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# Educational Malpractice: Given the National Goals for Education, are Courts Prepared to Recognize this Cause of Action?

*A meeting between President Bush and the Governors resulted in the establishment of six national goals for education. These national goals encouraged giving educators increased responsibility and flexibility. This Note asserts that while the courts' role in fostering educational changes is unclear, it should not include recognition of the tort of "educational malpractice." Judicial recognition of "educational malpractice" is surrounded by competing policy decisions along with a wide range of potentially adverse consequences. The National Goals for Education, while setting forth a plan for rehabilitating our public school system, have not provided the courts the necessary guidelines to satisfactorily adjudicate an action for inadequate education.*

## I. INTRODUCTION

Education has increasingly become the focus of national attention. At an historical education summit (Education Summit) held in Charlottesville, Virginia in October of 1989, President Bush and attending state governors established six national goals designed to make the United States more competitive internationally.<sup>1</sup> The President and the governors at the

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1. National Goals for Education, Press Release from Executive Office of the President, Washington, D.C. (Feb. 26, 1990) [hereinafter National Goals for Education]. The goals are as follows:

(1) All children in America will start school ready to learn; (2) The high school graduation rate will increase to at least 90 percent; (3) American students will leave grades 4, 8, and 12 having demonstrated competency in challenging subject matter including English, mathematics, science, history, and geography; they will also have learned to use their minds well, so they may be prepared for responsible citizenship, further learning, and productive employment in our modern economy; (4) U.S. students will be first in the world in science and mathematics achievement; (5) Every adult American will be literate and will possess the knowledge and skills necessary to compete in a global economy and to exercise the rights and responsibilities of citizenship; and (6) Every school in America will be free of drugs and violence and will offer a disciplined

summit recognized that education is central to our quality of life.<sup>2</sup> Yet, concerns about the effectiveness of the public educational system continue to surface. An educational system where students are functionally illiterate upon completion of available programs suggests serious flaws in that system.

The success of American society is dependent on the quality of education. Those attending the summit recognized that education "is at the heart of our economic strength and security, our creativity in the arts and letters, our invention in the sciences, and the perpetuation of our cultural values. Education is the key to America's international competitiveness."<sup>3</sup> Similarly, the United States Supreme Court in *Brown v. Board of Education*<sup>4</sup> stated that "[t]oday, education is perhaps the most important function of state and local governments."<sup>5</sup> Education not only prepares students for professional training but builds a foundation for good citizenship.<sup>6</sup>

Despite this recognition of education's importance, to both students and society, some public schools fail to instill necessary skills for productivity in a contemporary society. Consequently, the goals set forth at the Education Summit demand "[s]weeping, fundamental changes in our education system . . . ."<sup>7</sup> These changes must come not just from educators and students, but from all Americans;<sup>8</sup> communities, business and civic groups, and state, local, and federal government each play a vital role in ensuring the success of our public education system.<sup>9</sup>

The courts may play an important role in effectuating the changes necessary to attain these National Goals.<sup>10</sup> Restructuring education requires creating powerful incentives for teacher performance and improvement, and real consequences

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environment conducive to learning.

*Id.*

2. *Id.* at 1.
3. *Id.*
4. 347 U.S. 483 (1954).
5. *Id.* at 493. The Supreme Court indicated that great expenditures for education and compulsory school attendance laws demonstrate the government's recognition of the importance of education.
6. *Id.*; see also National Goals for Education, *supra* note 1, at 2-4 (reference made in Introduction, in Goal 3, and in Goal 5).
7. National Goals for Education, *supra* note 1, at 1.
8. *Id.*
9. *Id.* at 1-2.
10. National Goals for Education, *supra* note 1, at 3-5.

for persistent failure.<sup>11</sup> The exact role courts must play in creating incentives or consequences has not been established. Many commentators have urged courts to recognize the tort of educational malpractice.<sup>12</sup>

## II. EDUCATIONAL MALPRACTICE

"Educational malpractice" is the failure to adequately educate a student; it includes the improper or inadequate instruction, testing, placement or counseling of a child.<sup>13</sup> Educational malpractice claims can be divided into two distinct categories: (1) failure to provide an adequate education, and (2) misclassification and improper placement within the school system.<sup>14</sup> As

11. *Id.* at 7.

