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Educational Malpractice and Handicapped Students

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COMMENTS

Educational Malpractice and Handicapped Students

Recent renewed concern over educational quality and education's effect on our nation's future has led to a variety of educational reports, suggestions, and programs for reform. Many suggestions reflect general dissatisfaction with the current state of the nation's public schools. One result of this dissatisfaction is litigation over educational matters in state and federal court. Given the prevailing national concern about education, consideration of the validity and potential ramifications of "educational malpractice" claims is appropriate.[1]

Educational malpractice loosely covers claims arising in an educational setting, but specifically refers to actions brought against professional educators or educational institutions.[2] These actions have been especially attractive to parents of handicapped children because of the considerable evaluative, diagnostic, and placement services necessary to educate a handicapped child.[3] With one exception, however, courts have

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1. Although educational malpractice is a relatively new action, the highest courts in eight states have considered issues arising under this claim. The first major tort case in this area was Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976). Other states ruling on educational malpractice as a tort claim include: D.S.W. v. Fairbanks North Star Borough School Dist., 628 P.2d 554 (Alaska 1981); Tubell v. Dade County Pub. Schools, 419 So. 2d 388 (Fla. Dist. Ct. App. 1982); Hunter v. Board of Educ., 292 Md. 481, 439 A.2d 582 (1982); B.M. v. State, ____ Mont. ____, 649 P.2d 425 (1982); Myers v. Medford Lakes Bd. of Educ., 199 N.J. Super. 511, 489 A.2d 1240 (1985); Donohue v. Copiague Union Free School Dist., 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979); Aubrey v. School Dist., 63 Pa. Commw. 330, 437 A.2d 1306 (1981).

2. Suits have been against teachers, supervisors (including the school board), and other school professionals such as school psychologists.

3. There have been two general bases for negligence claims against school districts educating handicapped students: the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified in scattered sections of 20 U.S.C. ch. 33 (1982)), and state claims of negligence or breach of contract. This comment focuses on claims of handicapped students brought under negligence or breach of contract theories.

dismissed educational malpractice claims involving handicapped students. Relying on cases concerning functional illiteracy,[4] judges have cited lack of a duty to students, absence of workable standards of conduct for educators, and unwillingness to become embroiled in educational policy as factors mandating dismissal of all educational malpractice claims, including the claims of handicapped students. Where the government does not enjoy general immunity, educational malpractice claims by handicapped students should be viable causes of action; rather than being dismissed on a motion for summary judgment, such claims should be considered on the merits.

I. Background—Functional Illiteracy Cases

The gravamen of an educational malpractice action is failure to provide an adequate education. The result of such failure may be demonstrated by an otherwise capable student's inability to show competence in basic skills such as reading or writing, or by a handicapped student's inability to deal successfully with the "outside" world due to substandard training.

Two cases in California and New York, *Peter W. v. San Francisco Unified School District*,[5] and *Donohue v. Copiague Union Free School District*,[6] were the first attempts at holding a school district liable for educational negligence. The plaintiffs

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The many actions brought under the Education for All Handicapped Children Act of 1975 have generally been unsuccessful due to plaintiffs' failure to exhaust administrative remedies provided in the Act. *See, e.g.*, Board of Educ. v. Rowley, 458 U.S. 176 (1982); Timms v. Metropolitan School Dist., 718 F.2d 212 (7th Cir. 1983); Monahan v. Nebraska, 687 F.2d 1164 (8th Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983). For a discussion of claims under this act, see, *e.g.*, Kurker-Stewart & Garter, *Educational Malpractice and P.L. 94-142: A New Dilemma For Educators*, 10 NOLPE Sch. L.J. 128 (1982).

4. The two cases involving claims based on functional illiteracy or "failure to read" are Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976), and Donohue v. Copiague Union Free School Dist., 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).

5. 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976). *Peter W.* cousidered "whether a person who claims to have been inadequately educated, while a student in the public school system, may state a cause of action in tort against the public authorities who operate and administer the system." *Id.* at 817, 131 Cal. Rptr. at 855. Peter W.'s claim of educational malpractice was based on his inability to read adequately after graduating from high school. The court acknowledged that the plaintiff alleged the necessary elements of negligence, proximate cause, and injury, but dismissed based on lack of any duty of care between the school and student. *Id.* at 824, 131 Cal. Rptr. at 861.

6. 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979). This case involved facts similar to those in *Peter W.* The New York court also denied recovery on the basis of no "duty," citing public policy as the reason for the decision. *Id.* at 444, 391 N.E.2d at 1354, 418 N.Y.S.2d at 377.

were students who had graduated functionally illiterate. The two courts recognized the theoretical validity of the students' educational malpractice claims, but dismissed the cases.[7] The dismissals were not based on factual insufficiencies, but rather on the courts' perception that allowing educational malpractice claims would expose school districts to a flood of litigation by dissatisfied students and parents,[8] and would propel courts into "blatant interference with the responsibility for the administration of the public school system."[9] Although these two cases involved nonhandicapped students,[10] their analysis has strongly influ-

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7. *Peter W.*, 60 Cal. App. 3d at 823, 131 Cal. Rptr. at 859; *Donohue*, 47 N.Y.2d at 444, 391 N.E.2d at 1354, 418 N.Y.S.2d at 377 (1979).

