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EDUCATIONAL MALFEASANCE: A NEW CAUSE OF ACTION FOR FAILURE TO EDUCATE?

I. INTRODUCTION

In recent years, increasing public dissatisfaction with this nation's educational systems has stimulated a move to find redress in the courtroom.¹ Frustrated plaintiffs who believe the schools have failed in their duty to educate children have become increasingly aware of the possibility of a legal remedy for their grievances,² and at least two lawsuits have been brought for failure to educate.³ Even though both failed for lack of a recognizable cause of action, they represent the early development of a tort of educational malfeasance.⁴

This comment will examine the issues presented in these cases and attempt to predict the future of similar actions. An analysis will be made of the courts' reasoning in both cases, and an examination of recent legislative and educational trends towards accountability and competency-based programs will be made to determine their possible effect on suits for failure to educate.

1. For a general discussion of this trend to sue schools and their employees, see R. STRICKLAND, J. PHILLIPS, & W. PHILLIPS, *AVOIDING TEACHER MALPRACTICE* 63 (1976) [hereinafter cited as R. STRICKLAND]. Historically, these suits have been personal injury actions. For a collection of assorted cases, see Annot., 32 A.L.R. 2d 1163 (1953) and Annot., 86 A.L.R. 2d 489 (1962). See also Ripps, *The Tort Liability of the Classroom Teacher*, 9 AKRON L. REV. 19 (1975); Seitz, *Legal Responsibility Under Tort Law of School Personnel and School Districts as Regards Negligent Conduct Toward Pupils*, 15 HASTINGS L.J. 495 (1964). Cf. Owen, *Tort Liability in German School Law*, 20 LAW & CONTEMP. PROB. 72 (1955). Nevertheless, recovery for failure to instruct has been permitted where physical injury also resulted. See, e.g., *La Valley v. Stanford*, 272 App. Div. 183, 70 N.Y.S. 2d 460 (1947) (physical education teacher held liable for injuries plaintiff received in a boxing match after the teacher failed to instruct in defensive measures).

2. The question of sovereign immunity generally is beyond the scope of this paper, and it will be presumed in the following discussion that suits are not barred for that reason. Indeed, a majority of states have waived their sovereign immunity. Ripps, *supra* note 1, at 20. Only a few states, however, provide statutes allowing direct actions against school districts for damages caused by their boards, officers, agents, and employees. *Id.* For a brief history of sovereign immunity as applied to school districts, see Note, *Torts—Immunity—School District Liable for Torts of Employees*, 46 IOWA L. REV. 196 (1960). See generally Linn, *Tort Liability and the Schools*, 43 N.D.L. REV. 765 (1967); Mancke, *Liability of School Districts for the Negligent Acts of Their Employees*, 1 J.L. & EDUC. 109 (1972).

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

4. Misfeasance, malfeasance, and malpractice are used interchangeably in this article. Since no name has been given to the cause of action discussed here, any of the above could be used.

A. Historical Background

Providing a general educational opportunity for all children has not always been primarily the function of government. In this country's early history, the family assumed the major responsibility for preparing a child to become a productive member of society, and government had little or no concern with education and educational policies.⁵ The industrial revolution brought increased demands for an educational system that could adequately train children for more complex tasks.⁶ State and local governments gradually assumed the task of providing compulsory, tax-supported school systems to better serve this need.⁷ Public schools became the principal dispensers of knowledge and the importance of their role in society grew.

Today, even the Supreme Court has recognized that education has become one of the most significant functions of government.⁸ Society's recognition of the enormous benefits of providing children with a stimulating educational background has placed growing responsibilities on the school systems.⁹ Schools have not always been able to keep pace with the public's demands. The tense relationship which has subsequently developed between the public and the schools is one reason frustrated parents and students have turned to the courts for relief.¹⁰

5. J. HOGAN, *THE SCHOOLS, THE COURTS, AND THE PUBLIC INTEREST* 1 (1974) [hereinafter cited as J. HOGAN]. Educational responsibilities of parents and of the state are discussed in Comment, *The Right to Education: A Constitutional Analysis*, 44 U. CIN. L. REV. 796, 799-801 (1975) [hereinafter cited as *The Right to Education*].

6. J. HOGAN, *supra* note 5, at 1.

7. *Id.* See also Moskowitz, *Parental Rights and State Education*, 50 WASH. L. REV. 623 (1975).

8. *Brown v. Board of Educ.*, 347 U.S. 483 (1954). The Court, in an oft-quoted segment of its opinion, stated:

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 the very foundation of good citizenship. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Id. at 493. See also *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Tribe, *The Supreme Court 1972 Term*, 87 HARV. L. REV. 1, 105-16 (1973); Note, *Constitutional Law—Equal Protection—Property Taxes as a Method of Funding Public Education*, 7 AKRON L. REV. 151 (1973); Note, *The Right of Handicapped Children to an Education: The Phoenix of Rodriguez*, 59 CORNELL L. REV. 519 (1974); *Symposium—Public School Financing and Serrano v. Priest*, 4 HASTINGS CONST. L.Q. 421 (1977).

9. J. HOGAN, *supra* note 5, at 4. "Since schools exist to convey to youngsters certain knowledge, skills, and attitudes deemed necessary to help them develop as individuals and become contributing members of society, the learning experiences afforded children under the aegis of the school are a paramount concern of government." Reutter, *The Law and the Curriculum*, 20 L. & CONTEMP. PROB. 91, 91 (1955).

10. R. STRICKLAND, *supra* note 1, at 6.

B. *The Court's Role*

As the concept of education has changed in its relationship to the public interest, so has the role of the court changed in its relationship to education.¹¹ Policy decisions on educational issues have been devised

The fundamental purpose of civil litigation has always been to prevent or redress civil wrongs. In the United States, the law contemplates that when a person believes he has been wronged, or is about to be wronged, he may go into court and attempt to forestall the threatened wrong or seek relief from the wrong actually visited upon him by another. Regardless of whether the defendant in civil litigation was a person or a governmental or business entity, the courts are always willing to consider the plaintiff's claims and, where meritorious and not subject to some exemption by a rule of law, they have enjoined the future wrong or redressed the past one.

Thus, public schools in America have never been exempt from having to defend against lawsuits, although in some cases relevant rules of law, which restricted tort liability, protected the school boards' legislative discretionary authority against encroachment by the judiciary, placed severe limitations on school boards in the delegation of their legislative powers to school employees, or gave judicial sanction to a "hands-off" attitude fostered by the principle of *in loco parentis*, did limit the sanctions actually imposed. The limited relief granted some plaintiffs in civil suits brought against the public schools in years past undoubtedly did have a deterrent effect on litigation, but enough was directed against them over the decades to make them no strangers in the courtroom.

However, since 1954 and the landmark racial desegregation case of *Brown v. Board of Education*, a profound change has occurred in the courts' attitude toward public education in the United States. It is still evolving in a manner so pervasive that virtually every facet of public education is significantly affected.

In recent years, . . . factors have combined to change the attitude of the courts toward local public education. This has brought a corollary change in the approach of citizens who would resort to the judicial processes to solve disputes with the public schools. The fundamental emphasis in filing civil suits against the public schools has switched from seeking relief or redress of an alleged wrong to establishing and creating new law. Hence, a significant number of lawsuits now filed in the United States against the public schools are designed to put the judiciary in the position of creating new legal rights affecting public education, which state and local bodies will have to honor. And with this new design have come new tactics which plaintiffs use in imposing their views on, or enforcing their rights against, public school boards.

Shannon, *The New Tactics Used by Plaintiffs in Imposing Their Views on, or Enforcing Their Rights Against, Public School Boards—A Commentary*, 2 J.L. & EDUC. 77, 77-80 (1973) (footnote omitted). The author reviews these tactics and concludes that they are neither "good" nor "bad" but the "tactics must be understood if school people are to provide their best and most effective participation in the continuing process of reshaping democracy to meet the changing conditions successfully." *Id.* at 87.

11. J. HOGAN, *supra* note 5, at 5-6. In discussing the evolution of educational jurisprudence, Hogan categorizes the role of the courts in five stages: (1) the stage of strict judicial laissez faire (1789-1850) when courts generally ignored education; (2) the stage of state control of education (1850-1950) when state courts decided most educational questions; (3) the reformation stage (1950-present) when federal courts began to recognize that educational policies and practices were not in conformity with the federal constitution; (4) the stage of "education under supervision of the courts" (1950-present) when the tendency of the courts has been to expand their powers over schools, establishing a new judicial function; and (5) the stage of "strict construction" (March 21, 1973-present) when the courts have looked carefully at a constitutional basis for education cases. *Id.* See also Rist & Anson, *Social Science and the Judicial Process in Education Cases, An Introduction: Dimensions and Implications of the Increasing Role of the Courts in the Formulation of Educational Policy*, 6 J.L. & EDUC. 1 (1977); Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411 (1973).

more frequently by the courts,¹² and judges have been required to make broad reforms in the formulation of educational policy.¹³ Courts have become more willing to involve themselves with educational matters and educators have appeared powerless to alter the trend.¹⁴ Legal remedies are thus one of the growing number of reform movements taking place in the operation of public schools. The implications and dimensions of this greater judicial involvement must be considered in an examination of the specific problem of educational malfeasance.

II. RECENT CASES—ATTEMPTS TO ESTABLISH A TORT

A California case, *Peter W. v. San Francisco Unified School District*,¹⁵ is generally considered to be the first major case dealing with the issue of educational malpractice.¹⁶ The eighteen year old plaintiff had graduated from a high school in the defendant school district, having been enrolled in its schools for twelve years. He claimed that the school district, through its negligent acts and omissions, had breached both its common law and statutory duties to educate him and that he had suffered damages for which he should be compensated.¹⁷ The plaintiff further alleged that liability could also be based on a theory of intentional misrepresentation or fraud.¹⁸ The court's analysis and subsequent dismissal of these tort claims provide an important basis for a study of the issues involved in educational malpractice problems.