12. See Kimberly A. Wilkins, Note, *Educational Malpractice: A Cause of Action in Need of a Call for Action*, 22 VAL. U. L. REV. 427 (1988) (proposes that the theory of recovery grounded in negligence can be utilized. It also proposes a standard of care to aid in judicial assessment of educational malpractice complaints through legislative recognition of such a cause of action); Destin S. Tracy, Comment, *Educational Negligence: A Student's Cause of Action for Incompetent Academic Instruction*, 58 N.C.L. REV. 561 (1980) (urging judicial recognition of a cause of action for educational negligence that is limited in scope to protect both educators and society); Alice J. Klein, Note, *Educational Malpractice: Can the Judiciary Remedy the Growing Problem of Functional Illiteracy?*, 13 SUFFOLK U. L. REV. 27 (1979) [hereinafter Note, SUFFOLK U. L. REV.] (In the absence of self-instituted review and in an effort to stimulate educational improvements, the judiciary should require accountability for failings that educators could have prevented); Case Comment, *Belle L. Gordon, Schools and School Districts—Doe v. San Francisco United School District, Tort Liability for Failure to Educate*, 6 LOY. U. CHI. L.J. 462 (1975) (urging that the court's ruling in *Doe v. San Francisco United School District* will perpetuate the status quo and encourage the ignoring of existing educational requirements); John Elson, *A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching*, 73 NW. U. L. REV. 641 (1978) (analyzing the general policy considerations underlying court reluctance to make decisions concerning educational policies); Robert H. Jerry, II, *Recovery in Tort for Educational Malpractice: Problems of Theory and Policy*, 29 U. KAN. L. REV. 195 (1981) [hereinafter Jerry] (arguing that the refusal to recognize a cause of action for educational malpractice is incompatible with accepted tort principles); Joan Blackburn, Comment, *Educational Malpractice: When Can Johnny Sue?*, 7 FORDHAM URB. L.J. 117 (1978) [hereinafter Comment, FORDHAM URB. L.J.] (addressing the alternative theories which form a basis of a suit for educational malpractice and suggesting that an action for negligent misrepresentation may be the best theory for establishing liability); Nancy L. Woods, Note, *Educational Malfeasance: A New Cause of Action for Failure to Educate?*, 14 TULSA L.J. 383 (1978) (considering the feasibility of educational malpractice in light of educational accountability and competency-based education movements in some states); Comment, *Educational Malpractice*, 124 U. PA. L. REV. 755 (1976) (arguing that negligence suits with a comparative standard of care stand the most chance of success).

13. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131 (5th ed. 1984).

14. The scope of this note is limited to the first category, failure to provide an

of yet, no court has recognized a cause of action for failure to provide an adequate education.<sup>15</sup> While there are a variety of theories upon which recovery may be based,<sup>16</sup> the most popu-

adequate education. It has been argued by several commentators that claims in the second category should not be labeled as true "educational malpractice" actions. See Richard Funston, *Education Malpractice: A Cause of Action in Search of a Theory*, 18 SAN DIEGO L. REV. 743, 758 (1981) [hereinafter Funston]; Edward J. Wallison, Jr., Note, *Nonliability for Negligence in the Public Schools—"Educational Malpractice" From Peter W. to Hoffman*, 55 NOTRE DAME L. REV. 814 (1980) (arguing that *Hoffman v. Board of Ed. of City of New York*, 49 N.Y.2d 121, 424 N.Y.S.2d 376 (1979), was incorrectly labeled as an educational malpractice action).

One court has recognized a cause of action for misplacement of a student in special education—not based on failure to educate a student in basic academic skills. *B.M. v. State*, 649 P.2d 425 (Mont. 1982). In *B.M.*, it was alleged that the child was misplaced in a segregated special education program. However, the court based its acknowledgment of the cause of action on statutory and Office of Public Instruction requirements alone. *Id.* at 427.

