common definition found in the literature and provide a basis for the first series of proofs necessary for a plaintiff to prevail in a charge of instructional malpractice. Duty of care is a legal term requiring an individual to perform at certain levels of competence in accordance with accepted standards. The concept of duty of care has been described by many authors. Their analyses and conclusions are predicated on legal decisions and appropriate relevant statutes.

Three areas are addressed in the literature on duty of care relating to malpractice in general. The first area is a review of current standards of care including lack of standards, analogies to other professions' specific standards to consider in instructional malpractice, and the necessity for self-imposed standards. Second is the summary of proof necessary to allege instructional malpractice. A

summary of this type is necessary in order to develop acceptable standards of care. The third is a review of the literature regarding the potential for creating such standards, including current P.L. 94-142 processes for determining standards of care.

For a student or parent to prevail in charging an educator or school system with instructional malpractice, a duty of care must be established. As stated by Funston (1981), ". . . there can be no recovery for negligence unless there is a legal basis for imposing a duty of due care upon the defendant."

To what extent an individual is obligated to perform competently depends on an "assumption of duty." Such an assumption may exist through voluntary or involuntary indicators. Many authors have commented on the obligation of a citizen to attend to a person in physical need during an accident situation (Alexander, 1980; Prosser, 1974). An individual maintains no obligation to come to the aid of a person injured as a result of an auto accident and, therefore, assumes no duty of care as a result of knowledge that a person requires assistance. However, once an individual decides to offer assistance, he/she must perform in a competent manner and, therefore, operate under a legal duty of care. When a state, school district, and teacher assume the responsibility for educating students, they retain a duty of care.

> Applied to education, this formulation suggests that once a teacher, school, and school district undertake to provide education based on state constitutional authority, they assume a duty to educate non-negligently. This general principle of voluntary assumption of duty has been applied specifically to government undertakings in a variety of cases. (p. 774)

Educator Accountability

A wide range of opinions among educators and legal scholars in education is reflected in an analysis of malpractice and rural teachers (Johnson, 1984). This study of rural teachers presents similar problems for urban or suburban educators. Johnson stated that the responsibility of a teacher to provide a basic duty of care is apparent. However, "what is not clear is what good teaching entails" (p. 16). Even when a basic standard is definable, the problem of grade level and content area complicates the issue. He noted that the "range of expectations (goals) among language arts or English teachers in any school varies significantly" (p. 16). The variance is so significant that two students can receive the same grade for various levels of performance even where they are taking the same class but experience different teachers.

Funston (1981) also stated that because universally established goals in education are lacking, the creation of a workable standard of care makes it difficult to pursue such charges. He explained, "Some argue that the (goal of education) is to socialize students: and still others contend that it is to develop creative mental capacity"

(p. 780). This accepted line of rationale in the educational legal system is a key difference between the field of education and other professions. Phabian (1981) referred to the disparity between malpractice in education and other professions. "The major reason that the courts have been reluctant to establish a legal duty is the lack of an acceptable standard . . . the teaching profession does not easily lend itself to such standards" (p. 110). In the medical profession, it is easier to apply the "reasonable person standard" or district "community standards." Phabian (1981) and Elson (1978) agreed with this concept. They accepted the position that the courts have no difficulty with cases of malpractice in the fields of mental health and custodial care since the treatment is "terms of art with well-understood meanings" (Funston, 1981, p. 770). According to these authors, such clarity in the field of education, even with regard to the minimal educational basic needs, does not exist. The plaintiff's task of proving instructional malpractice will be extremely difficult, since the disagreement is based on the judgment of a professional. This lack of judgment must be based on harm and injury. Therefore, "The lack of a reliable teaching technology eliminates whatever justification there otherwise might be for holding educators legally accountable for student academic failure in the absence of proof of specific causative acts of educator negligence" (Elson, 1978, p. 719).

Three different types of standards were defined by two authors (Rubenburgh, 1980; Funston, 1981). These standards provide general categories to begin considering standards of duty of care (usually referred to as standard of care). The first two are common law principles and statutory enactments. Prosser (1961) stated that when a person provides a service in which another individual places his/her trust, the provider assumes an obligation to respond; in a non-negligent fashion. This is the concept of common law in regard to standards of care.

These legislated codes are not necessarily from governmental agencies; they can also be from a professional organization's governing body, i.e., the American Heart Association. Codes of ethics provide a basis from which standards for professionals are judged. In the educational field, no such agreed on document, i.e., set of standards, exists. For example, Funston noted that one case relied on the regulations which were self-imposed by a school system.

Self-imposed standards such as competency testing and other evaluative instruments are the third type most likely to be used in instructional malpractice suits (Tracy, 1980). These self-imposed standards may come from several sources. Professional standards are defined in state educational statutes and school administrative regulations. "Courts have uniformly rejected them as creators of tort duties . . ." (p. 621). Administrative rules, however, appear to distinguish procedures for "identifying, evaluating,

testing, placing, and offering remedial instruction to students with specific learning problems" (p. 621). These may become the basis for tort standards and the criteria used in determining negligence.

Professionals usually determine the standards for which they are responsible. Even when these are not in writing, the commonly accepted methods and procedures may define the standard by which an individual is judged. According to Reitz (1984), the "standard of reasonable care for a gall bladder patient, then, is dictated by the profession itself" (p. 51). In medicine or education, the person who does not provide an adequate standard of care under this definition is one who does not comply with minimal standards accepted by his/her fellow professionals.

This contention of self-imposed standards of care is elaborated by Rodenburgh (1980) who believed the profession, not outsiders, ought to develop such standards by which its members will be judged.

> . . . it does not seem proper to impose on educators a professional standard of care that ranks the relative merits of different teaching behaviors when educational experts themselves strenuously disagree. It does seem appropriate, however, to hold a professional educator to a clearly expressed, self-imposed standard of behavior. Moreover, there should be no objection to finding a breach of duty when the professional's behavior is clearly outrageous from a layman's (sic) point of view. (p. 579)

The reason for such a self-imposed standard of care is to force judgment based on professional standards of conduct determined by one's own profession. The alternative is to

use a reasonable person's standard of care which compares conduct to what a prudent person would do. The first effort for a student (plaintiff) in determining the course for a lawsuit in malpractice is to choose between these options, i.e., a reasonable person or a professional standard of care violation. "Under a professional standard, the educator will be liable if he (sic) fails to exercise the minimum skill and learning commonly held by members of his (sic) profession in good standing" (p. 3). If the plaintiff chooses the reasonable person concept to pursue litigation, comparisons outside the profession may be used. This obligation for a duty and standard of care is more difficult in higher education than in K-12 schools. The compulsory attendance aspect of K-12 education imposes a duty more easily established than in the voluntary nature of the higher education setting (Weeks, 1980).

The question of accountability becomes dichotomized into the conclusion that since education is not part of the federal constitution nor delegated to the states, it is therefore reserved for the people themselves. There is no constitutional duty for teachers to educate competently (Phabian, 1979). This legal duty is established through state constitutions which provide for education as in the following example from Article VIII, Section 2, of the constitution of the state of Michigan (1963).

> The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district

> shall provide for the education of its pupils without discrimination as to religion, creed, race, color, or national origin. (Michigan, 1977)

As a result of state statutes and constitutions, a fundamental right can be established through the enactment of common law.

Elson (1978), after researching duty of care in education, concluded that individual students deserve the protection of the court for negligent standards in education.

> Indeed, if there is any unfairness in the malpractice standard of care, it is to the detriment not of the professional, but of the individual consumer of professional services who may be denied recovery, even though a court recognizes that he (sic) was harmed by serious error in professional judgment. (p. 732)

The courts have not agreed with this position. Educators are afforded the latitude of professional judgment. Differences in opinion over the categorization of a professional, from a sociological perspective, are not considered since the judicial system considers educators as other professionals, i.e., doctors, lawyers, in suits of malpractice.

> Although sociologists may argue that educators are borderline professionals at best, neither the courts nor the defendants have questioned the placement of educators in that category by plaintiffs alleging educational malpractice. (Rodenburgh, 1980, p. 1148)

Some authors contend that educators, like other professionals, should be subject to negligence scrutiny, even in areas of judgment (Collingsworth, 1982).

> A further problem arises from the fact that there is nothing explicit in the United States Constitution establishing a duty on the states, municipalities, or school districts to educate students. Therefore, teachers cannot be held liable for malpractice unless the courts hold that they have a legal duty to provide students with an adequate education. (Phabian, 1979, p. 110)

He stated that the court will not normally consider a lawyer liable for wrong judgment when the law is uncertain. In medicine, law, and other professions (including education), many situations allow more than one method as acceptable in solving a problem. As a result, the professional cannot be held liable for exercising judgment when he/she has been hired to do just that (exercise judgment). When discretion is exercised, negligence can be the result only if the individual has failed to perform as professionally required, not because he/she selected the wrong approach. However, they are required to "undertake a reasonable search to attempt to find a basis for his (sic) opinion" (p. 405). For a standard of care to be established, agreement over the criteria is necessary. Since this does not exist in the profession, a plaintiff must attack the problem from the position that no reasonable standard was applied. From this position, no acceptable standard would be necessary.

If educators are susceptible to a professional duty of care as indicated in this second contention (and this must be the case to pursue such legal action), one must ask why a common standard of care is lacking. This question is

difficult in education because of the scope of opinions on the goals, methodology, and standards implemented in the classroom. Funston (1981) stated, ". . . the difficulty with using a professional standard of care in this area is that few teachers explicitly adhere to a particular educational school of thought" (p. 590). This duty is often negated by using the concept that a statutory duty exists only where the underlying purpose of the statute is the protection of individuals from the injury of a particular type. Many authors draw this distinction and further propose that education's function is not to protect an individual, but to serve the community.

When a standard of care is eventually established, other considerations are also significant. In education, children can be held accountable for their own actions. If a student contributes to his/her own educational demise (contributory negligence), it does not follow that educators are then immune from liability and responsibility. An article in the Kansas Law Review (1981) found that in the medical profession, doctors are liable for their actions even if patients do not treat their own body in a manner contributing to good health.

> A patient's outrageous eating and smoking habits may necessitate open-heart surgery, during which the physician makes a negligent, incapacitating error. The patient's physical problems, which have been exacerbated by his (sic) own conduct, and which could be fatal but for medical assistance, do not bar a malpractice action. On the contrary, the patient has the opportunity to prove that the doctor's negligence prevented him from

> becoming more healthy. By the same token, a student may be culturally deprived or may be less than diligent in his studies, but this should not bar him from attempting to prove negligence that prevented him from attaining greater proficiencies. (pp. 206, 207)

Rodenburgh (1980) noted two comparisons between duty of care in instructional malpractice and physical injuries and supervision. He first noted that the obvious line of argumentation for a plaintiff would be ". . . the long recognized duty of care for the physical safety of students should apply by analogy to academic instruction" (p. 566) since educators have been responsible for a duty of care in supervision and instruction. Secondly, he noted that a plaintiff may argue that there is no difference between physical supervisory responsibilities and instruction in terms of duty of care. A distinction is made between cases involving physical injury and those which are not physical, i.e., instructional malpractice. Rodenburgh used the comparison arising in medical and psychiatric malpractice. He stated, "Medical malpractice involves physical injury, although psychiatric malpractice results in nonphysical harm, yet both are viable causes of action" (p. 566). Usually, however, the definable standard of care determines the difference. Although medical and psychiatric malpractice involve differences in types of injury, they both embody a definable standard of care. This is the critical distinction between both of these (medical and psychiatric malpractice) and instructional malpractice. Education lacks

any clear, definable standard of care. These standards are often under consideration by the courts.

Pursuing a violation of standard of care is not as difficult in special education cases where P.L. 94-142 provides that states must include greater rights for handicapped children and their parents. The special education law enumerates a series of guidelines which were developed for five general purposes. First, the law was developed ". . . to ensure that all handicapped children had available a free appropriate public education that emphasizes special courses and related services designed to meet their unique needs" (Shrybman, 1982). Second is to ensure that the rights of handicapped students and their custodial agents are protected. Third is to assist states and local communities with federal money to develop education programs for the handicapped. Fourth is to assure and assess the effectiveness of such programs. Fifth is to hold a public agency responsible for such services. Although these statements of law provide a procedure to establish a specific measure of standard of care, they are unusual in the educational setting.

The types of enforceable standards found in P.L. 94-142 are desired by some authors and researchers in the regular K-12 classroom setting. Many of the reasons for this accountability are explained by Elson (1978) as he set forth arguments for professional standards. The threat of liability would serve as a deterrent for teachers currently

practicing in the classroom. In addition, this threat of litigation might dissuade those who are not really serious about teaching from becoming certified. He also believed, "It would stimulate school systems to develop internal quality control and grievance resolution procedures to minimize the prospect of their being held liable in negligence for the educational misfeasance of their employees or for their own institutional failings" (p. 745). Standards which are enforceable would also provide a means of compensation for those who have been harmed by negligent educational techniques imposed by individuals or school systems as in the following example.

> It would stimulate students and parents who have felt helpless against the arbitrariness that they do have certain rights in the educational system that they can seek to enforce, regardless of the obstinacy of the bureaucracy. (p. 745)

Finally, Elson expects that enforceable standards, resulting in increased accountability, would alleviate the negative feelings of professionals in education towards themselves and their colleagues. Standards which are defined by the profession, instead of being imposed from the outside, gain ownership from educators expected to comply with such criteria. Such standards left undefined by the profession result in outside imposed standards. These standards by non-educational personnel invoke numerous problems for educators (Rodenburgh, 1980; Garber, 1980). As instructional malpractice cases increase in education, duty and standard

of care continue to be defined and affect the behavior of educators in the classroom.

Role of the Judiciary

Judicial restraint has become a common reason used by courts not to intervene in charges of instructional malpractice. Four major reasons surface for the reluctance of the judiciary to consider these objections.

The first involves a cost factor. Schools are overburdened with expenditures which impede their ability to deliver the educational process communities demand. Sepler (1981), as noted earlier, predicts that these cases will increase. If courts begin to consider the merits of each instructional malpractice charge, schools would face a potentially overburdening expenditure in direct litigation or professional malpractice insurance. Funston (1981) noted this reason for non-interference:

> . . . it is feared that the result would be to burden the courts with a flood of claims, many of which would be frivolous if not, in fact, feigned. At the same time, there is acute awareness that most judges possess little, if any, expertise in the complex educational issues that are and would be involved in malpractice suits. (p. 793)

The second reason is that the courts do not possess the necessary expertise to rule on issues of instructional malpractice is explained by Elson (1978). Persons within the judiciary do not possess the expertise in experience to understand the quality of pedagogical performance: ". . . courts cannot call upon the information gathering and

deliberative processes that allow for thorough consideration of the complex variables determinative of questions of pedagogical performance . . . " (p. 668.) He also viewed the field of pedagogy to be somewhat "mystical" and inappropriate for this highly controversial subject.

The third reason is related to the mechanisms set forth in legislative directives. These directives are similar to those of the National Labor Relations Act (NLRA). Alternative procedures such as school board action, state tenure laws, and collective bargaining agreements provide adequate due process protections.

The fourth concern is that the judiciary would be in a policy making role and thus diminish the ministerial and discretionary powers of local boards of education. These powers originate from state constitutions, and the judiciary is reluctant to override such inherent powers.

Since the federal constitution does not refer to the right to an education, the federal courts are not involved in such litigation, except for those cases dealing with federal law such as P.L. 94-142. However, individuals have found their way to the federal judiciary through arguments based on constitutional issues such as "due process" or "equal protection clauses" (Garber, 1980). Funston (1981) noted this problem when considering an instructional malpractice suit. "This task is rendered considerably more difficult by the fact that no less an authority than the United States Supreme Court has held that there is no

federal constitutional right to an education" (p. 767). These issues of due process emanate from the 14th Amendment which prohibits states from depriving any persons of ". . . life, liberty, or property, without due process of law." Questions of access to the Supreme Court center on this debate in regard to constitutional applicability. Harris and Carter (1980) explained this approach.

> The constitutional approach would claim the deprivation of a "right to education." An attempt would be made through the suit to impose an "absolute responsibility" for the "product of education" through the Due Process and Equal Protection Clauses of the Fourteenth Amendment . . . . (p. 257)

Access to state courts is procured "explicitly" or "implicitly" through specific language in their constitutions (Funston, 1980). The right to education may be derived from state constitutions or through state statutes. However, if a state mandates education for all citizens, it must then provide it on an equitable basis. As a result, education becomes a fundamental right under the state constitution.

A more progressive view is advanced by Masner (1982) who speculated that in instructional malpractice cases, the court must examine the "degree of duty" obligated to the plaintiff. As a result of an affirmation of the school's legal charge to provide an adequate education, a denial of substantive due process would prevail: therefore, the plaintiff's interests would be elevated to a constitutional level.

In addition to this method of moving instructional malpractice litigation into the court systems through due process arguments, two other procedures could be successful. First, those school districts receiving federal funds would be responsible for accountability standards set forth by the appropriate federal statutes or agencies (Campbell, 1981). This is often used by local constituents as a reason not to use federal funds, i.e., loss of local control. Second, litigation which involves accusations of violation of P.L. 94-142 standards for handicapped students would be applicable to the federal judiciary.

Arguments against these reasons for judicial restraint promote the concept of judicial review for instructional malpractice. In response to claims that there would be a flood of litigation, there seems to be doubt concerning this prediction. Elson (1978) expanded this and stated that even if a significant number of competent educators are sued for "insubstantial and malicious" reasons, this should not isolate students from the judicial process. He related legal protection for students to the charge of police brutality. "Certainly, the fact that police are sometimes sued for brutality by arrestees who have been forcefully, but properly, subdued when resisting arrest is not an acceptable justification in law for cutting off all civil rights suits alleging police brutality during arrest" (p. 653).

A caution in this area comes from the dilemma faced by the judicial system in all areas of tort liability. The

student with financial means to pursue such expensive litigation may be at an unfair advantage over the individuals not so fortunate. However, as in the case above, this should not prevent access to the courts. If all students had easy access to the judiciary, it could result in a disrupted educational environment. In Tinker v. Des Moines Independent Community School District (1969),

> . . . one can only speculate as to the extent to which public education will be disrupted by giving every school child the power to contest in court any decision, made by his (sic) teacher, which arguably infringes the state-conferred right to education. (p. 650)

As the courts continue to provide decisions which generate definitions and opinions of this nature promoting judicial review in instructional malpractice, educators find themselves in an "increasingly vulnerable situation." Kurker and Stewart (1981) studied this increasing willingness to pursue malpractice suits in education. They stated that even though it appears difficult to succeed with a charge of educational malpractice, the situation is likely to change. The authors stated ". . . as the courts analyze individual cases and their components, educators may well become increasingly vulnerable to charges of educational misfeasance" (p. 65). However, the current reluctance of the courts to become involved in such decisions is reflected in the writing of legal scholars from the Maryland School of Law.

> Over the past seven years, students have attempted to sue the public schools for their failure to provide an adequate education, and almost every jurisdiction has flatly rejected these claims. Legal commentators, however, have urged that this new tort, commonly referred to as "educational malpractice," be recognized. The courts have been reluctant to allow the cause of action even for a limited class of claims because they fear disenchanted students and parents will use the courts as a forum for challenging the administration of the public school system. (pp. 582-583)

This position of the courts to remain aloof from the administrative decisions of a school is partly based on the American educational tradition of local control. Local authorities have traditionally and by statute assumed the role of determining school policies, acceptable standards, and other ministerial and discretionary powers conferred on them by the states.

Judicial interference may significantly reduce local authority. This form of judicial intervention was noted by Washburn (1982) in promoting the concept that a compulsory attendance law should demand a reciprocal condition requiring competent instruction. As a result of compulsory attendance laws, he believed that the judiciary should become involved because of the legal obligation of parents to send their children to school. These scholars noted that state courts have recognized the fundamental right of education, even though it is not mentioned in the federal constitution, but at the same time ". . . have refused to uphold claims by parents and students that inadequate education has been provided" (p. 577). In their analysis, they

reviewed relevant cases and concluded that no court has addressed the quid pro quo aspect of compulsory education and educational accountability. They further believed that there exists potential for successful litigation relating to this argument.

More literature exists in the area of "physical injuries and problems regarding improper supervision" as was previously stated. This body of literature in physical negligence results from greater amounts of successful litigation. Although there does exist this willingness to consider physical negligence by the courts, they are less inclined to address mental negligence in the form of instructional malpractice. This willingness to consider physical negligence is a result of a more readily definable standard of care in physical negligence claims (Phabian, 1979). He stated, ". . . the courts have directed their attention at protecting students who are physically harmed due to a teacher's negligence, and to assuring equal educational opportunities for minorities, ethnic groups, and the handicapped" (p. 103). This condition results in heightening public awareness and pressure to consider certain aspects of instructional malpractice and "break through" this trend toward immunity for inappropriate instruction as in other areas of educational law. As Phabian stated, "Nevertheless, courts stubbornly cling to their belief in academic freedom, and in so doing, disregard their

obligation to see that public education, in the various states, is responsive to its students" (p. 103).

Because of the courts' reluctance to consider instructional malpractice, it is difficult to hold educators accountable to a strictly defined standard which is ascribable to the entire profession. Since a teacher's work ". . . tacitly develop(s) from integrating the study of pedagogical principles with the knowledge gained from experience, standards vary in response to the educational environment" (Elson, 1978, p. 731). These standards, however, become more easily defined in P.L. 94-142.

"The enactment of P.L. 94-142 has created a new set of problems for educators" (Kurker & Stewart, 1981, p. 64). The standards which exist in enforcement of P.L. 94-142 legislation for educators are not clear and concise. Most of the ambiguity centers on the wording, which states that the system must provide an "appropriate education" (Section 3). Even though this term is ambiguous, courts have been willing to intervene on such issues, and their decisions begin to define the standard of care for an "appropriate education." These standards enable parents of handicapped children a legal framework to enforce accountability criterion applicable to educators. These standards are specifically defined as a result of P.L. 94-142 legislation. They are a result of the process established by this statute which provides a method for determining standards. As a result, school officials

determine what is appropriate in cooperation with teachers, parents, and (where appropriate) students.

Within this setting of instructional malpractice emerging from judicial decisions, educators are forewarned of the impending potential crisis in education. Since educators are the last of the three largest professional groups (Strickland, 1976) to experience such litigation, there is a complacency concerning such liability. "R. C. Newell, writing in 1978, warned educators to consider malpractice a serious threat to . . . professional integrity . . . particularly when medical practice has been so severely distorted by fear of such suits on the part of the practitioner" (Patterson, 1980, p. 195).

Competency Standards

Competency standards are an important part of the discussion on instructional malpractice. For teachers, testing through examination may be introduced, with expert testimony, to establish that negligence or incompetence prevails (Pennsylvania, 1976). Educators, if desired, can define their own standards through tests which are modified to give appropriate weighting. These exams would, however, ensure a minimal level of competency as in other professions.

> As the jury was correctly instructed, an attorney does not ordinarily guarantee the soundness of his (sic) opinions and, accordingly, is not liable for every mistake he may make in his practice. He is expected, however, to possess knowledge of those plain and elementary principles of law which are

> commonly known by well(-)informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques. (Smith, 1975, p. 627)

This competency level, once determined, develops the standard of care referred to earlier.

Student testing is used to prove that a student has not mastered the fundamentals the educational system is expected to provide. Phabian (1976) noted that this type of testing is an ". . . important step towards the elimination of functional illiteracy" (p. 119). Nevertheless, he felt that testing could have an adverse effect on the question of competency and ultimately instructional malpractice suits. Tests would not address the problem of unmotivated professionals who are fully qualified and competent but fail to exercise their skills to benefit their students. In the same manner, while competency exams would motivate students who desire to avoid the social embarrassment of failing, tests would not ensure that the students were learning.

Competency exams are difficult to develop. What is considered to be functional literacy to one person is not necessarily that to another. Phabian (1979) has noted that in Denver most students pass the minimal competency test given there, while in Florida a high percentage have failed. In other situations, a competency test given to students was so compromised that its value was rendered meaningless (James, 1977). Phabian's conclusion was that this wide difference of opinion indicates that the judiciary would be

in as good a position as any forum to standardize such requirements.

Many states have enacted competency tests. According to the New England Law Review (1979), "Currently, student minimal competency tests are either being considered, planned, or implemented in nearly every state" (p. 115).

> State legislatures have reacted to this "troublesome" question by enacting legislation to insure (sic) minimal standards. Thirty-six states have attempted to eliminate social promotion by establishing minimum competencies, mastery of which is recommended (or required) for progression through the grades. Sixteen states have taken the next step, attempting to give substance to the diploma by requiring students to pass a literacy test as a graduation requirement. (Patterson, 1980, p. 195)

Strickland (1976) confirmed that Arizona developed basic criteria in math and reading both of which must be met to receive a high school diploma. Even more pervasive is a proposal introduced by Representative Ronald Mottl (D, Ohio). This proposal is an amendment to an education bill designed to create a national test as a requirement for high school diploma (Harris & Carter, 1980).

Establishing maximum levels of performance are an additional effect of testing in the establishment of competency standards. The competency exam may act as an excuse to achieve only certain goals and may encourage "setting goals as low as possible" (San Diego Law Review, 1981, p. 807).

Student competency exams appear more often in the literature as the call for "excellence in education" reaches all levels of the academic profession (see Nation at Risk

report). In order for the judiciary to consider issues of instructional malpractice, standards must be adopted which will give the courts a measure which is accepted in the profession.

Summary

Instructional malpractice is a legal concept which has become more popular in recent years. Education is the last of the major professions to experience the liability of malpractice. Physical supervision and injury liability have always been a concern of the school system as well as a concern of the private sector's business community. Although the first instructional competency suit was filed at Columbia University in 1959, only recently has a trend developed which places the educational system in a potentially costly area of litigation.

Instructional malpractice is a tort liability and, therefore, a civil wrong which does not necessarily result in an abreachment of contract. Tort liability is a negligent act resulting from a violation of a duty of care which is imposed on an individual through general law provisions, professional obligations, or general policies and rules. Three types of tort liability are found in education, including physical injuries, defamation of character, and instructional malpractice.

Instructional malpractice, the concern of this study, evolves from the argument that the educational system or

individuals within that system are responsible for deficient instructional behavior which results in personal harm. As a result, the profession (or system) has failed to provide minimal levels of skill which are acceptable to universal codes of conduct.

The major problem with successfully pursuing a charge of instructional malpractice is that the professional services performed by a teacher or administrator are not defined by a universally accepted code of ethics. Defining such a standard of care is difficult in education because of the scope of opinions concerning goals, methodology, and strategies implemented in the classroom.

Three different types of obligations provide general categories to begin considering standards of care. These are common law principles, statutory enactments, and self-imposed standards. If one of these is not provided, the judiciary may become involved in setting such standards through court decisions. Whether educators should be required to provide a standard of care which is enforceable through the legal system is a topic of considerable debate. However, once acceptance prevails over the necessity of such standards, professionals in education must decide whether standards are to be determined by themselves or the courts.

Courts are reluctant to consider instructional malpractice litigation as it is difficult to hold educators accountable to a strictly defined standard which applies to the entire profession. This position of the courts to

refrain from judicial interference in the schools is based on the educational concept of local control which is so basic to the fundamental precepts of our political system.

Judicial restraint has become a common rationale used by the courts to avoid instructional malpractice decisions. Four reasons surface in these discussions for non-intervention. First, is the cost factor. Legislation of this nature can disrupt the educational environment of a system whether the plaintiff wins or loses his/her case. The second factor is related to mechanisms set forth in legislative directives (internal remedies), i.e., tenure rules and regulations. The third concern is the judiciary would be in a policy making role and thus diminish the ministerial and discretionary powers of local boards of education. Lastly, the student with financial means to pursue such expensive litigation may be at an unfair advantage over individuals not able to hire counsel for such an endeavor.

Instructional malpractice is becoming more important to educators. Although success has eluded major decisions concerning standards of care in recent years, a trend is developing which reflects increased litigation. The results of such litigation profoundly impact the educational system as evident in teacher performance, available personnel, productive experimentation, and finances. These cases are costly whether or not the defendant educator or teacher is exonerated. If the accused educator is found guilty, the settlement, whether in remedial assistance or monetary

compensation, will be charged to the educational system, again impacting the curriculum in terms of reduced financial resources. A thorough analysis of the practices and policies which lead to such litigation is found in subsequent chapters.