The plaintiff's first count of negligence in *Peter W.* stated that the school district had

negligently and carelessly failed to provide plaintiff with adequate instruction, guidance, counseling, and/or supervision in basic academic skills such as reading and writing, although

12. Wise, *The Hyper-rationalization of American Education*, 35 EDUC. LEADERSHIP 354 (1978).

13. J. HOGAN, *supra* note 5, at 12. "The courts have indicated a growing willingness to involve themselves in school and college problems. This is a change in judicial philosophy from the prior 'hands-off' attitude; schools are now aware of the potential answerability to the court system and must adjust institutional conduct accordingly." Ripps, *supra* note 1, at 31. See generally Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977).

14. "A teacher, like every other member of society, should be held accountable for his negligent torts . . . [including] failing to instruct." Dugan, *Teacher's Tort Liability*, 11 CLEV.-MAR. L. REV. 512, 520 (1962). For an overview of education issues that have been litigated, see E. REUTER & R. HAMILTON, *THE LAW OF PUBLIC EDUCATION* (1970); M. SORGEN, P. DUFFY, W. KAPLIN, & E. MARGOLIN, *STATE, SCHOOL, AND FAMILY: CASES AND MATERIALS ON LAW AND EDUCATION* (1973).

15. 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).

16. Saretsky, *The Strangely Significant Case of Peter Doe*, 54 PHI DELTA KAPPAN 589 (1973). *Peter Doe* was later changed to *Peter W.* in the style of the case.

17. 60 Cal. App. 3d at 818, 131 Cal. Rptr. at 856.

18. *Id.* at 827, 131 Cal. Rptr. at 862.

said school district had the authority, responsibility and ability . . . [to do so]. . . Defendant school district, its agents and employees, negligently failed to use reasonable care in the discharge of its duties to provide plaintiff with adequate instruction . . . in basic academic skills and failed to exercise that degree of professional skill required of an ordinary prudent educator under the same circumstances. . . .¹⁹

The allegations also listed specific acts exemplifying the district's failure to meet its duty and stated other facts necessary to satisfy the required elements of negligence, including proximate cause, injury, and damages.²⁰ The court ignored those elements and focused exclusively upon whether the facts alleged were sufficient to show that the defendant owed the plaintiff a legal duty of care. The plaintiff argued that his status as a student in the defendant school system was enough to show the requisite duty of care.²¹ The court responded by saying that

no reasonable observer would be heard to say that these facts did not impose upon defendants a "duty of care" within any common meaning of the term: given the commanding importance of public education in society, we state a truism in remarking that the public authorities who are dutybound to educate are also dutybound to do it with "care." But the truism does not answer the present inquiry, in which "duty of care" is not a term of common parlance; it is instead a legalistic concept of "duty" which will sustain liability for negligence in its breach, and it must be analyzed in that light.²²

In its subsequent refusal to recognize the existence of such a duty in the defendant, the court used public policy considerations as a basis for its rationale. Citing *Raymond v. Paradise Unified School District*,²³

19. *Id.* at 818, 131 Cal. Rptr. at 856 (alterations and omissions by the court).

20. *Id.* at 820, 131 Cal. Rptr. at 857. In explaining the California formula for a negligence cause of action, the court cited 3 WITKIN, CALIFORNIA PROCEDURE, PLEADING § 450, at 2103 (2d ed. 1971).

21. The plaintiff argued that his enrollment established a duty of care in the school district under any of the following theories: (1) that the school district had "assumed" the function of instruction and a resulting duty to exercise reasonable care in the discharge of that function, (2) that the special relationship between students and teachers supports a duty to exercise reasonable care, and (3) that a duty to exercise reasonable care in instruction and supervision is recognized in California. 60 Cal. App. 3d at 820, 131 Cal. Rptr. at 858.

The cases cited by the plaintiff in each of these arguments were dismissed by the court as inapplicable since they concerned either rights and duties for physical care or equal protection privileges, *distinguishing* *Lau v. Nichols*, 414 U.S. 563 (1973); *Serrano v. Priest*, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971); *Dailey v. Los Angeles Unified School Dist.*, 2 Cal. 3d 741, 89 Cal. Rptr. 376, 470 P.2d 360 (1970). See also note 92 *infra*.

22. 60 Cal. App. 3d at 821, 131 Cal. Rptr. at 861.

23. 218 Cal. App. 2d 1, 31 Cal. Rptr. 847 (1963). Of the numerous policy arguments stated in this case for determining duty, *Id.* at 7, 31 Cal. Rptr. at 851, the judges in *Peter W.* seemed most

Rowland v. Christian,²⁴ and Dean Prosser,²⁵ the court reasoned that public policy factors could be used to support a departure from the fundamental principle that all persons have a duty to use ordinary care in their conduct to prevent others from being injured.²⁶ The court considered two policy factors to be critical in denying liability. First, administrative considerations, such as the difficulty of proof necessary to show readily acceptable standards of care for classroom methodology, militated against liability.²⁷ Second, socio-economic considerations led the court to conclude that this type of tort claim, if allowed, would create too great a public burden in time and money.²⁸

Another argument, describing the breached duty in *Peter W.* as a mandatory statutory duty under California's Education Code,²⁹ was dismissed as a misconstruction of the statutes. The court held that the code sections relied upon by the plaintiff were designed to provide "optimum educational results,"³⁰ not to protect against risks of a particular type of injury.

Finally, the plaintiff argued that tort liability for the school district's acts could rest on a theory of intentional or negligent misrepresentation.³¹ The court dismissed this complaint as improperly pleaded for failing to allege the requisite element of reliance upon the asserted

persuaded by the "workability" of a rule of care; by the relative ability of the parties to bear the financial burden of injury; and by the availability of means distributing the loss. 60 Cal. App. 3d at 822, 131 Cal. Rptr. at 861.

24. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). In this case, the California Supreme Court allowed a departure from liability if certain public policy considerations outbalanced the need for protection from injury. The court noted that factors to be considered included: foreseeability of harm, degree of certainty of injury, closeness of connection between defendant's conduct and injury, moral blame, prevention of future harm, extent of burden on defendant, consequences to community of imposing a duty of care, and the availability, cost, and prevalence of insurance. *Id.* at —, 443 P.2d at 564, 70 Cal. Rptr. at 100.

25. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 4 (4th ed. 1971) [hereinafter cited as W. PROSSER].

26. 69 Cal. 2d at —, 443 P.2d at 564, 70 Cal. Rptr. at 100.

27. 60 Cal. App. 3d at 824-25, 131 Cal. Rptr. at 861. See note 45 *infra*.

28. 60 Cal. App. 3d at 825, 131 Cal. Rptr. at 861. See note 45 *infra*.

29. CAL. EDUC. CODE § 10759 (West) (repealed 1975) required school districts to keep parents and guardians informed of the educational progress of their children. CAL. EDUC. CODE § 8573 (reorganized as § 51225) (West 1978) forbade a school district from granting a diploma if certain standards of proficiency were not met. CAL. EDUC. CODE § 8505 (reorganized as § 51204) (West 1978) mandated that school districts design courses to meet the needs of the pupils for which the courses were designed. CAL. GOV'T CODE § 815.6 (West 1966) states:

Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

30. 60 Cal. App. 3d at 826, 131 Cal. Rptr. at 862.

31. *Id.* at 827, 131 Cal. Rptr. at 862. See also notes 104-09 *infra* and accompanying text.

misrepresentation.³² The plaintiff failed to amend the complaint, but it is reasonable to conclude that a properly pleaded cause of action for intentional or negligent misrepresentation in a similar case could withstand a motion to dismiss.³³ This final dismissal ended the *Peter W.* litigation and the educational malpractice issue was temporarily settled.

On July 31, 1978, a complaint similar to that filed in *Peter W.* alleging educational malpractice was dismissed by the New York Supreme Court, Appellate Division, in *Donohue v. Copiague Union Free School District*.³⁴ This decision resembled the earlier *Peter W.* finding in California in that it also refused to recognize the cause of action.³⁵ A comparison of the two cases will follow, but one important distinction should be noted immediately. *Donohue* contained a dissenting opinion indicating strong judicial interest in the nature of this cause of action and in the feasibility of future educational malpractice suits.³⁶ The case is on appeal,³⁷ and the recognition of the new tort remains a possibility.

The plaintiff in *Donohue*, as in *Peter W.*, was a graduate of a high school in the defendant school district. According to his complaint, he was unable to read and write basic English. He claimed that, after graduation, he found it necessary to be tutored in the fundamental skills which he believed he should have learned in school. For these alleged deficiencies, the plaintiff sought to recover \$5,000,000 in damages.³⁸ He based his complaint on two theories of liability. The first cause of action was in negligence and was similar to the complaint in *Peter W.* The plaintiff claimed that the school district owed him a duty of care to "teach the several and varied subjects . . . ; ascertain his learning capacity and ability; and . . . evaluate his ability to comprehend the subject matters . . . [so] as to be able to achieve sufficient passing grades . . . and therefore, qualify for a Certificate of Graduation."³⁹ He also asserted that the defendant had breached this duty by failing (1) to evaluate his ability, (2) to teach him in a manner so that

32. 60 Cal. App. 3d at 827, 131 Cal. Rptr. at 863.

33. See the dissenting opinion in *Donohue v. Copiague Union Free School Dist.*, 407 N.Y.S.2d 874, 881 (1978).

34. 407 N.Y.S.2d 874 (1978).