15. See *Poe v. Hamilton*, 565 N.E.2d 887 (Ohio Ct. App. 1990); *Rich v. Kentucky Country Day, Inc.*, 793 S.W.2d 832 (Ky. Ct. App. 1990) (against a private school); *Camer v. Seattle Sch. Dist. No. 1*, 762 P.2d 356 (Wash. Ct. App. 1988); *Rubio v. Carlsbad Mun. Sch. Dist.*, 744 P.2d 919 (N.M. Ct. App. 1987); *Armstrong v. Data Processing Inst., Inc.*, 509 So.2d 1298 (Fla. Dist. Ct. App. 1987); *DeRosa v. City of New York*, 517 N.Y.S.2d 754 (App. Div. 1987); *Agostine v. Sch. Dist.*, 527 A.2d 193 (Pa. Commw. Ct. 1987); *Denson v. Steubenville Bd. of Educ.*, No. 85-J-31, 1986 WL 8239 (Ohio Ct. App. July 29, 1986); *Moore v. Vanderloo*, 386 N.W.2d 108 (Iowa 1986); *Cavello v. Sherburne-Earlville Cent. Sch. Dist.*, 494 N.Y.S.2d 466 (App. Div. 1985); *Myers v. Medford Lakes Bd. of Educ.*, 489 A.2d 1240 (N.J. Super. Ct. App. Div. 1985); *Swidryk v. Saint Michael's Medical Ctr.*, 493 A.2d 641 (N.J. Super. Ct. Law Div. 1985); *Torres v. Little Flower Children's Serv.*, 474 N.E.2d 223 (N.Y. 1984); *Village Community Sch. v. Adler*, 478 N.Y.S.2d 546 (Civ. Ct. 1984); *Doe v. Bd. of Educ.*, 453 A.2d 814 (Md. 1982); *Paladino v. Adelphi Univ.*, 454 N.Y.S.2d 868 (App. Div. 1982) (action against a private school); *Tubell v. Dade County Pub. Sch.*, 419 So.2d 388 (Fla. Dist. Ct. App. 1982); *Hunter v. Bd. of Educ.*, 439 A.2d 582 (Md. 1982); *Aubrey v. Sch. Dist.*, 437 A.2d 1306 (Pa. Commw. Ct. 1981); *Washington v. City of New York*, 442 N.Y.S.2d 20 (App. Div. 1981); *D.S.W. v. Fairbanks North Star Borough Sch. Dist.*, 628 P.2d 554 (Alaska 1981); *Helm v. Professional Children's Sch.*, 431 N.Y.S.2d 246 (App. Div. 1980); *Hoffman v. Bd. of Ed.*, 400 N.E.2d 317 (N.Y. 1979); *Donohue v. Copiague Union Free Sch. Dist.*, 391 N.E.2d 1352 (N.Y. 1979); *Peter W. v. San Francisco Unified Sch. Dist.*, 131 Cal. Rptr. 854 (Cal. Ct. App. 1976).

16. Other theories of recovery include notions of contract law, misrepresentation, and constitutional grounds. See Comment, *FORDHAM URB. L.J.*, *supra* note 12 (misrepresentation); Charles M. Masner, Note, *The ABC's of Duty: Educational Malpractice and the Functionally Illiterate Student*, 8 GOLDEN GATE U.L. REV. 293 (1978) (contract); Note, *Educational Malpractice and the Right to Education: Should Compulsory Education Laws Require a Quid Pro Quo?*, 21 WASHBURN L.J. 555 (1982) (constitutional grounds).