CHAPTER III

FINDINGS: LEGAL CONCEPTS

Introduction

This chapter is designed to present the findings of relevant legal terms from a comprehensive analysis of selected cases. After completing the review of literature and computer searches as described in Chapter I, a group of 84 cases emerged as the reference sources for this study on instructional malpractice. The objectives of this chapter will be achieved using the following format to present these findings: (a) the operational definition of the term in relation to court decisions, (b) selected case excerpts from which evolve definitions of the legal concept, and (c) resulting definitions as related to instructional malpractice.

Certain legal terms appear in both Chapters II and III. Chapter II relied on secondary sources of reference, and the legal terms and concepts presented were defined from materials authors developed from numerous written legal sources. Legal terms and concepts in this chapter are data from this study emanating from primary sources and result in legal definitions after a comprehensive analysis of instructional malpractice related cases. These legal terms incorporate different definitions than from their general use. This

chapter complements the findings in Chapter IV. Quotations from court decisions are developed in the matrix of Chapter IV and rely on the definitions produced in the findings from primary sources presented in this chapter.

Terms

Accountability

Accountability is a legal concept which evolves from the relationship between an individual teacher and school board. As a result of the ministerial and discretionary powers conferred by a state on local boards of education, an obligation of the board is to maintain teachers accountable to accepted standards of professional performance. In Connelly v. University of Vermont State (1965), the decision stated that boards of education are required to maintain in their "respective towns good public elementary and secondary schools." In determining accountability standards, a board is the final judge of teacher competency. According to Judge McManus in Scheelhaase v. Woodbury Central Community School District (1972), ". . . the matter of employment of teachers lies wholly within the discretionary power vested in the board of directors" (p. 241).

Standardized tests as presented in defining competency in the previous section are a concrete measure the courts use as reference for evidence in accountability standards. All judicial decisions used in this study reflect a responsibility by local boards for defining accountability

standards for the employees of their district. The judiciary, therefore, considers accountability standards a ministerial function of a board of education.

Authority

Authority is a concept which surfaces in many decisions on instructional malpractice: 22 references were found from selected cases. The first aspect of this term addressed by the judiciary is the origination of authority. According to Circuit Judge Engel in Mercer v. Michigan State Board of Education (1974), ". . . the State has the power to establish the curriculum or to delegate some of its authority to local agencies for the final shaping of the curriculum" (p. 586). This authority can be "delegated to the teacher" or to the school district. In New York City School Boards Association v. Board of Education of the City School District of New York (1976), "The ultimate general management and control of educational affairs in the State is vested in the Board of Regents and Commissioner of Education" (p. 571). The foregoing indicates the legislative aspect of authority. Since the judiciary ultimately determines which body has the authority in determining instructional policy, it could retain this power for its branch of government through judicial intervention. However, the courts have stated in many cases (some addressed under "judicial restraint" in Chapter II) that the legislative branch is the appropriate body to determine such issues of authority.

Authority is vested to individuals, educators, and other public officials. Instructional authority is primarily granted to individual educators within a classroom setting. "(The) public school teacher has not only (the) civic right to freedom of speech both outside and inside (the) schoolhouse but also some measure of academic freedom as to his (sic) in-classroom teaching" (Mailloux v. Kiley, 1971, p. 1387). In Militana v. University of Miami (1970), wide discretion was given school authorities unless they operated in bad faith or with arbitrary and capricious actions. The decision that authority is granted unless one acts without regard to good faith judgments was also related by Chief Justice House in Simmons v. Budds (1973). He stated that a public officer or board is considered to have delegated authority if it acts honestly and fairly in exercising judgment.

Authority is, however, tempered by reasonable limitations as determined by the judiciary. The relative nature of authority is exemplified in numerous cases. In Board of Education, Island Trees Union Free School District v. Pico (1982), Supreme Court Justice Brennan stated a board could not remove instructional materials, i.e., books, merely because it did not like the ideas contained in them.

> While petitioners might rightfully claim absolute discretion in matters of curriculum by reliance upon their duty to inculcate community values in schools, petitioners' reliance upon that duty is misplaced where they attempt to extent their claim of absolute discretion beyond the compulsory environment of the classroom into the school

> library and the regime of voluntary inquiry that there holds sway. (p. 2801)

A case in the Michigan school district of Gibralter (Nigosian v. Weiss, 1971), this relative (non-absolute) nature of authority was confirmed when the United States District Court ruled that teachers and boards of education had an obligation to refrain from abusing their authority and that they could not use a classroom as a forum for their personal views. A basic decision of authority, as the determination of whether or not a student attends school, was questioned in Leonard v. School Committee of Attie (1985). In this decision, the superintendant was restrained from preventing a student from attending high school.

In instructional decisions, malpractice cases give virtually absolute authority in determining whether a student has been delinquent in his/her studies. Connelly v. University of Vermont State (1965) placed the burden of proof on the student for ". . . showing that his (sic) dismissal was motivated by arbitrariness, capriciousness, or bad faith" (p. 99). The court in Todd v. Rochester Schools (1972) stated that schools must retain this authority in academic matters as youth are exposed to exciting ideas from antiquity to the present.

Authority is a legal concept which relies on statutory definitions from the legislature. These academic decisions are under the authority of local districts and individual teachers. The burden of proof in instructional malpractice

cases involving allegations of incompetent instruction remains with the plaintiff.

Care

Care is the root concept of the terms "duty of care" and "standard of care." The duty to provide professional care for students evolves from the position of educators as they stand in loco parentis (in place of parents). This obligation results from a state's statutorily defined obligation for mandatory attendance in public education. A concise definition resulted from the case Raymond v. Paradise Unified School District (1963) as follows. "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" (p. 857).

References to care in instructional malpractice suits are described in many different forms. In Donohue v. Copiague Union Free School District (1978), the plaintiff alleged that educators owed a duty of care to (a) teach several basic subjects to him, (b) evaluate his learning ability, and (c) evaluate and ensure that he understood specific subject matter before granting a passing grade. By the school's complying with these criteria, the plaintiff stated he would be qualified for a high school diploma. He argued that since he was not qualified for such a diploma,

he was not afforded a professional care in accordance with appropriate professional standards.

In Donahue, supra, other charges were alleged as a violation of duty of care including failure to (a) evaluate underachieving students thus promoting unqualified students, (b) individualize mental ability and the capacity to comprehend subjects being taught, (c) take proper means and precautions for underachieving students, and (d) interview and provide other testing procedures to evaluate the plaintiff to ascertain his potential for success. Even though the plaintiff was unsuccessful in litigation, charges as these are the type with which educators must be concerned in order to avoid charges of instructional malpractice.

This duty of care, as defined by cases in instructional malpractice, often requires more of educators than just "text book learning." In Mastrangelo v. West Side Union High School District (1935), the courts provided a broader definition of care.

> It is not unreasonable to assume that it is the duty of a teacher of chemistry, in the exercise of ordinary care, to instruct students . . . rather than to merely hand them a textbook with general instructions to follow the text. (p. 636)

Defining how much care must be afforded varies from case to case, depending on the experience, age of the child, and individualized attention required for a specific subject matter. For example, instruction in operating a band saw requires closer scrutiny than most other subjects of education.

Cases in instructional malpractice tend to negate the fact that there are differences of opinion in methodology. However, when a planned teaching method is not implemented, charges of not providing proper quantity and quality of education as described in Donahue, supra result. Providing a proper methodology for instruction becomes the focus of litigation. Flexibility in permitting differences of judgment in methodology is developed in many cases, such as Harrigan v. United States (1976), where the court recognized ". . . more than one mode of treatment was . . . proper." The direction of educators in this regard is left to local authorities. In Board of Curators of the University of Missouri v. Horowitz (1978), judicial interposition in determining care for individual schools is avoided as it should remain, according to Justice Rehnquist, ". . . the control of state and local authorities."

The court is indisposed to begin describing and defining standards of care for educators when such action would expose them to a multitude of tort claims from disgruntled parents. Parents could use the courts as their method of obtaining individualized educational programs (IEPs). This is described in instructional malpractice cases such as Donohue, supra. Courts which negate a legal duty of care for educators respond to the issue as in Peter W. v. San Francisco Unified School District (1976), stating simply that no "workability of a rule of care" from which to base an instructional malpractice is present.

In Trustees of Columbia University v. Jacobsen (1959), a student alleged that the University's catalogs, brochures, and other written statements developed a standard of performance one should expect in attending a university. The courts rejected these documents as standards of performance, although the documents were the most tangible evidence available. Justice Goldmann concluded that descriptions of this nature are ". . . nothing more than a fairly complete exposition of the (educational institution's) objectives" (p. 63).

Proximate Cause

Two definitions of this term are found in Black's Law Dictionary. First is that proximate cause is a ". . . continuous sequence of events which produce the harm (injury)." Second is that an event ". . . stands next in causation to the effect." Substantiation that an action is responsible for an injury is evident when there is proof that without that action no injury would have resulted. Not only must a plaintiff prove that in cases of instructional malpractice the alleged action caused the injury, he/she must also demonstrate that there is a legal duty imposed by statute to prevent such injury (Coleman v. California Yearly Meeting of Friends, 1938). Each of these criteria is difficult to use as a basis of proof since responsibility is difficult to determine. Which individual is responsible for the resulting injury is difficult to prove. Many environmental

influences have an effect on individual students, i.e., educators and parental role models.

Providing proximate cause arguments is a formidable task in cases of instructional malpractice since there must be a direct correlation between the common and statutory duties of care and a plaintiff's failure to learn. In Donohue v. Copiague Union Free School District (1978), the court reasoned, "The failure to learn does not bespeak a failure to teach" (p. 881). It used the example of other students in the classroom not failing to learn in the same setting. If the teaching methodology were the problem, then all students should be likewise affected.

The responsibility to protect a student is well established in cases regarding personal liability and supervision. However, in instructional malpractice suits, developing proximate cause is more confusing. Since no widely accepted procedures of teaching methodology are identifiable, conflicting teaching practices are supported and no "right way" exists.

> . . . 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 (sic) might--and commonly does--have his own emphatic views of the subject. Peter W. v. San Francisco Unified School District, 1976, p. 860

Proving proximate cause in instructional malpractice cases is a major problem.

Assuming one could prove a direct relationship between a plaintiff's education and the effects on a student, this relationship would not ensure success in litigation. The potential of any student, in terms of educational ability, is difficult to assess. Determining what a student could have attained under different conditions is the responsibility of the party charging instructional malpractice. This difficulty was explained in D. S. W. v. Fairbanks North Starborough School District (1981), as the court concluded it would render ". . . legal cause an imponderable which is beyond the ability of the courts to deal with in a reasoned way" (p. 556).

Although proximate cause is extremely difficult to prove, an analysis of the different types is necessary in determining activities of liability for educators. As an antecedent condition to proximate cause, Peter W. v. San Francisco Unified School District (1976) set forth the position that those in the public sector are liable for an injury in terms of instructional malpractice proximately caused by a failure to discharge their duty. In Hoffman v. Board of Education of City of New York (1978), the action charged which caused the harm was alleged to be inadequate evaluations (specifically re-evaluations). A more direct charge of proximate cause was found in Gardner v. State (1930), where a lack of proper instruction was found to be the cause of a physical injury. The instruction or lack of instruction became the focus of this litigation. "Where an

11 year old child sustained misplaced vertebra while attempting a head stand in a physical education class . . . proximately caused by lack of proper instruction . . . ." (p. 344). Determining proximate cause in activities which involve physically dangerous situations is less difficult. Examples include physical education, industrial arts' classes, drivers' education, chemistry, and certain elementary and pre-school activities.

Competency

Competency is a product of legislation, rules, policies, and regulations. It is redefined by judicial decisions which respond to charges of inappropriate validity (inherent flaws in the evaluation instrument) and aspects of discrimination. The legal concept of competency can be dependent on the definition provided by the local agency (school system).

Instructional malpractice commonly involves a charge of a lack of competency. Two types of competency appear in these allegations. First are general expectations of performance by individual educators, i.e., teachers, administrators, school systems. These general expectations are usually questions raised regarding the proficiency of specific individuals employed by school systems. Second are competency questions in the testing of a student's classroom performance. Questions of competency are directed at a teacher's ability to perform and also the resulting ability

(or inability) of a student to perform. In charges of instructional malpractice, both of these competency questions are introduced as evidence.

Competency standards developed by local school systems or state boards of education have been questioned by litigants claiming that a specific test is not an accurate indicator of student performance. These standards are an area of concern for a school system which is attempting to implement competency testing as a means to provide protection against the potential for instructional malpractice litigation.

Determining the definition of the word competency, and assessing the inability of instructional malpractice charges is essential through statutes, rules, regulations, and policies. States have enacted competency standards which determine whether a student will receive a high school diploma. At the beginning of this decade, 36 states had enacted legislation in an attempt to avoid social promotion, and 16 had taken steps to give substance to the diploma through the use of competency tests (Patterson, 1980). Since this period, many states are developing such tests. As a result, competency is a term which is defined by legislative decrees. An example of this trend and the state standards which were referred to in the Copiague School District are found in Donohue v. Copiague Union Free School District (1978) as follows.

> No high school diploma shall be conferred which does not represent four years or their equivalent in grades above eight, and no such diploma shall be conferred upon a pupil who has not achieved a passing rating in each of the basic competency tests established by the commissioner. (p. 883)

Competency, according to this definition, is a protracted process. The term competency is continuously changing according to current standards.

Tests are often the basis for lawsuits. Validity of the evaluation instrument is the first step in this process. In James v. Board of Education of City of New York (1977), this type of allegation was presented:

> . . . whether the courts have power to enjoin, even temporarily, the administration of examination to school pupils based on contentions that the integrity of the examinations had been fatally compromised is the issue presented for our consideration. (p. 1291)

Since the test will establish the definition of competency, a threshold argument is the issue of involving the judiciary in reviewing such examinations. Wide debate on the advisability of judicial intervention is exemplified in the decision of James. The Appellate division in New York granted an injunction to prevent a scheduled examination. The Supreme Court of New York overturned this decision as inappropriate judicial interference. However, once a test is considered valid, whether by judicial intervention or nonintervention, the examination serves as the local agency's definition of competency.

The second type of argument involves charges of unfairness. In Debra P. v. Turlington (1981), the essence of

the claim was that a test was used to determine competency (SSAT II) while perpetuating and re-emphasizing "the effects of past purposeful discrimination." Not only must a test be determined valid, but it must also be nondiscriminatory.

Curriculum

Curriculum is a word which has various definitions. Recent trends in curriculum research expand the concept of curriculum to include many competencies which affect the learning environment. Court decisions on instructional malpractice tend to refer to curriculum in terms of subject matter. This definition is a stricter construction of curriculum and is important to consider when analyzing issues of instructional malpractice.

The court's persuasion in dealing with the concept of curriculum is summarized in Kuhlmeier v. Hazelwood School District (1984). The courts do not desire to substitute their judgment for that of a school. As stated in Kuhlmeier, "School officials have (a) great deal of discretion in (the) realm of determining curriculum: constitutional values are not implicated in curricular decisions" (p. 1287). This premise that curriculum is determined locally is pervasive to the extent that it discourages judicial interference when possible. In Todd v. Rochester Community Schools (1972), Justice Bronson stated, ". . . the judicial garb should never be mistaken for the accoutrements of censor, and the black robes of the trial court may not

exclude, from the public school students, the light of ideas--irrespective of their varied hues" (p. 99). When instructional malpractice or similar educational issues are litigated, the courts attempt to avoid those subjects which directly relate to curriculum. The court in Meyer v. Nebraska (1922) noted ". . . the power of the state to . . . prescribe curriculum were (sic) not issues before the court" (p. 569).

The justification for this reluctance of the courts to interfere in curricular decisions is articulated in Hunter v. Montgomery County Board of Education (1981) as follows.

> We are aware that a serious social problem exists when, as here, a student is "promoted" through the school system, from grade to grade, and yet he or she has not been taught to read . . . . The seriousness of a matter, however, does not mean that a solution may be found, or redress obtained, through the use of the courts. Courts cannot solve every societal problem. (p. 684) (Emphasis added.)

This theme is found throughout decisions relating to curriculum or those discussions which issue charges pertaining to curriculum. The court's avoidance of curricular decisions, by default, places the definition of curriculum with state and local authorities.

The courts do not allow absolute providence over decisions concerning curriculum. In Board of Education, Island Trees Union Free School District No. 26 v. Pico (1982), Justice Brennen concluded for the court that while the petitioner could influence curriculum by relying on community values, he/she could not sustain a carte blanche

jurisdiction to determine library books and other such matters. Even though these petitioners are the local authority (voters reflecting community values), the courts will preserve the integrity of the schools' authority over matters of curriculum.

Curriculum is based on the authority of the state and local school system and is defined by these local agencies. Although the courts remain hesitant to intervene in matters to retain the independence of the academic setting, the court will consider the merits of each case when school officials, individual educators, or community members misapply such authority.

Diagnosis

The question of an educator's role in achieving a proper diagnosis in a school setting is often the major issue in instructional malpractice suits. Diagnosis includes the assessment given at the time of evaluation and also the continuing procedures required for future (follow-up) evaluations. In Hoffman v. Board of Education of New York City (1979), the plaintiffs contended that their son was not diagnosed properly. The issue presented before the court was that the board of education was liable for negligence in failing to follow the recommendation of a school psychologist. Since the original diagnosis of intelligence was just below the cutoff point for attending regular classes, a re-evaluation was prescribed by the

school psychologist. Twelve years later, the student was found to be in the "normal" intelligence (I.Q. level) range, yet he remained in special classrooms because of a failure to diagnosis his later improvement properly. This concept of extending an evaluation to include procedures of implementation and reassessment is broader than a definition which equates diagnosis to a specific procedure (the original assessment) at one given period of time.

Many of the cases referencing malpractice as negligence are founded in decisions from the medical profession: however, they relate to instructional malpractice. In Adkins v. Rodd (1938), the courts stated that a physician or a professional is a specialist because of his/her specialized learning and, as a result, is required to provide an adequate diagnosis. The physician must ". . . devote special attention to the study of the disease, its diagnosis and treatment, having regard to the present state of scientific knowledge" (p. 727). The educator is equally obligated to provide a diagnosis in a manner consistent with the current state of accepted educational practices. This consistency is more difficult to ascertain in education. In Cooper v. United States (1970) and Johnson v. Borland (1947), the courts addressed the fact that the actual judgment or assessment is not proper for judicial review. However, the duty to provide a diagnosis is a responsibility of the professional ". . . defendant properly claims that a doctor is not liable for a mistake in diagnosis: but this is not

true if he (sic) is negligent in making a proper examination" (p. 757). Educators are required to perform functions involving professional judgment (diagnosis) in a competent manner. As demonstrated in Hoffman v. Board of Education of City of New York, charges of misfeasance can result from improper diagnosis.

Due Process

Due process is the protection of individual rights under the law. Students and parents contend that negligent instruction violates their right to due process. Numerous cases establish a student-educator relationship in regard to due process. In Soglin v. Kaufman (1968), the courts stated that disciplinary actions are subject to due process provisions of the constitution when the school suspends a student which results in loss of credit. Due v. Florida A&M University (1963) established that minimal due process requirements must be afforded to students when suspensions and expulsions occur. Also, in Dixon v. Alabama State Board of Education (1961), procedural due process was required for students. The proponents of a cause of action for instructional malpractice assume (from these decisions) that a lack of proper education or enforced confinement (failure to mainstream) of students results in a deprivation of liberty without due process of law.

This charge of a violation of due process for negligent instruction is similar to the type of argument proposed in

San Antonio Independent School District v. Rodriguez (1972). In this case, the Supreme Court indicated that an adequate education was mandated since the state chose to require education by statute. However, since this was a class action suit attempting to establish liability under the Civil Rights Act, the decision may not pertain to individual students. In addition, the minimal standards suggested by this court would not provide a standard to judge allegations of instructional malpractice.

An example of the argument that due process is violated in instructional malpractice litigation occurs when the school system fails to provide adequate education. An example is in Mahavongsanan v. Hall (1976).

> Withholding the degree from the plaintiff because of her failure to satisfy the examination requirement is, in the absence of adequate notice with respect to the scope and depth of the examination, a deprivation of a valuable property right without due process of law in violation of the 14th Amendment to the United States Constitution. . . . (p. 488)

In Debra P. v. Turlington (1981), the court cited the difference between academic and disciplinary dismissals. However, the court noted that the rights afforded an individual under these two types of dismissals are not clear (due process). This ambiguity is apparent in instructional malpractice (academic dismissal) cases where competency tests are required to receive a high school diploma.

Courts are also reluctant to get involved in due process arguments as found in curriculum and other educational

matters of instructional malpractice. However, this reluctance does not diminish due process rights of students. In Board of Curators of the University of Missouri v. Horowitz (1978), the court stated,

> . . . courts are particularly ill-equipped to evaluate academic performance . . . . The factors discussed . . . with respect to procedural due process speak a fortiori here and warn against any such judicial intrusion into academic decision making. (p. 92)

This restraint by the judiciary has not decreased the claims by individuals that violation of the 14th Amendment is an acceptable consideration in determining instructional malpractice.

Due process in instructional malpractice is concerned with the violation of an individual's right to obtain state mandated requirements of education. The level of acceptable standards become the most difficult criterion to establish before the court. This aspect (difficulty in establishing an acceptable standard) of substantive due process (level of acceptable standards) might provide a buffer for educators concerned with charges of professional malpractice.

Funding

Court decisions which impact instructional malpractice cases involve two different phases of funding: (a) the concept of federal funding restrictions and (b) mandatory funding for federal programs. The first is broader and encompasses a variety of federal programs. The second relates to Special Education Act P.L. 94-142 and involves

the right of these students to an "appropriate education as a result of the funding process."

Courts confirm the concept of federal control for programs requiring federal funding. An example of this federal control appears in Campbell v. Talledega County Board of Education (1981) where the court pronounced ". . . defendants must thus adhere to the conditions accompanying the federal grant" (p. 52). Instructional malpractice suits can result from alleged violations of these federal programs. The decision in Campbell further stated that the ultimate responsibility for enforcement of these standards rests with local governing bodies, i.e., the state board or local school district.

In Bossier Parrish School Board v. Lemon (1967), an example develops from the Civil Rights Act of 1964. "Parrish school boards and superintendents of schools, in accepting federal funds for maintenance . . . under the federal act . . . became bound by provisions in the Act . . ." (p. 848). The criteria from these federal programs provide a standard of care by which to judge educator and educational system performance. Violation of these standards are the impetus for many instructional malpractice suits.

When funds are scarce, and federally mandated standards are difficulty to comply with, courts have taken the position in certain cases that schools cannot arbitrarily or capriciously choose which parts of a program they desire to

support. If they were allowed to arbitrarily cut portions of programs, there would be radical loopholes in the law. In Crawford v. Pittman (1983), the manner in which programs are to be regulated must be on an equitable basis as indicated in the following excerpt:

> . . . . If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system, then the available funds must be expended equitably in such a manner that no child is excluded from a publicly supported education consistent with his (sic) needs and abilities to benefit therefrom. (p. 1035)

This concept was supported in Mills v. Board of Education of the District of Columbia (1972) which called for equitable distribution of funds in financial exigencies. The act of funding, by federal or other authorities, which results in specific performance criteria for the recipient can provide the basis for an instructional malpractice suit relying on a violation of a duty of care.

Immunity

Governmental immunity appears in a number of cases concerning school teachers, administrators, and other public employees. In certain situations, the legal concept of immunity is extended to public school educators, and other cases indicate an opposite conclusion. Some states, including Michigan, are considering legislation to accomplish this immunity protection. The 11th Amendment of the United States Constitution states the following.

> The judicial power of the United States shall not be construed to extend to any suit in law or

> equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

Individual states determine the amount of liability incurred from tort suits on its employees. Some states limit the liability of their employees and, in effect, exempt themselves from the 11th Amendment. In Michigan, for example, governmental immunity is under consideration in the form of House Bill 5163 as follows. "Under the statute, as a rule, all governmental agencies are immune from tort liability in all cases in which the governmental agency is engaged in the exercise of discharge of a governmental function." In cases which are related to educational malpractice, the concept of governmental immunity, however, is not a major obstacle in pursuing such litigation.

Examples of support for governmental immunity can be found in Leviton v. Board of Education of City of Chicago (1940) which stated, ". . . (there is) no responsibility to respond in damages in a civil action, for neglect in the performance of duties unless the statutes of a particular state provide for such litigation" (p. 497). Also in Loughran v. Flanders (1979), in reference to litigation concerning methodology and other educational practices, the court dismissed the suit on the basis of governmental immunity.

Determining the liability of a public employee was addressed in Whitney v. City of Worcester (1977). The court stated the criterion to be used in determining the applica-

tion of governmental immunity is whether the act is for the common good of all, which does not include an element of corporate benefit, or whether it is for corporate profit. There is no liability if it is for the common good.

Governmental immunity, however, in most cases is not extended to the action(s) of individual educators in a school system unless by specific statute. In Bookenberger v. Storer (Morgenstern, 1983), the court ruled while educators may be liable for "malicious or deliberate harm," they are not liable for torts committed in "the performance and within the scope of those duties" involving exercise of judgment (p. 24). Instructional malpractice cases fall within this category of tort judgment. The court further held that a teacher is responsible for upholding a reasonable standard of care in the performance of his/her duties. After extensive discussion of this concept, the court confirmed that sovereign immunity did apply to other school officials in the performance of their ministerial functions. This type of application, which creates a dichotomy between ministerial and discretionary powers, has been noted in prior court decisions regarding governmental immunity. "Government officials are liable for the negligent performance of their ministerial duties, but are not liable for their discretionary acts within the scope of their authority" (Muskopf, 1961, p. 462).

The precedent in developing the concept of governmental immunity for school systems is well established. Similarly,

non-extension of this right to individual educators for cases of negligence is also well established. In the case of Levmel v. Johnson (1930), the extension of immunity to educators was addressed directly. The court stated that no matter how well the profession of education is regarded, a conclusion that a teacher should exercise the sovereign powers of the state is not possible. Although the responsibilities of teachers are great, i.e., paternalist, moralist, and disciplinarian, teachers can ". . . accomplish them as . . . a citizen, and for success . . . (they) need not be clothed in . . . sovereign functions of the state" (p. 552). In Duncan v. Koustenis (1970), the court conceded that although governmental immunity extended to local school boards, in many cases this immunity was not extended to individual teachers. The court made this statement on the basis that a public school teacher is a "professional contract employee" of the state and not directly a public official.

In issues of instructional malpractice, the courts often refer to Muskopf v. Corning Hospital (1961). This case establishes a basis for the reluctance of courts to impulsively accept immunity as a defense. Muskopf established that suits of negligence, i.e., instructional malpractice, allow immunity as an exception, not as the rule, in determining exemption from liability. In Pittman v. City of Taylor (1976), the court stated this objection. "Accordingly, we hold that the traditional common-law judge

made (sic) immunity that the state and its instrumentalities heretofore enjoyed from its torts should be and it hereby is abrogaded" (p. 515). This endeavor, to re-establish governmental immunity, was suggested in Molitor v. Kaneland Community Unit District No. 302 (1959). In this case, the courts reiterated that school districts are not liable for issues on instructional malpractice (torts or negligence); however, that type of liability protection could be promulgated by legislative action in the form of statutes. Statutes can extend liability to individual teachers as well as to school systems. Unless legislation provides a buffer against legal liability for negligence in schools, educators must assume they are vulnerable to actions of tort regarding instructional malpractice.

In Loco Parentis

In loco parentis means "in place of parents." This concept is often defined in terms of current situations, changes which occur in societal attitudes, and rules and regulations of governing agencies. The first definition of this term for educators is found in Burdee v. Burton (1878).

> In the school, as in the family, there exists on the part of the pupils the obligations of obedience to lawful commands, subordination, civil deportment, respect for the rights of other pupils and fidelity to duty. These obligations are inherent in any proper school system, and constitute, so to speak, the common law of the school.