35. *Id.* at 876.

36. *Id.* at 881 (Suozzi, J., dissenting).

37. *Donohue v. Copiague Union Free School Dist.*, 407 N.Y.S.2d 874 (1978), *appeal docketed*, Judges' No. 249.

38. 407 N.Y.S.2d at 876.

39. *Id.*

he could reasonably understand and cope with the subjects, (3) to advise his parents of his problems, and (4) to "adopt the accepted professional standards and methods to evaluate and cope with plaintiff's problems which constitute educational malpractice."⁴⁰ The second cause of action in this suit was based upon an alleged breach of a duty imposed upon the defendant by the state constitution and statutes.⁴¹ The court rejected both complaints and held that no cause of action for educational malpractice was recognized in New York.⁴² This suit contained no allegations of intentional or negligent misrepresentation, as in *Peter W.*, so the court did not address that issue.

Relying on the *Peter W.* decision and the public policy reasons stated therein,⁴³ the New York court held that to recognize a cause of action for educational malpractice would be an impermissible judicial intrusion into the administration of public schools.⁴⁴ The negligence action was dismissed on the duty issue. The court looked to public policy factors including moral, preventative, economic, and administrative considerations and concluded as a matter of law that, in this particular set of circumstances, the defendant did not owe a legal duty of care to the plaintiff.⁴⁵ Recognizing that school officials and teachers should

40. *Id.*

41. *Id.* at 877. See note 47 *infra*.

42. 407 N.Y.S.2d at 876.

43. See notes 23-28 *supra* and accompanying text.

44. 407 N.Y.S.2d at 879.

45. *Id.* at 878.

"Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might—and commonly does—have his own emphatic views on the subject. The 'injury' claimed here is plaintiff's inability to read and write. Substantial professional authority attests that the achievement of literacy in schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified.

"We find in this situation no conceivable 'workability of a rule of care' against which defendants' alleged conduct may be measured . . . no reasonable 'degree of certainty . . . that . . . plaintiff suffered injury' within the meaning of the law of negligence . . . , and no such perceptible 'connection between the defendant's conduct and the injury suffered,' as alleged, which would establish a causal link between them within the same meaning.

"These recognized policy considerations negate an actionable 'duty of care' in persons and agencies which administer the academic phases of the public education process. Others, which are even more important in practical terms, command the same result. Few of our institutions, if any, have aroused the controversies or incurred the public dissatisfaction, which have attended the operation of the public schools during the last few decades. Rightly or wrongly, but widely, they are charged with outright failure in the achievement of their educational objectives; according to some critics, they bear responsibility for many of the social and moral problems of our society at large. Their public plight in these respects is attested in the daily media, in bitter governing board

be held accountable for failure to perform their duties reasonably,⁴⁶ the court was still unwilling to accept the idea of a legal remedy in damages as a solution to the problem.

In dismissing the claim of a breach of constitutional and statutory duty, the majority stated that the plaintiff had misconstrued the statutes and constitutional section involved. Looking at the purpose of these laws, the court concluded that they were intended to confer free educational benefits upon the general public and were not designed to protect against the "injury of ignorance."⁴⁷ *Donohue* further expanded the earlier *Peter W.* rationale for dismissing educational malpractice actions by discussing causation as it related to a breach of either the common law or statutory duties. The court reasoned that numerous other factors such as innate intelligence and social, emotional, or economic influences may have caused the plaintiff's illiteracy; therefore, it deemed the relationship between failing to learn and failing to teach to be too remote to support liability.⁴⁸

The dissenting opinion in *Donohue* is also significant in an analysis of educational malfeasance questions. The dissent, in an extensive opinion, concluded that *Donohue's* complaint did state a valid cause of action.⁴⁹ It did not consider the policy rationale stated in both *Donohue* and *Peter W.* to be a persuasive argument for dismissal.⁵⁰ Rather, the dissent saw the negligence issue as a question of proof to be resolved at trial.⁵¹ Additionally, it concluded that the "floodgate" ar-

elections, in wholesale rejection of school bond proposals, and in survey upon survey. To hold them to an actionable 'duty of care,' in the discharge of their academic functions, would expose them to the tort claims—real or imagined—of disaffected students and parents in countless numbers. They are already beset by social and financial problems which have gone to major litigation, but for which no permanent solution has yet appeared. . . . The ultimate consequences, in terms of public time and money, would burden them—and society—beyond calculation."

Donohue v. Copiague Union Free School Dist., 407 N.Y.S.2d at 878, quoting *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 824-25, 131 Cal. Rptr. 854, 860-61 (1976).

46. 407 N.Y.S.2d at 878. The court freely admitted that educators are "ethically and legally responsible for providing a meaningful public education for the youth of our state," and "may be held to answer for the failure to faithfully perform their duties. [H]owever, . . . they may not be sued for damages" by a student for failing to learn. *Id.* at 878 (emphasis added).

47. *Id.* at 880. The plaintiff's constitutional complaint was based on a section which stated: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of the state may be educated." N.Y. CONST. art. 11, § 1. He further argued that the enabling legislation and compulsory education statutes established the necessary duty in the school district. Compare 16 N.Y. Educ. Law art. 65 (McKinney 1970) with CAL. EDUC. CODE §§ 8505 (reorganized as § 51204) (West 1978), 8573 (reorganized as § 51225) (West 1978), and 10759 (repealed 1975).

48. 407 N.Y.S.2d at 881.

49. *Id.* (Suozzi, J., dissenting).

50. *Id.* at 883 (Suozzi, J., dissenting).

51. "Whether the failure of the plaintiff to achieve a basic level of literacy was caused by the

gument was without merit.⁵² The dissent's second criticism was of the majority's failure to find a cause of action in the statutory breach complaint. Citing a state commissioner's regulation requiring satisfactory completion of certain courses as requisite for a high school diploma,⁵³ it argued that Donohue's transcript could hardly be described as reflecting satisfactory completion. This inadequacy, coupled with another commissioner's regulation requiring the school district to take certain actions if a student was deemed to be a failure or underachiever,⁵⁴ was considered to establish the necessary statutory duty of care in the defendant. The dissent also suggested that a cause of action for intentional misrepresentation might have been appropriately pleaded in this case.⁵⁵

III. ANALYSIS OF THE ISSUES

The general theories litigated in *Peter W.* and *Donohue* may still arise in other courts. Although the California and New York courts dismissed the issues as a matter of law, the law of torts is not static⁵⁶

negligence of the school system . . . or was the product of forces outside the teaching process, is really a good question of proof to be resolved at a trial." *Id.* (Suozzi, J., dissenting).

52. On this point, the dissent noted:

The fear of a flood of litigation, perhaps much of it without merit, and the possible difficulty in framing an appropriate measure of damages, are . . . unpersuasive grounds for dismissing the instant cause of action. Fear of excessive litigation caused by the creation of a new zone of liability was effectively refuted by the abolition of sovereign immunity many years ago, and numerous environmental actions fill our court where damages are difficult to assess. Under the circumstances, there is no reason to differentiate between educational malpractice on the one hand, and other forms of negligence and malpractice litigation which currently congest out [*sic*] courts.

407 N.Y.S.2d at 883 (Suozzi, J., dissenting). See note 75 *infra* and accompanying text.

53. Compare 8 NYCRR § 103.2, which was in effect at the time of this suit and which stated general academic standards for granting high school diplomas, with CAL. EDUC. § 8573 (reorganized as § 51225) (West 1978)), *supra* note 29.

54. N.Y. EDUC. LAW § 4404 (McKinney 1970) (amended 1976, 1977). This law was in effect while Donohue was in school. It required the board of education of each school district to examine students who failed repeatedly to determine if the child could benefit from ordinary classroom instruction or needed to be provided with special educational facilities.

55. 407 N.Y.S.2d at 876 (Suozzi, J., dissenting). It was further recommended that the case should have been remanded on a procedural question that the defendant raised concerning the plaintiff's failure to serve a timely notice of the claim.

The running of the statute of limitations on educational malpractice may prove problematic. Both *Peter W.* and *Donohue* demonstrate that the plaintiff may not realize his injury until after graduation from high school, the point at which the statute arguably begins to run. It is submitted that, although the limitation on a suit in contract may begin to run on the date of the agreement, an action in tort should be governed by a discovery rule similar to medical malpractice. As applied, that rule would not permit the limitation period to run until the plaintiff knew or should have known of his injury. *See, e.g.,* Hall v. Musgrave, 517 F.2d 1163 (6th Cir. 1975) (applying Kentucky law); Tomlinson v. Siehl, 459 S.W.2d 166 (Ky. 1970) (faulty sterilization).

56. As Dean Prosser noted:

New and nameless torts are being recognized constantly, and the progress of the com-

and educational malfeasance cases may yet be recognized. Several observations can be made about these two cases which future litigants and courts must consider as they study the problem of educational malfeasance. First, in their negligence analyses, both courts based the failure to find a workable duty of care on public policy rationale.⁵⁷ Second, the causation issue⁵⁸, which was mentioned only briefly in each case, could present problems in other cases. In addition, neither court adequately addressed the possibility of a misrepresentation cause of action.⁵⁹ Finally, a cause of action for educational malfeasance could be brought under theories other than negligence or misrepresentation.⁶⁰

A. Negligence Analysis

1. Duty of Care.

In order to establish a tort of educational malfeasance based on negligence, the requisite element of duty must be found.⁶¹ In his discussion of duty, Prosser states that its character is artificial in nature; and since there is no universal test for establishing duty, a court can easily find it where it desires to do so.⁶² Further, the essential question of duty is whether the plaintiff's interests are entitled to legal protection against the conduct of the defendant.⁶³ Because courts have the discretion to look at policy factors to determine the wisdom of declaring such a common law duty,⁶⁴ another court might take a different view of educational malfeasance litigation than did *Peter W.* and *Donohue*.