8. Donohue v. Copiague Union Free School Dist., 64 A.D.2d 29, 42, 407 N.Y.S.2d 874, 883 (1978) (Suozzi, J., dissenting). The *Peter W.* court specified the following factors as relevant to its determination that a legal duty of reasonable care between plaintiff student and defendant school district did not exist:

> foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant'a conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Peter W., 60 Cal. App. 3d at 823, 131 Cal. Rptr. at 859-60 (quoting Rowland v. Christian, 69 Cal. 2d 108, 112-13, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968)).

9. *Donohue*, 47 N.Y.2d at 445, 391 N.E.2d at 1354, 418 N.Y.S.2d at 378. The intermediate appellata court in *Donohue* also listed factors supporting its policy-based decision that a duty between plaintiff and defendant school district did not exist:

> *moral* considerations arising from the view of society towards the relationship of the parties, the degree to whicb the courts should be involved in the regulation of that relationship and the social utility of the activity out of which the alleged injury arises; *preventative* considerations, which involve the ability of the defendant to adopt practical means of preventing injury, the possibility that reasonable men can agree as to the proper course to be followed to prevent injury, the degree of certainty that the alleged injuries were proximately caused by the defendant and the foreseeability of harm to the plaintiff; *economic* considerations, which include the ability of the defendant to respond in damages; and *administrative* considerations, which concern the ability of tha courts to cope with a flood of new litigation, the probability of feigned claims and the difficulties inherent in proving the plaintiff'e case . . . .

Donohue, 64 A.D.2d at 33, 407 N.Y.S.2d at 877 (emphasis in original).

10. *Peter W.* and *Donohue* illustrate the so-called "pure" malpractice claim involving the failure of a nonhandicapped student to demonstrate mastery of basic skills. This type of claim was the first brought under an educational malpractice theory and has heen universally rejected. It has been widely discussed in scholarly literature. *See, e.g.*, E. CONNORS, EDUCATIONAL TORT LIABILITY AND MALPRACTICE (1981); Note, *The ABC's of Duty: Educational Malpractice and the Functionally Illiterate Student*, 8 GOLDEN GATE 293 (1978). In contrast, discussion concerning handicapped students appeared only after the initial furor over *Peter W.* and *Donohue* subsided, and thus there is less scholarly discussion of educational malpractice claims brought by handicapped students.

enced subsequent educational malpractice cases involving handicapped students.

In *Donohue,* the New York Court of Appeals noted that, although a complaint alleging educational malpractice might state a cause of action within traditional notions of tort law, the "heart of the matter" is whether "the courts should, as a matter of public policy, entertain such claims."[11] When a court faces any new tort claim such as educational malpractice, it must analyze the underlying policy bases for allowing the claim.[12] Moreover, undeniable public interest exists in the outcome of suits against government entities.[13] Thus even more reason exists for carefully articulating and scrutinizing underlying policy bases. Courts faced with educational malpractice claims by handicapped students have not clearly articulated or scrutinized relevant policy bases; rather, in reliance upon the two functional illiteracy cases (*Peter W.* and *Donohue*) they have dismissed claims by handicapped students without examination of the merits. This comment examines basic judicial objections to recognizing an educational malpractice claim and then illustrates why those objections are not persuasive in the context of education for handicapped students.

II. Analysis

A. Governmental Immunity

Although courts have not explicitly discussed sovereign or governmental immunity as a defense in educational malpractice actions, such a defense obviously would bar suits against school districts.[14] However, most states have substantially abolished

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11. *Donohue,* 47 N.Y.2d at 444, 391 N.E.2d at 1354, 418 N.Y.S.2d at 377.

12. Dean Prosser has noted that perhaps more than any other branch of the law, the law of torts is a "battleground of social theory." He added, "The influence of public policy on tort law is apparent, and most likely to be controversial, when it comes to bear upon a proposed change that is accomplished by overruling an established precedent." W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 3, at 15 (5th ed. 1984) [hereinafter cited as Prosser].

13. Not only is public interest greater when claims exist against a government entity because of the monetary investment every citizen has in government functions, but also because most citizens have a direct interest in the quality of education offered by public schools.

14. Certainly, the sovereign immunity defense would not apply to a private school, and few educational malpractice actions have been pursued against private institutions. *See infra* notes 68-72 and accompanying text. However, basic judicial unwillingness to interfere with the decisions of other government branches causes judicial objections to apply to malpractice claims against private as well as public schools since many aspects

the sovereign immunity doctrine,[15] thus preventing courts from dismissing educational malpractice claims on that basis.

Nevertheless, immunity is retained in some areas either by statute or by judicial decision. The major exceptions to abolition of governmental immunity are discretionary immunity imposed by statute, and the judicially created "public duty" doctrine.

Several states recognize immunity for discretionary government conduct, "decisions involv[ing] the kind of basic policy issues typically [appearing] in legislation."[16] Statutes allowing claims against the state or its political subdivisions often retain immunity for "discretionary" conduct as opposed to more routine "operational" conduct.[17] The major justification for this immunity is that the "judiciary should not invade the province of the executive branch of government by supervising its decisions through tort law."[18]

Given this justification for "discretionary" immunity, courts are not surprisingly reluctant to adjudicate educational malpractice claims reflecting administrative and legislative policy decisions concerning education. Although only one court examining an educational malpractice claim has explicitly phrased its opinion in terms of discretionary immunity,[19] both discretionary im-

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of special education programs are regulated whether or not the school is public.

15. Although one or two states seem to have retained something like a total sovereign immunity, the great majority have now consented to at least some liability for torts, in all cases retaining the immunity at least to the extent of basic policy or discretionary decisions.

PROSSER, *supra* note 12, § 131, at 1044.