Also, some of these theories have been advanced in the case law. In *Peter W.*, the theories of misrepresentation and negligence were the basis of the claim for relief. *Peter W. v. San Francisco Unified Sch. Dist.*, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (Cal. Ct. App. 1976). In *Donohue*, the claim was based on the theories of negligence and constitutional grounds. *Donohue v. Copiague Union Free Sch. Dist.* 47 N.Y.2d 440, 418 N.Y.S.2d 375 (1979). *B.M.'s* alleged cause of action included

lar theory lies in the tort principles of negligence.<sup>17</sup>

Traditionally, a person alleging a cause of action for negligence must prove four basic and necessary elements: duty, breach of duty, causal connection, and injury. First, the law must recognize a duty requiring the defendant's conduct to conform to certain standards (standard of care) to protect others against unreasonable risks. Second, that duty must be breached by the defendant. Third, there must be a reasonably close causal connection between the defendant's conduct and the injury to the plaintiff. Fourth, actual loss or damage to the plaintiff must be demonstrated.<sup>18</sup>

### A. *Duty Owed*

Courts have refused to recognize a cause of action for educational malpractice because of the absence of a workable standard of care.<sup>19</sup> The court in *Peter W. v. San Francisco Unified School District* held that no workable standard of care exists to measure an educator's teaching methods. It explained that the science of pedagogy promotes a multitude of conflicting views and approaches to educating students, and determining the "correct" method would be an impossible task.<sup>20</sup>

#### 1. *Standard of care for the "Professional Educator"*

Although commentators have urged the courts to adopt a "workable" standard of care, the courts have been unable to find such a standard.<sup>21</sup> Because the National Goals for Education emphasize placing more responsibility on educators, courts may be compelled to accept the standard of care set forth for professionals. This standard of care requires that professionals possess and use the knowledge, skill and care ordinarily employed by members of that particular profession in good standing.<sup>22</sup> Courts have applied this professional standard of care to cases involving doctors,<sup>23</sup> dentists,<sup>24</sup> pharmacists,<sup>25</sup> psychi-

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claims for negligent and constitutional violations. *B.M. v. State*, 200 Mont. 58, 649 P.2d 425 (1982).

17. See Jerry, *supra* note 12 (for a list of educational malpractice cases based on negligence).

18. See KEETON ET AL., *supra* note 13, § 30.

19. See *Peter W.*, 131 Cal. Rptr. at 860-61.

20. *Id.*

21. *Id.* at 861.

22. KEETON ET AL., *supra* note 13, § 32.

23. See, e.g., *Shumaker v. Johnson*, 571 So.2d 991 (Ala. 1990); *Battles v.*

atrists,<sup>26</sup> veterinarians,<sup>27</sup> lawyers,<sup>28</sup> architects and engineers,<sup>29</sup> accountants,<sup>30</sup> abstractors of title,<sup>31</sup> chiropractors,<sup>32</sup> karate teachers,<sup>33</sup> pilots,<sup>34</sup> and nurses.<sup>35</sup> The court in *Donohue v. Copiague Union Free School District* suggested that "[i]f doctors, lawyers, architects, engineers and other professionals are charged with a duty owing to the public whom they serve, it could be said that nothing in the law precludes similar treatment of professional educators."<sup>36</sup> In fact, the National Goals for Education refer several times to educators as "professionals."<sup>37</sup> At present, however, the majority of courts have held educators to a lesser, quasi-professional standard.<sup>38</sup>

Aderhold, 430 So.2d 307 (La. Ct. App. 1983); *Walls v. Boyett*, 226 S.W.2d 552 (Ark. 1950); *Hill v. Boughton*, 1 So.2d 610 (Fla. 1941); *DeLaughter v. Womack*, 164 So.2d 762 (Miss. 1964).

24. *Capps v. Manhart*, 458 N.W.2d 742 (Neb. 1990); *Elliott v. Owen*, 393 S.E.2d 347 (N.C. Ct. App. 1990) (orthodontist); *Willard v. Hagemeister*, 175 Cal. Rptr. 365 (Cal. Ct. App. 1981); *Rice v. Jaskolski*, 313 N.W.2d 893 (Mich. 1981).

25. *Koderick v. Snyder Brothers Drug, Inc.*, 413 N.W.2d 856 (Minn. Ct. App. 1987); *Tropi v. Scarf*, 187 N.W.2d 511 (Mich. Ct. App. 1971); *French Drug Co. v. Jones*, 367 So.2d 431 (Miss. 1978).