Both the *Peter W.* and *Donohue* decisions reflected public policy concerns in two major areas: first, fear of over-involvement by the ju-

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

W. PROSSER, *supra* note 25, § 1, at 3-4. See also McClellan, *Clarification of Tort Policy: A Comparison of the Common Law, Calabresian, and Lasswell-McDougal Approaches to the Resolution of Tort Claims*, 23 WAYNE L. REV. 995 (1977).

57. See notes 61-82 *infra* and accompanying text.

58. See notes 86-98 *infra* and accompanying text.

59. See notes 104-09 *infra* and accompanying text.

60. See notes 110-52 *infra* and accompanying text.

61. See *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928); James, *Scope of Duty in Negligence Cases*, 47 NEV. U.L. REV. 778 (1953); Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953) reprinted in W. PROSSER, *SELECTED TOPICS IN THE LAW* 191 (1954); Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372 (1939).

62. W. PROSSER, *supra* note 25, § 53, at 325-26.

63. *Id.* at 326.

64. See notes 23-25 *supra* and accompanying text.

diciary in the administration of schools if they set standards for learning that educators themselves have had difficulty formulating;⁶⁵ and second, fear of excessive and fraudulent claims that could unduly burden the schools in terms of time and money.⁶⁶ Ignoring, and thereby condoning, school district conduct like that occurring in these cases may be seen by some courts as more damaging to the public interest than administrative problems or worries of floodgate litigation. Public policies should be viewed with sufficient flexibility that shifting social demands may be satisfied.

The fear of over-involvement has been addressed in previous court decisions concerning educational issues. The Supreme Court, for example, in *San Antonio Independent School District v. Rodriguez*⁶⁷ expressed the concern that its "lack of specialized knowledge and experience" might interfere with informed educational policy made at state and local levels of government.⁶⁸ When faced with issues it is ready to address, however, the judiciary has quite clearly become directly involved in the supervision of schools.⁶⁹ Perhaps educational malpractice should be such an issue. Although a school district would certainly be administratively and financially burdened by a \$5,000,000 judgment against it, the public interest might be better served if such liability was imposed. The national publicity surrounding such an action would put school districts nationwide on notice that they will be held accountable for their teaching.⁷⁰ This would stimulate school systems to formulate standards of learning as well as to upgrade policies and procedures. It is difficult to understand why a court would not become involved with the problem of graduating illiterates when courts have not hesitated to become involved in internal decision-making in the past. For example, schools have been required to provide special programs for the underprivileged⁷¹ and have been compelled to bus students to achieve racially balanced enrollments.⁷² An over-involvement argument hardly seems appropriate when viewed in the light of the activist role courts have played in recent years in defining the re-

65. 60 Cal. App. 3d at 825, 131 Cal. Rptr. at 861; 407 N.Y.S.2d at 879.

66. 60 Cal. App. 3d at 825, 131 Cal. Rptr. at 861; 407 N.Y.S.2d at 879.

67. 411 U.S. 1 (1973).

68. *Id.* at 42.

69. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (efforts to formulate guidelines for implementation of desegregation); Note, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 1 J.L. & EDUC. 134 (1973). See also note 114 *infra* and accompanying text.

70. See notes 125-26 *infra* and accompanying text.

71. See generally THE YEARBOOK OF SCHOOL LAW § 2.2b (1977).

72. *Goss v. Board of Educ.*, 373 U.S. 683 (1963).

sponsibilities of education.⁷³

The fear of excessive litigation and fraudulent claims is an equally unpersuasive ground for refusing a plaintiff his day in court. The California Supreme Court addressed this issue in *Dillon v. Legg*⁷⁴ as it decided the appropriateness of allowing recovery for another new tort. Arguing against the soundness of a "floodgates"⁷⁵ theory, the court stated that meritorious allegations must be heard regardless of the possibility of fraudulent future claims.⁷⁶ The facts of each case must be weighed alone to determine the viability of a cause of action, and fear of similar suits should not be considered by the court as a legitimate factor in refusing to hear the action. A primary responsibility of the courts is to award damages for sound claims, and this duty should not be abrogated for reasons of administrative convenience.⁷⁷

It can be argued further that state statutes reflect public policy attitudes requiring that school districts be held responsible for their actions. For example, in *Donohue* the state legislature had established general standards for schools in the Education Code.⁷⁸ Copiague School District's questionable compliance with a state regulation requiring a student to complete satisfactorily certain courses before acquiring a high school diploma⁷⁹ should have been examined at trial. Another statute requiring that special education provisions be made for students who fail repeatedly,⁸⁰ as did *Donohue*,⁸¹ was also violated by the school district. According to the dissent, this statute alone established a duty flowing from the school district to *Donohue*, and "to dismiss the complaint, as the majority proposes, without allowing the plaintiff his day in court would merely serve to sanction misfeasance in the education system."⁸² The public policy issue need not be considered at all by the courts when they find a statutory duty. The legisla-

73. See notes 11-14 *supra* and accompanying text.

74. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (negligent infliction of emotional trauma and physical injury from witnessing daughter's death).

75. Floodgates is a general term referring to the argument expressed at various times by the judiciary that allowing one particular claim will encourage others to flood the courts with similar claims. An inference usually accompanies the argument that most of the ensuing claims will lack merit and will waste the court's time.

76. 68 Cal. 2d at 730, 441 P.2d at 924, 69 Cal. Rptr. at 71. The dissent in *Donohue* notes that these fears were also raised before other new forms of malpractice and negligence litigation were recognized. 407 N.Y.S.2d at 883 (Suozzi, J., dissenting). See note 52 *supra*.

77. 68 Cal. 2d at 730, 441 P.2d at 924, 69 Cal. Rptr. at 71.

78. See N.Y. EDUC. LAW §§ 1-1501 (McKinney 1978).

79. 8 N.Y.C.R.R. § 103.2.

80. N.Y. EDUC. LAW § 4404 (McKinney 1970) (amended 1976, 1977).

81. 407 N.Y.S.2d at 876.

82. 407 N.Y.S.2d at 881 (Suozzi, J., dissenting).

ture has already expressed public policy by enacting the statute or providing for the regulation.

2. Breach of Duty

Once the court has recognized a common law or a statutory duty to educate, the plaintiff must then show that the school district has breached this duty. The duty is to take reasonable care under the circumstances to educate students, and the circumstances will include such things as a student's social and economic environment, aptitudes and abilities, motivation, and educational resources and facilities.⁸³ Each of these circumstances may be one factor in a student's failure to learn. In deciding whether the school district has breached its duty to educate reasonably under the circumstances, the court must make a factual determination of what was or was not done for the pupil given the surrounding conditions. In a case like *Donohue*, for example, the plaintiff would allege a breach of duty in the denial of special education opportunities which should have been offered him as an underachiever.⁸⁴ Failure to provide alternative methods of teaching or failure to notify parents of deficiencies in their child's performance⁸⁵ are other examples of a breach of the duty to act reasonably under the circumstances.

3. Causation

The questions to be resolved in determining the issue of breach of duty are identical to those involved in causation in fact. The causal relationship between the defendant's acts or omissions⁸⁶ and the plaintiff's harm has apparently confounded the courts. The relationship was not adequately addressed in either *Peter W.* or *Donohue*. The *Donohue* court summarized its views of the causation problem when it stated: "The failure to learn does not bespeak a failure to teach."⁸⁷ A child's educational progress, or lack of progress, can be caused by a combination of factors. Physical and social environment, economic stability,

83. See note 48 *supra* and accompanying text.

84. 407 N.Y.S.2d at 881.

85. See, e.g., *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).

86. Acts of omission or commission can be affirmative conduct for purposes of determining liability. For example, a train engineer who fails to sound a warning signal is acting affirmatively for purposes of negligence, even though his action is one of omission. Crowe, *The Anatomy of a Tort—Greenian, as Interpreted by Crowe Who Has Been Influenced by Malone—A Primer*, 22 LOY. L. REV. 903, 904 (1976).

87. 407 N.Y.S.2d at 881.

motivation from family, and innate ability are examples of components outside the realm of the school system that can affect a child's learning ability.⁸⁸ Weak educational programs and policies, however, must be considered in assessing a child's skills.⁸⁹

All events have multiple causes, often numerous and complex. Indeed, that the plaintiff was born at all is a cause. The initial inquiry, therefore, is whether the defendant's acts or omissions contributed to the plaintiff's harm.⁹⁰ More specifically, in an educational malpractice

88. 124 CONG. REC. S 14862 (daily ed. Sept. 11, 1978) (record entry of Sen. Proxmire). See also *Bichrest v. School Dist.*, 346 F. Supp. 249 (E.D. Pa. 1972); *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).

89. The public seems unsure of where to place the blame for poor academic performance, but a general belief exists that schools are responsible for many such problems. 124 CONG. REC. S14862 (daily ed. Sept. 11, 1978).

CBS News produced a three part documentary entitled "Is Anyone Out There Learning?" in which parents, taxpayers, and educators stated their views on the competence of American schools. Sen. Proxmire expressed concern over the "fruitlessness of the present Federal school aid approach" and asked that excerpts from the CBS News broadcast be printed in the Record. The transcript includes interviews with HEW Secretary Joseph Califano, U.S. Education Commissioner Ernest L. Boyd, and other professionals and nonprofessionals interested in education. According to Proxmire, even though the report never focused on the federal government's role in education, it revealed alarming problems associated with educating children. *Id.* at S14862.