The specific meaning of the "lawful commands" and inherent powers of the school was further defined in Richardson v.

Braham (1964) as the court concluded that school boards, principals, and teachers are in control of the educational environment, and his control extends to "health, proper surroundings, (and) necessary discipline."

The school has similar authority as parents, although it is not identical. Limitations have been established through decisions which reflect the changing predilection of society. These limitations transcend those incorporated in the doctrine of family immunity, just as family immunity precludes parents from tort liability connected with the family relationship. Abuse of authority is unlawful and not immune from tort liability as in family immunity. Educators, however, do not retain the same providence of authority as parents. They must act within guidelines set forth by state and local authorities, in addition to fulfilling requirements of professional care.

In Connelly v. Board of Education of City of New Britain (1956), a Connecticut court ruled that an educator had a responsibility to provide "good" education since he/she had the right of in loco parentis.

> This relationship imposes obligations upon the teacher as well as upon the pupil. Boards of education are required to maintain in their respective towns good public elementary and secondary schools. It is axiomation that schools can be no better than the teachers they employ. (p. 752)

An example of a violation of this responsibility in which the courts relied on the doctrine of in loco parentis is found in the Appeal of Denise Pierce and Christopher Rice

(1982), where the board was found negligent. A student was determined to be disabled by a private physician on numerous occasions, and his recommendation for special education status was ignored. The responsibility of the board to follow through on such a recommendation was referred to as negligent in fulfilling responsibilities evolving from the concept of in loco parentis. This concept was similar to the duty of care for Denise Pierce (student) (p. 68). It is the basis for the assumption that an educator has a responsibility to provide general care for his/her students and is not immune from court action.

Liability

Liability in instructional malpractice refers to the accountability for which a school system or educator is responsible. Although a school system retains liability, even under a doctrine of governmental immunity, the liability extends only to those functions which are ministerial. In Whitney v. City of Worcester (1977), the court held that misfeasance as alleged by a plaintiff was not recognizable since the " . . . conduct is discretionary rather than ministerial." Governmental immunity, as discussed in the prior findings section, refers to this dichotomy between ministerial and discretionary functions. Liability is applied by the courts to those powers which the board assumes from state mandated ministerial functions.

As in other types of governmental immunity, the legislature may grant to educators immunity from their discretionary instructional functions which are otherwise unprotected. In Peter W. v. San Francisco Unified School District (1976), the court concluded that statute granted immunity from tort liability for discretionary actions of instructional activities.

The judiciary does not necessarily grant immunity for discretionary aspects of an educator's performance unless defined by statute, since matters of judgment can be challenged. Whitney v. City of Worcester (1977), provided the comparison between public and private sectors for liability in exercising judgment.

> . . . the exercise of judgment and discretion, the nature of that judgment is not qualitatively different from the judgments of private individuals which are reviewed every day through the mechanism of an action in tort. (p. 1210)

Liability for actions of judgment are subjects of litigation and provide a mechanism for students or parents to revert to the courts. This concept was confirmed in Hoffman v. Board of Education of New York (1979), as the court stated in the original decision. " . . . a case of educational malpractice may be pleaded and established against a board of education . . . " (p. 113). Establishing a case against a board of education, teacher, or school system for instructional malpractice is a formidable task. Evidence of this results from the fact no general educator has been found liable for instructional malpractice. However, in

recent litigation, different theories have been applied to commence liability on boards of education for issues of inappropriate instruction. Incompetent instructors, as determined through a variety of sources (including the selection process), may provide evidence necessary for instructional malpractice litigation. In Kolar v. Union Free School District (1939), a plaintiff was alleging negligence of inadequate supervision during physical exercises. Although the court negated this as a cause for action, the decision did state that a district could be held liable if it failed to select a suitable person as an instructor.

Negligence

Negligence refers to a delinquency in the manner of care a reasonable person ought to exhibit in a similar situation. This principle was stated in Siau v. Rapids Parish School Board (1972), where the court noted that negligence is the failure to " . . . do something that one ought to have observed and done, and would have done...with ordinary care" (p. 375). Determining the ordinary educational care is the major problem for plaintiffs to overcome in instructional malpractice cases and serves as an area of protection for educators against such successful litigation. Negligence may be the only method of charging incompetence in instructional malpractice, as this type of negligence centers on the action which was not taken, rather than a standard of care prescribed.

Academic negligence includes the failure to act properly by providing instruction in basic skills. Failure to diagnose and treat a student in the basic skills of education was at issue in the case of Donohue v. Copiague Union Free School District (1978). The court stated that this failure to provide basic skills in education was not unlike a doctor confronted with a patient who is terminally ill.

> (It) is not unlike that of a doctor who . . . fails to pursue medically accepted procedures to diagnose the specific condition . . . and instead allows the patient to suffer the inevitable consequences of the disease. (p. 884)

This model, accepted by the courts in most cases of instructional malpractice, uses the standard criteria for negligence. As stated in the instructional malpractice case of Peter W. v. San Francisco Unified School District (1976), the court required that the allegations of instructional malpractice include: (1) facts showing a duty of care, (2) negligence constituting a breach of this duty, and (3) injury to the plaintiff as a proximate result. These standards are the basis for all charges of instructional malpractice (negligence). The criterion of cause in negligence is not addressed until a breach of duty of care has been established, as in Raymond v. Paradise Unified School District (1963). This reliance on a breach of duty for proximate cause is an important protection for educators if they are involved as defendants in litigation.

In issues of instructional malpractice, negligence was determined in a variety of examples throughout the study.

The research demonstrated that the courts would be the determining factor for charges of academic negligence, even though they were reluctant to become involved in the educational decision making process. Donohue v. Copiague Union Free School District (1978), exemplified this was an appropriate activity of the courts. The decision stated that the determination of blame in the teaching process over the matter of a plaintiff's failure to achieve basic literacy " . . . is really a question of proof to be resolved at a trial" (p. 883). This requires the proof of a violation of a professional duty and standard of care, and only courts are the proper forum for such activity.

Special education cases may embody a statutory violation, i.e., (P.L. 94-142). An example of a statutory violation alleging academic negligence can be found in Loughran v. Flanders (1979). The school district claimed it did not have resources to provide necessary re-evaluation procedures. The plaintiff charged that the school system breached statutory provisions by failing to provide the student with free and appropriate education.

> This breach of duty allegedly arises from the defendants' failure to properly diagnose and take effective steps toward remedying his learning disabilities. (p. 112)

Determining negligence involves the concept of contributory negligence. Contributory negligence, as defined in Honaker v. Critchfield (1933), is an act or omission by the plaintiff which contributes to his/her injury. This concept

is a forceful argument in charges of negligence in instructional malpractice suits. However, in Bellman v. San Francisco High School District (1938), the court stated that because a plaintiff does not exercise his/her responsibilities, he/she is not necessarily guilty of contributory negligence, nor, conversely does it absolve him/her from liability.

On the side of school districts in defending charges of negligence in academic instruction is the misguided notion by plaintiffs that the school institution must effectuate a cure for any academic ill. In Adkins v. Ropp (1938), the court, in regard to professional malpractice, stated an implied contract does not include a promise of cure and ". . . negligence cannot be imputed because a cure is not effectuated" (p. 727). In addition, the plaintiff must prove a specific cause was responsible for the negligent action. Donohue v. Copiague Union Free School District (1978) concurred with this position.

> Because of (a) multitude of factors affecting (the) learning process it would be impossible to prove that acts or omissions of educators were proximate cause of student illiteracy in a negligence action for educational malpractice. (p. 876)

The first step in a charge of instructional malpractice is proving proximate cause and establishing negligence.

Property Rights

An important aspect of property rights surfaced in the cases for this study. Property rights involve the property

interests of the individual educator which affords him/her protection under the due process clauses of the fourteenth amendment of the U.S. Constitution. These rights and other such job security provisions, i.e., tenure rights or contractual rights, require a school district to act in an appropriate and responsible manner in dismissing staff. The dismissal of incompetent staff was shown to be an aspect of instructional malpractice. Retaining unqualified staff is a charge found in numerous cases of instructional malpractice.

Property rights vary in broad terms and involve more than just tangible items, and they include in certain cases an individual's job or profession. Tenure is one method of securing this property right for educators. Tenure systems vary widely across the United States. State laws concerning tenure directly influence the claim to property rights. In Scheelhaase v. Woodbury Central Community School (1972), the question of renewal or non-renewal of contract was directly related to the tenure laws as designated by the individual states. In those states where tenure laws do not exist, property rights may be severely limited as described in Freeman v. Gould Special School District (1969).

> Absent statutory or contractual requirements, persons discharged for inefficiency, incompetency, or insubordination have no constitutional right to a hearing with rights of cross-examination and confrontation of witnesses. (p. 1161)

The method in which an educator is dismissed for incompetence must also be in accordance with proper procedures and accepted standards. Again in Scheelhaase v. Woodbury

Central Community School (1972), the court found that a teacher's privilege to remain on staff could not solely be the result of competency tests administered to his/her students. As a result of numerous decisions of this nature relating to due process, i.e., progressive discipline, first amendment rights, and contractual obligations, a board of education must respond to proper procedures and criteria in dealing with staff problems. Violating such rights may cause a retention of personnel inclined to place the school system in a position of liability in regard to instructional malpractice suits.

Potential Remedies

It is necessary to determine the types of remedies courts are willing to consider prior to discussing the recovery for which educators of a school system may be liable. In the appeal of Hoffman v. Board of Education of City of New York (1978), the court deliberated on the possible conflict between public policy considerations and remedies.

> The significant issue presented on this appeal is whether considerations of public policy preclude recovery for an alleged failure to properly evaluate the intellectual capacity of a student. (p. 377)

On the first appeal of this case, the court decided that remedy was possible in terms of monetary damages ($750,000.00). On further appeal, this decision was reversed, and the court relied on public policy

considerations to negate a monetary remedy in a case of instructional malpractice.

When a case of instructional malpractice is argued on the basis of federal law, i.e., Civil Rights Act of 1964, or title programs, there is a question whether compensatory damages are appropriate. Courts have ruled for and against such remedies. In Boxall v. Sequoia High School District (1979), questions of remedies in federally funded programs were considered inappropriate. The court stated that federal programs which are supplemental in nature should not be seen as providing a new entitlement to damages. However, in other cases awards have been allowed.

Three types of relief appeared in cases regarding instructional malpractice. The first is removal of the incompetent instructor. This action results from complaints regarding specific individuals rather than school systems in general. Remedial instruction is the second type and considered a more viable option. The third type, as charged in Peter W. v. San Francisco Unified School District (1976) is damages for future income which the student is incapable of earning because of the alleged damages (inadequate education). This type of litigation, if successful, would necessitate the purchase of liability insurance for professional malpractice. Insuring educators for malpractice may be a result of increased instructional malpractice claims. Courts might be more willing to award damages if insurance companies are paying the bill. This insurance would also

remove one of the public policy considerations (financial burden) discussed in Chapters IV and V.

Testing

Testing as a concept in instructional malpractice litigation developed from specific use of tests within the educational setting. Implementation of tests includes a responsibility to evaluate their validity and importance. Exams are given to students as a diagnostic tool to test competency.

Tests can be used to show whether specific criteria have been realized. In Campbell v. Talledega County Board of Education (1979), the court concluded that a testing program was sufficient and appropriate in determining a proper program for handicapped children. This type of decision confirms the use of tests for competency matters (assuming they are proven reliable and valid). An example of testing as an appropriate measure of evaluation for determing basic skills is found in Paladino v. Adelphi University (1982).

> In 1979, while he was attending fifth grade. Michael evidenced certain learning problems and his parents sent him to a private testing institution for independent evaluation. The results showed that Michael was not equipped with sufficient skills for fifth grade and was several grades below fifth grade level . . .

The plaintiff charged that the educators within the school gave passing grades although they failed to evaluate. He alleged that educators neglected to perform appropriate testing and other educational methods necessary for satis-

factory fulfillment of instruction. Testing is, therefore, one instrument to document student achievement in avoiding instructional malpractice litigation. Private institutions for purposes of testing are occasionally used to confirm or rebut results of particular examinations.

Tests which were taken for a variety of reasons prior to the initiation of a lawsuit against a school system may be used or introduced as evidence of negligence. Most tests are now inaccessible through individual state privacy statutes. However, they have been accepted in a variety of cases for use in litigation (Pennsylvania, 1976, p. 800). This type of evidence assists in validating the preceding discussion of test results when used as documentation to prove achievement of basic skills for an individual student. Tests which confirm student performance may be considered as important records, which should be retained, to document student achievement (should instructional malpractice become an issue).

A final aspect of the legal concept of testing found in this study relates to the appropriateness of the exam in terms of reliability. In Debra P. v. Turlington (1979), the plaintiffs contended, "The application of the SSAT II testing program only to public schools (as opposed to both public and private schools) is a violation of the equal protection and due process clauses of the fourteenth amendment" (p. 262). Discrimination was alleged since more (10 times) black students failed the exam than white students. The

plaintiffs charged that the test was, therefore, inherently discriminatory. This is an example of a charge which questions the testing instrument as well as the testing procedure. Questions regarding the reliability of testing instruments when they appear in suits of instructional malpractice are not uncommon.

Summary

The purpose of this chapter was to provide a basis for conclusions in chapters IV and V. The analysis of cases in Chapter IV is based on definitions as determined from court decisions. These definitions change as the court sets new patterns of judicial review. (An example of the transitions of definitions is the changing character of discrimination from Plessy v. Ferguson, (1896) to Brown v. Board of Education, (1954).) References to the terms in analyzing cases in instructional malpractice must be placed in context as found in relevant cases of similar litigation. These terms reappeared throughout decisions relating to instructional malpractice and establish the basis for analyzing data from this study.

As cases persist concerning professional malpractice, these definitions will continue to evolve. Analysis of data in Chapters IV and V depends on the definition of the terms developed in this chapter.

CHAPTER IV

FINDINGS: COURT DECISIONS RELATIVE TO INSTRUCTIONAL MALPRACTICE

Introduction

The data reported in this chapter result from an extensive review of primary cases which were selected as paradigmatic of instructional malpractice litigation. The results are a summary of the major cells in a matrix which evolved from the collection of the data. This delineative approach reflects the predominant concepts which establish the current state of judicial review with respect to instructional malpractice. Many of the more than 84 secondary cases analyzed contribute to decisions of the courts. Those decisions which are not considered primary cases for this study were analyzed in Chapter III.

Throughout the course of this study, cases directly related to instructional malpractice surfaced as the leading decisions. Twelve such cases are considered primary or relevant to this analysis and will be presented in this chapter using the criteria established in Chapter I as follows:

1. name:
2. background:
3. decision:

4. case references:
5. remedy petitioned:
6. arguments presented, sustained, and/or requested:
7. arguments sustained:
8. arguments denied;
9. educator(s) actions cited:
10. potential actions cited: and
11. legal principles and/or concepts.

These cases will form one axis in the matrix used for analysis of the data. The criteria listed above form the other axis of the matrix and determine the trends referred to in the research question.

Selected cases used for this study are briefly summarized by topic in Appendix D using case, state, and summary. This analysis provides a method of referring to concepts and principles in applicable secondary cases. The list is arranged in alphabetical order by case title.

Primary Case Findings

The 12 primary cases which were analyzed by use of the matrix are presented in Chapter III chronologically within four categories. The first set includes Peter W., Donohue, Hoffman, Hunter, and Snow. Peter W. is the first major case involving instructional malpractice. This case is quoted more than any other and developed some of the original arguments for subsequent decisions. The case was decided in 1976 and presented the concept that under normal

circumstances, public policy considerations precluded findings of instructional malpractice. Donohue, in 1978, confirmed the findings of Peter W. and is probably the second most quoted case. This case concentrated on monetary remedies and delineated public policy considerations which deter instructional malpractice suits. Educators' actions were stressed in more detail in Donohue than in Peter W. Next in line for cases of instructional malpractice is Hunter, in 1981 which attempted to bring instructional malpractice litigation to Maryland. The court, in Hunter, relied on Peter W. to prevent successful use of instructional malpractice. The court addressed the issue of educator's accountability for learning. In 1983, Snow was a successful case of medical malpractice. The defendants attempted to convince the court that instructional malpractice was the real issue which would prevent successful litigation. This case reflects the current protection for educators from instructional malpractice in terms of successful litigation.

The second category of cases involves P.L. 94-142. Campbell was litigated in 1981 and addresses the issue of mainstreaming. This decision represents the courts most active involvement in the development of curriculum. Specific remedies were ordered to ensure compliance with the Education For All Handicapped Children Act of 1975. D.S.W., in 1981, involved the problem of improper diagnosis. Under P.L. 94-142, the plaintiffs attempted to correlate improper

diagnosis to violations of the process as set forth in the act. According to the plaintiffs, the result of improper diagnosis was that the students lost opportunity for adequate employment and earning capability. Loughran, in 1979, is an example of a case in which the defendant guardians were dissatisfied with the individual educational program and attempted to use the court rather than internal mechanisms of the school as provided by P.L. 94-142.

Helm, Paladino, and Torres are cases where attempts were made to bring instructional malpractice charges to private schools and agencies. The court treated these cases as other instructional malpractice litigation. These cases directly affect the public schools as they were contracting or auxiliary agencies of the education system. The plaintiffs contended that the contractual relationship provided opportunities to consider breach of contract charges, which differed from the relationship between teacher and student found in the public school (and other instructional malpractice litigation).

Debra P., in 1979, considered the issue of competency testing. Legal issues regarding such tests are an important aspect of instructional malpractice research, since competency exams and other forms of evaluation through testing seem the most immediate source of protection against instructional malpractice litigation.

Peter W. v. San Francisco Unified School District

Background. The plaintiff in this case was an eighteen year old male. He brought suit against the San Francisco Unified School District for allegedly failing to provide adequate instruction, guidance, counseling, and supervision in basic academic skills, such as reading and writing. He claimed that this failure to act by the school district was a tort claim of negligence. This negligence, which deprived him of basic academic skills, was characterized to be intentional misrepresentation by the school district.

The plaintiff contended that he would only be able to obtain menial employment with the skills he possessed and that a high school diploma should mean competency in basic skills and something more than certification of attendance. The Superior Court of San Francisco dismissed the suit, stating that the defendant failed to state a cause of action for negligence within the criteria established for tort negligence. The Court of Appeals affirmed the lower court's ruling.

The plaintiff's allegations have immense implications for educators. If students can sue a school system because they cannot meet certain objective criteria, i.e., reading level and writing skills, then extensive testing and evaluation will be required to ensure basic levels of performance. In most states, students receive diplomas for passing grades in course work without demonstrating minimal competency

levels in basic skills. As noted in the case summaries, inherent problems exist with testing in terms of potential litigation.

Remedies petitioned. The damages requested for this alleged misrepresentation and negligence on the part of the school district were the costs of tutoring to gain basic reading and writing skills for meaningful employment in the job market.

Arguments presented, denied, and/or sustained. Numerous arguments and theories of harm were presented by the plaintiff. He asserted that the school district and its employees falsely represented to his guardian that he was performing at or near grade level in basic academic skills. The court did not accept this argument. One of the methods which did indicate academic performance, according to the court, was grade cards which the plaintiff brought home indicating his poor progress in specific academic areas. The court stated the administrative requirements for informing parents of the progress of students are directed to obtain maximum educational performance, but are not protective in a legal sense as to promote actions alleging injury.

The plaintiff professes a duty of care is inferred because the student was undergoing instruction in a public school system which he was required to attend. As stated in Chapter III, a duty of care must be established to prove negligence. In this case, the allegation is that legal duty

of care develops from the statutory mandated attendance requirement for public schools. This attempt to link a duty of care with attendance requirements was refuted by the court in stating that no conceivable workability of a rule of care against the school district could be found. The court did so by relying on recognized public policy considerations which negate an actionable duty of care for educators who administer the academic curriculum of the schools. These public policy considerations will be discussed in the section which follows on legal principles.

The plaintiffs further stated that if the court refused a duty of care argument with the mandatory attendance requirement, another argument yet remained. The plaintiff's counsel stated that an obligation for care was also established by the special relationship which exists between students and teachers. This particular relationship demands a duty to exercise reasonable care. The court did not grant either argument, as the legal duty of care involves other factors, including public policy considerations.

Educator actions cited. Actions of administration are an important criterion to analyze because they indicate those areas where educators are prone to liability. These actions are not selected on the basis of their success in litigation, but rather to identify the types of activities which find their way to the plaintiff's attorney's brief and which may precipitate such litigation.

The first action cited was that educators in this system failed to assess the student's reading disabilities. Occasionally a student is promoted through the system, receives a diploma, and yet is unable to read adequately. If this failure to evaluate properly leads to an inability to perform minimal levels of competency needed to obtain meaningful employment for general employment upon graduation, then lawsuits regarding instructional malpractice may follow.

This reading problem is followed by a line of argumentation which centers around the ability to comprehend assigned material. According to the parents, material which was presented in class was too advanced for the student's skill level. Counsel for the plaintiff infers that the failure to determine appropriate material is problematic of a system which placed him in classes where the teachers were not adequately prepared to work with his reading disability. They assigned him to classes in which he could not read the books and other required materials. Educator actions (administration), regarding the specific assignment of materials, may demand more careful evaluation of reading ability in relation to textbooks and other assigned material. Attention must also be placed on the training of teachers qualified to deal with reading problems.

According to the plaintiff, the educator actions in this case resulted in negligent school district conduct as they allowed him to advance to another grade level with

knowledge that he had not achieved the skills necessary for he to succeed in current courses of instruction. The culmination was that he graduated from high school, although he was unable to read above the eighth grade level. Repeated throughout this case is a reliance on the reading level of the plaintiff.

In Peter W., the court stated that to prove instructional malpractice under the concept of negligence, a plaintiff must demonstrate an acceptable theory of liability. The student in this case failed to show a duty of care in terms of negligence as a breach of that duty. In describing this breach of duty, the court considered the difference between "care" and "duty of care." General care is expected of all professionals, especially those in the classroom dealing with children. However, care, in general, is different from care in the legal sense as described in Chapter III. The court dismissed all allegations which were predicted on a legal duty of care for educators. Although these attempts to link the concept of accountability (general care) with a legal duty of care were dismissed in Peter W., the door was left open for future actions charging intentional misrepresentation. The justices noted that charges of intentional misrepresentation were not addressed in a manner by the plaintiff which merited a decision by the court. According to this decision, educator actions in general must be considered separately from a legal duty of care.

Legal principles and/or concepts. In most cases involving public schools, the question of governmental immunity is at issue. In this case, the court referred to Muskopf v. Corning Hospital District (1961), stating that immunity under negligence is the exception not the rule. However, the courts noted for future cases that the cause of action must be framed properly in order to consider a case of instructional malpractice. The court stated that the question of immunity must be considered for each individual case.

Policy judgments are an important legal concept discussed in this case. Policy judgments preclude successful litigation in instructional malpractice. Three aspects of public policy considerations were described. The first refers to the social utility of the activity contrasted with the risks. (Is the value of education worth the risks of negating injury for "failure of educational achievement" within the meaning of the law?) Since there is no acceptable method of determining duty and standards of care, courts are reluctant to impose such standards on educators where diverse methodology and many other variables are the norm. The second policy consideration is the relative ability of the schools to bear the financial burden. This specific policy consideration is a major factor in negating claims of instructional malpractice. The potential financial burden on a school district could negate its ability to provide standards of care imposed by this type of

litigation. Third, is the closeness in the degree of conduct of the defendant to the injury. Determining direct and proximate cause by the defendants is difficult in cases of instructional malpractice.

In denying instructional malpractice claims based on the arguments presented in Peter W., the court noted the consequence it would have on the effectiveness of teachers. To hold educators to an actionable duty of care would expose them to tort claims from disagreeing and disgruntled parents and students. This legal liability may temper their ability to freely experiment and individualize teaching methodology and unique approaches of presenting material. The individualized attention necessary for students in the upper ranges of ability may be diminished by overly traditional approaches aimed at preventing instructional malpractice litigation.

Peter W. is the most referenced case on instructional malpractice. Simply stated, the court ruled that the failure of educational achievement is not "injury" within the meaning of tort law. The most quoted phrase for use by defendants in claims of instructional malpractice is from Peter W. as follows:

> 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 (sic) own emphatic views on the subject . . . Substantial professional authority attests that the achievement of

> literacy in the school, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. (p. 860-861)

Donohue v. Copiague Union Free School District

Background. Edward Donohue, the plaintiff, brought action against the school district contending it violated the statutory duty to educate. Because of this alleged instructional malpractice, the student found tutoring necessary to acquire those skills he had not obtained in high school. The student did not receive good marks in high school: in fact, many were marginal. He claimed he should not have passed from grade to grade without command of basic skills indicated by a high school diploma.

The courts ruled, consistent with Peter W., that educators owe no legal duty of care to their students upon which to base a negligence action for educational malpractice. The decision expanded the conclusions reached in Peter W. to include the immunity for educators from certain aspects of evaluation. A school district is not liable for instructional malpractice because an educator fails to evaluate an underachiever. This process of evaluation differs from the Hoffman case in terms of types of negligence. In Hoffman, the failure to evaluate was based on misfeasance, i.e., the negligent implementation of an original assessment. In this case, the failure to evaluate was based on nonfeasance, that

is, the failure to provide assessment to determine the current skill level of students.

Even if the court were to accept the proposition that the acts of omission in providing evaluations could have been responsible for the educational result of the student, the conclusion that lack of education was the proximate cause of the eventual harm (illiteracy) would not necessarily follow. This is because of a multitude of factors affecting the learning process, which results in various levels of literacy. Further, if the courts were to accept the alleged negligence as proximately responsible for the illiteracy of the student, the court stated the result would be to oversee the administration of the State's public school system.

Remedies petitioned. As in Hoffman, the potential damages to the school district were formidable. The plaintiff requested recovery of $5,000,000.00 in damages for alleged deficiencies in his knowledge. A settlement of this proportion would have long term ramifications on the ability of any school system to provide adequate education. If such an award would occur, a school district probably would not be financially capable of providing the quality of education demanded by instructional malpractice litigation, certainly not the type of evaluation procedures solicited by this case.

Arguments presented, denied, and/or sustained. The arguments were broadly presented to include most of those charges alleged in other suits of instructional malpractice. Although Peter W. is the most quoted case, Donohue provides a more comprehensive review of instructional malpractice in education. The plaintiff alleged the school district owed a duty of care to determine his learning capacity and ability. In addition, the school had a legal obligation to test him properly to determine if he had the ability to comprehend the subject matter presented. Both of these allegations were similar to those in Peter W. Again, these allegations were denied by the courts. However, if material is presented which the student cannot comprehend, then educators are in a position of liability for charges of improper instruction.

The court did state that charges of willfully neglecting their duties are possible. The court further stated that educators are to discharge their functions with care. According to the court, all educators and officials of the school systems may be held accountable for the failure to execute their duties properly. This is a result of the important trust placed in them. These references to future possibilities of successful litigation should concern educators.

Many of the same allegations and conclusions presented in this case as are found in Peter W. Among them are the following.

1. The school system did not owe the plaintiff a cognizable duty of care.
2. The defendant did not fail to discharge its general education duties.
3. The plaintiff's damage was not the result of demonstrable proximate cause.
4. Educational malpractice was neither comprehensible nor assessable within the existing judicial framework.
5. To evaluate conflicting theories of how best to educate is not within the current judicial framework.
6. State statutes on education were not designed to protect the plaintiff from injury.
7. An educator's failure to evaluate underachieving students is not a probable cause of action based on tort.
8. The failure to educate cannot be characterized as an injury within the meaning of tort law.
9. The judicial system remains an inappropriate forum in which to test the efficacy of educational programs and methodology.

Educator actions cited. Charges of instructional malpractice focused on the evaluation techniques of staff. The first action cited by the plaintiff was promoting the student when basic competencies (reading and writing) were not met. Often educators find themselves in a dilemma with pressure placed on them to pass children by the parents and student. while at the time placed in a position of being sued for unwarranted academic promotion.

The failure to interview and discuss problems with the student to ascertain his ability to comprehend and understand material was also cited by the plaintiff. Grade

reports and other methods of notifying parents of progress vary greatly from district to district. Although the parents were apprised of the student's grades through normal report cards, the plaintiff indicates this method was misleading. If the student is in fact passing, albeit with poor grades, basic skills in reading and writing are assumed as a result of promotion.