16. PROSSER, *supra* note 12, § 131, at 1046. For purposes of this comment "discretionary immunity" is immunity for decisions made by a legislator or school professional when reasonable alternatives to the action taken exist and there is a public policy basis for the decision. An example of a discretionary decision would be a superintendent of education deciding that home tutoring of emotionally disturbed children is no longer allowable, that such children should be served by special education programs or be institutionalized. Although this decision could be attacked (and probably challenged through administrative channels), the superintendent would not be subject to suit because the decision involves policy matters.

17. *See, e.g.*, Irwin v. Town of Ware, 392 Mass. 745, 467 N.E.2d 1292 (1984).

18. PROSSER, *supra* note 12, § 131, at 1046.

19. Myers v. Medford Lakes Bd. of Educ., 199 N.J. Super. 511, 516, 489 A.2d 1240, 1242 (1985). The New Jersey court dismissed the claim by explaining that the plaintiff did not bring his action under the New Jersey Tort Claims Act, the only possible basis for recovery. Furthermore, even if the plaintiff had asserted a claim under the act, he would have been unsuccessful since the statute "grants immunity from governmental liability for exercises of judgment or discretion, such as the evaluation of a course of education for plaintiff." *Id.* In other cases none of the malpractice claims were invalidated expressly because of discretionary immunity, although a few courts discussed governmental immunity as a possible defense. *See Peter W.*, 60 Cal. App. 3d at 819, 131 Cal.

munity and past dismissals of educational malpractice claims are built on the idea that the courts should not make policy decisions. After discussing bases for discretionary immunity, Prosser states:

> All this may be a way of saying that courts have confused the issues of duty and negligence on the one hand with the issue of the discretionary immunity on the other. It seems fairly clear in at least some of the cases that courts have decided negligence or duty issues under the guise of "discretion." Perhaps this has not always led to a bad result, but the difference is quite important in many cases. The discretionary immunity issue, often viewed as jurisdictional, is usually resolved on motion to dismiss or on summary judgment motion—in other words, resolved without a full trial on the merits. If this device is in fact used to decide negligence and duty issues, the judge is likely to be acting without adequate factual development.[20]

Several cases also recognize a "public duty" exception to the general abolition of governmental immunity.[21] The "public duty" exception retains immunity for breach of unspecified duties owed only to the general public. Individuals thus have no redress for violation of these public duties.[22] Courts have recently challenged this exception by refusing to imply immunity when the relevant state statute does not provide for a "public duty" exception.[23] The "public duty" doctrine has not been invoked in educational malpractice actions.

Both exceptions—discretionary immunity and the "public duty" doctrine—raise the level of proof required if a plaintiff is to survive a motion for summary judgment. In a state that has

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Rptr. at 857; Tubell v. Dade County Pub. Schools, 419 So. 2d 388, 389 (Fla. Dist. Ct. App. 1982) (plaintiff student was tested incorrectly, misclassified based on the testing, and improperly placed to his detriment in a special education program for a number of years).

20. PROSSER, *supra* note 12, § 131, at 1042-43. Note that most educational malpractice claims have been dismissed before trial on the merits. *See supra* note 1.

21. *See, e.g.*, Simpson's Food Fair, Inc. v. City of Evansville, 149 Ind. App. 387, 272 N.E.2d 871 (1971); Suarez v. Dosky, 171 N.J. Super. 1, 407 A.2d 1237 (1979); Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968).

22. PROSSER, *supra* note 12, § 131, at 1049. An illustration of this "public duty" exception would be denying the right to sue a state parole board for having released a dangerous prisoner who shortly thereafter committed assault. Although the parole board has a duty to administer the criminal code and thus has a "duty to the public," the board's judgment as to prisoner release is discretionary, and no duty is owed te tbe specific plaintiff harmed.

23. *See, e.g.*, Ryan v. State, 134 Ariz. 308, 656 P.2d 597 (1982); Irwin v. Town of Ware, 392 Mass. 745, 467 N.E.2d 1292 (1984).

abolished governmental immunity but recognizes one of the exceptions, a plaintiff is allowed to bring suit against a government entity. Nevertheless, a court may for policy reasons deny review on the merits by invoking one of the exceptions. Such denial circumvents the legislative judgment allowing government liability if the exception is judicially created. Thus a judge may make a threshold determination of immunity even where governmental immunity has been formally abolished. The *Peter W.* functional illiteracy case depicts this approach. Although noting that under the California Tort Claims Act "liability is the rule, and immunity the exception," the *Peter W.* court nevertheless pointed out that the plaintiff's immunity argument merely meant that he "*may* state a cause of action for negligence [against the school district] . . . not that he *has* stated one."[24] Thus, despite the general abolition of governmental immunity, "abrogation of immunity itself does not always import liability."[25]

B. Rationale for Denying Educational Malpractice Claims

Court decisions concerning educational malpractice claims have focused on whether a school district has a duty to exercise reasonable care. Although at least one court has recognized that educators are responsible for meaningful public education,[26] most courts have been reluctant to extend that recognition to acknowledgment of a "legal duty" with attendant liability. This reluctance is evident in the two main reasons cited for dismissing educational malpractice claims: (1) lack of satisfactory standards of conduct, and (2) unwillingness to interfere in educational judgments properly made by state or local educators.[27]

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24. *Peter W.*, 60 Cal. App. 3d at 819, 131 Cal. Rptr. at 857 (emphasis in original).