A poll conducted in conjunction with the programs showed that 41% of the interviewees believed their children were not receiving as good an education as they had received. *Id.* at S14863. When asked their reasons for rating schools poorly, the participants in the program and the poll named both societal and educational factors. Complaints of poor discipline, inept teachers, and lax promotion policies were mixed with general observations about the permissiveness of society and the influence of television. See also *Gallup - Kettering Education Poll*, 106 INTELLECT 268 (1978).

A recent Gallup poll on education also reflected similar concerns with education. Gallup conducts a yearly poll on educational problems. The following complaints are listed in the order of frequency mentioned by the people polled in 1977: (1) lack of discipline, (2) integration, segregation, busing, (3) financial support, (4) difficulty getting good teachers, (5) poor curriculum, (6) drugs, (7) parental lack of interest, (8) size of classes, (9) teachers' lack of interest, (10) mismanagement of funds and programs. This list reflects both society related and school related problems that affect schools. *Id.* at 268-69.

90. Crowe, *supra* note 86, at 904.

The basic concept of early tort law was that if one hurt another, however innocently, he must make recompense. The concept persisted with slight modification until the late 1700's and is still one of the bastions of tort liability. In its early tort usage, cause was synonymous with blame, fault, wrongdoing and culpability. These are spongy terms, each capable of absorbing the meaning of the others, and frequently used interchangeably. The meanings of these terms are still the core of causation doctrines. Causal relation, causal connection, or cause-in-fact, was only *one* ingredient of the orthodox cause concept. In early tort cases this ingredient—the identity of the defendant and causal connection between his conduct and the victim's injury—did not give rise to troublesome problems. The chief problem in early tort law was the choice of the proper form of action—trespass or trespass on the case. The forms of action were based on causation, *i.e.*, whether the injury of the victim was the *direct* or *consequential* result of the defendant's use of force. The whole of liability was rolled, as it were, into this dual concept of causation, reflected by appropriate writs to give the common law courts jurisdiction. Although causal relation between conduct and injury was essential to tort liability, it was the *moral* content of cause that gave and still gives character to causation doctrines. In modern tort law, causal relation between conduct and injury has attained a separate and

case, the issue is whether the school district's failure to take reasonable measures under the circumstances was a cause of the student's ultimate learning inadequacies. Even though other factors or circumstances may have contributed to a student's failure to learn,⁹¹ the school system's breach of its duty to the student *in light of those conditions* may be found to be the cause in fact of the student's inadequacy.

In short, the determinations of causation and of breach of duty are intertwined in an educational malpractice case in that both are established by the same conduct. This result is neither odd nor unfamiliar to the common law,⁹² but the idea is seemingly novel when applied to the

independent status as the beginning point for establishing the liability of a defendant, and involves no moral content.

Cause, as a basis of liability by virtue of its quality of wrongness, has been frequently expressed in terms of unlawfulness, intent, blame, fault, deceit, negligence—summed up as culpability. Cause has been frequently characterized as direct, proximate, imputed, presumed, inducing, efficient, active, culpable, and by many other descriptive terms. Moreover, liability based on the cause concept is frequently qualified or limited by cause characterized as remote, passive, sole, intervening, independent, superseding, supervening, and similar terms. The causation *doctrinal superstructure* for determining liability is extensive, refined, complicated in detail, and metaphysical both in thought and terminology. It was the creation of the nineteenth century during the transition period from medieval to modern tort law, and designed as a means of *limiting* liability, primarily by the judge as opposed to a jury. As a basis for the adjudication of litigated tort cases it has had a weird history and has resulted in great confusion of legal theory, endless, and arid legal disquisition, and many injustices to litigants.

Green, *Duties, Risks, Causation Doctrines*, 41 TEX. L. REV. 42, 42-43 (1962) (footnotes omitted, emphasis in the original). See also Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543 (1962).

91. See notes 87 & 88 *supra* and accompanying text.

92. A pertinent analogy can be made to the common law tort involving a rescue. Like a victim in danger of drowning, an uneducated person finds himself to be in peril from the outset. Just as there is no duty to rescue at common law, there is no inherent duty requiring a school system to educate. However, a duty to rescue may be imposed upon a rescuer by statute, a special relationship between the parties, or an attempted rescue. See generally J. RATCLIFF, *THE GOOD SAMARITAN AND THE LAW* (1966); Comment, *Rescuers and Good Samaritans*, 34 MOD. L. REV. 241 (1971) [hereinafter cited as *Rescuers*]. In addition, after performance has clearly begun, there can be no doubt that there is a duty of care imposed. W. PROSSER, *supra* note 25, § 56, at 346. A similar duty (to educate) has been incurred by the school district. See notes 61-82 *supra* and accompanying text. In rescuing the hypothetical drowning victim above, the rescuer may be met by high winds, waves, tides, and deep water. In attempting to educate the initially ignorant child, a school system may be similarly confronted with barriers and obstacles that impede its progress. There is no duty to *succeed* in educating a student just as there is no duty to succeed in saving a victim. Both rescuer and educator must, however, act reasonably under the circumstances. The rescuer beaten back by the waves does not breach his duty any more than does a school system that fails to overcome a child's serious learning disability. If, however, the rescuer has a rope at hand and fails to use it, or educators have educational alternatives available and do not use them, an action for negligence arises. It is the defendant's failure to act reasonably under the circumstances, thereby breaching an established duty, that is the actual and proximate cause of the plaintiff's failure to be saved from his peril.

This analogy is drawn in order to demonstrate that the framework for a tort of educational malfeasance is not new. It is *identical* to that traditionally applied by the common law to situations involving rescue. See generally Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217 (1908); Scheid, *Affirmative Duty to Act in Emergency Situa-*

issue of educational malfeasance.

Since many variables affect a student's academic skills, the issue of causation in fact will surely arise in an educational malpractice claim. The plaintiff will need to provide empirical evidence of damage⁹³ to his educational progress and to show his injury to be a result of the defendant's breach of its duty.⁹⁴ Since these variables in any one case would present a question upon which reasonable people may differ, the question would be one of fact for a jury to decide.⁹⁵

Once a breach of duty and causation in fact have been established, proximate cause⁹⁶ presents no obstacle to the negligence analysis. Under any of the accepted tests, such as foreseeability or substantial factor,⁹⁷ the proximate cause element undoubtedly would be satisfied. It is unquestionably foreseeable that a school district charged with the responsibility of taking reasonable measures to educate its pupils will damage those students when it breaches this duty. Alternatively, a school district's breach of its established duty is certainly a substantial factor in the resulting harm to the student. The proximate cause issue is intimately related to causation in fact, duty, and breach of duty. Once the policy requiring liability has been established,⁹⁸ it should not be difficult to connect a legal, or proximate, relationship between the defendant's acts and the plaintiff's harm.

4. Harm

In order to satisfy the required elements of a negligence tort, the plaintiff must always prove that some damage was suffered.⁹⁹ A student in an educational malpractice case will need to show some harm such as an inability to secure and hold employment due to his lack of

tions—*The Return of the Good Samaritan*, 3 J. MAR. J. PRAC. & PRO. 1 (1969); Note, *The Duty to Rescue*, 47 IND. L.J. 321 (1972). For cases establishing a duty to rescue imposed by a special relationship, see, e.g., *Anderson v. Atchison T. & S.F. Ry.*, 333 U.S. 821 (1948) (employer-employee); *Pacific Atlantic SS. Co. v. Hutchison*, 242 F.2d 691 (9th Cir. 1957) (ship-seaman). Even without this relationship, some courts have begun to recognize conduct which could be considered nonfeasance to be misfeasance. Comment, *Rescuers and Good Samaritans*, 34 MOD. L. REV. 241, 243 (1971). See also Comment, *The Bad Samaritan: Rescue Reexamined*, 54 GEO. L.J. 629, 630-35 (1966).

93. W. PROSSER, *supra* note 25, § 41.

94. *Id.*

95. *Id.*

96. For a general discussion of proximate cause and its relation to duty and foreseeable risk, see W. PROSSER, *supra* note 25, §§ 31, 42, 43, 44. See also James & Perry, *Legal Cause*, 60 YALE L.J. 761, 783-811 (1951).

97. W. PROSSER, *supra* note 25, § 42.

98. See notes 23-28, 61-82 *supra* and accompanying text.

99. W. PROSSER, *supra* note 25, § 30.

basic skills. Perhaps, as in *Donohue*, compensation for the cost of a tutor could be claimed.¹⁰⁰ Damages might also include the plaintiff's lost wages attributable to time spent in his attempting to remedy deficiencies caused by the school district's malfeasance.¹⁰¹

Although both the *Peter W.* and the *Donohue* courts refused to recognize the tort of educational malfeasance, it has been shown that the elements of negligence can be satisfied in such an action.¹⁰² A defendant school district that causes harm to a student by breaching its duty to take reasonable measures to educate should be held liable for its negligence; and, as in any other negligence tort, the plaintiff should be compensated for his damage.¹⁰³

B. Misrepresentation

A complaint of intentional or negligent misrepresentation is a possible basis for an action for educational malpractice which should be explored further. The plaintiff in *Peter W.* failed to plead the requisite element of reliance,¹⁰⁴ and the plaintiff in *Donohue* chose not to plead this cause of action at all.¹⁰⁵

A student who has been repeatedly promoted and has been reported to be working at or near grade level in basic academic skills¹⁰⁶ should be able to charge the schools with misrepresentation when he

100. 407 N.Y.S.2d 874 (1978).