The charging parties alleged the school system failed to provide numerous tangible resources. The plaintiffs stated the school failed to provide adequate school facilities, teachers, administrators, and psychologists trained to evaluate remedial students properly. The plaintiffs charged the school system failed to hire qualified personnel experienced in handling such matters. Administrators would be placed in a position of defending their hiring procedures and methods of evaluating applicants if the courts had sustained this allegation. Although the court dismissed the charge of inadequate resources, including trained personnel, educators could be placed in a position of defending their professional competency if attorneys decided to focus on their abilities in direct and cross examination at a trial.

Legal principles and/or concepts. The duty to educate has been discussed in all cases of instructional malpractice. In this case, the argument was primarily based on statutory provisions. The plaintiffs cited Section 1 of Article XI of the New York State Constitution as follows,

"The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." Many states have statutes similar to this. A duty of care was argued to be a statutory obligation upon the school system. The duty of care was enumerated to be based on principles of sound public policy as follows:

1. moral considerations,
2. preventive consideration,
3. economic considerations, and
4. administrative considerations.

The court responded by stating that the purpose of schools and statutes as referenced by the student was to confer benefits of free public education and not to protect against injury of ignorance for every individual. This concept is the reason the court refused to characterize the failure of educational achievement as instructional malpractice.

Many contributory factors are involved in the failure of a child to learn. The first, which was noted by the court, is the parent's failure to respond or further investigate poor grade reports or similar evidence from the school. The proof that other factors must affect a child's learning ability was the presence of other academically successful school children in similar classroom situations. Second, identical classroom instruction was afforded other students, and not everyone ended in the situation (academic level) of this plaintiff: factors of contributory negligence

by the plaintiff are apparent. The court concluded a variety of social, emotional, and economic factors are involved in the learning process of the child and these are not entirely within the control of the school system.

Justice Suozzi, one of the judges in this case, strongly dissented. Suozzi began his dissenting opinion by stating the complaint should be a valid cause of action. He based his opinion on part of the Peter W. case which stated that the determination for the reason a student does not achieve a basic level of literacy, i.e., whether forces outside or within the system, is a matter for the courts to decide. According to Justice Suozzi, and in agreement with the plaintiff, students ought to have the right to bring a cause of action for instructional malpractice on the basis of their statutory rights.

The fear of excessive litigation, according to Suozzi, is without merit. He stated that this fear is unfounded as demonstrated by the abolition of sovereign immunity and environmental actions. Sovereign immunity was used as a reason to avoid public sector litigation based on the reasoning in instructional malpractice (excessive litigation). After the protection of sovereign immunity was removed, litigation increased: however, it did not hinder the operation of the public sector. Judge Suozzi infers instructional malpractice will follow the same path and be an acceptable form of negligence in the future. He stated his view as follows, "under the circumstances there is no

reason to differentiate between educational malpractice on the one hand, and other forms of negligence and malpractice litigation which currently congest our courts" (p. 833). In addition, the justice noted there was another reason for allowing this complaint. The school system violated appropriate educational standards, and the charge was not solely an issue of instructional malpractice. He noted the plaintiffs charged that the student failed various subjects: the school officials were aware of these failures and as a result failed in their duty to prescribe appropriate corrective measures. The State Commissioner of New York had a regulation stating the requirements for a diploma beginning with the words. "The satisfactory completion of . . ." Suozzi concluded, "Anyone reading (this transcript) would be hard pressed to describe his work as a 'satisfactory completion' of a course of study" (p. 279). He further stated the school has a duty to promote the students in more than merely a perfunctory manner. He believes that to dismiss a complaint of instructional malpractice as judicial interference in the educational process serves to promote misfeasance in the educational system. His summary. which is important in anticipating potential instructional malpractice decisions. summarizes the analogy made with medical and other professional malpractice litigation.

> In my view. the negligence alleged in the case at bar is not unlike that of a doctor who, although confronted with a patient with a cancerous condition. fails to pursue medically accepted procedures to (1) diagnose the specific condition and (2)

> treat the condition, and instead allows the patient to suffer the inevitable consequences of the disease. Such medical malpractice would never be tolerated. (p. 884)

If a court is to rule in favor of an instructional malpractice charge, the reasoning by Suozzi may be offered. Since at least one justice in this case believes in the merits of instructional malpractice, it may be wise to continue avoiding practices which lead to judicial review and potential decisions of this nature.

Daniel Hoffman v. Board of Education of City of New York

Background The case of Daniel Hoffman, plaintiff, alleges instructional malpractice for negligence in failing to assess correctly the intellectual ability of the defendant. In addition, a charge for failure to reassess the status of a previous evaluation a recommended for the student by a school psychologist was at issue.

Upon entering kindergarten, the plaintiff was placed in a class for mentally retarded children. He remained in this setting for longer than ten years. Upon re-examination, the defendant was found not mentally handicapped, and a charge was brought against the school district alleging educational malpractice. As in Peter W., the court ruled that because of public policy considerations, the court would not intervene.

The original testing of the plaintiff demonstrated an intelligence quotient of 74 and recommended that he be

placed in a class for Children with Retarded Mental Development (CRMD). The psychologist was not certain of his findings because the student suffered from a severe speech defect. The inability to communicate made it difficult to assess his mental capacity. The psychologist performing the original assessment recommended that the plaintiff's intelligence be evaluated every two years. On subsequent academic tests measuring reading ability, four years after the original assessment, he received a score in the 90th percentile, indicating his potential for learning (at least in reading) was higher than average. In 1968, the plaintiff was transferred into an occupational training program and, upon testing, showed an I.Q. of 85 in verbal skills, and an I.Q. of 107 in performance skills, for an overall rating of 94, indicating normal range intelligence. As a result of these scores, the school system did not allow him to return to the special education environment in which he was comfortable. Hoffman was an appropriate case to test the applicability of evaluation procedure, alleged to be negligent, as nonfeasance under tort law. The results of this case were the same as those in the instructional malpractice considerations of Peter W.. The major difference is that the plaintiff was successful at the trial court and appellate division level. However, the Supreme Court of New York reversed the decision.

Remedies petitioned. The plaintiff requested monetary damages for the alleged misfeasance which on the part of the district caused lifelong harm. The original jury award was for $750,000.00, no small sum for a school district (even one the size of New York). This type of award would certainly cause long-term financial problems for a smaller school district. The appellate division affirmed this verdict: however, the amount was reduced to $500,000.00. The Appellate Court stated that the failure to re-evaluate within two years was the deciding evidence used in its decision. The court considered this recommendation to re-evaluate as an extension of the first testing procedure and thus concluded that the district was guilty of an affirmative act of negligence. If the Supreme Court had not overruled the decision of both lower courts, the first successful instructional malpractice case would have permeated the educational community.

Arguments presented, denied, and/or sustained. The arguments in this case do not cover the broad spectrum of charges possible under instructional malpractice. They focus on the issue of the Board of Education's failure to retest the student in accordance with the psychologist's recommendation. The uniqueness in this case, according to the plaintiff, is that it was an issue of misfeasance rather than nonfeasance. In Peter W., the argument was of the school and educator's non-action (nonfeasance). No

assessments were given in that case to determine the status of a student's skill level (in reading). Although action to deal with the student was taken, competent action did not result in implementing the recommendation of the psychologist, which was nonfeasance. The court, however, determined there was no meaningful difference between misfeasance and nonfeasance in regard to instructional malpractice and set a precedent for considering them to be the same in terms of negligence in instructional malpractice.

Educator actions cited. There was a clear distinction made in this case between nonfeasance and misfeasance. On the basis of this opinion, courts could more readily entertain the idea of negligence under misfeasance as opposed to nonfeasance. This case confirms the potential for continued litigation in instructional malpractice cases, considering that both lower courts found in favor of the plaintiff and there was strong dissent in the Supreme Court's decision.

Once the Superior Court comingled the concepts of misfeasance and nonfeasance, the result was the same as in Peter W.. This became a charge against the professional judgment of the Board of Education and the individual educators. The court assumed the teachers of the student were continuously re-evaluating him through observations and general class assessments. Accordingly, the courts stated they would intervene in the administration of the public

school system only in the most exceptional circumstances. A dissent in this case by Justice Meyer indicates that at least one justice believed there was a discernible affirmative negligence on the part of the Board in failing to carry out the recommendation for re-evaluation every two years and was, therefore, an identifiable proximate cause and instructional malpractice.

Legal principles and/or concepts. The principles on which the court based its opinion were well established through Peter W. and Donohue. Mr. Justice Meyer felt compelled to write a dissent and did so on the basis that the board failed to re-evaluate. This, the judge contended, was clearly misfeasance and actionable under tort law since proximate cause could be established. Proximate cause would be more difficult to prove in cases of nonfeasance. But here, harm, standard of care, and liability were apparent, according to Meyer.

> (This case is a) discernible affirmative negligence on the part of the board of education in failing to carry out the recommendation for re-evaluation within a period of two years which was an integral part of the procedure . . . . (p. 380)

If a cause of action is successful in instructional malpractice cases, the action may emanate from allegations of misfeasance rather than nonfeasance.

J. Hunter v. Board of Education of Montgomery County

Background. In 1981, a case of instructional malpractice was brought before the Maryland courts. In this case, the plaintiff, Ross J. Hunter, brought charges against the Montgomery County School District for failing to provide him with a quality education. The suit stated the district and three teachers named in the case should have known of the student's inability to comprehend the subject matter presented to him. The action alleged the educators named and the board of education failed to teach him subjects which they were required to provide. As summarized by the court, "The teachers have been sued for failure to see that Hunter drank from the well of knowledge." The plaintiffs requested a reversal of the lower court's decision to dismiss the case. This action was an attempt to bring an instructional malpractice suit to trial in Maryland. Instructional malpractice may be initiated in other states, although California and New York have negated the possibility of such litigation.

Remedies petitioned. No specific damages were requested, as this was an appeal to allow litigation of the matter. The plaintiffs did, however, indicate they would ask for damages if this court granted their request. There is no indication of a request for remedial education as is found in other cases of instructional malpractice.

Arguments presented, denied, and/or sustained. Five different charges were brought by the plaintiffs. The first was an allegation of instructional malpractice in the standard form, as found in Peter W. and Donohue. The school allegedly had a duty of care to provide basic skills for every child. The second charge was that acts evolving from instructional malpractice were willful and deliberate. Third, the plaintiff alleged the Board was negligent in evaluating its staff and programs which were insensitive to the needs of this child. The responsibility of hiring qualified individuals was expanded in Donohue and also referred to in this case. The fourth charge was similar to the first, alleging instructional malpractice, except that the duty was claimed to be statutory rather than inherent. The fifth charge used the concept of an implied contract. This concept of an implied contract was also addressed in Little Flower as a potential theory of recovery.

The plaintiffs forwarded an argument based on perceived effects of negating all instructional malpractice litigation. They concluded if they are to preclude litigation of instructional malpractice, then education can run astray of its inherent purposes. The court did not agree with the premise that education would go astray if instructional malpractice cases are dismissed because of public policy considerations.

> To hold that public policy precludes such a suit as that initiated by the Hunters would, they say, place this Court astride a 'very unruly horse' that would carry us astray. We do not, however, perceive 'public policy' to be a mustang, running wild and unbridled. (p. 684)

The court felt teachers would understand the precariousness of their position in making sensitive judgment calls if the court allowed cases of instructional malpractice. According to this court, to allow such litigation would place all educators under judicial scrutiny for day-to-day activities.

Legal principles and/or concepts. The justices noted similar arguments as those which surfaced in the previous instructional malpractice cases. They did, however, make specific reference to the quantity of litigation which might result. The court concluded that claims of this nature might result in charges the teacher did not spend sufficient time with a student. If the courts are to consider an individualized program in regular school similar to the IEP in special education, then educators may be responsible for extensive documentation, i.e., indicating the amount of time spent with each child. In addition, educators would face a dilemma in promoting children. Educators could be asked to justify not passing a child, and at the same time, justify passing a child in fear of potential litigation. This defense by the teacher would have to satisfy the judicial process, not merely their direct supervisors (administration).

The court refused, in Hunter, to create a new tort of educational malpractice and instead deferred to Peter W. and other instructional malpractice cases. Again the court confirmed that public policy barred an action for instructional malpractice. The court's major justification is as follows, "The field of education is simply too fraught with unanswered questions for the courts to constitute themselves as the proper forum for resolution of those questions" (p. 685).

Snow v. State

Background. The case of Donald Snow is usually included in files concerning medical malpractice. However, the issue of whether this should be considered a case of medical or instructional malpractice is a part of the court record. This decision also demonstrates how a case of instructional malpractice which was debated in the court record can be construed as medical malpractice. Snow also serves as another example of problems with malpractice evaluations, i.e., misdiagnosis.

The Court of Claims in New York found the State guilty of medical malpractice for failing to evaluate a deaf child properly. The child was not diagnosed as deaf and instead evaluated in 1965 as retarded. He remained in institutions with this label until December of 1974. Although the plaintiffs characterized the negligence as medical malpractice, the defendants claimed they were immune from misdiagnosis

under previous case law relating to educational malpractice. The unsuccessful outcomes of educational malpractice cases as exemplified by the defendants attempted to change the charges against them from medical to educational malpractice.

Remedies petitioned. The original suit requested damages of $4,000,000.00 for a series of allegations summarized as follows:

1. pain and suffering. both mental and physical. while in confinement:
2. violation of civil rights for the inappropriate admission:
3. damage in the normal learning process due to the loss of contact with society: and
4. breach of contract.

An award was originally granted for $2.500,000.00. This amount was reduced by the Supreme Court of New York to $1,500,000.00. No requests for remedial assistance in educational training were granted.

Arguments presented, denied. and/or sustained. The state focused its defense on the position that the consideration of a claim of medical malpractice is inappropriate since the defendants are actually attempting to second guess the professional judgments of staff. The court concluded this type of allegation is non-actionable. The defendants specifically noted Hoffman and Donohue. Although the plaintiffs contended there should have been more frequent

evaluations, the defendants countered that such action was not merited. They stated that the evaluation of the student in 1971 indicated an I.Q. of 57. This significantly low score left educators with the opinion that no further testing was needed. As a result of these assessments, the state asserts that even if the staff erred in determining the program for the plaintiff, the evaluation was a professional judgment which is not cognizable in a court of law consistent with other decisions of instructional malpractice.

The court did not agree with the defendants claim that this was an issue involving the questioning of professional judgment and, therefore, a charge of educational malpractice. The court concluded that even if there were errors in professional judgment, the accusations by the plaintiffs are not based on intellectual reasoning in terms of misfeasance or nonfeasance. Other arguments presented by the attorneys in this case are not germane to this study as they substantiated claims of medical malpractice.

Educator actions cited. The actions cited are similar to the problems encountered in Hoffman. Evaluation, and particularly subsequent re-evaluation, are at issue and precipitate litigation based on improper conduct. In this case, and in Hoffman, the potential educators' action which places them in the most vulnerable position for charges of instructional malpractice is the failure to evaluate

periodically. This type of evaluation would circumvent the misdiagnosis and provide a means to substantiate claims of the intellectual or emotional status of the individual. Proper evaluations, on a continuing basis, would prevent these charges of inappropriate programmatic needs.

Legal principles and/or concepts. The legal principles upon which the court based its determination of whether this was a subject of medical or instructional malpractice may have significant value in future litigation. The part of this claim which appears to be educational malpractice is the failure of the agency to re-evaluate the student. The court stated that this was critical since the isolation of an individual from "normal" society can have severe consequences. In schools, the concept of mainstreaming has been well documented to be in the best interest of a student with learning disabilities.

When arguments focus on treatment rather than program, the issue is medical and not educational. The court concluded the following on the debate between classifying such a claim properly in negligence tort action, "It is clear to the Court that the malpractice, which was committed was not one of educational malpractice" (p. 961). The critical criteria in this determination were the nature of the school and the treatment. The school is more like a hospital than a state run school. The treatment given is continuous, rather than in seminar and classroom settings. If this same

set of facts occurred in the public school system of New York, the results might have been quite different. As instructional malpractice would have provided an umbrella of protection.

Campbell v. Talledega County Board of Education

Background. Often cases alleging instructional malpractice involve P.L. 94-142, the Education for All Handicapped Children Act. Hoffman v. Board of Education of New York was not tried under this Act: Campbell was a case which is tried under provisions of P.L. 94-142. The process, which sets standards of P.L. 94-142, is the focus of this litigation. The case of Campbell v. Talledega County Board of Education centers around the phrase "appropriate education" as established by P.L. 94-142.

A mentally retarded 18-year-old boy alleged a violation of his right to an appropriate education under the Act. The plaintiffs charged the school did not place the student in meaningful contact with non-handicapped students to the maximum extent possible (mainstreaming). The school made limited attempts to test the student and was unable to obtain a measurable response. Although his chronological age was eighteen, his mental age was between two and three years. The school notified the parents they could only provide a homebound program consisting of about an hour of instruction daily. When the parents rejected this and the school administered the Stanford Binet I.Q. test, they did

not find any substantial differences in their conclusions. The court found the program offered by the school lacking in appropriateness and thus not in compliance with the Education for All Handicapped Children Act. One of the issues involved was that of his ability to take care of himself. An important aspect of the federal program was the emphasis regarding 'independent learning.'

Remedies petitioned. The plaintiffs asked the student be compensated for past negligence, including monetary damages, remedial instruction, and attorneys' fees. The court concluded it could not order compensation for past negligence. Future educational programs and remediation were ordered as follows.

1. The individualized program must be readjusted to focus on the requisition of functional skills.
2. The program must include instruction in daily living activities.
3. The instruction must include vocational activities.
4. The program must comprise of social and community adjustment activities.
5. The individualized educational program (IEP) must include instruction leading to the development of non-verbal communication skills.

This educational program must also encompass the entire school year, including summer sessions. The court in Campbell became more directly involved in the curriculum of the individual student.

In actual monetary awards, the district was directed to pay the plaintiff's attorneys' fees, amounting to $18,000.00 plus $235.18 for phone calls. In addition to these charges, the district was responsible for their own attorneys' fees, administrative time involved in processing the litigation, and the expensive budgetary allotment in implementing court ordered programs. This type of liability can greatly impact programs of smaller school districts.

Arguments presented, denied, and/or sustained. Arguments for the plaintiffs in this case centered around effects of not placing the student with "regular" children in accordance to a comprehensive Individualized Educational Program (IEP). The IEP the school chose to use, in this situation, allegedly failed to teach him functional and communicative skills which might increase his independence. The plaintiff's attorneys brought in witnesses from private evaluation services. Expert witnesses contended the student was capable of functioning at higher levels than he exhibited under his current IEP. Experts testified he could have been placed in a non-handicapped, lesser restrictive, educational environment. Allegations were made that the separation from regular classroom activities deprived him of an essential role model.

Since the school district had chosen to receive federal funds, the plaintiffs stated they must adhere to conditions accompanying a federal grant. This argument makes it

possible for districts to avoid such litigation by not receiving federal monies, and, as a result, avoiding federal regulations.

In Peter W., Hoffman, and Donohue, the court completely withdrew from becoming involved in the educational decision, particularly those curricular in nature, with respect to individual students. The only hint of a court willing to address such issues was in the dissent by Justice Suozzi (Donohue). However, the court in Campbell was willing to rule on the applicability of law in the curriculum. The court admitted that it was unfamiliar with the field, but stated that reliance would be placed on the testimony of experts. In addition, the standard of care requiring mainstreaming to the "maximum extent possible" is defined by P.L. 94-142. They concluded the plaintiff was not placed into contact with non-handicapped students to the maximum extent possible, which would be consistent with an appropriate education as mandated by the Education for All Handicapped Children Act.

Educator actions cited. The actions cited which may assist educators in avoiding litigation, in this case were partially successful. Many practices were cited by the plaintiffs, and the combination of them led to a partial verdict against the defendant school district.

The first action cited related to the purpose (goals) of the designated instructional program. The plaintiffs

alleged the program did not teach even minimal survival skills to the plaintiff, as required under federal regulations governing P.L. 94-142. Borrowing rationale from previous cases on instructional malpractice, the plaintiff would have to show that the district willfully neglected a legal duty of care. However, the court concluded in favor of Campbell, stating that the program did not have to be an impediment to progress, but rather must impart functional and communicative skills which might increase the student's independence.

In conjunction with the issue of the program is student contact time and the type of instruction provided by educators. The court determined this verdict resulted from educators developing programs simply to take up time instead of concentrating on a meaningful set of objectives to advance the student's learning capacity.

The plaintiff cited that teachers were not properly trained in techniques fundamental to a comprehensive program. Training, as a prerequisite for teaching specific courses, was not addressed by the courts and received the same judicial recognition of non-interference as previous instructional malpractice cases.

The concept of "separate but equal" surfaced in a different form than was experienced in Brown v. Board of Education of Topeka (1954). Rather than applying this in the racial context, the plaintiffs contended that separate classroom facilities were not equal, and the student should

be mainstreamed with regular classroom activities. The court noted for future cases that schools providing separate facilities must ensure their equity in relation to all other classroom facilities. The student in such a program would have to enjoy similar benefits to a traditional classroom experience.

Legal principles and/or concepts. General legal concepts were discussed in describing the status of the Education for All Handicapped Children Act. Congress did not attempt to provide detailed substantive content to the concept of an appropriate education. The purpose of the act was to engage an individualized program centered on the child. In so doing, the law required these children be placed in regular classroom activities, where possible, to ensure they have role models other than similarly handicapped students. The educational system is required to provide these objectives when they receive federal funds and are, as a result, bound by the prescribed philosophy and intent of the Act.

D.S.W. v. Fairbanks North Star Borough School District

Background. The question in this case is whether a school district should be found liable for negligent classification, placement, or teaching of a student. The lower courts found against such action, and the Supreme Court of Alaska affirmed their position.

The plaintiff was a 17 year old student suffering from dyslexia. He had to repeat the sixth grade, and it was not until the last day of the school year that he was diagnosed as dyslexic. After this time, the district placed him in special education classes designed to deal with this problem. The courses were subsequently terminated as a result of budget cuts. A second plaintiff for which this case is named, D.S.W., suffered the same problem and was not properly diagnosed until the fifth grade. This program was also dropped, and the students found themselves without assistance for their learning disability. As a result, the students were allegedly denied an appropriate education under the provisions of P.L. 94-142.

The court in this case found it was preferable to exhaust internal remedies as opposed to using the mechanisms of tort action for damages. The problem with court action is that administrative intervention is usually much quicker and more responsive to the problem. The court also concluded monetary damages were a poor substitute for proper education and evaluation.

Remedies petitioned. The student alleges the following losses should have been corrected since they were a direct result of the damage caused by the negligent acts of the school district including loss of:

1. education,
2. opportunity for employment,

3. opportunity to attend college or post high school studies,
4. income, and
5. income earning ability.

In addition, the plaintiff requested monetary damages for mental anguish. The remedial portion of the suit was dismissed by the court, stating that parents could go to a hearings officer as an internal remedy if they felt there was a problem with a child's placement or program. The court also directly dismissed the possibility of monetary damages by stating that they are a "poor and only tenuously related substitute for proper education." (p. 557)

Arguments presented, denied, and/or sustained. Arguments presented by the plaintiffs were a listing of negligent actions. These "failures to do . . ." included the failure to evaluate properly and place the child in a program designed to address his disability. A unique argument made by the plaintiffs was the failure to continue a prescribed program once a deficiency was found. This failure to compensate his learning disability placed him in a position of being unable to comprehend the materials presented in the classroom.

Educators actions cited. The actions of educators cited in this case involved the school system as opposed to individual educators. It placed the board of education in a

position of answering the claims of lack of programs to meet special education needs.

Legal principles and/or concepts. This case relied exclusively on the following cases regarding instructional malpractice:

1. Peter W. v. San Francisco Unified School District,
2. Donohue v. Copiague Union Free School District,
3. Smith v. Alameda County Social Services.

In citing Peter W., the court relied on arguments which demonstrated there is no workable standard of care rule the court can apply for instructional malpractice. The decision also suggested much burdensome and expensive litigation would result from malpractice suits in the schools. From Donohue, the court chose the acknowledgment that judicial recognition of instructional malpractice suits would be a blatant infringement on the educational system. Hoffman was applied to establish that improper evaluation does not necessarily lead to charges of negligence. The court emphasized the conclusions founded in both Peter W. and Smith v. Alameda County Social Services that the court simply cannot deal with issues of instructional malpractice.

> The level of success which might have been achieved had the mistakes not been made will, we believe, be necessarily incapable of assessment, rendering legal cause an imponderable which is beyond the ability of courts to deal with in a reasoned way. (p. 556)

D.S.W. did not set any new ground in establishment of immunity for instructional malpractice litigation. This case did confirm and accept the principles established in previous instructional malpractice cases. D.S.W. also reinforced the concept that misfeasance or nonfeasance do not necessarily result in a finding of instructional malpractice (negligence) against a school district even under provisions of P.L. 94-142. This concept was originally found in the decision of Hoffman.

Loughran v. Flanders

Background. The plaintiff was a fifteen-year-old student of the Windsor Locks Public School System. The parents were attempting to gain a court order for the school district to implement an individualized program for their child under the provisions of P. L. 94-142. In this case, the board of education members were sued both individually and collectively. Since the first grade, the student was known to be suffering from learning disabilities which were not diagnosed until later in her school career. The plaintiffs alleged the re-evaluation of this student was deficient in that the school district failed to evaluate the entire problem and implement a comprehensive program. As a result, the plaintiffs charged the student could not function normally in the educational setting and would suffer lifelong harm.

The school countered with the argument that it did not have the educational or economic resources to deal fully

with the student's disabilities. School districts are often placed in a position of cutting desired educational programs as a result of financial problems (usually as a result of millage failures). As a result, the student asked for monetary damages for this long term harm inflicted as a result of violation of the Education for All Handicapped Children Act.

Remedies petitioned. The attorneys requested monetary compensation in the amount of $1,000,000.00. The relief was requested for the alleged negligence in failing to comply with the Education for All Handicapped Children Act. The basis for the award was the long term effects suffered as a result of the district's failure to implement an appropriate individualized program. According to the court, the victim was essentially alleging he was the victim of instructional malpractice. The court relied on the decisions of Peter W., Hoffman, and Donohue in formulating their decision.

Arguments presented, denied, and/or sustained. Since the case was originally granted by a lower court, the defendant school district presented arguments in this report in an attempt to convince the court to vacate the original award. The first counter claim by the school district was that the provisions of the Education for All Handicapped Children Act did not provide for monetary damage remedies. The provisions of the act provide for internal remedies in the form of hearings to determine the appropriateness of a

student's program. The second counter claim stated that because these remedies were provided, the plaintiff failed to exhaust internal remedies before proceeding through the judicial system. The third argument by the district was that the claim for damage was barred by governmental immunity.

The court negated the question of governmental immunity and assumed the case was a valid question of law consistent with prior decisions. In determining whether damages should be awarded in a case which cites violation in the Education for All Handicapped Children Act, they referred to conclusions from Court v. Ash, 422 U.S. 66. Four relevant factors were used to determine if a statute implied damage awards.

1. Is the plaintiff one for whom the status was intended?
2. Was there any intent by the legislature to create the possibility of monetary damage awards?
3. Is it consistent with the act to imply such monetary standards for settlement?
4. Are there other possible laws within the state which would allow for monetary damage settlements?

The court did not feel that any of these were applicable in this case and, therefore, did not justify an award of monetary damages.

The final determination of the court in negating this suit related to the intent of P.L. 94-142 litigation. Although the plaintiffs did not specifically state they were alleging educational malpractice in the suit, they, in fact,

were charging claims of instructional malpractice. In accordance with such a charge, the case was dismissed using the same considerations as in Hoffman, Peter W., and Donohue.

Educator actions cited. Most prior decisions on instructional malpractice state a cause of action for improper evaluation procedures. These charges were also present in Loughran. In addition to charges of misdiagnosis or maldiagnosis, is the issue of an inappropriate educational program as stated in the Education of All Handicapped Children Act. Evaluations by administrators and teachers become major issues in instructional malpractice suits, particularly when there is a lack of testing.