25. PROSSER, *supra* note 12, § 131, at 1045.

26. This determination [of no duty] does not mean that educators are not ethically and legally responsible for providing a meaningful public education for the youth of our State. Quite the contrary, all teachers and other officials of our schools bear an important public trust and may be held to answer for the failure to faithfully perform their duties. It does mean, however, that they may not be sued for damages by an individual student for an alleged failure to reach certain educational objectives.

Donohue, 64 A.D.2d at 35, 407 N.Y.S.2d at 879.

27. Other reasons are given for dismissing educational malpractice claims, but since they appeared infrequently in the above cases, they are discussed only in the section of this comment entitled "Application of Rationale to Handicapped Students' Claims." *See* notes 43-77 and accompanying text.

1. Standards of conduct

The lack of a workable rule of care provided one basis for dismissal in *Peter W.*[28] The court emphasized that professional educators disagree on educational standards, thus implying that judges cannot be expected to determine professional standards of conduct when educators cannot do so.

A similar concern over the judiciary determining standards of conduct has arisen in malpractice cases involving handicapped students.[29] For example, the New York Court of Appeals in *Hoffman v. Board of Education*[30] suggested that imposing liability would "allow the court or jury to second-guess the determinations of each of plaintiff's teachers," and "open the door to

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28. *Peter W.*, 60 Cal. App. 3d at 825, 131 Cal. Rptr. at 861. The court in *Peter W.* pointed out that whenever the California Supreme Court has opened or sanctioned new areas of tort liability,

> it has noted that the wrongs and injuries involved were both comprehensible and assessable within the existing judicial framework. . . . This is simply not true of wrongful conduct and injuries allegedly involved in educational malfeasance. 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 the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers.

Id. at 824, 131 Cal. Rptr. at 860-61; *see also Donohue*, 64 A.D.2d at 34, 407 N.Y.S.2d at 878 (quoting *Peter W.*, 60 Cal. App. 3d at 824-25, 131 Cal. Rptr. at 860-61).

29. D.S.W. v. Fairbanks North Star Borough School Dist., 628 P.2d 554, 555 (Alaska 1981); Smith v. Alameda City Social Serv. Agency, 90 Cal. App. 3d 929, 939, 153 Cal. Rptr. 712, 719 (1979); Doe v. Board of Educ., 295 Md. 67, 82-83, 453 A.2d 814, 821 (1982) (Eldridge, J., dissenting); Hunter v. Board of Educ., 292 Md. 481, 484, 439 A.2d 582, 583-84 (1982); Hoffman v. Board of Educ., 49 N.Y.2d 121, 126-27, 400 N.E.2d 317, 320, 424 N.Y.S.2d 376, 379-80 (1979). *But see Donohue*, 47 N.Y.2d at 443, 391 N.E.2d at 1353, 418 N.Y.S.2d at 377 ("Nor would creation of a standard with which to judge an educator's performance . . . pose an insurmountable obstacle.").

30. 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979). *Hoffman* is perhaps the best known handicapped student's educational malpractice case. The plaintiff had been diagnosed after kindergarten as borderline mentally retarded. Although subsequent reevaluation had been recommended by the psychologist who originally tested him, he was not retested until 13 years later. He was then found to have above average intellectual potential and was unable to continue in an educable mentally retarded vocational program. Plaintiff's assertion of negligence against the school board rested in the board's original incorrect assessment and subsequent failure to retest pursuant to the school psychologist's recommendation. *Id.* at 123-25, 400 N.E.2d at 318-19, 424 N.Y.S.2d at 377-78.

an examination of the propriety of each of the procedures used in the education of every student in our school system."[31]

2. *Undue interference with school administration*[32]

Judges have also been unwilling to interfere in the daily administration of educational institutions when the interference includes setting standards of conduct for educators, supervising educational activities to determine if relevant standards are met, or evaluating the validity of an injured student's claim. For example, in *Doe v. Board of Education*,[33] the court characterized the claim for damages as one involving the "proper administration of the public school system,"[34] and thus affirmed dismissal of the claim even though the plaintiff alleged injury based on improper evaluation by a public employee and improper placement by the board of education.[35] The claim was against a

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31. *Id.* at 126-27, 400 N.E.2d at 320, 424 N.Y.S.2d at 379.

32. This section focuses on judicial interference with public schools because legislative or administrative action is most likely to have the greatest impact on public schools. However, objections to judicial interference apply equally to private schools, since all schools are subject to some state requirements.

33. 295 Md. 67, 453 A.2d 814 (1982). Plaintiff Doe, a student, had been evaluated in 1967 by a psychiatrist who recommended placement in a brain-damaged class and reevaluation in ten months, neither of which was done. A private doctor diagnosed dyslexia rather than brain injury in 1968. In 1975 the student was evaluated by another school psychologist who recommended that he enroll in a special education program at military school and have a complete eye examination. Again, no brain damage was found. It was eventually determined that plaintiff's only problem was dyslexia. The student had been in special education programs for the mentally retarded for seven years. *Id.* at 71-72, 453 A.2d at 815-16.

34. It will be seen that it is for error in evaluation for purposes of educational placement, regardless of the manner in which others may see fit to characterize it, for which plaintiffs here seek to recover. No school system can operate successfully without a program for evaluating and placing its pupils. No matter how one examines it, the claim here is concerned with the proper administration of the public school system.

Id. at 78-79, 453 A.2d at 819.