101. Damages for mental and emotional disturbance and embarrassment, even though the harm is no doubt present, would probably not be permitted. See generally W. PROSSER, *supra* note 25, § 54. But see *Hoffman v. Board of Educ.*, 410 N.Y.S. 2d 99 (App. Div. 1978) (plaintiff recovered \$500,000 for diminished intellectual development and psychological injury).

102. As the dissent in *Donohue* pointed out:

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

407 N.Y.S.2d at 884.

103. The fundamental premise is that one is liable for damage caused by his fault and that "a tortfeasor must pay compensation for all damages caused by fault, even by mere negligence." Tunc, *Tort Law and the Moral Law*, 30 *CAMB. L.J.* 247, 249 (1972).

104. 60 Cal. App. 3d at 827, 131 Cal. Rptr. at 863.

105. 407 N.Y.S.2d at 885.

106. This was the basic factual background of the plaintiff in *Peter W.*

discovers after graduation that he is a "functional illiterate."¹⁰⁷ The schools have a responsibility to keep the parents and students accurately informed of the student's progress. Conversely, parents and students have a right to know if they are not meeting standards set by the schools. The record of the plaintiff in *Peter W.* revealed average grades and no indication of his later-discovered inadequacies.¹⁰⁸ Even though the plaintiff in *Donohue* had knowledge of some of his deficiencies because of poor grades, he still received a diploma reflecting satisfactory completion of high school.¹⁰⁹ Grades, test scores, and diplomas are typically indicators to the parents, students, and anyone interested that the student meets a level of competence and knowledge in relation to certain criteria established by a school or educational body. A school, therefore, which inaccurately represents a student's competence and educational progress should be held responsible for any damage to the student resulting from reliance on that misrepresentation.

C. *Alternative Actions*

Although the two causes of action discussed above are still possible avenues of redress for future plaintiffs, other bases for liability should also be considered including breach of contract, infringement of a constitutional right, and violation of section 1983 of the Civil Rights Act.¹¹⁰

The contractual relationship between a student and an educational institution has previously been a subject for litigation.¹¹¹ One plaintiff was a university student who sued to recover her tuition and expenses. She contended that the university did not provide the course for which she had registered and that they should be held liable to her for a breach of contract.¹¹² The implied contractual relationship was allegedly established when the plaintiff paid her registration fees for a course described in the university's bulletin.¹¹³ A plaintiff suing a public school may need to rely on such factors as compulsory education statutes and school regulations describing standards or courses in order to claim a contractual relationship.

107. This is a commonly used term in education meaning that a person can read and write only at a very fundamental level.

108. 60 Cal. App. 3d at 817, 131 Cal. Rptr. at 856.

109. 407 N.Y.S.2d at 876.

110. 42 U.S.C. § 1983 (1976).

111. Hammond, *Understanding the Parameters of Academic Fraud*, NASPA J., Fall, 1975, at 28.

112. *Id.* This case, while drawing wide attention, is apparently unreported.

113. *Id.* at 31.

In light of a recent judicial trend towards recognizing students' rights,¹¹⁴ an alternative cause of action might be brought based on the fourteenth amendment.¹¹⁵ The school's failure to educate would be an alleged confinement without due process of law.¹¹⁶ Under a system of compulsory education, the rights of the students and parents must be balanced against the right of the state to govern the instruction in schools.¹¹⁷ A school's power to require student attendance without providing substantial benefits should not go unchallenged.¹¹⁸ Education should prepare a child to enter society as a self-sufficient and self-reli-

114. See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); Note, *Constitutional Law—Free Exercise Clause Prohibits Compulsory Education of Amish Children*, 4 LOY. U.L.J. 256 (1973); Note, *The Amish Exception: A Constitutionally Compelled Exception?*, 34 U. PITT. L. REV. 274 (1972); *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503 (1969); Haskell, *Student Expression in the Public Schools: Tinker Distinguished*, 59 GEO. L.J. 37 (1970). A consent decree in *Pennsylvania Assoc. for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972), modifying, 343 F. Supp. 1257 (E.D. Pa. 1971), held that a school may not constitutionally exclude children by classifying them as "uneducable" in the face of overwhelming evidence that all children can learn to some extent. See generally D. SCHIMMEL & L. FISCHER, *THE CIVIL RIGHTS OF STUDENTS* (1975); McClung, *Do Handicapped Children Have a Legal Right to Minimally Adequate Education?*, 3 J. L. & EDUC. 153 (1974); Comment, *The Handicapped Child Has a Right to an Appropriate Education*, 55 NEB. L. REV. 637 (1976); Note, *Constitutional Law—The Children's Crusade for Constitutional Recognition*, 78 W. VA. L. REV. 192 (1975-76).

115. Theories have been advanced under both the equal protection and the due process clauses of the fourteenth amendment. *Lora v. Board of Educ.*, 456 F. Supp. 1211 (E.D.N.Y. 1978). *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972) held that handicapped children have a right to public education because the equal protection clause requires that all children be provided with an education. See also *In re Peter H.*, 66 Misc.2d 1097, 323 N.Y.S.2d 302 (Fam. Ct. 1971). One commentator has observed that "the real issue is not equality, but quality." *The Right to Education*, supra note 5, at 810. That article also reviews the due process analysis. *Id.* at 807-09. See also McClung, *The Problem of the Due Process Exclusion: Do Schools Have a Continuing Responsibility to Educate Children with Behavior Problems?*, 3 J.L. & EDUC. 491 (1974).

116. Comment, *The Rights of Children: A Trust Model*, 46 FORDHAM L. REV. 669, 711 (1978). For a criticism of the confinement argument based on compulsory attendance, see *The Right to Education*, supra note 5, at 807-09. Nevertheless, that author favors a cause of action based on substantive due process and finds that

there is something fundamentally irrational in compelling a parent to send his child to school if evidence indicates that the school fails to teach him. If the justification for compulsory education is the parental duty to educate the child, and if the parent can demonstrate that enrolling his child in public school will not achieve that purpose, compulsory attendance becomes a cruel hoax at the child's expense. At the very least the substantive due process theory calls into question the constitutionality of compulsory education for many children.

Id. at 809.

117. *Rights of Children*, supra note 116, at 714. Every state but Connecticut has a provision in its state constitution for the establishment of a public school system. *The Right to Education*, supra note 5, at 797 n.11. See generally Dimond, *The Constitutional Right to Education: The Quiet Revolution*, 24 HASTINGS L.J. 1087 (1973); Woltz, *Compulsory Attendance at School*, 20 L. & CONTEMP. PROB. 3 (1955). For a general discussion of the scope and powers of local school boards, see Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Non-Constitutional Analysis*, 117 U. PA. L. REV. 373 (1969).

118. See generally Comment, *Schools and School Districts—Doe v. San Francisco Unified School District, Tort Liability for Failure to Educate*, 6 LOY. U. L.J. 462 (1975).

ant individual.¹¹⁹ A system of compulsory education that fails to provide those benefits violates a student's right to educational development.¹²⁰

Another federal remedy could be sought under section 1983 of the Civil Rights Act.¹²¹ The scope of liability for public officials is a present controversy in the courts,¹²² and school officials have been held subject to section 1983 liability where they knew, or should have known, that their actions violated a student's rights.¹²³ The present climate of increasing judicial awareness of the civil rights of students¹²⁴ provides fertile ground for litigating an educational malpractice issue under section 1983.

IV. RECENT TRENDS: ACCOUNTABILITY AND COMPETENCY-BASED EDUCATION

Public discontent has caused educational policymakers to institute major reform programs in American schools.¹²⁵ Legislatures and school officials have responded to the general public complaint of unsatisfactory schools by initiating programs of accountability and competency-based testing.¹²⁶ These reform movements, though designed to strengthen the performance of school systems, could potentially pro-

119. See note 6 *supra* and accompanying text.

120. *Rights of Children*, *supra* note 116, at 697-99. A compulsory system which fails to educate has a deleterious effect on society as much as on individual students. "It is, therefore, incumbent upon the school to provide students with the instruction and environment necessary to enable them to realize their intellectual potential." *Id.* at 697.

121. 42 U.S.C. § 1983 (1976) provides:

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

122. Comment, *Immunity of Teachers, School Administrators, School Board Members, and School Districts From Suit Under Section 1983 of Civil Rights Act*, 1976 U. ILL. L.F. 1129 [hereinafter cited as *Immunity of Teacher's Under Section 1983*]. See also Yudof, *Liability for Constitutional Torts and the Risk-Averse Public School Official*, 49 So. CAL. L. REV. 1322 (1976); Note, *School Board Members' Immunity from Section 1983 Suits—Wood v. Strickland*, 29 ARK. L. REV. 554 (1976); Note, *Official Immunity from Damages in Section 1983 Suits: Wood v. Strickland*, 56 ORE. L. REV. 124 (1977).

123. See, e.g., *Wood v. Strickland*, 420 U.S. 308 (1975).

124. See generally *Immunity of Teachers Under Section 1983*, *supra* note 122. See also Comment, *Suability of School Boards and School Board Members*, 21 CLEV. ST. L. REV. 181 (1972); *The Rights of Children*, *supra* note 116. But see *Bichrest v. School Dist.*, 346 F. Supp. 249 (E.D. Pa. 1972) (school district not "person" within meaning of the statute).

125. L. BROWDER, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, AN ADMINISTRATOR'S HANDBOOK ON EDUCATIONAL ACCOUNTABILITY 10 (1975) [hereinafter cited as ADMINISTRATOR'S HANDBOOK]. See also *Accountability, Competency Testing, Back to Basics: Symposium*, 62 NASSP BULL. 1 (1978).

126. See generally ADMINISTRATOR'S HANDBOOK (1975), *supra* note 125 (accountability); 59

vide meaningful evidence in malpractice litigation.¹²⁷ Educators should be forewarned of the powerful latent effect of accountability and competency-based education (CBE)¹²⁸ movements on their liability for failure to educate.