26. *Ray v. Ameri-Care Hosp.*, 400 So.2d 1127 (La. Ct. App. 1981); *Cotton v. Kambly*, 300 N.W.2d 627 (Mich. Ct. App. 1980).

27. *Barlett v. MacRae*, 635 P.2d 666 (Or. Ct. App. 1981); *Ruden v. Hansen*, 206 N.W.2d 713 (Iowa 1973); *Posnien v. Rogers*, 533 P.2d 120 (Utah 1975).

28. See, e.g., *Meller v. Bartlett*, 580 A.2d 484 (Vt. 1990); *Mali v. Odom*, 367 S.E.2d 166 (S.C. 1988); *Ramp v. St. Paul Fire & Marine Ins. Co.*, 269 So.2d 239 (La. 1972); *Caltrider v. Weant*, 128 A. 72 (Md. 1925).

29. *Robinson Redevelopment Co. v. Anderson*, 547 N.Y.S.2d 458 (App. Div. 1989); *Cutlip v. Lucky Stores, Inc.*, 325 A.2d 432 (Md. Ct. Spec. App. 1974); *City of Eveleth v. Ruble*, 225 N.W.2d 521 (Minn. 1974).

30. *Bily v. Arthur Young & Co.*, 271 Cal. Rptr. 470 (Cal. Ct. App. 1990); *Seedkem, Inc. v. Safranek*, 466 F. Supp. 340 (D. Neb. 1979); *Bonhiver v. Graff*, 248 N.W.2d 291 (Minn. 1976); *Spherex, Inc. v. Alexander Grant & Co.*, 451 A.2d 1308 (N.H. 1982).

31. *Razete v. Preferred Research, Inc.*, 397 S.E.2d 489 (Ga. Ct. App. 1990); *Adams v. Greer*, 114 F. Supp. 770 (W.D. Ark. 1953).

32. *Ammon v. Carpenter*, 252 Cal. Rptr. 748 (Cal. Ct. App. 1988); *Chamness v. Odum*, 399 N.E.2d 238 (Ill. App. Ct. 1979).

33. *Fantini v. Alexander*, 410 A.2d 1190 (N.J. Super. Ct. App. Div. 1980).

34. *Heath v. Swift Wings, Inc.*, 252 S.E.2d 526 (N.C. Ct. App. 1979).

35. *Gasbarra v. St. James Hosp.*, 406 N.E.2d 544 (Ill. App. Ct. 1979) (defendant hospital and hospital nurses); *Bambert v. Central Gen. Hosp.*, 430 N.Y.S.2d 336 (App. Div. 1980).

36. *Donohue*, 391 N.E.2d 1352, 1352 (N.Y. 1979).

37. National Goals for Education, *supra* note 1, at 1, 7.

38. Jay M. Pabian, Note, *Educational Malpractice and Minimal Competency Testing: Is There a Legal Remedy at Last?*, 15 NEW ENG. L. REV. 101, 127 (1979). The definition of a professional often excludes education. W. MOORE, *THE PROFESSIONS* 5-6 (1970) (professional preparation involves rigorous education). Public school teachers are described by the author as members of an aspiring semi-professional

Some commentators argue that educators should be held to the same standard applied to other professionals in light of educators' numerous responsibilities. These responsibilities include selecting materials to carry out mandatory curriculum objectives, establishing standards of performance, organizing instruction along with selecting appropriate instructional techniques, and measuring and evaluating the accomplishments of students.<sup>39</sup> One of the objectives of the National Goals for Education is to give educators (principals and teachers) the discretion to make more decisions. This would provide educators with greater flexibility to innovate new methods of teaching, to use resources in more productive ways, and to provide alternate entrance paths for gifted professionals who wish to teach.<sup>40</sup> With increased flexibility, the educator's responsibility toward his pupils would be enhanced, requiring the heightened status of "professional."