35. *Id.* at 74-75, 453 A.2d at 817. Much of the majority's reasoning relied on previous conclusions made by the Maryland Court of Appeals in Hunter v. Board of Educ., 292 Md. 481, 439 A.2d 582 (1982). The plaintiff in *Hunter* had alleged negligent evaluation of his learning abilities that required him to repeat first grade materials in second grade with resulting embarrassment and development of learning deficiencies. In reviewing his claim, the majority substantially agreed with the reasoning employed in *Peter W.* and *Donohue*:

[T]o allow petitioners' asserted negligence claims to proceed would in effect position the courts of this State as overseers of both the day-to-day operation of our educational process as well as the formulation of its governing policies. This responsibility we are loathe to impose on our courts. Such matters have been properly entrusted by the General Assembly to the State Department of

health care professional (normally subject to suit), but was dismissed because the professional service was rendered in an educational context.[36]

Several judges have summed up their discomfort over supervising educational matters by such statements as, "Simply put, the courts should refrain from becoming overseers of the learning process,"[37] and, "Simply stated, the recognition of a cause of action sounding in negligence to recover for 'educational malpractice' would impermissibly require the courts to oversee the administration of the State's public school system."[38]

New York courts have most clearly enunciated their unwillingness to become involved in administrative decision making, holding that no cognizable cause of action existed because the state constitution placed "the obligation of *maintaining and supporting* a system of public schools upon the *Legislature*."[39] In *Donohue,* the court recognized that control and management of educational affairs were vested in the board of regents and the commissioner of education; thus courts should not interfere with such affairs.[40] In *Paladino v. Adelphi University,* one sees the most complete statement of judicial abdication:

> Professional educators—not Judges—are charged with the responsibility for determining the method of learning that should

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> Education and the local school boards who are invested with authority over them.

Id. at 488, 439 A.2d at 585.

36. *But see* Doe v. Board of Educ., 295 Md. 67, 80, 453 A.2d 814, 820 (Eldridge, J., dissenting). The dissent vigorously denied that the claim should have been dismissed because the plaintiff alleged negligence by a health professional (psychologist retained to evaluate the plaintiff). He reviewed the major objections to educational malpractice actions presented by previous courts and cited by the majority, and then proceeded to show why those objections did not apply to a health professional retained by a school district. *Id.* at 80-89, 453 A.2d at 820-23; *see also* Davis v. Tirrell, 110 Misc. 2d 889, 443 N.Y.S.2d 136 (1981) (plaintiff claimed negligence by a psychiatrist who had diagnosed him as "emotionally handicapped," with the result that he was placed in a home tutoring situation; the New York Supreme Court dismissed the claim for lack of a physician-patient relationship since the school committee for the handicapped had hired the psychiatrist).

37. Paladino v. Adelphi Univ., 89 A.D.2d 85, 91, 454 N.Y.S.2d 868, 873 (1982).

38. *Donohue,* 64 A.D.2d at 36, 407 N.Y.S.2d at 879.

39. *Donohue,* 47 N.Y.2d at 443, 391 N.E.2d at 1353, 418 N.Y.S.2d at 377 (emphasis in original); *see also* Hoffman v. Board of Educ., 49 N.Y.2d 121, 126, 400 N.E.2d 317, 320, 424 N.Y.S.2d 376, 379 (1979), in which the New York Court of Appeals noted that *Donohue* had been based on the "principle that courts ought not interfere with the professional judgment of those charged by the Constitution and by statute with the responsibility for the administration of the schools of [the] State."

40. *Donohue,* 47 N.Y.2d at 444, 391 N.E.2d at 1354, 418 N.Y.S.2d at 377.

> be pursued for their students. When the intended results are not obtained, it is the educational community—and not the judiciary—that must resolve the problem. For, in reality, the soundness of educational methodology is always subject to question and a court ought not in hindsight, substitute its notions as to what would have been a better course of instruction to follow for a particular pupil. These are determinations that are to be made by educators and, though they are capable of error, their integrity ought not be subject to judicial inquiry.[41]

These comments indicate that judges do not wish to become involved with educational decision making, particularly when decisions require determinations perceived to be solely within the discretion of state educational administrators or agencies.[42]

C. *Application of Rationale to Handicapped Students' Claims*

As shown by the preceding discussion, educational malpractice claims brought by handicapped students have generally been dismissed before examination on the merits. Although governmental immunity may provide a defense against such claims in some states, suits have primarily been dismissed based on policy factors cited in functional illiteracy suits.[43] None of the cases dismissing handicapped students' claims reveals a principled effort to distinguish the educational malpractice claims of handicapped students from claims advanced by students graduating illiterate.

1. *Governmental immunity*

As already indicated, most states have abolished sovereign immunity, at least absolute sovereign immunity.[44] Nevertheless,

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41. 89 A.D.2d 85, 91-92, 454 N.Y.S.2d 868, 873 (1982). Even though the claim was against a private school, the court said, "The quality of the education and the qualifications of the teachers . . . are concerns not for the courts, but rather for the State Education Department and its commissioner." *Id.* at 93, 454 N.Y.S.2d at 873.

42. Note that at least the New York courts appear to be equally uncomfortable with overseeing private schools. *Paladino*, 89 A.D.2d 85, 454 N.Y.S.2d 868.

43. *Peter W.*, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854; *Donohue*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375. A few judges have considered policy factors in examining claims by handicapped students, but all opinions concerning handicapped education claims cite *Peter W.* or *Donohue* with varying degrees of reliance.