Educational accountability involves holding educators both responsible and answerable for the "educational outcome" of their students.¹²⁹ President Nixon is generally credited with beginning this reform movement when he stated that school administrators and teachers should be held accountable for their performances.¹³⁰ Nixon openly challenged schools to improve their standards when he claimed that American education is in urgent need of reform.¹³¹ School districts across the nation responded with reforms that came to be known as the accountability movement.¹³²

One of the most significant aspects of the accountability movement has been the development of defined performance criteria both by local school districts and by state educational policymakers.¹³³ Measurable goals are replacing broad, abstract rhetoric which had comprised educational objectives in the past.¹³⁴ For example, policymakers have transformed generalized expectations that schools teach children to read and to do arithmetic into objectives evidencing specific reading and mathematical abilities.¹³⁵ Performance expectations are written to reflect a consensus of what schools should be accomplishing.¹³⁶

One state, for example, has recently passed an Educational Accountability Act¹³⁷ requiring school districts to establish high school graduation standards and requiring programs of pupil progression

PHI DELTA KAPPAN 585 (1978) (special issue focusing on minimum competency testing movement).

127. R. STRICKLAND, *supra* note 1, at 64.

128. CBE is the shortened form for "competency-based education," the currently popular phrase for this education reform movement. See Reilly, *Competency-Based Education: Pros and Cons*, 14 AM. EDUC. 21 (1978).

129. ADMINISTRATOR'S HANDBOOK, *supra* note 125, at 5-6. See also Carrieri, *Who Is Accountable in the Schools?*, 45 CONTEMP. EDUC. 19 (1973). "[T]he concept means that a teacher or school could be called to task for not meeting agreed upon objectives." *Id.*

130. ADMINISTRATOR'S HANDBOOK, *supra* note 125, at 10; R. STRICKLAND, *supra* note 1, at 63.

131. ADMINISTRATOR'S HANDBOOK, *supra* note 125, at 10; R. STRICKLAND, *supra* note 1, at 63.

132. ADMINISTRATOR'S HANDBOOK, *supra* note 125, at 9-10.

133. *Id.* at 16.

134. Wise, *supra* note 12, at 356.

135. Often termed "behavioral objectives," they are written by school personnel, local community members, and/or state legislators. See ADMINISTRATOR'S HANDBOOK, *supra* note 125, at 16.

136. Wise, *supra* note 12, at 356.

137. Florida has been developing programs and laws committed to educational accountability

(promotion) to be based on performance. The two basic themes of the law are the elimination of social promotion and educator accountability for education programs.¹³⁸ This type of legislation is an attempt to appease the dissatisfied public, but school administrators, board members, teachers, and legislators should beware of potential legal liability which could attach to a failure to meet self-imposed standards.

Courts may perceive accountability statutes as providing the necessary duty¹³⁹ and causation in fact elements¹⁴⁰ in future educational malpractice litigation. Plaintiffs can argue that these statutes reflect a public desire to hold schools accountable for adherence to certain minimum standards. This policy of defining school responsibility can be seen as a public willingness to establish a legal duty of care upon which liability can be based. In *Peter W.*, the court argued that judicial recognition of a legal duty of care is to be dictated by public policy and that a major determinant of this public policy is whether the particular injuries in question are comprehensible and assessable.¹⁴¹ That court reasoned that no duty existed because there were no readily acceptable standards of care in the case at hand;¹⁴² however, an accountability statute could have provided the necessary standard. Accountability standards provide a means for identifying and correcting serious shortcomings in public schools. The public has set the standards, and schools that fail to meet them should be held legally responsible for their insufficiencies.

Another currently popular reform in American education is competency-based education (CBE).¹⁴³ CBE is essentially a test-oriented program in which state or district-mandated proficiency tests are used to decide if students will be promoted or graduated. Proponents of CBE maintain that a high school diploma will gain some needed stature if tests are used to control who is promoted and graduated.¹⁴⁴ A school district using a CBE program is basically guaranteeing that its

since the late 1960's. This latest act passed unanimously. FLA. STAT. § 229.814 (1977). See also Fisher, *Florida's Approach to Competency Testing*, 59 PHI DELTA KAPPAN 599 (1978).

138. See generally Fisher, *supra* note 137, *Florida's Approach to Competency Testing*, 59 PHI DELTA KAPPAN 599 (1978).

139. See notes 61-82 *supra* and accompanying text.

140. See notes 86-98 *supra* and accompanying text.

141. 60 Cal. App. 3d at 824, 131 Cal. Rptr. at 860.

142. *Id.* at 825, 131 Cal. Rptr. at 861.

143. See note 128 *supra*.

144. Reilly, *Competency-Based Education: Pros and Cons*, 14 AM. EDUC. 21 (1978). Proponents also claim that test results can be used to prod students and unproductive teachers, that they aid in distributing funds where needed, and that the public will better understand the schools. *Id.* at 23, 26. See also Spady, *Concept and Implication of Competency Based Education*, 36 EDUC. LEADERSHIP 16 (1978).

students who earn diplomas have acquired certain minimum skills.¹⁴⁵ The popularity of this movement can be seen in a recent poll in which eighty-two percent of those polled favored requiring a passing score on standardized tests before graduation.¹⁴⁶

As of March 15, 1978, thirty-three states had mandated some type of minimum CBE standards.¹⁴⁷ At the federal level, a bill was intro-

145. Spady, *supra* note 144.

146. 124 CONG. REC. S 14863 (daily ed. Sept. 11, 1978). See generally notes 88 & 89 *supra* and accompanying text.

147. A coded summary of that activity follows:

KEY

1. Action taken
2. Setting of standards
3. Grade levels assessed
4. Skill areas assessed
5. Use of standards and test
6. Comments

* State department of education

† State board of education

Alabama—1. State board resolution, 1977. 2. SDE* 3. 9-12 4. Basic skills 5. For H.S. graduation 6. State supt. of educ. has appointed a committee of 100 to study and make recommendations on standards, the test, and H.S. diploma issue; due July 1, 1978. *Arizona*—1. SDE ruling 2. SDE; assessment by local district; no statewide test prescribed 3. 8 and 12 4. Reading, writing, computing 5. For grad. from grades 8 & 12 6. Effective Jan. 1, 1976, students to read, write, compute at grade 6 level to receive standard grade 8 certificate; at grade 9 level for H.S. diploma. *California*—1. Early exit test (SB 1112-1972; SB 1243-1975; SB 1502-1976) 2. Test and cut-off standards set by SDE 3. Age 16 to adult 4. Process areas: reading, computing; content areas: consumer economics, math 5. Award H.S. diploma and leave school with parent permission 6. Title of program: California High School Proficiency Test; test administration and security handled under contract with private testing corporation.

1. AB 3408, Ch. 856-1976 2. State board to supply performance indicators, examples of minimum standards; local dists. set graduation standards. 3. Once, 7 to 9; twice, 10 to 11 4. Reading, writing, computing 5. For H.S. graduation 6. Act also prescribes course of study requirements; in effect for the graduating class, 1980.

1. AB 65, Ch. 894 2. Local dists. 3. Once, 4 to 6; once, 7 to 9; twice, 10 & 11 4. Reading comprehension, writing, computing 5. For remediation and grade promotion decisions 6. This law is to move California into elem. grade testing. *Colorado*—1. SB 180-1975, C.R.S., 22-32-109.5 2. Local boards 3. Twice a year, 9 to 124. Local dist. option 5. Local dist. option for H.S. graduation 6. If local bd. imposes a proficiency test for H.S. graduation, it must follow stipulations of this act. *Connecticut*—1. SBE† resolution, Nov., 1977 (early exit program) 2. SDE, using existing GED and APL test standards 3. Age 16 4. Academic: GED test; life skills: APL (Adult Performance Level) test 5. With counseling and follow-up teaching, students can leave school with H.S. equivalency diploma. 6. Final implementation contingent upon \$300,000 appropriation from legislature in 1978. *Delaware*—1. SBE resolution, 1976 2. SDE after baseline test is given 3. Baseline instrument in grade 11, 1978 4. Level II competencies; i.e., applications of reading, writing, math 5. For H.S. graduation 6. Contract to develop baseline testing instrument awarded to private test maker. *Florida*—1. CSSB 340, 1975; Fla. Statute 229.814. CSSB 107, 1976; F.S. 76.226 2. State and local boards 3. 3, 5, 8, 114. Basic skill areas; functional literacy 5. For high school graduation, grade promotion and early exist from high school 6. Titled: Educational Accountability Act. Places ban on social promotion. *Georgia*—1. SBE action 2. SBE and SDE 3. 4, 8, 114. Grades 4 & 8; reading math, social studies, science. H.S. test under development 5. SBE has not taken final action on use of the tests. 6. Student assessment program is part of long-range, comprehensive plan; local districts to get funding for program. *Idaho*—1. SBE resolution 2. SBE 3. 9-12 4. Reading, writing, arithmetic, spelling 5. For H.S. graduation at option of local districts 6.