Unique to this case was the counter argument that there was not adequate funding in the Windsor Lock School District to comply with the provisions of the federal act. The court did not address this problem and did not consider lack of funds as a reason for not offering a specific program. The court avoided developing any conclusions on the issues of lack of funding. Whatever monies are available for curriculum, choices are made on the basis of subjective priorities. Therefore, the school district's argument of lack of funds was not considered an adequate defense by the court. Funding might become the focus of litigation regarding instructional malpractice in the future.

Legal principles and concepts. The court noted federal legislation in the field of special education is designed to provide two distinct functions. First, is to assist the states in providing an appropriate education for each handicapped child. The word "each" emphasizes individualized attention required by the act. This can become difficult for a school district with limited resources and personnel. Second, individualized programs are designed to serve as a catalyst by encouraging innovation. Successful instructional malpractice suits could discourage this aspect of the act.

The court dismissed the possibility of monetary awards under this act and verbalized the entire history of special education legislation and concluded the following:

> The legislative histories of these Acts share a second common trait: each is devoid of even the slightest suggestion that Congress intended for it to serve as a vehicle through which to initiate a private cause of action for damages. (p. 114)

Helm v. Professional Children's School

Background. The parents of Dean Helm, a 14 year old student, brought suit charging educational malpractice on the Professional Children's Private School. The facts of the specific allegations are not reported: however, the issue addressed is whether a cause of action for instructional malpractice can be brought against a private school. The Supreme Court of New York concluded that, as a matter of

public policy, a private school cannot be held liable for claims of instructional malpractice.

Remedies petitioned. (Not Reported)

Arguments presented, denied, and/or sustained. The attorneys maintained that this case is distinguishable from Hoffman and Donohue, because the case is against a private school. The rationale for the argument is that a contract theory is present between the private school and the guardians paying a tuition fee. The concept of a legal contract theory of recovery, which at first glance seems applicable to private schools, has been denied as a possibility by this decision.

Educator actions cited. (Not Reported)

Legal principles and concepts. The basis for the opinion was a reference to a concurring opinion by Judge Wachtler in Donohue. The judge in Donohue stated that to prove an educator responsible for the learning deficiencies of students would be practically impossible. He stated, "Factors such as the student's attitude, motivation, temperament, past experience and home environment . . . " all contribute to the education of a child.

Considering the issues of proximate cause and public policy considerations, the court determined there was no difference between public and private education. They found the arguments which traverse negligence in instructional

malpractice suits for public schools equally applicable to private schools.

Paladina v. Adelphi University

Background. At issue was whether a suit can be initiated against a private elementary school alleging educational malpractice because of a breach of contract. The student contended the school failed to provide a quality education. Although periodic reports were sent to parents describing the student's progress, the student experienced considerable learning problems. The parents sent the student to a private agency for testing and evaluation. The tests indicated he did not possess the necessary educational skills for the fifth grade in which he was enrolled. The school refused to promote him based on these tests, and the parents subsequently enrolled him in a public school.

The court ruled that recovery is not possible against a private school for breach of contract based on instructional malpractice and the failure to provide a quality education. The court held that statements which are made about the quality of education to be provided cannot be considered criteria on which to base a breach of contract charge. Even if these charges were allowed by the courts, they did not find that the facts presented in this case justified a finding against the school.

Remedies petitioned. Remedies petitioned cannot be determined from the report of a specific case. However,

since this is a breach of contract issue, a minimal request would include a refund of costs for tuition.

Arguments presented, denied, and/or sustained. The first argument presented by the student's father was that the school breached its agreement by failing to provide expert teachers, necessary tutorial and supportive skills, and accurate and factual progress reports. These arguments were based on a standard of care which the parents asserted was implied by a contract based on tuition payments. The court focused on standard of care and not on implied contract arguments. The decision implies that the contract provides a duty of care just as state mandated attendance laws impose a duty on schools. However, the criteria for standards of care are equally difficult to determine in public and private schools. Proximate cause remains a non-provable standard for negligence cases in both private and public school settings. The contract signed by the parents does not change these parts (proximate cause and other difficulties of proof) of a negligence tort claim based on instructional malpractice.

The second argument forwarded by the parent was progress reports were misleading and reflected satisfactory progress. This progress was reinforced by the private school's advancement of the student from the first to the fifth grades with other "normally" developing children. As in other instructional malpractice cases, schools are placed

in a position of liability when they pass students without ensuring their academic ability to comprehend material presented at the next grade level.

Educator actions cited. Once again, the issue of advancing a student to the next grade level when he/she is incapable of comprehending the material presented has surfaced. The school asked for summary judgment because of the decisions in Hoffman, Loughran, Hunter, and Donohue. In the original decision, the court granted this request, stating the following, ". . . the established policy of our courts in refusing to entertain lawsuits for educational malpractice did not bar an action in contract nor one based on fraudulent misrepresentation" (p. 870).

Legal principles and/or concepts. A major legal principle was referenced from each of the major cases cited above. These cases provide the basis for this court's reversal of the lower court's decision not to grant summary judgment.

In Hoffman v. Board of Education, the court uniformly refused to consider instructional malpractice based on public policy considerations. The court referenced the following cases in supporting the view of immunity from academic negligence:

1. Loughran v. Flanders
2. D.S.W. v. Fairbanks No. Star Bor. Sch. Dist.

3. Hunter v. Board of Educ. of Montgomery County

4. Helm v. Professional Children's School

From Loughran v. Flanders, the court selected the argument which stated a damages claim which centered on the inappropriateness of judicial review in question of methodology. In referencing Hunter v. Board of Educ. of Montgomery County, the court pointed to the effect of considering instructional malpractice suits. This rationale may lead to the courts' involvement in day-to-day educational matters. The courts' reluctance to become involved is reflected as follows: "This responsibility we are loathe to impose on our courts." (p. 870) Finally, in referencing Donohue v. Copiague Union Free School District, the court cited the argument that the court may not get involved in decisions of educational deficiency. The court related all arguments rejecting court interference in the educational process from public school decisions to private schools. "In our view, the soundness of this policy of noninterference is equally applicable when the action is brought against a private educational institution and is formulated in contract" (p. 871-872). The court reiterated the conclusion that if the educational system is not meeting its obligations, the remedies for a solution to the problem are internal. The court's position in this case, of attempting to invoke instructional malpractice litigation on a private school using the argument of breach of contract, is as follows:

> The educational malpractice cases serve to define the function and role of the judiciary in relation to education institutions generally. Simply put, the courts should refrain from becoming overseers of the learning process. (p. 872)

This court did, however, state that the schools may be liable if a contract with a private school or agency (see Torres v. Little Flower) were to provide a specific objective measure of instruction, i.e., a certain number of hours. The decision also stated that any fraudulent misrepresentation has no place in the educational process. The burden to prove such negligence is, however, an immense task for the plaintiff.

Torres v. Little Flower Children's Services

Background. Little Flower was a case in which the plaintiff sued the social services agency where he was a foster child. The legal custodians of this child brought a charge of educational malpractice against the system. The Little Flower Children's Services assumed care for the defendant after his mother abandoned him. They assumed a contractual arrangement based on 42 USC 1983 Special Education Law to provide religious, educational, and vocational training. The child spoke and understood little English. A few years after his enrollment, he was found to be borderline in terms of retardation. The teachers assigned him extremely small amounts of work and basically allowed him to sit in the back of the "regular" classroom and proceed at his own pace. Eight years after he was enrolled in the

program, a reading specialist tested him and found that he had an extremely complex reading disability. His learning disability was a result of severe reading problems. Since the result of such practices left him functionally illiterate, he brought suit (alleging educational malpractice) on the Board of Education, the school principal, and other associated individuals, alleging educational malpractice.

The social services agency in which the plaintiff was placed, according to the courts, was barred from educational malpractice suits, as are school systems. This immunity from prosecution in terms of instructional malpractice was again described as a result of public policy considerations. The plaintiffs in this case stated there were differences between Hoffman and Donohue and this case, in that Hoffman and Donohue involved public schools. However, the court concluded the same policy considerations barred recovery.

Remedies petitioned. Although the court did not specifically mention any actual monetary request for remuneration of damages, the summary referred to a case which appropriated a substantial award. In Snow v. State of New York, 120 N.E. 639, the court ordered recovery for the plaintiff of $1,500,000.00. This award was a result of a misdiagnosis from a similar psychiatric care center. In this particular case, the court ruled the misdiagnosis was medical rather than educational malpractice. The extent to which the

plaintiff in Torres desired compensation is indicated by this reference to Snow.

Arguments presented, denied, and/or sustained. The first argument presented by the student attempts to distinguish the instant case from those of previous instructional malpractice decisions, i.e., Hoffman, Peter W., and Donohue. The student's representatives contended those cases were directed against educators. This case charged malpractice against those who were responsible for his care as legal guardians. Since these individuals were not in a position as teachers in a school system, they cannot be immune from prosecution under the guise of educational activities. In addition, the plaintiffs were not asking the courts to question or interfere with different educational approaches, which are activities clearly isolated by Peter W., but rather to enforce duties prescribed by state statutes, specifically those rules promulgated by the Social Services Law. The court denied this request and concluded that these were basically charges of instructional malpractice and not appropriate for litigation against an educational agency. The court reached this verdict because the issue was not which agency or individual was the defendant, but rather the nature of the malpractice charge.

The same type of rationale was used to overcome the plaintiffs charges that this was not one of the issues of instructional malpractice, but rather a breach of contract

with the social services agency. Even though there was a contractual relationship in this situation, the court determined that policy arguments are not negated which prevent judicial interference in educational programs. The court did, however, note a different conclusion could be reached if specific services were called for in the contractual arrangement. This conclusion might also be difficult to overcome because of the outcomes of Hoffman, where specific evaluative requirements were not followed, and yet the court refused to consider the prospect of instructional malpractice.

The student contended he did not receive due process requirements under the Education for all Handicapped Children Act. As a result, he did not receive an appropriate education. This was not allowed by the court because of the way in which this particular complaint was pleaded. Harm was not demonstrated as a result of the lack of any specific program. The court concluded that the contention of not receiving an appropriate education was without reference to specific programs denied and, therefore, depends on the decisions of educators in respect to individual students.

Educator actions cited. Often students are left to work individually for a variety of reasons. The plaintiffs charged the teachers effectually abandoned the student by allowing him to sit in the back of class without participating in "regular" instruction. If a student is given

independent programs, the court expects a system of evaluation and teacher assistance. Providing for extensive individualized instruction may require educators to document objectives carefully.

As in Hoffman, the student charged the school had failed to assess and evaluate his learning disability properly. The sole treatment offered was to attempt to mainstream, although the allegations contend this was minimal, and no effort was implemented to deal with his severe reading problem. Without treating the reading disability properly, the student was placed in a position of not comprehending the material presented in class. The reading problems were present because the student could not adequately understand the English language. The plaintiff also noted the school's inability to implement a program which would resolve this disability. The plaintiffs presented material to show the I.Q. scores achieved were inconsistent with a finding of mental retardation. After finally recognizing his language and resulting reading deficiencies, the school did nothing during the remaining four years. The Little Flower agency, as his guardian, did nothing to put pressure on the schools, even though they received regular reports of his progress.

Legal principles and/or concepts. Although the court relied on previous instructional malpractice decisions, particularly Hoffman and Donohue, the plaintiff asserted this

case was unique. He relied on two basic arguments to demonstrate the uniqueness of this case. The first was to contend the school board was responsible to ensure an adequate program. To demonstrate this statutory obligation, they noted that the social services law provided for the agency to arrange for the child to receive a "suitable education." In addition, they had the parental right to seek administrative review of decisions by the school system.

Secondly, the defendants attempted to demonstrate Little Flower breached its contract to provide an adequate education. This argument, if granted by the courts, would have opened the door for potentially successful litigation against school districts for instructional malpractice based on a contract theory of responsibility. The court dismissed these allegations on the basis that a contract theory did not alter the intent of the litigation.

The above determination by the court also dismissed the attempt to construe this litigation as one of medical malpractice. The court relied on Snow v. State of New York by transferring educational malpractice allegations to those of medical malpractice and awarded the plaintiff complainant $1,500,000 for its failure to diagnose an individual properly as retarded.

The court did state that Little Flower may have been argued in the wrong manner. At the conclusion of its decision, the court stated at best this could be construed to be a case of custodial malpractice; however, the arguments

presented by the attorneys were founded on issues of educational policy, and, therefore, reverted to a charge of instructional malpractice. As a result, the court would not consider such a charge based on the public policy arguments as presented in Hoffman and Donohue.

Debra P. v. D. Turlington

Background. Numerous complainants sued the Commissioner of Education, Ralph D. Turlington, several politicians, the School Board of Hillsborough County Florida (naming them individually), and the Superintendent of Schools for the district, Raymond O. Shelton. The suit alleged that the Florida Functional Literacy Exam (SSAT II) was illegal on both a constitutional and statutorial basis. This case was chosen to be included in the primary search as being representative of the problems which might occur in administering examinations to avoid charges of instructional malpractice.

The Florida school system developed a history of segregation and dealt with the problems in a wide variety of methods, from court ordered programs to internal policies and procedures. Three arguments from the case are germane to this study. The first charge by the plaintiffs was that the test was discriminatory because it was racially biased. This argument contended that withholding a diploma would violate equal protection as punishing black students for past occurrences of institutional occurrence. The second claim was that the test lacked construct validity and was

not a fair test. This argument was based on the assertion that students were not adequately prepared for the examination and, as a result, experienced a denial of equal protection and due process. The third claim was that the school system, educators, and state did not give adequate notice of the requirements for passage of the test, and the students did not have adequate time to prepare for the examination. The plaintiffs stated the effect of not receiving a high school diploma would include the probability of menial employment (reverse argument of Peter W. with the same results). Applying such a standard for graduation was alleged to produce injury for future educational goals in that admission to some universities is predicated upon receipt of a high school diploma. In addition, the stigma which resulted from the failure of this competency test was significant, as students who have failed are often labeled as "functionally illiterate."

The State of Florida advanced the decision that these types of tests may alleviate allegations of instructional malpractice, even though the validity, appropriateness, and completeness cannot be assured. They contended that improving tests and eventually confirming the reliability was within the providence of the school system, since they were taking a first step in the process of improving education.

The court agreed this was a first step (and an appropriate step) in correcting educational programmatic deficiencies. However, since the educational atmosphere prior

to the test was not conducive to achieving its objective, the test must be delayed. The district court decision so enjoined the school district from implementing the examination for a period of four years.

Remedies petitioned. Two primary remedies, important to this study, were requested by the plaintiffs. The first was to declare the tests unconstitutional because they did not give the students adequate time to prepare. The court rejected this argument, but granted part of the request in the form of a delay. The second remedy was to ask the state to cease and desist from preparing and administering such an exam. The court rejected this request, but, did grant a delay.

Arguments presented, denied, and/or sustained. Since this case covered a number of aspects concerning the appropriateness of competency testing as a requirement for graduation, the major arguments presented are listed as follows.

1. The test was inherently discriminatory.
2. The test did not have adequate content and construct validity.
3. The test was racially biased.
4. There was inadequate notice prior to sanctioning the objectives.
5. The use of the test to classify for remediation was unconstitutional.
6. The passage of the test was not required for private schools in Florida.

7. The timing of the test is important as these students were suddenly presumed to be prepared for the test, but their schools may or may not have had instructional objectives consistent with the exam.

Although the results of these arguments were analyzed in the preceding section, it is important to note the implications of arguments sustained in litigation of instructional malpractice. The court considers the judiciary an important forum to consider a decision to implement a specific examination which determines competency for graduation from high school. Although a competency exam is not inherently unconstitutional, construct validity of examinations (for constitutionality) is open to judicial review. This decision presents an exception to the conclusions in other instructional malpractice which renders the judiciary a role of non-interference in educational matters and decision making.

The original decisions of the district court were upheld by the Court of Appeals, but remanded for further evidence on two issues. First, the state had to prove the validity of the test in terms of materials taught during the school year. Second, the state had to show that the failure rate among black student was not due to effects of past segregation. Generally, the federal appeals court upheld the appropriateness of high-school graduation exams.

Educator actions cited. The actions of educators in this case are a major contribution towards understanding practices which lead to instructional malpractice

litigation. The court begins by ascertaining the state has an interest in assuring that all of its students receive instruction in basic practical application skills. The court's decision in this case indicates that a competency test to determine skill level as a requirement for graduation is an appropriate step in the direction of programmatic improvement. The decision advances this argument by stating that educators must assure all students receive instruction in basic practical application skills.

Practices of educators in the testing arena are specifically addressed in this case. Tests may be used without fear of the constitutionality of "tests for competency." Administrative agencies may decide to implement selective tests in certain school districts without fear of charges that students were not treated equally under the law. This district court stated the schools could not be expected to cure the problems of education in one clean sweep, that a piecemeal implementation was acceptable.

The educational environment which is antecedent to the examination must be conducive to the objectives of a competency examination. When tests are implemented, educators must give adequate notice and proper preparation. The teaching staff must be advised and trained to promote an atmosphere of instruction relevant to the impending test. The test must also be analyzed to determine content validity. The court's willingness to consider all of these

factors indicates validity and bias must be considered in test implementation to avoid litigation.

Legal principles and/or concepts. In this decision, the court discussed the concept of illiteracy from a legal perspective. What is functionally literate to one individual may not be functionally literate to another, and this problem in definition confuses the development of assessment instruments. Therefore, the definition of functional illiteracy must be considered and justified when developing a competency exam. Once this definition is determined, the court must ensure that the objectives are clearly instructed in the educational setting to assure proper preparation. In assessing proper instruction of objectives, the court stated it must inquire into the instruction prior to the act of implementing the examination.

A careful analysis of all aspects of test implementation, including proper notification (timely notification), content validity and communication of objectives to students and teachers are important parts of competency testing. Analyzing these potential foundations might prevent charges of instructional malpractice due to inadequate procedures in test implementation.

Summary

The data collected and reported in this chapter establish the practices and trends which are referred to in the research question. By using consistent criteria throughout

the analysis, conclusions supported by judicial decree result. Trends in litigation of instructional malpractice are based on the concepts developed from the primary cases in this chapter as the leading body of litigation.

Future case decisions can be evaluated using the same criteria found in this chapter. The research provides a method of comparing specific aspects of instructional malpractice litigation for use by educators in developing the curriculum.

CHAPTER V

CONCLUSIONS AND RECOMMENDATIONS

Introduction

The purpose of this study has been to analyze court decisions to determine issues or practices of educators which lead to instructional malpractice litigation. The study focused on cases which were directed to charges of inappropriate instruction under the broad subject of educational malpractice.

Of the more than 84 cases which were analyzed in various court decisions, 12 were selected as primary to the central research question as set forth in Chapter I. The research was considered in terms of 10 subsidiary research questions.

Method of Research

A documentary case study method was applied to develop a matrix. The X axis represented the 12 primary cases. The Y axis represented the criteria for analysis adapted from those research questions enumerated in Chapter I.

Results of the case analyses (X axis) are reported in Chapter IV. The conclusions represented by the Y axis provide the supporting evidence for the conclusions and recommendations reported in this chapter.

Research Questions

The research questions (adapted from Chapter I), addressed in this chapter, are as follows.

1. What general principles have emerged in instructional malpractice suits?
2. On the basis of the analysis of legal cases, is it possible to define conditions, practices, or behaviors which might have high potential for resulting in instructional malpractice suits?
3. What actions or failures to act on the part of administrators and teachers have led to instructional malpractice suits?
4. Is it possible from the review of cases to define concepts and legal principles which teachers and administrators should be aware of to deal more effectively with the issues of instructional malpractice?
5. What conditions over which teachers and administrators have some control tend to place them in positions of greater vulnerability?
6. To what extent is competency testing creating a potential liability for school districts?
7. On the basis of these trends, what future developments are likely?

Conclusions

The central focus of this study is on "issues and practices" which lead to instructional malpractice litigation. Results of the research findings are found in answers to each of the subsidiary questions as proposed in Chapter I. Determining these issues and practices will assist in preventing unnecessary litigation, which has become a problem in many educational systems.

The negative effects on educational systems are not only in terms of time and dollars but also in questioning an individual's professional integrity and competency. For example, in Torres v. Little Flower (1984) and Hunter (1981), individuals are named in the lawsuit. This act, by itself, may create a negative professional reputation for the individual and, subsequently, may affect teaching performance or student receptivity.

To substantiate the cost of instructional malpractice to school districts, 28 letters were sent out to superintendants who experienced cases directly, or indirectly, involved with instructional malpractice. Eleven school districts responded to a letter (see Appendix F) which asked the following questions.

1. What costs were involved, including attorneys' fees, administrative time, etc.?
2. What effects did the decision have on your school district?
3. Has any other litigation (or other official action) developed from this case?

Responses to these letters confirmed the negative ramifications which have resulted from instructional malpractice litigation.

The first concern of these respondents was of cost and administrative time. Only partial costs were listed as most respondees indicated that it was impossible to account for all administrative time involved. The following quotations

from superintendents (or school officials) to the letters reflect these costs to selected school districts.

> . . . the school district spent $5,329.70 in defending itself in legal fees and $243.45 in printing legal briefs . . . . There was considerable administrative time used in gathering materials for the defense. (Scheelhaase, 1974)

> Considerable administrative time was spent preparing for the case as well as time spent in the three day hearing. (Lang, 1982)

> As of FY 1981, Montgomery County Public Schools expended $11,774.92 . . . . I would indicate that it is my understanding that there are still continuing legal costs involved in this matter. (Hunter, 1981)

> The costs involved in defending . . . were approximately $18,000 to this point . . . . It cost us $18,000.00 to explain to them they were suing the wrong people. (Crawford, 1983)

Responses which vividly demonstrate the problems with litigation for schools is best described by an administrator in the Hazelwood School District in Florissant, Missouri. He stated that, in the case of Kuhlmeier v. Hazelwood School District (1985), "dozens, possibly hundreds of hours of time" were spent on defending the case. According to this administrator, "It simply meant that other (educational) responsibilities had to be set aside." This is the type of litigation that educators must attempt to avoid. An administrator in the Woodbury School District in Iowa stated the problem of deferring educational funds for litigation as follows. "There is no question that both cases had an impact on the school. Dollars were spent and valuable time lost which could have gone to educating children."

Many other effects of instructional malpractice litigation were noted by respondents. In regard to curriculum, one superintendent stated, "It did serve to reinforce our efforts to make certain that everyone is fulfilling their (sic) contractual obligations to board policies and adopted curriculum." In the Scheelhaase case, internal problems with the board of education developed. "The teacher resigned after the case was decided. It did put relative against relative during the litigation (the litigant was a relative of a board member)."

Many of these responses indicate that an educational system should prevent, if possible, such litigation. Determining those issues and practices relied on by courts to consider such lawsuits will assist educators in avoiding the courtroom in favor of the classroom. Although adoption of policies to prevent instructional malpractice litigation may appear a worthwhile endeavor, an overextension of concern for procedures can lead to a conservative curriculum lacking creativity, innovation, and a future-orientation.

General Principles Emerging from Instructional Malpractice Suits

Researched cases from this study demonstrated that many students and parents were concerned with the results of their educational experience upon graduating from high school. In the cases presented in this study, charges of instructional malpractice involved many general principles

which must be considered by administrators and teachers to ensure that such potential for legal actions are minimized. The general principles adopted by courts are the following.

1. A high school diploma will be considered to indicate basic knowledge in reading and writing skills.

2. Competency tests given for the purpose of assessing such knowledge must be fair and equitable with adequate notification for their usage given.

3. Students should be evaluated to periodically assess their capability of comprehending the material presented.

4. Recommendations by school officials for further programmatic action for individual students should be implemented.

5. Areas of the curriculum which pose personal danger should receive adequate instruction prior to conducting such activities.

6. Programs, implemented properly, should be developed to meet the individualized needs of handicapped children.

As demonstrated in Peter W., a student, after passing through grade 12 and receiving a high school diploma, albeit with poor grades, expects to be able to function in society and obtain meaningful employment. If students or parents find their high school diplomas do not reflect such skills, they might return to the courts for remedial education or monetary damages. Schools are often pressured by parents into promoting students from one grade to the next. This action may encourage a student upon graduating to question the schools' reliance on parental desires rather than attained skills in decisions of promotion. Suits of

instructional malpractice contend a high school diploma should be more than a certificate of attendance. Testing competency in areas of expected achievement might be the only course of action available to a school system in preventing instructional malpractice litigation.

General care is expected of all professional staff in dealing with children in schools. However, general care is viewed much differently by the courts than duty of care or standards of care. General care was assumed and specifically addressed in Peter W. and Donohue v. Copiague. No case reflected standards which the judiciary found to be applicable to all educators. No workable duty of care was found for educators, and, therefore, a key criterion in cases of negligence is missing. If the courts decide to begin implementing standards of care, educators may lose one of their most important discretionary authorities, i.e., the authority to set their own standards which evolved from concepts of academic freedom. Many states are considering licensure for, and by, the teaching profession. If such legislation results, workable standards of care may be available for the courts to consider in charges of instructional malpractice litigation.

In most of the primary cases, references were made to inadequate notification and communication with parents from educators. Although this may have surfaced in testimony, the courts are unwilling to allow a lack of proper notification or communication to result in instructional

malpractice. In Peter W., the court stated that requirements for informing parents are for maximum progress, not for legal protection. School officials should carefully examine the communications and notification process with parents. Many techniques, i.e., written concurrence of promotion for borderline students and offering opportunities for school visitation and counseling, may prevent instructional malpractice litigation.

General principles in terms of the testing which result from this study include the following.

1. Tests are an appropriate means of evaluation.
2. Tests do not inherently deny equal protection and due process rights of students.
3. Tests must be fair and nondiscriminatory.
4. Adequate notification must be given to ensure an understanding of expectations.
5. Tests are but one method of evaluating students and cannot be expected to cure all educational ills.

In Debra P. v. Turlington, the court responded to charges questioning the constitutionality of testing. Adequate notification was part of this charge. The plaintiffs contended that testing should be declared unconstitutional when students are not given adequate time to prepare. To avoid such litigation, schools must respond to the entire educational climate regarding procedures and mechanics of testing procedures. Students must be made aware of expectations so they can adequately prepare for competency examinations. Notification in writing to both students and parents

may assist in avoiding litigation concerning these examinations. When a student's diploma is withheld on the basis of a competency test, educators can assume that various avenues of appeal might be pursued.

Educators must assess the fairness of tests in terms of minority students. As a response to litigation concerning the discriminatory aspects of examinations in instructional malpractice litigation. The litigation on instructional malpractice reflected a concern and focus on results of tests for different racial groupings. In evaluating tests, educators should analyze test results demographically to ensure that they are not biased for any specific subgrouping of students.

Evaluation procedures for competency should include a broad comprehensive program. The cases analyzed did not provide a conclusion that would ensure success for school districts in defending all instructional malpractice litigation. Rather, the courts stated that testing is but one step in improving the quality of education. However, based on specific charges of this type, educators should consider developing a comprehensive program of evaluation of which testing is only one part. Reliance on many different assessment techniques will diminish the overall effect of errors in any one testing procedure.

Many instructional malpractice suits have evolved regarding special education. Although the cases analyzed did not produce any major decisions against a school

district, courts appear more willing to consider instructional malpractice charges in special education. The Education for All Handicapped Children Act (P.L. 94-142) provides a process to determine general standards. However, successful litigation has not developed because courts defer to the Instructional Educational Program (IEP) concept of determining education needs. Once the IEP is established for each student, standards are available for the court to analyze. In cases where guardians believed the IEP was violated, courts deferred to internal remedies of the appeal process. As a result, the appeal process should be comprehensive and compete to ensure adequate due process. A well-developed program will prevent courts from feeling the need to determine and become involved in educational methodology.

Another principle which developed from cases involving auxiliary services is that employees from other agencies might also be held responsible for faulty educational practices. When the school system contracts with other agencies or services, actions of these agencies are subject to litigation. The school system can be named as a co-defendant. Administrators should consider procedures to evaluate the services of private contracting agencies attending to their students.