44. For a comprehensive review of governmental immunity in the states and their political subdivisions, see RESTATEMENT (SECOND) OF TORTS §§ 895B, 895C, reporter's note (Tent. Draft No. 19, 1973). For some specific examples of statutes governing immu-

whether discretionary immunity extends to school professionals who administer or teach special education programs remains to be determined.[45] Since discretionary immunity covers administrative policy decisions rather than routine operations,[46] decisions by a state education department or state commissioner concerning the type of program promulgated would probably be immune. Statutes passed by a state legislature concerning statewide program requirements would also be immune.[47] Similarly, a local school board that fulfills its mandated instructional hours through itinerant teachers could not be sued for its decision.

However, if a state or local educational entity does not comply with state statutes or local school district regulations, discretionary immunity does not apply. For example, Arizona law mandates that a school principal wishing to place a child in a special education classroom first consult the child's current teacher or parent.[48] Similarly, in Montana if a child were placed in a special education classroom for a long period of time without parental knowledge, discretionary immunity would not apply.[49]

Therefore, governmental immunity should apply when no ascertainable standard for decision making in policy matters exists.[50] In contrast, governmental immunity should not apply when policy decisions have been made but a school employee fails to comply with a regulation or statute.

Also, the "public duty" exception should not commonly apply to educational malpractice claims brought by handicapped students. Although at least one court has partially invoked this

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nity, see ALA. CODE §§ 41-9-60 to -74 (1982); ARIZ. REV. STAT. ANN. §§ 12-820 to 12-826 (Supp. 1984-1985); CAL. GOV'T CODE §§ 900-996.6 (West 1980 & Supp. 1985); FLA. STAT. ANN. § 768.28 (West Supp. 1984) (limited abolition of immunity); N.Y. JUDICIARY-COURT ACTS COURT OF CLAIMS ACT §§ 8-12 (McKinney 1963 & Supp. 1984-1985).

45. The following are examples of statutes that have retained some immunity for discretionary action: ALASKA STAT. § 09.50.250 (1983); ARIZ. REV. STAT. ANN. § 12-820.01 (Supp. 1984-1985); CAL. GOV'T CODE § 820.2 (West 1980 & Supp. 1985); IDAHO CODE § 6-904 (1979 & Supp. 1984).

46. *See supra* notes 16-17 and accompanying text.

47. *See* PROSSER, *supra* note 12, § 131, at 1046.

48. ARIZ. REV. STAT. ANN. § 15-766 (1984).

49. B.M. v. State, ___ Mont. ___, 649 P.2d 425, 427 (1982) (citing state statute requiring parental notification).

50. See Hoffman v. Board of Educ., 49 N.Y.2d 121, 126, 400 N.E.2d 317, 320, 424 N.Y.S.2d 376, 380 (1979), in which the New York Court of Appeals discussed a misfeasance/nonfeasance distinction on which the lower court had allowed recovery. The court of appeals said that even if it were to accept such a distinction, it would dismiss the case. *Id.* at 126, 400 N.E.2d at 320, 424 N.Y.S.2d at 379.

exception to dismiss the claim in a functional illiteracy suit,[51] the plaintiff in that case simply relied on the compulsory education provision of the state constitution and its enabling legislation.[52] Further, the plaintiff could not be differentiated on a *statutory* basis from all other students in the New York educational system merely because he was unable to read.[53] In contrast, most state statutes define students eligible for special education, thus raising the presumption of a special duty to a discrete group.[54]

In general, governmental immunity should not be extended by judges under the above two exceptions. In one of the few educational malpractice claims remanded for decision on the merits,[55] the appellate court recognized this principle and expressly refused to recognize governmental immunity in the absence of a clear legislative directive:

> [T]he State argues that public policy prohibits a holding that the State can be held liable for negligent administration of a special education program. Not only do we not see any public policy requirements in support of such an argument, in the absence of a clear statutory declaration granting immunity, it is our duty to permit rather than to deny an action for negligence.[56]

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51. It is a well-established principle of torts that statutes which are not intended to protect against injury, but rather are designed to confer a benefit upon the general public, do not give rise to a cause of action by an individual to recover damages for their breach.

Donohue, 64 A.D.2d at 37-38, 407 N.Y.S.2d at 880 (citations omitted).

52. *Id.* at 37, 407 N.Y.S.2d at 877.

53. Students have not traditionally been statutorily classified or distinguished based on reading ability. Therefore, recognizing a special duty flowing to a particular student who cannot read is very difficult.

54. For examples of statutory definitions of those eligible for special education programs, see ARIZ. REV. STAT. § 15-761 (1984); COLO. REV. STAT. § 22-20-103 (1973 & Supp. 1984); FLA. STAT. ANN. § 228.041(18) (West Supp. 1984); MD. EDUC. CODE ANN. § 8-401 (Supp. 1985); N.Y. EDUC. LAW § 4401 (McKinney 1981 & Supp. 1984-1985); VA. CODE § 22.1-213 (Supp. 1985).

55. B.M. v. State, ___ Mont. ___, 649 P.2d 425 (1982). The child in this case had been classified as educable mentally retarded, which normally covers students with intelligence quotients between 50 and 75. Her score was 76 and she was placed in a resource room for educable mentally retarded children for 40% of the school day without her foster parents' knowledge or permission.

56. *Id.* at ___, 649 P.2d at 427. *B.M.* did not raise a "public duty" exception to governmental immunity, but the court clearly rejected the rationale underlying that exception by refusing to imply any immunity without legislative authorization.