However, there are several practical reasons for differentiating educators from other recognized professionals such as doctors and lawyers. First, an educator is a public servant who receives his salary from the community budget.<sup>41</sup> The salary schedule of teachers reflects only their level of education and experience, rather than their reputation or status.<sup>42</sup> Parental recognition of an educator's ability or excellence will generally not affect the educator's salary. Second, clients exercise significant control over the hiring and firing of professionals such as lawyers and doctors.<sup>43</sup> Students and parents, however, exercise only a limited amount of control over educators. Parents normally do not perceive teachers as their employees.<sup>44</sup>

Until a "workable" standard of care is determined to be applicable to educators, the courts will continue to deny educational malpractice claims.

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occupation. *Id.* at 73.

39. V. Hodges & W. Johnson, *Legal Responsibility for Curriculum in the Basic Skills: Whose Job Is It?*, Colorado State Univ. (Mar. 1981) (paper presented at the Annual Meeting of the Regional Conference of the Colorado Language Arts Society (Colorado Springs, Colo., Mar. 13-15, 1981)).

40. National Goals for Education, *supra* note 1, at 7.

41. Note, SUFFOLK U. L. REV., *supra* note 12, at 42.

42. Comment, *Professional Negligence*, 121 U. PA. L. REV. 627, 631-32 (1973) (professionals rely primarily on reputation and status to determine earning capacity).

43. Note, SUFFOLK U. L. REV., *supra* note 12, at 42.

44. Hentoff, *Who's to Blame? The Politics of Educational Malpractice*, 6 LEARNING 40, 43 (Oct. 1977).

## 2. Policy considerations against the recognition of a duty

Applying a standard of care to educators is not without its problems. The recognition of a duty is "the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."<sup>45</sup> For example in *Peter W. v. San Francisco Unified School District*, the court relied on public policy considerations for not recognizing a duty.<sup>46</sup>

The recognition of a duty to adequately educate would expose educators to countless claims, real or imagined. This burden would cost society not only time and money,<sup>47</sup> but also prospective instructors. The drafters of the National Goals for Education recognize that the key to the restructuring of our nation's public education system is the capability to attract and keep quality teachers who have educational skills and knowledge of up-to-date technology.<sup>48</sup> The recognition of educational malpractice claims would require administrators to tighten the policies on hiring and certification of potential educators. Yet, the National Goals of Education encourage adoption of policies to attract more qualified teachers from diverse backgrounds.<sup>49</sup>

The court in *Donohue* argued that an educational malpractice claim would constitute unwarranted judicial intrusion not only into broad educational policies, but more importantly, into the day-to-day implementation of such policies.<sup>50</sup> Such an intrusion is contrary to the need to allow greater flexibility for educators to innovate new ways to improve learning.<sup>51</sup> The desire for increased flexibility,<sup>52</sup> coupled with the inherently impre-

45. *Peter W. v. San Francisco Unified Sch. Dist.*, 131 Cal. Rptr. 854, 860 (Cal. Ct. App. 1976) (quoting *Dillon v. Legg*, 69 Cal. Rptr. 72, 76 (Cal. Ct. App. 1968)).

46. *Id.* at 861. The court stated, "These recognized policy considerations alone negate an actionable 'duty of care' in persons and agencies who administer the academic phases of the public educational process."

47. *Id.*

48. National Goals for Education, *supra* note 1, at 7.

49. *Id.*

50. *Donohue v. Copiague Union Free Sch. Dist.*, 391 N.E.2d 1352, 1354 (N.Y. 1979).

51. National Goals for Education, *supra* note 1, at 7.

52. The court in *Peter W.* stated that "[t]he science of pedagogy . . . 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." *Peter W. v. San Francisco Unified Sch. Dist.*, 131 Cal. Rptr. 854, 860-61 (Cal. Ct. App. 1976).

cise nature of education, conflicts with the rigidity and absolute nature of court made rules. Therefore, the courts have resisted applying a single standard of care to educators in light of the host of variable factors which influence the process of education.<sup>53</sup>

### B. Remaining Elements of Negligence

Even if a plaintiff is able to establish a workable standard of care he must still satisfy the remaining three elements of negligence: breach of duty, causal connection between the defendant's conduct and the resulting injury to plaintiff, and actual loss or damage to plaintiff.