In defending cases of instructional malpractice, a general principle which evolved was the umbrella of protection offered by public policy considerations. The courts do not want to become involved in these cases because of

aspects of public policy which negate the value (to society) of such litigation. Because of the social utility of this litigation, the inability of schools to bear the financial burden of adverse decisions and determine proximate cause, courts have disallowed allegations of instructional malpractice. Avoiding such litigation by focusing on the issues and trends which lead to instructional malpractice litigation is a means of avoiding the courtroom. This approach is necessary since the courts continue to review charges of instructional malpractice, even though litigation has not been successful. Charges of instructional malpractice are not, at present, dismissed before trial.

Conditions, Practices, Behaviors Frequently Leading to Instructional Malpractice Suits

The most prevalent condition which has led to instructional malpractice suits is the promotion and granting of diplomas to students who do not have the ability to read and write at an appropriate grade level. Rationale for such a charge can be found in Peter W., Donohue, Hoffman, and others. Many schools are attempting to implement competency testing to avoid this occurrence. The major condition which prevails in schools is the nature of the high school diploma. Over a period of years, the diploma has, in some instances, become a certificate of attendance. Although the student must pass individual classes, there is often no evaluation system to assess the comprehensiveness of a

student's educational career. Efforts of competency testing attempt to fill this gap in educational evaluation. Periodic competency testing prior to the last year of an educational program provides an opportunity for remedial assistance.

When a student is promoted in a perfunctory manner, as charged in Peter W., the school officials become vulnerable to instructional malpractice litigation. Charges are made that the school falsely represented itself through the issuance of a diploma which did not accurately reflect the performance level of the recipient. As a result, the student charges he/she cannot function in society due to inadequate reading, writing, or other basic skills. A diploma is expected to represent a student's ability to gain meaningful employment in regard to basic educational skills. Assessing the progress of a student alleviates instructional malpractice litigation, as the student will be prevented from advancing to the next grade level without competency in basic reading and writing skills.

Evaluation of a student's progress (in reading and writing skills) will assist in reducing the potential for instructional malpractice litigation regarding the student's ability to comprehend material presented in the classroom. Educators often assume the students enrolled in their classrooms have demonstrated the ability to comprehend material at this grade level. This assumption can continue over a period of years until the student is many grade levels

behind the material presented (in terms of reading ability). In many of the cases analyzed charging instructional malpractice, the inability to comprehend the material presented was a major part of the charge against the school system.

After completing this study, conclusions regarding which conditions place educators and school systems in positions of liability regarding instructional malpractice are apparent. More reading level evaluations in terms of quantity and quality are necessary if educators prefer to avoid instructional malpractice litigation. References to reading not only involve the ability to comprehend material presented, but also the final result of a student's reading level at graduation. On the basis of the litigation analyzed, educators cannot assume that students operate at a given level of performance.

The practice of failing to interview and discuss problems with students in order to ascertain their ability to comprehend and understand material appeared repeatedly in charges of instructional malpractice. Two distinctly new aspects surface as a condition which may lead to litigation. Nonfeasance and misfeasance in evaluation offer opportunities for court action. Nonfeasance is reflected in the conclusion that proper evaluations are not present. Misfeasance appears as the condition where schools do not follow through on recommendations of their own staff: this certainly was the situation in Hoffman.

In Paladino v. Adelphi University (1982), a private agency was used to ascertain the ability of the student in question. Although this institution decided to accept the results and not promote the student, such results (of private testing) could lead to instructional malpractice litigation. Private testing agencies could track students and provide the basis for a charge of instructional malpractice against the school system. Educational institutions might want to avoid instructional malpractice litigation in this area by providing adequate and comprehensive evaluation systems to ensure that students deserve the diplomas they receive. This monitoring is especially important when outside agencies or individuals are retained to service students of a school district.

A practice which places a system in high potential for instructional malpractice suits is the failure to mainstream special education students properly. As exemplified by Campbell v. Talledega (1981) mere placement in a traditional classroom setting does not fulfill the legislated expectations of the concept of mainstreaming. Separate facilities are not an acceptable condition for special education students. If a student is placed in a classroom and not comingled into the curriculum, a charge of isolationism continues to exist. Brown v. Board of Education of Topeka (1954) was used as a reference to this alleged unlawful practice. To avoid litigation, schools must focus on the intent of mainstreaming special education children, i.e., to

engage an individualized program in the least restrictive environment centered on the child in need.

A final condition which leads to potential for instructional malpractice litigation concerns programmatic needs. In D.S.W. (1981), and other cases noted in Chapter IV, the program of a school system was questioned. Students who were enrolled in specific programs because of special needs sought court action to prevent the elimination of their specialized programs in the curriculum. The court disallowed this type of judicial intervention and relied on the argument of exhausting internal remedies. Internal remedies were found to be much more expeditious and appropriate. However, periodic review of the curriculum and programmatic needs of children designated with a learning disability might be a prudent method of avoiding instructional malpractice litigation.

Actions or Failures to Act Leading to Instructional Malpractice Suits

Many of the actions or lack of actions of administrators or teachers are covered in previous and subsequent questions of this chapter. However, this subsidiary question was considered separately to develop a compilation of these findings in terms of specific actions which place educators in positions of professional liability.

Following is a list, resulting from the analysis of this study, of actions and inactions of educators leading to instructional malpractice litigation:

1. failing to assess the intellectual capability of a student:
2. promoting students through the system when they are unable to read at an appropriate grade level:
3. failing to diagnose reading disabilities:
4. general misdiagnoses and nondiagnoses:
5. failing to rediagnose:
6. failing to appropriately deal with reading disabilities:
7. not providing an adequate program, thus abandoning (educationally) a student with special needs:
8. failing to continue a prescribed program once it has begun:
9. not placing special education students in maximum contact with other students:
10. using improperly trained teachers, administrators, or psychologists:
11. failure to provide adequate educational facilities.

Some of the above (2. 3, 4, 5) were addressed previously. The remaining items regarding a failure to act are important to understand the specific practices resulting in a position of liability for educators. Numerous cases have evolved to provide these practices which develop the legal trends framing characteristics of instructional malpractice litigation.

Failing to assess the intellectual capability of students in terms of instructional malpractice litigation

involves incorrect intelligence (IQ) tests. In Hoffman, the original (incorrect) assessment of a student placed him in a special education program. If yearly assessments had been administered, the entire litigation in Hoffman from original hearings to the Supreme Court could have been avoided. Periodic evaluations of special education students, including IQ testing, should become a standard to avoid malpractice litigation.

An inaction found throughout the cases of this study was the inability to deal with reading problems. Not only must educators assess reading levels, but they must deal with the problem through remedial programs. Failing to do so has been charged as intentionally neglecting an educational deficiency (i.e., Peter W.).

Once a program to alleviate a learning deficiency has begun, a discontinuance of the program may be charged as a form of educational abandonment. Beginning a program to correct a deficiency is an acknowledgement of a need for such a program. Educators may find themselves facing court action to continue programs which have been characterized as "necessary" for specific children (example, D.S.W.). It may be safer to characterize programs as "supplementary" and "complementary" rather than as "necessary." Those characterized as necessary must be carefully assessed as to their effects on individual students within each program. If a program is truly necessary for a particular student, then private or individual assistance may be required as a

substitute when a program cannot be offered within the school system. However, private assistance must include continuous monitoring to prevent conditions as in Little Flower, which led to litigation.

When finances dictate the discontinuance of programs, courts have denied charges that they must be continued. However, on the basis of instructional malpractice cases considered in this study, ignoring the effects of program elimination on individual students invites potential litigation.

Special education programs must provide objectives consistent with the legislative intent of P.L. 94-142. The program must ensure the school is attempting to provide skills for students to prepare them to operate in society (see court conclusion in Campbell v. Talledega). Not providing for maximum contact (least restrictive environment) is a situation which has initiated instructional malpractice litigation.

Using improperly trained or unqualified administrators, teachers, and psychologists might be one of the areas of this study which will most concern educators. This area of litigation, although unsuccessful against school systems, might result in educators being subpoenaed as witnesses in court. As witnesses, they can be cross-examined to determine competency in specified areas. Anyone who has experienced the rigors of cross-examination in a courtroom will understand the advisability in preventing instructional

malpractice litigation. On the basis of these conclusions, administrators might prefer to ensure that qualified staff are assigned to appropriate programs. This type of assessment is often lacking in the development of school curriculum.

Concepts and Legal Practices to Deal with Instructional Malpractice

Legal duty of care has been an issue in all cases of instructional malpractice analyzed for this study. Although the courts have concluded that educators do not owe a duty of care in terms of legal liability, they do sustain a duty for general care of the student. The state has the responsibility to ensure basic educational needs of students are attained. The result of this accepted philosophy regarding education is that courts are willing to review charges of instructional malpractice. To consider the courts' unwillingness to question educational methodology as a policy of immunity from prosecution for educators is not an accurate assessment of the current legal environment. The court is willing to rule on charges of instructional malpractice, as evident from this research. The negative effects of litigation, even if one assumes a favorable decision for the educator (or school system), encompass more than adverse decisions. Often, the negative effects on individuals and school systems are experienced prior to and regardless of any decision of a court.

Mandatory attendance policies of the state require that educators perform their services in a competent manner. In the cases analyzed, there has not been much weight given to arguments based on the correlation between mandatory attendance and duty of care. Future cases might involve an attempt to base arguments on this aspect of duty of care.

The legal principle of governmental immunity is the exception and not the rule for educators. Tort liability for negligence does not retain the immunity umbrella as other types of legislation. Unless specific legislation is adopted, educators are not immune from negligence suits alleging instructional malpractice. None of the cases analyzed dismissed charges on the basis of governmental immunity.

The courts have concluded that for special education cases (P.L. 94-142) internal mechanisms of the educational system must be exhausted first. This legal conclusion is an important concept for educators to grasp in regard to instructional malpractice. Since the courts will defer to this internal process, this due process right must be implemented properly in the school and an adequate appeal's process must become part of the curriculum. Three aspects of internal remedies should be considered: access to internal remedies, the comprehensiveness of the due process mechanism, and the protection afforded.

Students and parents must have access to an appeals process which often substitutes for and avoids judicial

action. Proper notification, including their knowledge of this procedure, is part of this procedure. It would not be plethoric to include a "Miranda mumble" as standard notification in evaluative decisions, especially in special education. The seriousness of this appeal's process is evident from the cases analyzed. The internal mechanism of the appeal's process offers the best protection in what is the most vulnerable area of instructional malpractice litigation--special education.

Two of the primary cases addressed the concept of a contract theory of care (Hunter and Little Flower). Educators should be aware of any contractual arrangements between students and the school system. This arrangement is especially important in the area of special education with regard to an Individualized Educational Program (IEP). Three different types of contractual arrangements were litigated under the charge of instructional malpractice: contracting agencies, inappropriate IEPs, and recommendations for future re-evaluations. In Little Flower, the charge was the contracting agency, a private educational institution, did not fulfill its obligations to provide an appropriate education. An appropriate education is at issue in cases such as Campbell which questioned the designated IEP and its fulfillment of mainstreaming.

Hoffman did not involve charges of an inappropriate education under the special education act but implied a contractual arrangement between the recommendation of the

school psychologist and the implementation of that recommendation by the school system. If a recommendation is made by a school official and is not implemented, the potential for instructional malpractice increases. A year-end annual review of each individual student by officials responsible for the following year's curriculum might be worthy of consideration.

Administrators should be reminded that the judiciary and legislature agree that with federal funding comes federal responsibility. The legislation which provides for special education funding involves the enactment of certain procedures and guidelines, i.e., individualized educational programs. If these guidelines are mandated for a district and individual educators by the acceptance of federal funds, then implementation of these procedures can be a source for instructional malpractice litigation. Proper internal remedies become an important aspect of protectionism from instructional malpractice suits.

A final legal concept which evolves from the cases of this study is the potential for charges of discrimination in competency testing. Examinations which have been found by the courts to be constitutional and a good source of evaluation ought to be carefully reviewed for construct validity, reliability. and discrimination. However, courts are willing to litigate the nature of a competency test as exemplified in Debra P. When examinations are initiated. some students can be expected to fail. From this group of

disappointed students and parents, instructional malpractice suits usually emanate. Attention to remedial assistance and evaluation can avoid future courtroom proceedings.

Vulnerable Conditions Teachers and Administrators Can Control

Educators must be prepared to deal properly with the special problem of remedial students. This is a charge (inadequate preparation) which reappears in instructional malpractice litigation (Palidino). Administrators are in control of such conditions concerning placement of staff. Three aspects of the preparation of teachers of which the administration is in control summarize the charges against the school system: properly trained and advised teaching staff (Campbell, Palidino, and Debra P.), experienced personnel in handling special education and remedial matters (Donohue), and evaluation of staff and programs (Hunter). For each remedial problem, a staff assignment, including qualifications of individual staff members, should be considered in all written recommendations. Proper training and experience can be accomplished through inservice and other supplemental workshops.

In Hunter, the charge was asserted that administrators were negligent in evaluating staff and programs. This activity is in the control and direction of the administrative staff. If evaluations of staff assignments and curriculum in terms of curricular needs is conducted periodically, this charge of malpractice litigation might be avoided.

Educators are in control over tests which are implemented in their system. Standardized tests such as the Scholastic Aptitude or Michigan Educational Assessment Program evaluations might be preferred: however, they must be applicable to the problems under consideration. When district exams are initiated, usually in the form of graduate competency exams, careful evaluation of potential problems which can result in litigation is advisable. Debra P. provides an example of court litigation which affected students in the entire state of Florida.

The cases analyzed determined the difference in vulnerability of different grade levels and types of curricula. Administrators and teachers can ascertain which of these curricula should be scrutinized for the prevention of conditions which place the schools in a position of vulnerability for litigation. Lower grade levels appear to consist of conditions which are more susceptible to negligence liability. Also, secondary courses such as chemistry, physical education, and drivers' education provide conditions which should be assessed for potential litigation. The supervisory aspect of physical education classes is not always in question, but the lack of adequate instruction to perform certain exercises produced litigation of instructional malpractice. Instruction in all areas which are more vulnerable to litigation should be scrutinized.

Once programs and assignments are determined, educational assessment must focus on the quality of the program.

This condition is within the control of an administrator and individual classroom teacher. As an example, in Campbell the charge was made that the program offered was simply to take up time instead of concentrating on a meaningful set of objectives to advance a student's learning capacity. This condition is even more prevalent in special education classes where mainstreaming is difficult to implement because of the severity of a learning disability. If these children are mainstreamed and not incorporated into a meaningful learning environment in an assigned classroom, instructional malpractice litigation may result.

Retesting and re-evaluating are occasionally overlooked in the classroom setting. This condition was the focus of the lawsuit in Hoffman. The implementation of a psychologist's recommendation to re-evaluate a student in two years is the type of condition which is the responsibility of those charged with following the academic progress of learning disabled students (or any remedial student). This case almost succeeded through the legal system. Only the Supreme Court of New York voided the one-half million dollar judgment against the school district. This decision had a strong dissent. Avoiding the courtroom over similar charges of failure to retest and follow written recommendations of staff is a condition over which the educators within the system have authority and responsibility.

The inability of a student to comprehend material is a charge which is common in the primary cases from this study

concerning instructional malpractice. The condition over which educators are in control in preventing this type of litigation is the selection of text materials. The correlation between textbooks and other materials used in the classroom must be appropriate and within an individual student's reading ability. In most textbook committees, the review takes place over those books which are appropriate for a given grade level and for an average student within that grade level. However, individualized attention to students who deviate in reading ability from the normal text material should be assessed carefully. Standardized tests of reading levels at the beginning of the academic years would assist staff in locating remedial students.

Documentation is another condition which, when neglected, places a school system in a greater position of vulnerability. When educators communicate with students and/or parents, documentation may provide a defense against future accusations of instructional malpractice litigation. A prominent contention which appeared throughout the cases analyzed was that parents were unaware of the extent of their children's problems. In Peter W. and Donohue, a diploma was characterized by parents as assurance that basic reading levels and other skills were attained by their children.

The educational environment is a condition which must meet the criterion set forth by the court in Debra P. as conducive to a proper educational environment. This

environment must be an atmosphere which is conducive to the achievement of the objectives set by the school system. This is especially important in preparing students for mandatory requirements such as competency testing. If, according to charges in instructional malpractice litigation, the system does not promote programs and time factors appropriate for such requirements, the court can review and may, as in Debra P., dictate modifications. Assessing such objectives and programs might prevent instructional malpractice litigation concerning the appropriateness of programs in relation to school system requirements.

Liability of Competency Testing for School Systems

Competency testing has been confirmed as appropriate by the courts as a method of assessing student ability. Although Debra P. is the most referenced case concerning this topic, the issue is mentioned in other instructional malpractice litigation. The court has inferred that competency testing is a recommended method of addressing curricular problems.

As described previously, proper notification, preparation, and test construction may be established to withstand judicial review. The fear of instructional malpractice might encourage districts to consider such examinations. As competency testing becomes more common in schools as a prerequisite for graduation, instructional malpractice litigation may decrease.

Future Developments in Response to Instructional Malpractice Litigation

Cases against school districts for tort action in negligence have proven unsuccessful: two conditions prevail which merit consideration in avoiding future instructional malpractice litigation.

First, the dissent by justices in instructional malpractice litigation provides the basis for judgments against school districts. If all of these cases included unanimous opinions by the judiciary against allegations of instructional malpractice, one could dismiss instructional malpractice as a moot issue. However, this is not the situation. Decisions have been split, and the dissents require careful analysis.

Second, instructional malpractice litigation takes up valuable administrative time and school district money to defend. Avoiding the courtroom is a worthwhile endeavor agreed upon by most educators.

The dissent in Hoffman by Justice Meyer is important in predicting future developments in instructional malpractice litigation. His decision implied that misfeasance should be considered actionable and distinct from nonfeasance. The failure to act as in Peter W. and Donohue is quite different from the misfeasance presented in Hoffman. When a school system clearly fails to evaluate as recommended by a psychologist and harm (misfeasance) results, Justice Meyer

felt that the action should be found as negligence by a court of law.

In Donohue, Justice Suozzi disagrees with the argument that public policy considerations are a reason to negate charges of instructional malpractice. He stated that the problem with proving proximate cause is a question of proof to be resolved at a trial. The fear of a flood of litigation is unpersuasive, according to Suozzi, in preventing negligence charges against educators. Finally, he concluded that there is no reason to differentiate between instructional malpractice and other forms of negligence.

If a conclusion similar to Justice Meyer's dissent is reached by the court, extensive litigation might result. Until the issue is resolved conclusively, preventing such courtroom litigation seems appropriate to avoid the potential for a decision in favor of instructional malpractice. Ensuring proper levels of performance could become standard procedures in most school systems of the United States. Should instructional malpractice continue to progress closer to a successful decision, extensive testing and evaluation might become a standard feature of the curriculum.

Another potential future development is the court's willingness to initiate and order programmatic changes in the curriculum, even though courts presently will not substitute their judgment for that of educators. In Campbell, the court ordered specific programmatic changes as compensation for past negligence. Future decisions such as

this could change the direction of the courts and involve them directly in programmatic needs of students.

Tenure laws and collective bargaining agreements have offered protection for educators in terms of professional competency. Instructional malpractice litigation might provide a basis for students and parents to demand a defense of skills and professional competency. Through instructional malpractice litigation, clients can cross-examine professionals to determine their ability to implement instructional programs. If instructional malpractice litigation continues, educators might find themselves defending their competency, the school curriculum, and their teaching methodology in the courtroom.

Should instructional malpractice become more prevalent, whether successful or not, schools may be in a position of purchasing expensive malpractice insurance. When one examines the increasing quantity of instructional malpractice litigation (as documented in Chapter II, Sepler), avoiding such litigation is within the control of the educator. If this type of litigation requires insurance for protection, and the courts follow the example of medical malpractice litigation, legal expenses in the schools could dramatically increase.

Summary and Recommendations

Decisions concerning educator liability in terms of instructional malpractice will continue to unfold.

Predictions concerning the quantity of cases for the next decade is that there will be an increase in instructional malpractice suits. Since litigation will continue concerning instructional malpractice, analyzing issues and practices which lead to litigation will assist educators in preventing expensive, time-consuming, and often embarrassing court action. Preventing instructional malpractice litigation will also reserve money expended for attorneys and case research for classroom use and the students for which it was intended.

Educators need to become more aware of the potential impact of instructional malpractice on their classrooms and professional careers. Their effectiveness can be diminished through the stigma placed on them as a result of being named in a suit charging instructional malpractice.

This study was a comprehensive research of the current state of instructional malpractice litigation. Continued legal analysis is necessary to update the body of knowledge in this area which is so critical to educators and school curricula in general. Further research concerning the current state of Individual Educational Programs (IEPs) as mandated by federal law P.L. 94-142 is also needed. In addition, an analysis of higher education curriculum regarding the professional liability of our future educators will provide some similar protections as offered by this study. An assessment of the current knowledge of educators and administrators regarding academic liability will determine which

educational programs, concerning the issue of instructional malpractice, are needed for continuing education of all educators.

The current state of instructional malpractice indicates that schools are not responsible for a duty of care in the legal sense of the term. Determining proximate cause between a particular educator or curriculum and the alleged harm resulting from an inappropriate education is not possible using present standards of assessment. Cases analyzed did not provide any basis for instructional malpractice within the existing judicial framework. A cause of action in tort liability is not present when educators fail to evaluate underachievers. According to Peter W., the judicial system remains an inappropriate forum in which to test the efficacy of educational programs and methodology.

A variety of factors affect the result of students' education. Among these are their attitudes, motivations, temperaments, past experiences, home environments, and medical factors. According to the cases analyzed, no one educator nor program can be determined to be the cause of harm, in basic skills, to an individual student. Even if such correlation could be remotely established, the courts have noted (Donohue) the purpose of schools was to confer the benefits of free public education and not to protect against the injury of ignorance for every individual.

If the courts were to allow judgments of instructional malpractice, educators could be placed in a position of

deferring curricular decisions to the courts. The courts, as a result, would find themselves involved in policy development over curriculum which they are trying to avoid.

The effects of a change in court direction in terms of instructional malpractice litigation could be detrimental to the freedom our educational system now enjoys. Necessary experimentation in classroom methodology may be discounted when teachers understand the precariousness of their position in making sensitive judgments and programmatic decisions.

To hold educators responsible for instructional malpractice would expose them to tort claims from disgruntled students and parents, even if contrived. Courts can dismiss such charges, if proper action is taken by educators to justify their programs for individuals and collectively for the school. The results of this study will assist in that endeavor.

Years have passed since the first case resembling instructional malpractice was charged against the Columbia University Board of Trustees in 1923. A student charged that the University's catalogs and brochures prescribed a standard of care which was violated since they were unable to achieve such promises of education. The court dismissed this charge. After analyzing the instructional malpractice cases considered in this research, it appears as if the courts have continued to hold to this principle. As stated in Hunter, in reference to a standard of care for

instruction, the courts assume that educators are not required to make students "drink from the well of knowledge." This has been the opinion of the courts in the United States regarding instructional malpractice litigation in public schools.

APPENDICES

APPENDIX A

CODE OF ETHICS

CODE OF ETHICS
OF THE EDUCATION PROFESSION

(Adopted by the 1975 NEA Representative Assembly)

Preamble

The educator, believing in the worth and dignity of each human being, recognizes the supreme importance of the pursuit of truth, devotion to excellence, and the nurture of democratic principles. Essential to these goals is the protection of freedom to learn and to teach and the guarantee of equal educational opportunity for all. The educator accepts the responsibility to adhere to the highest ethical standards.

The educator recognized the magnitude of the responsibility inherent in the teaching process. The desire for the respect and confidence of one's colleagues, of students, of parents, and of the members of the community provides the incentive to attain and maintain the highest possible degree of ethical conduct. The Code of Ethics of the Education Profession indicates the aspiration of all educators and provides standards by which to judge conduct.

The remedies specified by the NEA and/or affiliates for the violation of any provision of this Code shall be exclusive and no such provision shall be enforceable in any form other than one specifically designated by the NEA or its affiliates.

Principle I- Commitment to the Student

The educator strives to help each student realize his or her potential as a worthy and effective member of society. The educator therefore works to stimulate the spirit of inquiry, the acquisition of knowledge and understanding, and the thoughtful formulation of worth goals.

In fulfillment of the obligation to the student, the educator--

1. Shall not unreasonably restrain the student from independent action in the pursuit of learning.

2. Shall not unreasonably deny the student access to varying points of view.

3. Shall not deliberately suppress or distort subject matter relevant to the student's progress.

4. Shall make reasonable effort to protect the student from conditions harmful to learning or to health and safety.

5. Shall not intentionally expose the student to embarrassment or disparagement.

6. Shall not on the basis of race, color, creed, sex, national origin, marital status, political or religious beliefs, family, social or cultural background, or sexual orientation, unfairly:

   a. Exclude any student from participation in any program:

   b. Deny benefits to any student:

   c. Grant any advantage to any student.

7. Shall not use professional relationships with students for private advantage.

8. Shall not disclose information about students obtained in the course of professional service, unless disclosure serves a compelling professional purpose or is required by law.

Principle II - Commitment to the Profession

The education profession is vested in the public with a trust and responsibility requiring the highest ideals of professional service.

In the belief that the quality of the services of the education profession directly influences the nation and its citizens, the educator shall exert every effort to raise professional standards. to promote a climate that encourages the exercise of professional judgment, to achieve conditions which attract persons worthy of the trust to careers in education, and to assist in preventing the practice of the profession by unqualified person.

In fulfillment of the obligation to the profession, the educator--

1. Shall not in any application for a professional position deliberately make a false statement or fail to disclose a material fact related to competency and qualifications.

2. Shall not misrepresent his/her professional qualifications.

3. Shall not assist entry into the profession of a person known to be unqualified in respect to character, education, or other relevant attribute.

4. Shall not knowingly make a false statement concerning the qualifications of a candidate for a professional position.

5. Shall not assist a noneducator in the unauthorized practice of teaching.

6. Shall not disclose information about colleagues obtained in the course of professional service unless disclosure serves a compelling professional purpose or is required by law.

7. Shall not knowingly make false or malicious statements about a colleague.

8. Shall not accept any gratuity, gift, or favor that might impair or appear to influence professional decisions or actions.

APPENDIX B

TABLE OF CASES

TABLE OF CASES

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APPENDIX C

P.L. 94-142

Public Law 94-142
94th Congress

An Act

To amend the Education of the Handicapped Act to provide educational assistance to all handicapped children, and for other purposes.

Nov. 29, 1975
[S. 6]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Education for All Handicapped Children Act of 1975".

Education for All Handicapped Children Act of 1975.
20 USC 1401 note.

EXTENSION OF EXISTING LAW

SEC. 2. (a)(1)(A) Section 611(b)(2) of the Education of the Handicapped Act (20 U.S.C. 1411(b)(2)) (hereinafter in this Act referred to as the "Act"), as in effect during the fiscal years 1976 and 1977, is amended by striking out "the Commonwealth of Puerto Rico,".

(B) Section 611(c)(1) of the Act (20 U.S.C. 1411(c)(1)), as in effect during the fiscal years 1976 and 1977, is amended by striking out "the Commonwealth of Puerto Rico,".

(2) Section 611(c)(2) of the Act (20 U.S.C. 1411(c)(2)), as in effect during the fiscal years 1976 and 1977, is amended by striking out "year ending June 30, 1975" and inserting in lieu thereof the following: "years ending June 30, 1975, and 1976, and for the fiscal year ending September 30, 1977", and by striking out "2 per centum" each place it appears therein and inserting in lieu thereof "1 per centum".

(3) Section 611(d) of the Act (20 U.S.C. 1411(d)), as in effect during the fiscal years 1976 and 1977, is amended by striking out "year ending June 30, 1975" and inserting in lieu thereof the following: "years ending June 30, 1975, and 1976, and for the fiscal year ending September 30, 1977".

(4) Section 612(a) of the Act (20 U.S.C. 1412(a)), as in effect during the fiscal years 1976 and 1977, is amended—

(A) by striking out "year ending June 30, 1975" and inserting in lieu thereof "years ending June 30, 1975, and 1976, for the period beginning July 1, 1976, and ending September 30, 1976, and for the fiscal year ending September 30, 1977"; and

(B) by striking out "fiscal year 1974" and inserting in lieu thereof "preceding fiscal year".