A corollary to finding immunity or lack of a duty is concern with exposing government entities to burdensome liability.[57] Since school funding comes from taxes, judges are aware that state or local residents must pay an award against a school district. But if that fact justifies denying liability, the same consideration ought to negate assertions of negligence against school districts when a student is physically injured. Several cases have recognized school liability for injury to students in transportation to and from school, on field trips, or within the classroom, and monetary relief has not been denied on the basis of cost to taxpayers.[58] Nor have courts denied claims against educators for intentional torts.[59] Although courts may express concern about cost to a school district, cost alone has not been sufficient to change resulting liability if the elements of negligence are proved.[60] Furthermore, some states limit the amount recoverable from a government entity.[61] Setting such a limitation minimizes the taxpayer burden while recognizing the important policies implicit in allowing government liability.

Therefore, states that have abolished governmental immunity should not revive it solely for educational malpractice actions. Recognizing that discretionary immunity is valid when there is a policy decision, a state should not use an immunity rationale to dismiss educational malpractice claims brought by handicapped students when the conduct challenged is contrary

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57. Hunter v. Board of Educ., 292 Md. 481, 484, 439 A.2d 582, 584 (1982); *see also* Aubrey v. School Dist., 63 Pa. Commw. 330, 332, 437 A.2d 1306, 1307 (1981) (policy against money damage actions); D.S.W. v. Fairbanks North Star Borough School Dist., 628 P.2d 554, 556 (Alaska 1981) (remedy of money damages inappropriate).

58. *See, e.g.*, Castro v. Los Angeles Bd. of Educ., 54 Cal. App. 3d 232, 126 Cal. Rptr. 537 (1976); Raymond v. Paradise Unified School Dist., 218 Cal. App. 2d 1, 31 Cal. Rptr. 847 (1963); Zawadski v. Taylor, 70 Mich. App. 545, 246 N.W.2d 161 (1976); Lawes v. Board of Educ., 16 N.Y.2d 302, 213 N.E.2d 667, 266 N.Y.S.2d 364 (1965); Ohman v. Board of Educ., 300 N.Y. 306, 90 N.E.2d 474 (1949).

59. Paladino v. Adelphi Univ., 89 A.D.2d 85, 93-94, 454 N.Y.S.2d 868, 874 (1982). The Maryland Court of Appeals in an education malpractice claim specifically noted that a viable cause of action exists when an individual is shown to have "wilfully and maliciously injured a child entrusted to his educational care." Hunter v. Board of Educ., 292 Md. 481, 490, 439 A.2d 582, 587 (1982).

60. Although the availability and increasing use of school liability insurance could lessen any possible burden on a school district, courts are divided on the applicability of insurance to claims against a school district (at least claims based on intentional torts). In educational malpractice claims, the availability and applicability of insurance has not been litigated and has been mentioned infrequently in policy analysis.

61. For a few examples of statutes limiting the amount of money damages against a governmental entity, see COLO. REV. STAT. § 24-10-114 (1973 & Supp. 1984); DEL. CODE ANN. tit. 10, § 4013 (Supp. 1984); FLA. CODE § 6-926 (Supp. 1984).

to that mandated by statute or regulation. Nor should the "public duty" exception apply when the group protected by statute is discrete and readily identifiable.

2. *Judicial objections to extension of liability*

One judicial objection to extending liability to school professionals has been that standards for determining negligence are uncertain. However, even in light of major concerns expressed by judges dismissing educational malpractice claims, handicapped students' malpractice claims generally are valid because of the existence of statutes and regulations containing detailed procedural requirements for special education programs, clearly specified standards of conduct for educational professionals working with handicapped children, and recognition of a special duty owed to those students least able to profit by normal educational programs.[62] Even if such statutes or regulations do not explicitly provide a cause of action, they do provide clear standards of conduct under which a malpractice action may be maintained.[63]

For example, most special education programs require parental permission for student enrollment and parental notification of any changes in a student's Individualized Education

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62. Judge Meyer, dissenting in Torres v. Little Flower Children's Serv., 64 N.Y.2d 119, 474 N.E.2d 223, 485 N.Y.S.2d 15 (1984), advocated a similar position by stating that "the negligent failure . . . to carry out the obligations imposed by statute or regulation may give rise to liability." *Id.* at 132, 474 N.E.2d at 230, 485 N.Y.S.2d at 22. He was not persuaded by the majority's distinctions between the case at bar and Klostermann v. Cuomo, 61 N.Y.2d 525, 463 N.E.2d 588, 475 N.Y.S.2d 247 (1984), which held that "if a statutory directive is mandatory, not precatory, it is within the courts' competence to ascertain whether an administrative agency has satisfied the duty that has been imposed on it by the Legislature." *Id.* at 129, 474 N.E.2d at 228, 485 N.Y.S.2d at 20 (quoting *Klostermann*, 61 N.Y.2d at 531, 463 N.E.2d at 590, 475 N.Y.S.2d at 249).

63. It is true that education for the nonhandicapped student is also regulated. However, there are usually not detailed regulations regarding parental notification of such matters as program changes, placement decisions, and yearly evaluation for nonhandicapped students.

One example of the extensive regulation for handicapped education is standards promulgated under the Education for All Handicapped Children Act of 1975. *See supra* note 3. That act provides that, in order to receive federal funds, states must effect a policy that assures all handicapped children the right to free appropriate education. The state plan must cover identification, location, and evaluation of all students requiring special educational services. All state plans must also comply with the detailed provisions of the act including periodic state and federal review of programs and particular provisions regarding parental notice and involvement (with the option of administrative remedies).