duced in the 1978 session of Congress which would have created a Na-

Student passing proficiency exam will get diploma with state board seal. In districts not participating, students to get district diploma. *Indiana*—1. SBE resolution, Feb., 1978 2. By local dists. with advisory committee of teachers, administrators, parents, community members 3. 3, 6, 8, 10 4. Reading 5. Primarily for remediation; local districts may use for other purposes. 6. Rules & regulations for this resolution await attorney general and governor's approval (March 14, 1978). *Kansas*—1. SBE ruling, Jan., 1978 2. SDE will set standards, goals with help of local dists. 3. 3, 6, 9, 12 4. Academic skills: reading and math., grades 3, 6, 9; life skills: grade 12 5. Local district option 6. Pending legislation has good chance of passing in 1978; could alter some aspects of SBE mandate. *Kentucky*—1. SBE adopted 4-yr. competency plan, 1977 2. SDE with task force assistance 3. 3, 5, 8, 11 4. Criterion-referenced tests in reading, writing, arithmetic 5. For H.S. graduation, grade promotion 6. —. *Louisiana*—1. HB 810, Act 709, 1976 2. State supt. of schools 3. 4, 8, 11 4. Basic communication and computing skills with criterion-referenced tests 5. No mention of graduation or grade promotion 6. Requirements are part of accountability and assessment law. *Maine*—1. Amends LD 1810, Ch. 78, Private Special Laws 2. SDE 3. 11 4. (See comments) 5. For H.S. graduation 6. Law requires statewide committee to help commissioner of education in developing assessment instrument, designating areas to be tested; names organizations to be represented. *Maryland*—1. HB 1433, M.A.C., Art. 77, Sec. 980, 1976; and HB 1462, Ch. 559, 1977 2. SBE 3. 2 to 12; 3, 7, 9, 11 4. Reading 5. For grade promotion and H.S. graduation 6. Students not meeting minimum requirements may be retained in grade or enrolled in remedial program. *Michigan*—1. SDE 2. SDE 3. 4, 7, 10 4. Reading and math 5. For local district use 6. Twelfth-grade minimum competency test covering life-role skills under study. *Missouri*—1. SBE 2. SDE 3. 8 4. Application of reading, math, government/economics skills 5. No mandate for graduation or grade promotion 6. Basic Education Skills test, developed by SDE, has been field tested in grades 8, 10, and 12. *Nebraska*—1. SDE 2. Local districts 3. Begins in 5, continues until mastery achieved in each skill area. 4. Reading, writing, math 5. State-developed test is *not* to be used for grade retention or promotion 6. Local districts may use Nebraska Assessment Battery of Essential Learning Skills (N-ABELS) or develop own test. *Nevada*—1. AB 400, 1977 2. SBE 3. 6, 9, 12 4. Reading, writing, math 5. For H.S. graduation 6. Students may be promoted to next grade if fail exam, but remedial work is to be provided. *New Hampshire*—1. SDE 2. SDE 3. 4; 8, 12 under development 4. Communications and math 5. Grade promotion and H.S. graduation *not mentioned* 6. Program is to provide guidelines for local districts. *New Jersey*—1. A.1736, Ch. 97, 1976 2. State 3. — 4. Reading and math 5. Student diagnosis and remedial identification 6. Local districts are to provide remedial assistance in order for students to meet state standards.

1. SDE 2. SDE 3. 3, 6, 9, 11 4. Reading and math; life skills under study 5. Identification of students needing instructional help 6. Development of testing instrument is under contract to private test development company. *New Mexico*—1. SBE 2. State 3. 10; at elem. level, choice up to local district 4. Elem.: local option; secondary: proficiency battery based on adult APL and writing sample 5. Proficiency endorsement on H.S. diploma if test is passed 6. The SDE is working on a series of basic skill-area curriculum guides. *New York*—1. State Board of Regents 2. State Board of Regents 3. 9-12 4. Reading and math with a criterion-referenced tests; civics, citizenship, practical science, health, drug education, writing, language skills 5. For H.S. graduation 6. The SDE also administers Regents Diploma Program and Pupil Evaluation Plan (PEP), both related to measuring student performance in basic skills. *North Carolina*—1. HB 204 2. Competency Test Commission created by law 3. 11, beginning in 1978-79 4. To be determined by Competency Test Commission; see comments 5. For H.S. graduation 6. Test is to measure "those skills and that knowledge thought necessary to enable an individual to function independently and successfully in assuming the responsibilities of citizenship."

1. HB 205 2. By Competency Test Commission (separate from HB 204 commission) 3. 1, 2 (criterion-referenced test); 3, 6, 9 (norm-referenced test) 4. To be determined by the Competency Test Commission 5. To be determined by the Competency Test Commission 6. —. *Oregon*—1. SBE, 1972 2. Local districts 3. District option 4. Reading, writing, computing; local option for personal development, social responsibility, career development 5. For H.S. graduation 6. Graduation requirements are based on course credit, attendance, and required competencies in personal, social career areas.

tional Commission on Basic Education to establish federal standards for minimal competency.¹⁴⁸ Politicians and educators have responded with a flurry of legislation designed to improve the quality of education, with the responsibility for implementing these requirements and standards resting at the local level.¹⁴⁹ It is in this implementation process that a school now has more responsibility upon which its liability could be based.

As with accountability, CBE laws can arguably be viewed as fulfilling the duty¹⁵⁰ and causation¹⁵¹ requirements for a negligence action. Judicial response to a school's failure to comply with CBE requirements is difficult to predict since the laws are a new phenomenon in most states. Nevertheless, the potential for liability seems to be greater than in the previous *Peter W.* and *Donohue* cases where statutes with

Oklahoma—1. SBE 2. Decision will follow baseline data test 3. 3, 6, 9, 12 4. Reading (3, 6, 9); survival skills (12) 5. Decision will follow baseline data test 6. Baseline test instrument given to 15,000 students in fall, 1977. *Rhode Island*—1. SDE 2. — 3. 4, 8, and age 17 used in pilot test 4. Comprehension, analysis, evaluation (known as "life skills") 5. For local district and SDE use; competency-based H.S. diploma under study 6. Rhode Island master plan for evaluation and statewide assessment program have jointly contributed to pilot testing in life-skills areas. *Tennessee*—1. SBE, Nov. 10, 1977 2. SDE 3. 11, 12 4. Reading, math, grammar, spelling 5. For H.S. graduation, class of 1982 6. Two different programs were established in the same court ruling.

1. SBE, Nov. 10, 1977 2. Local districts 3. 4, 5, 6, 8 4. Subjects at discretion of local districts 5. Remediation 6. —. *Utah*—1. SBE, Jan., 1977 2. Local districts 3. Local district option 4. Reading, writing, speaking, listening, arithmetic, democratic governance, consumerism, problem solving 5. For H.S. graduation, class of 1980 6. Local districts will choose test and set cut-off standards. *Vermont*—1. SBE 2. SBE 3. Continuous 4. Reading, writing, speaking, listening, math; area of reasoning under study 5. For H.S. graduation 6. Mastery of basic competencies to be one requirement for graduation unless student has handicap. *Virginia*—1. SBE ruling 2. Broad: state. Specific: local 3. — 4. Functional literacy in communicative skills; computing skills, history and cultures of U.S., including processes of democratic governance and economic system; ability to pursue higher education or gain employment 5. For high school graduation, class of 1981, and remediation 6. It is assumed that local districts will choose grade or grade levels to test. State mandates that it be done before graduation.

1. HB 256, 1976 2. SBE in cooperation with local districts 3. All yearly, with first emphasis in K-6 4. Reading, communications, math 5. To measure progress of individual students 6. Authorization known as Standard of Quality Act. *Washington*—1. SB 3026; HB 1345, 1976 2. Local districts 3. 4, 8 4. Reading, math, language arts, using standardized achievement tests 5. For school district and parent use 6. School districts are encouraged to develop separate test for grade 2 for early identification of pupils needing assistance in language and computation. *Wyoming*—1. SBE policy 2. Local districts will establish specific standards 3. — 4. Reading, writing, computing with proficiency; process and structure of democratic governance and free enterprise 5. For H.S. graduation 6. Start-up date, rules, regulations are to be determined by SDE. Local districts will verify state standards and are encouraged to go beyond minimum standards set by SBE.

Pipho, *Minimum Competency Testing in 1978: A Look at State Standards*, 59 PHI DELTA KAPPAN 585, 587-88 (1978).

148. H.R. 9574, 95th Cong., 1st Sess. (1978).

149. Pipho, *supra* note 147, at 587-88.

150. See notes 61-82 *supra* and accompanying text.

151. See notes 86-98 *supra* and accompanying text.

only generalized educational goals were in effect.¹⁵²

V. CONCLUSION

There is little doubt that educational malpractice will continue as a subject for judicial consideration. A frustrated public continues to seek the ultimate solution to the problem of declining effectiveness of schools, and the courtroom provides an avenue for redress to dissatisfied parents and students. Situations such as those in *Peter W.* and *Donohue* should not exist. Schools must be held responsible to students who, like the plaintiffs in these cases, attended and progressed through twelve years of schooling, earned a diploma, and then were unable to secure and sustain employment because of their poor academic backgrounds.

A trend towards holding schools responsible for their students' learning can be seen in accountability and CBE movements. No court has yet addressed the educational malpractice issue in a jurisdiction with accountability or CBE statutes. Arguments that can be made in support of holding school districts liable will be substantially strengthened if a statute of this type applies to the defendant school district.

The time is right for judicial intervention in upgrading educational standards. Malpractice by school districts cannot be allowed to continue. The courts are proper arbiters, and dismissal of such actions only perpetuates the status quo. If schools are to continue to be responsible for the general education of children, they must be held to this duty and must be liable for its breach.¹⁵³

Nancy L. Woods

152. 60 Cal. App. 3d at 826, 131 Cal. Rptr. at 862; 407 N.Y.S.2d at 877.

153. "It is incumbent upon us [as educators] then to seize this 'opportunity' irrespective of its origin, not to obfuscate nor philosophize, but to demonstrate that education is a profession willing to set standards and, furthermore, willing to be held accountable if those standards are not met." Saretsky, *supra* note 16, at 592.