(b)(1) Section 614(a) of the Education Amendments of 1974 (Public Law 93-380; 88 Stat. 580) is amended by striking out "fiscal year 1975" and inserting in lieu thereof the following: "the fiscal years ending June 30, 1975, and 1976, for the period beginning July 1, 1976, and ending September 30, 1976, and for the fiscal year ending September 30, 1977,".

20 USC 1411 note.

(2) Section 614(b) of the Education Amendments of 1974 (Public Law 93-380; 88 Stat. 580) is amended by striking out "fiscal year 1974" and inserting in lieu thereof the following: "the fiscal years ending June 30, 1975, and 1976, for the period beginning July 1, 1976, and ending September 30, 1976, and for the fiscal year ending September 30, 1977,".

20 USC 1412 note.

20 USC 1413 note.

(3) Section 614(c) of the Education Amendments of 1974 (Public Law 93-380; 88 Stat. 580) is amended by striking out "fiscal year 1974" and inserting in lieu thereof the following: "the fiscal years ending June 30, 1975, and 1976, for the period beginning July 1, 1976, and ending September 30, 1976, and for the fiscal year ending September 30, 1977,".

Ante, p. 773.

(c) Section 612(a) of the Act, as in effect during the fiscal years 1976 and 1977, and as amended by subsection (a)(4), is amended by inserting immediately before the period at the end thereof the following: ", or $300,000, whichever is greater".

Rules.
20 USC 1412.

(d) Section 612 of the Act (20 U.S.C. 1411), as in effect during the fiscal years 1976 and 1977, is amended by adding at the end thereof the following new subsection:

Publication in Federal Register.

"(d) The Commissioner shall, no later than one hundred twenty days after the date of the enactment of the Education for All Handicapped Children Act of 1975, prescribe and publish in the Federal Register such rules as he considers necessary to carry out the provisions of this section and section 611.".

Ante, p. 773.
Appropriation authorization.
20 USC 1411 note.

(e) Notwithstanding the provisions of section 611 of the Act, as in effect during the fiscal years 1976 and 1977, there are authorized to be appropriated $100,000,000 for the fiscal year 1976, such sums as may be necessary for the period beginning July 1, 1976, and ending September 30, 1976, and $200,000,000 for the fiscal year 1977, to carry out the provisions of part B of the Act, as in effect during such fiscal years.

STATEMENT OF FINDINGS AND PURPOSE

20 USC 1401 note.

SEC. 3. (a) Section 601 of the Act (20 U.S.C. 1401) is amended by inserting "(a)" immediately before "This title" and by adding at the end thereof the following new subsections:

"(b) The Congress finds that—

"(1) there are more than eight million handicapped children in the United States today;

"(2) the special educational needs of such children are not being fully met;

"(3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

"(4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

"(5) there are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected;

"(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

"(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of handicapped children;

"(8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children; and

"(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

"(c) It is the purpose of this Act to assure that all handicapped children have available to them, within the time periods specified in section 612(2)(B), a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.". *Ante*, p. 773.

(b) The heading for section 601 of the Act (20 U.S.C. 1401) is amended to read as follows: 20 USC 1401 note.

"SHORT TITLE; STATEMENT OF FINDINGS AND PURPOSE".

DEFINITIONS

SEC. 4. (a) Section 602 of the Act (20 U.S.C. 1402) is amended— 20 USC 1401.

(1) in paragraph (1) thereof, by striking out "crippled" and inserting in lieu thereof "orthopedically impaired", and by inserting immediately after "impaired children" the following: ", or children with specific learning disabilities,";

(2) in paragraph (5) thereof, by inserting immediately after "instructional materials," the following: "telecommunications, sensory, and other technological aids and devices,";

(3) in the last sentence of paragraph (15) thereof, by inserting immediately after "environmental" the following: ", cultural, or economic"; and

(4) by adding at the end thereof the following new paragraphs:

"(16) The term 'special education' means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

"(17) The term 'related services' means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

"(18) The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 614(a)(5). *Post*, p. 784.

"(19) The term 'individualized education program' means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

"(20) The term 'excess costs' means those costs which are in excess of the average annual per student expenditure in a local educational agency during the preceding school year for an elementary or secondary school student, as may be appropriate, and which shall be computed after deducting (A) amounts received under this part or under title I or title VII of the Elementary and Secondary Education Act of 1965, and (B) any State or local funds expended for programs which would qualify for assistance under this part or under such titles.

20 USC 241a note, 881.

"(21) The term 'native language' has the meaning given that term by section 703(a)(2) of the Bilingual Education Act (20 U.S.C. 880b-1(a)(2)).

"(22) The term 'intermediate educational unit' means any public authority, other than a local educational agency, which is under the general supervision of a State educational agency, which is established by State law for the purpose of providing free public education on a regional basis, and which provides special education and related services to handicapped children within that State.".

20 USC 1401.

(b) The heading for section 602 of the Act (20 U.S.C. 1402) is amended to read as follows:

"DEFINITIONS".

ASSISTANCE FOR EDUCATION OF ALL HANDICAPPED CHILDREN

SEC. 5. (a) Part B of the Act (20 U.S.C. 1411 et seq.) is amended to read as follows:

"PART B—ASSISTANCE FOR EDUCATION OF ALL HANDICAPPED CHILDREN

"ENTITLEMENTS AND ALLOCATIONS

20 USC 1411. Post, p. 793.

"SEC. 611. (a)(1) Except as provided in paragraph (3) and in section 619, the maximum amount of the grant to which a State is entitled under this part for any fiscal year shall be equal to—

"(A) the number of handicapped children aged three to twenty-one, inclusive, in such State who are receiving special education and related services;

multiplied by—

"(B)(i) 5 per centum, for the fiscal year ending September 30, 1978, of the average per pupil expenditure in public elementary and secondary schools in the United States;

"(ii) 10 per centum, for the fiscal year ending September 30, 1979, of the average per pupil expenditure in public elementary and secondary schools in the United States;

"(iii) 20 per centum, for the fiscal year ending September 30, 1980, of the average per pupil expenditure in public elementary and secondary schools in the United States;

"(iv) 30 per centum, for the fiscal year ending September 30, 1981, of the average per pupil expenditure in public elementary and secondary schools in the United States; and

"(v) 40 per centum, for the fiscal year ending September 30, 1982, and for each fiscal year thereafter, of the average per pupil expenditure in public elementary and secondary schools in the United States;

except that no State shall receive an amount which is less than the amount which such State received under this part for the fiscal year ending September 30, 1977.

"(2) For the purpose of this subsection and subsection (b) through subsection (e), the term 'State' does not include Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands. "State."

"(3) The number of handicapped children receiving special education and related services in any fiscal year shall be equal to the average of the number of such children receiving special education and related services on October 1 and February 1 of the fiscal year preceding the fiscal year for which the determination is made.

"(4) For purposes of paragraph (1)(B), the term 'average per pupil expenditure', in the United States, means the aggregate current expenditures, during the second fiscal year preceding the fiscal year for which the computation is made (or, if satisfactory data for such year are not available at the time of computation, then during the most recent preceding fiscal year for which satisfactory data are available) of all local educational agencies in the United States (which, for purposes of this subsection, means the fifty States and the District of Columbia), as the case may be, plus any direct expenditures by the State for operation of such agencies (without regard to the source of funds from which either of such expenditures are made), divided by the aggregate number of children in average daily attendance to whom such agencies provided free public education during such preceding year. "Average per pupil expenditure."

"(5)(A) In determining the allotment of each State under paragraph (1), the Commissioner may not count—

"(i) handicapped children in such State under paragraph (1)(A) to the extent the number of such children is greater than 12 per centum of the number of all children aged five to seventeen, inclusive, in such State;

"(ii) as part of such percentage, children with specific learning disabilities to the extent the number of such children is greater than one-sixth of such percentage; and

"(iii) handicapped children who are counted under section 121 of the Elementary and Secondary Education Act of 1965. 20 USC 241c-1.

"(B) For purposes of subparagraph (A), the number of children aged five to seventeen, inclusive, in any State shall be determined by the Commissioner on the basis of the most recent satisfactory data available to him.

"(b)(1) Of the funds received under subsection (a) by any State for the fiscal year ending September 30, 1978—

"(A) 50 per centum of such funds may be used by such State in accordance with the provisions of paragraph (2); and

"(B) 50 per centum of such funds shall be distributed by such State pursuant to subsection (d) to local educational agencies and intermediate educational units in such State, for use in accordance with the priorities established under section 612(3).

"(2) Of the funds which any State may use under paragraph (1)(A)—

"(A) an amount which is equal to the greater of—

"(i) 5 per centum of the total amount of funds received under this part by such State; or

"(ii) $200,000;

may be used by such State for administrative costs related to carrying out sections 612 and 613;

"(B) the remainder shall be used by such State to provide support services and direct services, in accordance with the priorities established under section 612(3).

"(c)(1) Of the funds received under subsection (a) by any State for the fiscal year ending September 30, 1979, and for each fiscal year thereafter—

"(A) 25 per centum of such funds may be used by such State in accordance with the provisions of paragraph (2); and

"(B) except as provided in paragraph (3), 75 per centum of such funds shall be distributed by such State pursuant to subsection (d) to local educational agencies and intermediate educational units in such State, for use in accordance with priorities established under section 612(3).

"(2)(A) Subject to the provisions of subparagraph (B), of the funds which any State may use under paragraph (1)(A)—

"(i) an amount which is equal to the greater of—

"(I) 5 per centum of the total amount of funds received under this part by such State; or

"(II) $200,000;

may be used by such State for administrative costs related to carrying out the provisions of sections 612 and 613; and

"(ii) the remainder shall be used by such State to provide support services and direct services, in accordance with the priorities established under section 612(3).

"(B) The amount expended by any State from the funds available to such State under paragraph (1)(A) in any fiscal year for the provision of support services or for the provision of direct services shall be matched on a program basis by such State, from funds other than Federal funds, for the provision of support services or for the provision of direct services for the fiscal year involved.

"(3) The provisions of section 613(a)(9) shall not apply with respect to amounts available for use by any State under paragraph (2).

"(4)(A) No funds shall be distributed by any State under this subsection in any fiscal year to any local educational agency or intermediate educational unit in such State if—

"(i) such local educational agency or intermediate educational unit is entitled, under subsection (d), to less than $7,500 for such fiscal year; or,

"(ii) such local educational agency or intermediate educational unit has not submitted an application for such funds which meets the requirements of section 614.

"(B) Whenever the provisions of subparagraph (A) apply, the State involved shall use such funds to assure the provision of a free appropriate education to handicapped children residing in the area served by such local educational agency or such intermediate educational unit. The provisions of paragraph (2)(B) shall not apply to the use of such funds.

"(d) From the total amount of funds available to local educational agencies and intermediate educational units in any State under subsection (b)(1)(B) or subsection (c)(1)(B), as the case may be, each local educational agency or intermediate educational unit shall be entitled to an amount which bears the same ratio to the total amount available under subsection (b)(1)(B) or subsection (c)(1)(B), as the case may be, as the number of handicapped children aged three to twenty-one, inclusive, receiving special education and related services in such local educational agency or intermediate educational unit bears to the aggregate number of handicapped children aged three to twenty-one, inclusive, receiving special education and related services in all local educational agencies and intermediate educational units which apply to the State educational agency involved for funds under this part.

"(e)(1) The jurisdictions to which this subsection applies are Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

"(2) Each jurisdiction to which this subsection applies shall be entitled to a grant for the purposes set forth in section 601(c) in an amount equal to an amount determined by the Commissioner in accordance with criteria based on respective needs, except that the aggregate of the amount to which such jurisdictions are so entitled for any fiscal year shall not exceed an amount equal to 1 per centum of the aggregate of the amounts available to all States under this part for that fiscal year. If the aggregate of the amounts, determined by the Commissioner pursuant to the preceding sentence, to be so needed for any fiscal year exceeds an amount equal to such 1 per centum limitation, the entitlement of each such jurisdiction shall be reduced proportionately until such aggregate does not exceed such 1 per centum limitation. *Ante*, p. 774.

"(3) The amount expended for administration by each jurisdiction under this subsection shall not exceed 5 per centum of the amount allotted to such jurisdiction for any fiscal year, or $35,000, whichever is greater.

"(f)(1) The Commissioner is authorized to make payments to the Secretary of the Interior according to the need for such assistance for the education of handicapped children on reservations serviced by elementary and secondary schools operated for Indian children by the Department of the Interior. The amount of such payment for any fiscal year shall not exceed 1 per centum of the aggregate amounts available to all States under this part for that fiscal year.

"(2) The Secretary of the Interior may receive an allotment under this subsection only after submitting to the Commissioner an application which meets the applicable requirements of section 614(a) and which is approved by the Commissioner. The provisions of section 616 shall apply to any such application.

"(g)(1) If the sums appropriated for any fiscal year for making payments to States under this part are not sufficient to pay in full the total amounts which all States are entitled to receive under this part for such fiscal year, the maximum amounts which all States are entitled to receive under this part for such fiscal year shall be ratably reduced. In case additional funds become available for making such payments for any fiscal year during which the preceding sentence is applicable, such reduced amounts shall be increased on the same basis as they were reduced.

"(2) In the case of any fiscal year in which the maximum amounts for which States are eligible have been reduced under the first sentence of paragraph (1), and in which additional funds have not been made available to pay in full the total of such maximum amounts under the last sentence of such paragraph, the State educational agency shall fix dates before which each local educational agency or intermediate educational unit shall report to the State educational agency on the amount of funds available to the local educational agency or intermediate educational unit, under the provisions of subsection (d), which it estimates that it will expend in accordance with the provisions of this part. The amounts so available to any local educational agency or intermediate educational unit, or any amount which would be available to any other local educational agency or intermediate educational unit if it were to submit a program meeting the requirements of this part, which the State educational agency determines will not be used for the period of its availability, shall be available for allocation to those local educational agencies or intermediate educational units, in the manner provided by this section, which the State educational agency determines will need and be able to use additional funds to carry out approved programs.

"ELIGIBILITY

20 USC 1412.

"SEC. 612. In order to qualify for assistance under this part in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

"(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

"(2) The State has developed a plan pursuant to section 613(b) in effect prior to the date of the enactment of the Education for All Handicapped Children Act of 1975 and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that—

"(A) there is established (i) a goal of providing full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

"(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such require-

ments would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

"(C) all children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

"(D) policies and procedures are established in accordance with detailed criteria prescribed under section 617(c); and

"(E) the amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Commissioner.

"(3) The State has established priorities for providing a free appropriate public education to all handicapped children, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

"(4) Each local educational agency in the State will maintain records of the individualized education program for each handicapped child, and such program shall be established, reviewed, and revised as provided in section 614(a)(5).

"(5) The State has established (A) procedural safeguards as required by section 615, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

"(6) The State educational agency shall be responsible for assuring that the requirements of this part are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency. Administration.

Notice, hearings.

"(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children, and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 613.

"STATE PLANS

20 USC 1413.

"SEC. 613. (a) Any State meeting the eligibility requirements set forth in section 612 and desiring to participate in the program under this part shall submit to the Commissioner, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as he deems necessary. Each such plan shall—

"(1) set forth policies and procedures designed to assure that funds paid to the State under this part will be expended in accordance with the provisions of this part, with particular attention given to the provisions of sections 611(b), 611(c), 611(d), 612(2), and 612(3);

"(2) provide that programs and procedures will be established to assure that funds received by the State or any of its political subdivisions under any other Federal program, including section 121 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241c-2), section 305(b)(8) of such Act (20 U.S.C. 844a (b)(8)) or its successor authority, and section 122(a)(4)(B) of the Vocational Education Act of 1963 (20 U.S.C. 1262(a)(4)(B)), under which there is specific authority for the provision of assistance for the education of handicapped children, will be utilized by the State, or any of its political subdivisions, only in a manner consistent with the goal of providing a free appropriate public education for all handicapped children, except that nothing in this clause shall be construed to limit the specific requirements of the laws governing such Federal programs;

20 USC 241c-1.

"(3) set forth, consistent with the purposes of this Act, a description of programs and procedures for (A) the development and implementation of a comprehensive system of personnel development which shall include the inservice training of general and special educational instructional and support personnel, detailed procedures to assure that all personnel necessary to carry out the purposes of this Act are appropriately and adequately prepared and trained, and effective procedures for acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and (B) adopting, where appropriate, promising educational practices and materials development through such projects;

"(4) set forth policies and procedures to assure—

"(A) that, to the extent consistent with the number and location of handicapped children in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this part by providing for such children special education and related services; and

"(B) that (i) handicapped children in private schools and facilities will be provided special education and related services (in conformance with an individualized educational program as required by this part) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this part or any other applicable law requiring the provision of special education and related services to all handicapped children within such State, and (ii) in all such instances the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies;

"(5) set forth policies and procedures which assure that the State shall seek to recover any funds made available under this part for services to any child who is determined to be erroneously classified as eligible to be counted under section 611(a) or section 611(d);

"(6) provide satisfactory assurance that the control of funds provided under this part, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this part, and that a public agency will administer such funds and property;

"(7) provide for (A) making such reports in such form and containing such information as the Commissioner may require to carry out his functions under this part, and (B) keeping such records and affording such access thereto as the Commissioner may find necessary to assure the correctness and verification of such reports and proper disbursement of Federal funds under this part; Reports and records.

"(8) provide procedures to assure that final action with respect to any application submitted by a local educational agency or an intermediate educational unit shall not be taken without first affording the local educational agency or intermediate educational unit involved reasonable notice and opportunity for a hearing; Notice, hearings.

"(9) provide satisfactory assurance that Federal funds made available under this part (A) will not be commingled with State funds, and (B) will be so used as to supplement and increase the level of State and local funds expended for the education of handicapped children and in no case to supplant such State and local funds, except that, where the State provides clear and convincing evidence that all handicapped children have available to them a free appropriate public education, the Commissioner may waive in part the requirement of this clause if he concurs with the evidence provided by the State;

"(10) provide, consistent with procedures prescribed pursuant to section 617(a)(2), satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under this part to the State, including any such funds paid by the State to local educational agencies and intermediate educational units;

Evaluation.

"(11) provide for procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of handicapped children (including evaluation of individualized education programs), in accordance with such criteria that the Commissioner shall prescribe pursuant to section 617; and

State advisory panel.

"(12) provide that the State has an advisory panel, appointed by the Governor or any other official authorized under State law to make such appointments, composed of individuals involved in or concerned with the education of handicapped children, including handicapped individuals, teachers, parents or guardians of handicapped children, State and local education officials, and administrators of programs for handicapped children, which (A) advises the State educational agency of unmet needs within the State in the education of handicapped children, (B) comments publicly on any rules or regulations proposed for issuance by the State regarding the education of handicapped children and the procedures for distribution of funds under this part, and (C) assists the State in developing and reporting such data and evaluations as may assist the Commissioner in the performance of his responsibilities under section 618.

"(b) Whenever a State educational agency provides free appropriate public education for handicapped children, or provides direct services to such children, such State educational agency shall include, as part of the State plan required by subsection (a) of this section, such additional assurances not specified in such subsection (a) as are contained in section 614(a), except that funds available for the provision of such education or services may be expended without regard to the provisions relating to excess costs in section 614(a).

"(c) The Commissioner shall approve any State plan and any modification thereof which—

"(1) is submitted by a State eligible in accordance with section 612; and

"(2) meets the requirements of subsection (a) and subsection (b).

Notice, hearings.

The Commissioner shall disapprove any State plan which does not meet the requirements of the preceding sentence, but shall not finally disapprove a State plan except after reasonable notice and opportunity for a hearing to the State.

"APPLICATION

20 USC 1414.

"SEC. 614. (a) A local educational agency or an intermediate educational unit which desires to receive payments under section 611(d) for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall—

"(1) provide satisfactory assurance that payments under this part will be used for excess costs directly attributable to programs which—

"(A) provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are handicapped, regardless of the severity of their handicap, and are in need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving such education and services;

"(B) establish policies and procedures in accordance with detailed criteria prescribed under section 617(c);

"(C) establish a goal of providing full educational opportunities to all handicapped children, including—

"(i) procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under section 613(a)(3);

"(ii) the provision of, and the establishment of priorities for providing, a free appropriate public education to all handicapped children, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education;

"(iii) the participation and consultation of the parents or guardian of such children; and

"(iv) to the maximum extent practicable and consistent with the provisions of section 612(5)(B), the provision of special services to enable such children to participate in regular educational programs;

"(D) establish a detailed timetable for accomplishing the goal described in subclause (C); and

"(E) provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal described in subclause (C);

"(2) provide satisfactory assurance that (A) the control of funds provided under this part, and title to property derived from such funds, shall be in a public agency for the uses and purposes provided in this part, and that a public agency will administer such funds and property, (B) Federal funds expended by local educational agencies and intermediate educational units for programs under this part (i) shall be used to pay only the excess costs directly attributable to the education of handicapped children, and (ii) shall be used to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant such State and local funds, and (C) State and local funds will be used in the jurisdiction of the local educational agency or intermediate educational unit to provide services in program areas which, taken as a whole, are at least comparable to services being provided in areas of such jurisdiction which are not receiving funds under this part;

"(3)(A) provide for furnishing such information (which, in the case of reports relating to performance, is in accordance with specific performance criteria related to program objectives), as may be necessary to enable the State educational agency to perform its duties under this part, including information relating to the educational achievement of handicapped children participating in programs carried out under this part; and

"(B) provide for keeping such records, and provide for affording such access to such records, as the State educational agency may find necessary to assure the correctness and verification of such information furnished under subclause (A);

Recordkeeping.

"(4) provide for making the application and all pertinent documents related to such application available to parents, guardians, and other members of the general public, and provide that all evaluations and reports required under clause (3) shall be public information;

Public information, availability.

"(5) provide assurances that the local educational agency or intermediate educational unit will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually;

"(6) provide satisfactory assurance that policies and programs established and administered by the local educational agency or intermediate educational unit shall be consistent with the provisions of paragraph (1) through paragraph (7) of section 612 and section 613(a); and

"(7) provide satisfactory assurance that the local educational agency or intermediate educational unit will establish and maintain procedural safeguards in accordance with the provisions of sections 612(5)(B), 612(5)(C), and 615.

Application approval.

"(b)(1) A State educational agency shall approve any application submitted by a local educational agency or an intermediate educational unit under subsection (a) if the State educational agency determines that such application meets the requirements of subsection (a), except that no such application may be approved until the State plan submitted by such State educational agency under subsection (a) is approved by the Commissioner under section 613(c). A State educational agency shall disapprove any application submitted by a local educational agency or an intermediate educational unit under subsection (a) if the State educational agency determines that such application does not meet the requirements of subsection (a).

Notice, hearing.

"(2)(A) Whenever a State educational agency, after reasonable notice and opportunity for a hearing, finds that a local educational agency or an intermediate educational unit, in the administration of an application approved by the State educational agency under paragraph (1), has failed to comply with any requirement set forth in such application, the State educational agency, after giving appropriate notice to the local educational agency or the intermediate educational unit, shall—

"(i) make no further payments to such local educational agency or such intermediate educational unit under section 620 until the State educational agency is satisfied that there is no longer any failure to comply with the requirement involved; or

"(ii) take such finding into account in its review of any application made by such local educational agency or such intermediate educational unit under subsection (a).

"(B) The provisions of the last sentence of section 616(a) shall apply to any local educational agency or any intermediate educational unit receiving any notification from a State educational agency under this paragraph.

"(3) In carrying out its functions under paragraph (1), each State educational agency shall consider any decision made pursuant to a hearing held under section 615 which is adverse to the local educational agency or intermediate educational unit involved in such decision.

"(c)(1) A State educational agency may, for purposes of the consideration and approval of applications under this section, require local educational agencies to submit a consolidated application for payments if such State educational agency determines that any individual application submitted by any such local educational agency will be disapproved because such local educational agency is ineligible

to receive payments because of the application of section 611(c)(4)(A)(i) or such local educational agency would be unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of handicapped children.

"(2)(A) In any case in which a consolidated application of local educational agencies is approved by a State educational agency under paragraph (1), the payments which such local educational agencies may receive shall be equal to the sum of payments to which each such local educational agency would be entitled under section 611(d) if an individual application of any such local educational agency had been approved.

Rules and regulations.

"(B) The State educational agency shall prescribe rules and regulations with respect to consolidated applications submitted under this subsection which are consistent with the provisions of paragraph (1) through paragraph (7) of section 612 and section 613(a) and which provide participating local educational agencies with joint responsibilities for implementing programs receiving payments under this part.

"(C) In any case in which an intermediate educational unit is required pursuant to State law to carry out the provisions of this part, the joint responsibilities given to local educational agencies under subparagraph (B) shall not apply to the administration and disbursement of any payments received by such intermediate educational unit. Such responsibilities shall be carried out exclusively by such intermediate educational unit.

"(d) Whenever a State educational agency determines that a local educational agency—

"(1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a);

"(2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or

"(3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children;

the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to handicapped children residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this part.

Funds, reallocation.

"(e) Whenever a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all handicapped children residing in the area served by such agency with State and local funds otherwise available to such agency, the State educational agency may reallocate funds (or such portion of those funds as may not be required to provide such education and services) made available to such agency, pursuant to section 611(d), to such other local educational agencies within the State as are not adequately providing special education and related services to all handicapped children residing in the areas served by such other local educational agencies.

"(f) Notwithstanding the provisions of subsection (a)(2)(B)(ii), any local educational agency which is required to carry out any program for the education of handicapped children pursuant to a State law shall be entitled to receive payments under section 611(d) for use in carrying out such program, except that such payments may not be used to reduce the level of expenditures for such program made by such local educational agency from State or local funds below the level of such expenditures for the fiscal year prior to the fiscal year for which such local educational agency seeks such payments.

"PROCEDURAL SAFEGUARDS

20 USC 1415.

"SEC. 615. (a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this part shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

"(b)(1) The procedures required by this section shall include, but shall not be limited to—

"(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

"(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

"(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

"(i) proposes to initiate or change, or

"(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

"(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

"(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

Hearing.

"(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

"(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

"(d) Any party to any hearing conducted pursuant to subsections (b) and (c) shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 613(a)(12)).

"(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) shall be final, except that any party may bring an action under paragraph (2) of this subsection.

"(2) Any party aggrieved by the findings and decision made under subsection (b) who does not have the right to an appeal under subsection (c), and any party aggrieved by the findings and decision under subsection (c), shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate. Civil action.

"(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

"(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy. Jurisdiction.

"WITHHOLDING AND JUDICIAL REVIEW

"SEC. 616. (a) Whenever the Commissioner, after reasonable notice and opportunity for hearing to the State educational agency involved (and to any local educational agency or intermediate educational unit affected by any failure described in clause (2)), finds— Notice, hearing. 20 USC 1416.

"(1) that there has been a failure to comply substantially with any provision of section 612 or section 613, or

"(2) that in the administration of the State plan there is a failure to comply with any provision of this part or with any requirements set forth in the application of a local educational agency or intermediate educational unit approved by the State educational agency pursuant to the State plan,

the Commissioner (A) shall, after notifying the State educational agency, withhold any further payments to the State under this part, and (B) may, after notifying the State educational agency, withhold further payments to the State under the Federal programs specified in section 613(a)(2) within his jurisdiction, to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children. If the Commissioner withholds further payments under clause (A) or clause (B) he may determine that such withholding will be limited to programs or projects under the State plan, or portions thereof, affected by the failure, or that the State educational agency shall not make further payments under this part to specified local educational agencies or intermediate educational units affected by the failure. Until the Commissioner is satisfied that there is no longer any failure to comply with the provisions of this part, as specified in clause (1) or clause (2), no further payments shall be made to the State under this part or under the Federal programs specified in section 613(a)(2) within his jurisdiction to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children, or payments by the State educational agency under this part shall be limited to local educational agencies and intermediate educational units whose actions did not cause or were not involved in the failure, as the case may be. Any State educational agency, local educational agency, or intermediate educational unit in receipt of a notice pursuant to the first sentence of this subsection shall, by means of a public notice, take such measures as may be necessary to bring the pendency of an action pursuant to this subsection to the attention of the public within the jurisdiction of such agency or unit.