#### 1. Breach of duty

Assuming a professional standard of care applies, the plaintiff must establish that the defendant failed to use known and available educational alternatives.<sup>54</sup> This proof must be established by an "expert witness," someone who is an expert in the profession, such as a teacher or administrator.<sup>55</sup> However, problems would arise since even educators disagree on what philosophies and methods of education are most appropriate.<sup>56</sup> The choice between various methods of education depends on a myriad of factors.<sup>57</sup> Therefore, expert witnesses could most certainly be located to support each side of the case. Also, due to the different approaches taken by the various districts and states, the "locality rule", which requires that the expert witness be an authority in the same geographic location as the defendant, would seem to be necessary.<sup>58</sup> However, some jurisdictions have discarded the locality rule altogether

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53. *Id.* at 861.

54. KEETON ET AL., *supra* note 13, § 32.

55. *Id.* at 188 (to prevail in a malpractice case the plaintiff must establish through expert testimony both the standard of care and the fact that the defendant's conduct did not measure up to that standard); *see, e.g.*, Campbell v. Palmer, 568 A.2d 1064, 1067 (Conn. App. Ct. 1990) (testimony of expert is necessary to establish both standard of proper professional skill or care on the part of physician and that defendant failed to conform to that standard of care).

56. *Peter W.*, 131 Cal. Rptr. at 860-61.

57. *Id.* One such factor is the recognition that there are two duties involved in malpractice cases. There is the duty of the educator to teach which is coupled with a duty to learn on the part of the student. *Donohue v. Copiague Union Free Sch. Dist.*, 407 N.Y.S.2d 874, 881 (App. Div.), *aff'd* 391 N.E.2d 1352 (N.Y. 1979).

58. Deborah D. Dye, Note, *Educational Malpractice: A Cause of Action that Failed to Pass the Test*, 90 W. VA. L. REV. 499, 506 (1987).

having noticed that, in medical malpractice suits, physicians from the same area are reluctant to testify against a colleague.<sup>59</sup> There is no reason to believe that an educator would be less reluctant to testify against another educator.

To further complicate the finding of a breach of duty, the National Goals for Education have stressed the desire to give educators greater flexibility to serve the needs of a diverse body of students.<sup>60</sup> The potential of subjecting an educator's unproven methods to laymen (judges and juries) and experts who have different theories of education may stifle innovation and creativity. Therefore, the questions remain: are courts in any position to determine "the correct way" to educate, and when has an educator breached his duty to educate?

## 2. *Causal connection between conduct and injury*

The plaintiff must also prove that the educator's breach of duty was a factual and proximate cause of plaintiff's injuries. The defendant's conduct is considered the factual cause of the injury if (1) the event would not have occurred but for the defendant's conduct ("but for" test), and (2) defendant's conduct is more than an insignificant contribution to the result ("substantial-factor" test).<sup>61</sup> Factual causation is very difficult, if not impossible, to prove due to a multitude of factors such as the student's motivation, attitude, temperament, and past experience, along with other mental, social and economic factors.<sup>62</sup>

Proximate cause deals with how far courts will extend liability. A defendant's conduct is the proximate cause if it is so closely connected with the result, and of such significance, that the law is justified in imposing liability.<sup>63</sup> Proving proximate causation is complicated by the multitude of factors outside the educator's control which influence a student's inability to

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59. KEETON ET AL., *supra* note 13, § 32 (some jurisdictions have replaced the "locality rule" with a general national standard, especially in the case of medical specialists); see, e.g., *Paintiff v. Parkersburg*, 345 S.E.2d 564 (W. Va. 1986) (West Virginia no longer applies the locality rule in medical malpractice suits because physicians from the same area are reluctant to testify against a colleague).

60. National Goals for Education, *supra* note 1, at 1, 7.

61. KEETON ET AL., *supra* note 13, § 41.

62. *Donohue v. Copiague Union Free Sch. Dist.*, 391 N.E.2d 1352, 1353-55 (N.Y. 1979) See also, *Funston*, *supra* note 14, at 784-90 (causation is the greatest impediment in "educational malpractice" suits).