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"(b)(1) If any State is dissatisfied with the Commissioner's final action with respect to its State plan submitted under section 613, such State may, within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Commissioner. The Commissioner thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of title 28, United States Code.

"(2) The findings of fact by the Commissioner, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Commissioner to take further evidence, and the Commissioner may thereupon make new or modified findings of fact and may modify his previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

"(3) Upon the filing of such petition, the court shall have jurisdiction to affirm the action of the Commissioner or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

"ADMINISTRATION

"SEC. 617. (a)(1) In carrying out his duties under this part, the Commissioner shall—

"(A) cooperate with, and furnish all technical assistance necessary, directly or by grant or contract, to the States in matters relating to the education of handicapped children and the execution of the provisions of this part;

"(B) provide such short-term training programs and institutes as are necessary;

"(C) disseminate information, and otherwise promote the education of all handicapped children within the States; and

"(D) assure that each State shall, within one year after the date of the enactment of the Education for All Handicapped Children Act of 1975, provide certification of the actual number of handicapped children receiving special education and related services in such State.

"(2) As soon as practicable after the date of the enactment of the Education for All Handicapped Children Act of 1975, the Commissioner shall, by regulation, prescribe a uniform financial report to be utilized by State educational agencies in submitting State plans under this part in order to assure equity among the States. Regulations.

"(b) In carrying out the provisions of this part, the Commissioner (and the Secretary, in carrying out the provisions of subsection (c)) shall issue, not later than January 1, 1977, amend, and revoke such rules and regulations as may be necessary. No other less formal method of implementing such provisions is authorized.

"(c) The Secretary shall take appropriate action, in accordance with the provisions of section 438 of the General Education Provisions Act, to assure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Commissioner and by State and local educational agencies pursuant to the provisions of this part. 20 USC 1232g

"(d) The Commissioner is authorized to hire qualified personnel necessary to conduct data collection and evaluation activities required by subsections (b), (c) and (d) of section 618 and to carry out his duties under subsection (a)(1) of this subsection without regard to the provisions of title 5, United States Code, relating to appointments in the competitive service and without regard to chapter 51 and subchapter III of chapter 53 of such title relating to classification and general schedule pay rates except that no more than twenty such personnel shall be employed at any time. 5 USC 51 5331.

"EVALUATION

"SEC. 618. (a) The Commissioner shall measure and evaluate the impact of the program authorized under this part and the effectiveness of State efforts to assure the free appropriate public education of all handicapped children. 20 USC 1418.

"(b) The Commissioner shall conduct, directly or by grant or contract, such studies, investigations, and evaluations as are necessary to assure effective implementation of this part. In carrying out his responsibilities under this section, the Commissioner shall—

"(1) through the National Center for Education Statistics, provide to the appropriate committees of each House of the Congress and to the general public at least annually, and shall update at least annually, programmatic information concerning programs and projects assisted under this part and other Federal programs

supporting the education of handicapped children, and such information from State and local educational agencies and other appropriate sources necessary for the implementation of this part, including—

"(A) the number of handicapped children in each State, within each disability, who require special education and related services;

"(B) the number of handicapped children in each State, within each disability, receiving a free appropriate public education and the number of handicapped children who need and are not receiving a free appropriate public education in each such State;

"(C) the number of handicapped children in each State, within each disability, who are participating in regular educational programs, consistent with the requirements of section 612(5)(B) and section 614(a)(1)(C)(iv), and the number of handicapped children who have been placed in separate classes or separate school facilities, or who have been otherwise removed from the regular education environment;

"(D) the number of handicapped children who are enrolled in public or private institutions in each State and who are receiving a free appropriate public education, and the number of handicapped children who are in such institutions and who are not receiving a free appropriate public education;

"(E) the amount of Federal, State, and local expenditures in each State specifically available for special education and related services; and

"(F) the number of personnel, by disability category, employed in the education of handicapped children, and the estimated number of additional personnel needed to adequately carry out the policy established by this Act; and

"(2) provide for the evaluation of programs and projects assisted under this part through—

"(A) the development of effective methods and procedures for evaluation;

"(B) the testing and validation of such evaluation methods and procedures; and

"(C) conducting actual evaluation studies designed to test the effectiveness of such programs and projects.

"(c) In developing and furnishing information under subclause (E) of clause (1) of subsection (b), the Commissioner may base such information upon a sampling of data available from State agencies, including the State educational agencies, and local educational agencies.

Report, transmittal to congressional committees.

"(d)(1) Not later than one hundred twenty days after the close of each fiscal year, the Commissioner shall transmit to the appropriate committees of each House of the Congress a report on the progress being made toward the provision of free appropriate public education to all handicapped children, including a detailed description of all evaluation activities conducted under subsection (b).

Contents.

"(2) The Commissioner shall include in each such report—

"(A) an analysis and evaluation of the effectiveness of procedures undertaken by each State educational agency, local educational agency, and intermediate educational unit to assure that handicapped children receive special education and related services in the least restrictive environment commensurate with their needs and to improve programs of instruction for handicapped children in day or residential facilities;

"(B) any recommendations for change in the provisions of this part, or any other Federal law providing support for the education of handicapped children; and

"(C) an evaluation of the effectiveness of the procedures undertaken by each such agency or unit to prevent erroneous classification of children as eligible to be counted under section 611, including actions undertaken by the Commissioner to carry out provisions of this Act relating to such erroneous classification.

In order to carry out such analyses and evaluations, the Commissioner shall conduct a statistically valid survey for assessing the effectiveness of individualized educational programs.

"(e) There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the provisions of this section. Appropriation authorization.

"INCENTIVE GRANTS

"SEC. 619. (a) The Commissioner shall make a grant to any State which— 20 USC 1419.

"(1) has met the eligibility requirements of section 612;

"(2) has a State plan approved under section 613; and

"(3) provides special education and related services to handicapped children aged three to five, inclusive, who are counted for the purposes of section 611(a)(1)(A).

The maximum amount of the grant for each fiscal year which a State may receive under this section shall be $300 for each such child in that State.

"(b) Each State which—

"(1) has met the eligibility requirements of section 612,

"(2) has a State plan approved under section 613, and

"(3) desires to receive a grant under this section,

shall make an application to the Commissioner at such time, in such manner, and containing or accompanied by such information, as the Commissioner may reasonably require.

"(c) The Commissioner shall pay to each State having an application approved under subsection (b) of this section the amount to which the State is entitled under this section, which amount shall be used for the purpose of providing the services specified in clause (3) of subsection (a) of this section.

"(d) If the sums appropriated for any fiscal year for making payments to States under this section are not sufficient to pay in full the maximum amounts which all States may receive under this part for such fiscal year, the maximum amounts which all States may receive under this part for such fiscal year shall be ratably reduced. In case additional funds become available for making such payments for any fiscal year during which the preceding sentence is applicable, such reduced amounts shall be increased on the same basis as they were reduced.

"(e) In addition to the sums necessary to pay the entitlements under section 611, there are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the provisions of this section. Appropriation authorization.

"PAYMENTS

"SEC. 620. (a) The Commissioner shall make payments to each State in amounts which the State educational agency of such State is eligible to receive under this part. Any State educational agency receiving payments under this subsection shall distribute payments 20 USC 1420.

to the local educational agencies and intermediate educational units of such State in amounts which such agencies and units are eligible to receive under this part after the State educational agency has approved applications of such agencies or units for payments in accordance with section 614(b).

"(b) Payments under this part may be made in advance or by way of reimbursement and in such installments as the Commissioner may determine necessary.".

Regulations. 20 USC 1411 note.

(b)(1) The Commissioner of Education shall, no later than one year after the effective date of this subsection, prescribe—

(A) regulations which establish specific criteria for determining whether a particular disorder or condition may be considered a specific learning disability for purposes of designating children with specific learning disabilities;

(B) regulations which establish and describe diagnostic procedures which shall be used in determining whether a particular child has a disorder or condition which places such child in the category of children with specific learning disabilities; and

(C) regulations which establish monitoring procedures which will be used to determine if State educational agencies, local educational agencies, and intermediate educational units are complying with the criteria established under clause (A) and clause (B).

Proposed regulation, submittal to congressional committees. Publication in Federal Register.

(2) The Commissioner shall submit any proposed regulation written under paragraph (1) to the Committee on Education and Labor of the House of Representatives and the Committee on Labor and Public Welfare of the Senate, for review and comment by each such committee, at least fifteen days before such regulation is published in the Federal Register.

(3) If the Commissioner determines, as a result of the promulgation of regulations under paragraph (1), that changes are necessary in the definition of the term "children with specific learning disabilities", as such term is defined by section 602(15) of the Act, he shall submit recommendations for legislation with respect to such changes to each House of the Congress.

20 USC 1401.

Definitions.

(4) For purposes of this subsection:

(A) The term "children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or environmental, cultural, or economic disadvantage.

(B) The term "Commissioner" means the Commissioner of Education.

20 USC 1411.

(c) Effective on the date upon which final regulations prescribed by the Commissioner of Education under subsection (b) take effect, the amendment made by subsection (a) is amended, in subparagraph (A) of section 611(a)(5) (as such subparagraph would take effect on the effective date of subsection (a)), by adding "and" at the end of clause (i), by striking out clause (ii), and by redesignating clause (iii) as clause (ii).

AMENDMENTS WITH RESPECT TO EMPLOYMENT OF HANDICAPPED INDIVIDUALS, REMOVAL OF ARCHITECTURAL BARRIERS, AND MEDIA CENTERS

SEC. 6. (a) Part A of the Act is amended by inserting after section 605 thereof the following new sections:

"EMPLOYMENT OF HANDICAPPED INDIVIDUALS

"SEC. 606. The Secretary shall assure that each recipient of assistance under this Act shall make positive efforts to employ and advance in employment qualified handicapped individuals in programs assisted under this Act. 20 USC 1405.

"GRANTS FOR THE REMOVAL OF ARCHITECTURAL BARRIERS

"SEC. 607. (a) Upon application by any State or local educational agency or intermediate educational unit the Commissioner is authorized to make grants to pay part or all of the cost of altering existing buildings and equipment in the same manner and to the same extent as authorized by the Act approved August 12, 1968 (Public Law 90-480), relating to architectural barriers. 20 USC 1406.

"(b) For the purpose of carrying out the provisions of this section, there are authorized to be appropriated such sums as may be necessary.". Appropriation authorization.

(b) Section 653 of the Act (20 U.S.C. 1453) is amended to read as follows:

"CENTERS ON EDUCATIONAL MEDIA AND MATERIALS FOR THE HANDICAPPED

"SEC. 653. (a) The Secretary is authorized to enter into agreements with institutions of higher education, State and local educational agencies, or other appropriate nonprofit agencies, for the establishment and operation of centers on educational media and materials for the handicapped, which together will provide a comprehensive program of activities to facilitate the use of new educational technology in education programs for handicapped persons, including designing, developing, and adapting instructional materials, and such other activities consistent with the purposes of this part as the Secretary may prescribe in such agreements. Any such agreement shall—

"(1) provide that Federal funds paid to a center will be used solely for such purposes as are set forth in the agreement; and

"(2) authorize the center involved, subject to prior approval by the Secretary, to contract with public and private agencies and organizations for demonstration projects.

"(b) In considering proposals to enter into agreements under this section, the Secretary shall give preference to institutions and agencies—

"(1) which have demonstrated the capabilities necessary for the development and evaluation of educational media for the handicapped; and

"(2) which can serve the educational technology needs of the Model High School for the Deaf (established under Public Law 89-694). 80 Stat. 1027.

"(c) The Secretary shall make an annual report on activities carried out under this section which shall be transmitted to the Congress.". Report to Congress.

CONGRESSIONAL DISAPPROVAL OF REGULATIONS

SEC. 7. (a)(1) Section 431(d)(1) of the General Education Provisions Act (20 U.S.C. 1232(d)(1)) is amended by inserting "final" immediately before "standard" each place it appears therein.

(2) The third sentence of section 431(d)(2) of such Act (20 U.S.C. 1232(d)(2)) is amended by striking out "proposed" and inserting in lieu thereof "final".

(3) The fourth and last sentences of section 431(d)(2) of such Act (20 U.S.C. 1232(d)(2)) each are amended by inserting "final" immediately before "standard".

(b) Section 431(d)(1) of the General Education Provisions Act (20 U.S.C. 1232(d)(1)) is amended by adding at the end thereof the following new sentence: "Failure of the Congress to adopt such a concurrent resolution with respect to any such final standard, rule, regulation, or requirement prescribed under any such Act, shall not represent, with respect to such final standard, rule, regulation, or requirement, an approval or finding of consistency with the Act from which it derives its authority for any purpose, nor shall such failure to adopt a concurrent resolution be construed as evidence of an approval or finding of consistency necessary to establish a prima facie case, or an inference or presumption, in any judicial proceeding.".

EFFECTIVE DATES

20 USC 1411 note.

SEC. 8. (a) Notwithstanding any other provision of law, the amendments made by sections 2(a), 2(b), and 2(c) shall take effect on July 1, 1975.

(b) The amendments made by sections 2(d), 2(e), 3, 6, and 7 shall take effect on the date of the enactment of this Act.

(c) The amendments made by sections 4 and 5(a) shall take effect on October 1, 1977, except that the provisions of clauses (A), (C), (D), and (E) of paragraph (2) of section 612 of the Act, as amended by this Act, section 617(a)(1)(D) of the Act, as amended by this Act, section 617(b) of the Act, as amended by this Act, and section 618(a) of the Act, as amended by this Act, shall take effect on the date of the enactment of this Act.

(d) The provisions of section 5(b) shall take effect on the date of the enactment of this Act.

Approved November 29, 1975.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 94-332 accompanying H.R. 7217 (Comm. on Education and Labor) and No. 94-664 (Comm. of Conference).

SENATE REPORTS: No. 94-168 (Comm. on Labor and Public Welfare) and No. 94-455 (Comm. of Conference).

CONGRESSIONAL RECORD, Vol. 121 (1975):

June 18, considered and passed Senate.

July 21, 29, considered and passed House, amended, in lieu of H.R. 7217.

Nov. 18, House agreed to conference report.

Nov. 19, Senate agreed to conference report.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 11, No. 49:

Dec. 2, Presidential statement.

APPENDIX D

ANNOTATION OF SELECTED CASES

ANNOTATION OF SELECTED CASES

CASE	STATE/COURT	TOPIC	SUMMARY
Adkins v. Ropp	Indiana Appellate Court	Duty of Care	Professionals in medicine live with implied control for duty of care but do not promise to effect a cure.
Armstrong v. Starksville	Court of Appeals, 5th	Competency Testing	Tests must relate to the purpose for which it was purportedly designed.
B.M. v. State	Supreme Court of Montana	Governmental Immunity	State was not immune from liability for its negligence in placing a child in a special education program. School authorities owed the child a duty of reasonable care in testing her and placing her in appropriate special education programs.
Bales v. Clarke	U.S. District Court, Virginia	P. L. 94-142	Under 94-142 and Virginia law, the state was not required to pay all of the expenses incurred by parents in educating the child, whether the child was handicapped or nonhandicapped.

CASE	STATE/COURT	TOPIC	SUMMARY
Biananja v. J. Irving	District Court of Appeals, 1st (Calif.)	Professional Certification	Private sector. An injured person may recover damages suffered by negligent preparation of a will by unlicensed and unlawful practice of law in the preparation of the will.
Boxall v. Sequoia Union High School District	U.S. District Court (Calif.)	P.L. 92-142. Monetary damages not O.K. in federal	Both Title VI and Section 504 of the rehabilitation act were not purported to programs give individuals a whole panoply of new rights and remedies.
Brown v. State	Supreme Court of Kansas	Governmental Immunity	The state university was not protected by immunity from action for breach of contract for failure to procure passenger liability insurance as required by contract and pertinent federal law and regulations.
Buchholtz v. Iowa	Supreme Court of Iowa	P.L. 94-142	The law does not require the Department of Public best program or the maximum program, but instead requires the provision of a program appropriate for a student's educational needs.

CASE	STATE/COURT	TOPIC	SUMMARY
Chumbler v. McClure	U.S. Court of Appeals, 6th	Conflicting methodology for professional	Where two or more schools of thought exist among competent members of the medical profession concerning proper medical treatment for a given ailment, each of which is supported by responsible authority, it is not malpractice to be among a minority in implementation.
Coleman v. California Yearly Meeting of Friends	District Court of Appeals, 2nd (Calif.)	Duty of care, Tort	To constitute an actionable tort, there must be a legal duty imposed by statute or otherwise, and this action must be responsible for the injury.
Cooper v. United States	U.S. District Court (Nebraska)	Negligence, Diagnosis	Error in judgment may turn to negligence if fault is established by procedures utilized in a particular facility which do not rise to the standard of care required of such facility. Private sector-medical.

CASE	STATE/COURT	TOPIC	SUMMARY
Conley v. Board of Ed. of New Britain	Supreme Court of Connecticut	Technical procedures of internal appeals process	The board, in acting as a quasi-judicial agency, is allowed to act in an informal manner. It is not necessary for it to follow technical rules of pleading and procedure.
Connelly v. Univ. of Vermont	U.S. District Court, Vermont	School authority in evaluation	This decision gives school authorities absolute discretion in determining whether a student is delinquent in his/her studies. The effectiveness of instruction depends on noninterference from noneducational tribunals.
Darling v. Charleston Community Memorial Hospital	Supreme Court of Illinois	Duty of care	Custom is relevant in determining the standard of care because it illustrates what is feasible. Custom dictates a body of knowledge.
Davis v. Ann Arbor	U.S. District Court	Due process and school responsibility	Standard for determining adequate procedural due process in school proceedings is concept of fundamental fairness. Mission of schools is to impart educational care necessary for teaching useful and productive lives.

CASE	STATE/COURT	TOPIC	SUMMARY
P. Duncan	Court of Appeals of Maryland	Governmental Immunity to teachers	Immunity does not extend to the individual teacher in tort action since they are a professional contracted employee and not a public official.
Engel v. Gosper	Superior Court of New Jersey	Failure to instruct properly	Allegation that teachers improperly instructed boys in dangers of experimenting with rockets while encouraging them to experiment.
Florence v. Goldberg	New York	Duty of care	Where a municipality assumes a duty to a person(s), it must perform that duty in a nonnegligent manner even though absent its voluntary assumption of that duty none would have existed.
Freeman v. Gould Spec. Schl. Dist. of Lincoln Cou.	Arkansas	OB Property rights of teachers	In Arkansas, teachers do not have absolute right to contract renewal and do not have right to hearing, providing cross examination, and confrontation of witnesses.

CASE	STATE/COURT	TOPIC	SUMMARY
Gardner v. State	New York	Failure to properly instruct	Just because a teacher is not present when a student sustains an injury does not mean it was the proximate cause of the injury.
Gaspar v. Bruton	U.S. Court of Appeals, 10th (Oklahoma)	School authority	Governing officials of a school exercise quasi-judicial functions, and in such capacity, their decisions are conclusive, provided their action has been in good faith and not arbitrary.
Gilliland v. Board of Ed. of Pleasantview	Supreme Court of Illinois	Board's authority; judicial restraint	The board's findings are not immune from judicial review. The court function, however, is limited and does not permit substitution unless those findings are contrary to the manifest weight of evidence.
Greenhill v. Bailey	U.S. District Court, Iowa	School authority	The courts will not review a decision of the school authorities relating to the academic qualifications of the students.

CASE	STATE/COURT	TOPIC	SUMMARY
T. Harrigan v. United States	U.S. District Court, Pennsylvania	Standard of care - Medical	Where more than one mode of treatment was recognized as proper, the professional would not be negligent in adopting any of such modes and his/her best judgment as adequate standard of care.
T. Harrigan	U.S. District Court, Pennsylvania	Standard of care	Where more than one mode of treatment was recognized as proper, surgeon would not be negligent in adopting any of such modes and only best judgment can be expected.
Board of Curators of the U of Missouri v. Horowitz	U.S. Court of Appeals, 8th District (Missouri)	Academic decision making	Courts are particularly ill-equipped to evaluate academic performance. There should not be judicial intrusion in academic decision making.
Island Trees Union Free School V.A. Pico	New York	Board's authority not absolute	Board's authority. Board's may not remove school books just because they dislike them.
James v. Board of Educ. of City of New York	New York	Competency exams	Courts should not interfere in decisions of test construction to measure academic achievement.

CASE	STATE/COURT	TOPIC	SUMMARY
Johnson v. Borland	Supreme Court of Michigan	Mistake in diagnosis	Doctor is not liable for a mistake in diagnosis; but this not true if he/she is negligent in making a proper examination. Diagnosis should follow the example of other in the profession in a given locality.
Johnson v. State	Supreme Court of California	Governmental immunity	Re: Muskopf. When there is negligence, the rule is liability, immunity is the exception.
Klostermann	New York	Separation of powers	Complex societal and governmental issues is a subject left to the discretion of the legislative and executive branches of government.
Kolar B. Union Free School Dist.	New York	Competency of Educator	A school district was not liable for any negligence of an instructor, but would be liable if it failed in its duty to select a suitable person as instructor.
Kuhlmeier	U.S. District Court, Missouri	School authority	School officials have a great deal of discretion in determining curriculum; constitutional values are not implicated in curricular decisions.

CASE	STATE/COURT	TOPIC	SUMMARY
Leonard v. School Comm. of Attleboro	Supreme Court of Massachusetts	School authority	The court's function in reviewing regulations for discipline of students is limited in light of broad discretionary powers which law confers on the board.
Leviton v. Board of Educ. of City of Chicago	Supreme Court of Illinois	Liability of district	A school district is a quasi-municipal corporation and is not liable for breach of duty of its officers.
Lipman v. Brisbane	Supreme Court of California	Discretionary functions	There is a vital public interest in securing free and independent judgment of school trustees in dealing with personnel problems otherwise, fear of suit would be the determining factor.
L. Lang v. Braintree School Committee	U.S. District Court, Massachusetts	94-142	Law was violated because of the school's failure to include parents in the development of long-range education program.

CASE	STATE/COURT	TOPIC	SUMMARY
Lucas v. L.S. Hamm	Supreme Court of California	Professional judgment	The professional is not the insurer of soundness of his/her opinions or of validity of instrument he/she drafts; and is not liable for being in error on professional judgment if similar to others in profess.
Mailloux v P. Kiley	U.S. District Court, Massachusetts	Teaching Methodology	The secondary school more clearly serves as parents with minors and does not have the independent broad discretion traditionally exhibited in higher education. Stricter standards of care in K-12.
Mahavongsnan v. M. Hall	U.S. Court of Appeals, 5th Circuit	Competency Examinations	The university's decision to require the comprehensive examination is a reasonable academic regulation within the expertise of the university.
Mastrangelo v. West Side Union High School	Supreme Court of California	Standard of care	A chemistry teacher is expected to instruct safety features of academic work with greater care than just giving a textbook and directing to follow instructions. Liability for injuries may result.

CASE	STATE/COURT	TOPIC	SUMMARY
R. Mercer v. Michigan State Board of Education	U.S. District Court	Curriculum	The school, by delegation of powers, has the authority to determine curriculum. The teacher does not have a right, constitutionally or otherwise, to teach what he/she sees fit.
J. Militana v. University of Miami	District Court of Appeal of Florida	School's authority	Academic requirements, including determining passing grades, is within the discretion of the school authorities and courts will not interfere, unless the school acted in an arbitrary or capricious manner.
Mills v. Board of Education of District Columbia	U.S. District Court, D of C	Distribution of funds for curriculum	If sufficient funds are not available to finance all of the services and programs that are needed, then they must be equally distributed for all children's needs.
Molitor v. Kaneland	Supreme Court of Illinois	Governmental Immunity	In this case, school district is liable in tort for the negligence of its employee.

CASE	STATE/COURT	TOPIC	SUMMARY
H. Monahan v. State of Nebraska	U.S. Court of Appeals, Nebraska	P.L. 94-42	Is primarily a procedural statute which imposes substantive duty to provide adequate education not to maximize each handicapped child's personal development.
Muskopf v. Corning Hospital District	Supreme Court of California	Governmental Immunity	Governmental immunity from tort liable is determined to be discarded as mistake and unjust.
N.Y.C. School Board v. United Fed. of Teachers	Court of Appeals of New York	Board authority	The board of education of New York is responsible for determining the appropriate number of hours of instruction.
Nigosian v. Weiss	U.S. District Court, Michigan	Curriculum	School teachers and board may not abuse their authority and use the public classroom as a forum for personal views unrelated to the school curriculum.
O'Brien v. Township High School District	Appellate Court of Illinois	Standard of care	When teachers provide medical treatment, they do not retain broad discretion as in the classroom setting. School district must demonstrate care in this area.

CASE	STATE/COURT	TOPIC	SUMMARY
Pierce v. Board of Education	Supreme Court of New Hampshire	Judicial Interference	In reviewing an administrative decision, the court will treat the agencies findings as lawful and reasonable; it will not substitute its judgment.
Pittman v. Taylor	Supreme Court of Michigan	Governmental Immunity	In Michigan, the doctrine of governmental immunity was shaped in early days and is now an outmoded defense for tort liability.
Raymond v. Paradise Unified School District	District Court of Appeal, 3rd (Calif.)	Duty of care	Once a school system provides a program it must offer a competent, safe system. Even if this obligation did not exist prior to providing such program.
Richardson v. Doe	Supreme Court of Ohio	Malpractice	If one is involved in activities where they are unable to accomplish the purpose intended they are susceptible to the charge of failure in the performance of professional duties.

CASE	STATE/COURT	TOPIC	SUMMARY
Scheelhaase v. Woodbury Central Comm. Schl.	U.S. District Court, Iowa	Teacher termination	A teacher has property interest in a contract of employment and must be afforded due process. Termination cannot be arbitrary and capricious.
E. Siau v. Rapides Parish School Board	Court of Appeal of Louisiana, 3rd	Negligence	If a student is found to contribute to his/her injury and is the proximate cause of such injury, then negligence by the school board is not considered.
C. Simmons v. J. Budds	Supreme Court of Connecticut	Grading	Grades may be changed by a delegated board or local agency over a teacher's objections. Due process is not denied a teacher in such a decision.
Smith v. Alameda	Court of Appeal, 1st (Calif.)	Misdiagnosis	District is not held responsible for negligently placing a child in classes for mentally retarded. The assertion that this was a breach of duty of care for appropriate educational training was denied.

CASE	STATE/COURT	TOPIC	SUMMARY
Smith v. Lewis	Supreme Court of California	Professional Standards	A professional does not guarantee the soundness of opinions and is not liable for every mistake made in practice. They are expected to know elementary principles commonly known by other members of the prof.
Stuart v. Nappi	U.S. District Court, Connecticut	Handicapped Mainstreaming	Handicapped children are neither immune from disciplinary process nor entitled to participate in programs when their behavior impairs other children of the program.
Todd v. Rochester Comm. Schools	Court of Appeals of Michigan	Schools authority in curriculum	School board and teachers determine the curriculum; the judicial censor is not appropriate in public education.
Whitney v. City of Worcester	Supreme Court of Massachusetts	Governmental Immunity	Test for determining application of immunity is whether the act is for common good of all or for special corporate benefit. If latter, there may be liability.

APPENDIX E

LETTER TO PARTICIPANTS

October 17, 1985

Dear

I am currently working on my doctoral dissertation at Michigan State University which involves research of the topic Instructional Malpractice. During the course of this study, the case of _____ has surfaced which may be included in this analysis.

The following information regarding _____ is important for this study.

1. What costs were involved including attorneys' feels, administrative time, etc.?

2. What effects did the decision have on your school district?

3. Has any other litigation (or other official action) developed from this case?

After concluding the preliminary research, it is evident that the above factors (questions 1-3) influence the curriculum of a school district in terms of costs and time, whether the case results in a favorable decision or not. Your input in developing the support for this conclusion (monetary costs of the case in terms of #1 above), where appropriate, will greatly assist in this research.

While this is a busy period of the school year, I would sincerely appreciate your time in responding to this request. If this is not possible, perhaps the letter could be forwarded to another individual who would assist in gaining this information.

Again, thanks for your time and consideration with this project.

Sincerely,

David W. Michelson

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