63. KEETON ET AL., *supra* note 13, § 41.

learn.<sup>64</sup> Clearly, the act of one particular teacher in a school system cannot cause a student to graduate from high school functionally illiterate. As an Alaskan court explained, the level of learning that a child might have reached if an educator had not breached his duty is impossible to assess; therefore, the determination of proximate cause is beyond the court's ability.<sup>65</sup>

### 3. Injury

The final element necessary for the tort of negligence is actual loss or damage suffered by the plaintiff. As stated in *Donohue*, "who can in good faith deny that a student who upon graduation from high school cannot comprehend simple English—a deficiency allegedly attributable to the negligence of his educators—has not in some fashion been 'injured'."<sup>66</sup> However, some courts have refused to recognize injury resulting from a failure to educate as an "injury" within the meaning of tort law.<sup>67</sup>

Court recognition of educational deficiency as tort injury creates two basic problems.<sup>68</sup> First, the plaintiff has lost what amounts to an expectancy interest or a failure to receive a benefit.<sup>69</sup> The issue of not receiving an adequate education is analogous to the issue resolved in *H.R. Moch Co., Inc. v. Rensselaer Water Co.*, where the court held that a municipal contractor's failure to furnish sufficient water to adequately fight fires was a denial of a benefit, not a commission of a legal wrong.<sup>70</sup> What was lost was an expectancy interest, for which the court does not recognize a right of redress. Likewise, in an educational malpractice suit the injury to the plaintiff is the lost expectancy interest.

Second, the calculation of damages for non-learning would be virtually impossible.<sup>71</sup> Damages would be based on future earnings which are mere expectations and are highly specula-

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64. *Peter W. v. San Francisco Unified Sch. Dist.*, 131 Cal. Rptr. 854, 861 (Cal. Ct. App. 1976).

65. *D.S.W. v. Fairbanks North Star Borough Sch. Dist.*, 628 P.2d 554, 556 (Alaska 1981).

66. *Donohue*, 391 N.E.2d at 1354.

67. *Peter W.*, 131 Cal. Rptr. at 862; *Donohue*, 391 N.E.2d 1352.

68. *Funston*, *supra* note 14, at 783-84.

69. *Id.*

70. *H.R. Moch*, 159 N.E. 896 (N.Y. 1928).

71. *Funston*, *supra* note 14, at 784.

tive. In one case, Sioux Indian children were denied recovery for lost educational benefits because the amount of the loss could not be determined with sufficient accuracy.<sup>72</sup> Education up to a particular level does not guarantee a particular income,<sup>73</sup> and damages resulting from a lack of education are difficult to assess. Therefore, the task of proving actual injury continues to be an obstacle for those who advocate recognition of educational malpractice as a legal cause of action.

### III. CONCLUSION

Many policy considerations are at the center of a court's decision of whether to recognize a claim for educational malpractice.<sup>74</sup> The National Goals for Education encourage restructuring of the public education system to make teachers and administrators more accountable. However, in light of the many other aspirations set forth in the National Goals of Education, this plea for increased accountability must be balanced with the need for greater flexibility. The courts have been unable to adequately balance these seemingly contradictory needs.

Judicial recognition of a cause of action for "educational malpractice" would burden an already inadequate education system. Holding educators accountable for their actions is desirable. Deciding the extent and enforcement of standards to increase accountability should not be left to the courts. These issues are largely political and are properly left to the legislative process. The hoped for improvements sought by the National Goals for Education require all Americans to take part in the restructuring of the public education system.<sup>75</sup> All parties—students, parents, educators, and legislators—need to take concrete steps to police and improve public education. If society does not take steps to restructure the faltering public school system, it runs the risk that the courts, with all the undesirable consequences accompanying such an action, may decide for us.

*Russell K. Smith*

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72. *Id.* (citing *Sioux Tribe v. United States*, 84 Ct. Cl. 16 (1936), *cert. denied*, 302 U.S. 740 (1937)).

73. *Id.*

74. *Donohue v. Copiague Union Free Sch. Dist.*, 391 N.E.2d 1352, 1354 (N.Y. 1979).

75. National Goals for Education, *supra* note 1.