Plan.[64] These programs also mandate frequent reevaluation of student progress and ability. When standards are clearly specified and are relayed to local teachers and administrators, no reason exists why these standards should not measure educators' conduct.[65] Thus, for handicapped students' claims, judges or juries would not be required to determine the requisite standard of conduct against which educators' actions were to be measured; such standards would come from relevant statutes or regulations.[66]

A second major judicial objection to extension of liability has been undue judicial interference in areas properly left to state administrators or administrative agencies. The abundance and specificity of standards in handicapped education do much to alleviate this judicial concern since judges are not asked to make educational policy decisions or to review the efficacy of educational procedures. Certainly, court regulation of every detail in the educational process is not desirable, but recognizing an educational malpractice claim would only require judicial application of settled professional standards. Rather than determining, against a blank slate, the propriety of procedures followed in a particular case, the court would merely be required to measure actual conduct against conduct mandated by an applicable contract, regulation, or statute.[67]

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64. See, for example, the following statutes that require parental notification of testing, placement, or change relating to a special education assignment: ARIZ. REV. STAT. ANN. § 15-766 (1984) (consultation required for referral to special education program); DEL. CODE ANN. tit. 14, § 3133 (Supp. 1984); MD. EDUC. CODE ANN. § 8-404.1 (Supp. 1985); N.Y. EDUC. LAW § 4402 (McKinney 1981 & Supp. 1984-1985).

65. Also, where state regulations mandate professional preparation in areas of future instruction, a school district that ignores that mandate could possibly be held liable for hiring someone who does not meet state guidelines. Furthermore, a number of states use competency-based certification requirements. If a school district allowed someone to teach without having completed those requirements, a viable claim could be brought.

66. Of course, this position presumes that the educator involved knows the relevant standards. School districts should at least ensure that information is available to special education teachers regarding program requirements. In practical terms, it would be difficult to escape knowledge of special education program requirements since many programs share common elements and nearly all programs are detailed in either state statutes or state education manuals.

67. The discussion focuses on allegations in the complaint because most cases have been dismissed before trial on the merits. Whether or not a plaintiff is successful on the merits depends on proof of requisite tort elements: duty, breach of duty, causation, and damages. An educational malpractice claim by handicapped students should proceed beyond a motion for summary judgment if sufficient factual allegations are pleaded rather than being dismissed because of policy factors. Although all educational malpractice actions will not and should not be successful, such claims should be individually reviewed

Furthermore, judicial unease over determining educational standards of conduct or interfering in school administration may be partially alleviated by examining cases partially based on breach of contract or misrepresentation. Although contract cases differ from tort cases, the basis of the plaintiff's malpractice claims may be the breach of a statutory or common law duty, or breach of contract. In several educational malpractice cases, plaintiffs sought recovery under theories of tort and contract law. In those cases, judges did not have to determine standards of conduct; the schools themselves made specific representations to the plaintiffs.

For example, in *Paladino v. Adelphi University*,[68] the New York Court of Appeals posited the hypothetical situation of a private school failing to provide any educational services, or contracting for certain specified services (*e.g.*, a designated number of instructional hours) and then failing to meet its obligations. In such a situation, the court asserted that a contract action with appropriate consequential damages may be valid.[69] The hypothetical situation was then contrasted with the case at bar in which the essence of the pleading was that the school had failed to educate the plaintiff:

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on the merits.

68. 89 A.D.2d 85, 454 N.Y.S.2d 868 (1982). In this case the student was tested in fifth grade and found below grade level in several areas. The school refused to promote him and he repeated fifth grade in a public school. Reports to the parents prior to that time had indicated no problems. Plaintiff's parents sued the school on theories of breach of contract and fraudulent misrepresentation. The New York Supreme Court, Special Term, distinguished the claim from general educational malpractice actions, saying that it was "patently distinct from a mere claim of negligently deficient educational performance." Paladino v. Adelphi Univ., 110 Misc. 2d 314, 316, 442 N.Y.S.2d 38, 39 (1981). On appeal, the New York Supreme Court, Appellate Division, rejected that position. *Paladino*, 89 A.D.2d 85, 454 N.Y.S.2d 868.

A previous New York court already had applied the *Donohue* and *Hoffman* rationale to a private school with very little discussion, dismissing the action on defendants' motion for summary judgment. Helm v. Professional Children's School, 103 Misc. 2d 1053, 431 N.Y.S.2d 246 (N.Y. App. Term. 1980).

This discussion of standards includes cases against private schools because private schools are more likely to make specific representations concerning their educational programs in order to attract students. However, one could argue that a public school making specified promises should also be held liable for failure to fulfill those promises under a theory of intentional or negligent misrepresentation.

69. *Paladino*, 89 A.D.2d at 92, 454 N.Y.S.2d at 873. Nevertheless, in this case the court held the "soundness of [the] policy of noninterference is equally applicable when the action is brought against a private educational institution and is formulated in contract." *Id.* at 89, 454 N.Y.S.2d at 871-72. It noted that the plaintiff's complaint only concerned the school's representations concerning quality, and thus were opinions rather than statements of fact capable of proof. *Id.* at 94, 454 N.Y.S.2d at 874.

> The asserted breach is predicated upon the quality and adequacy of the course of instruction. The claim requires the fact finder to enter the classroom and determine whether or not the judgments and conduct of professional educators were deficient. . . . It is readily apparent that the claims entail an analysis of the educational function. The sufficiency of tutorial services, academic assessments as to Michael's performance and determinations relative to graduation are not matters that should be subject to judicial review.[70]

Not surprisingly, a few years later a New York court recognized a breach of contract action against a school in *Village Community School v. Adler*.[71] The New York City Civil Court distinguished previous cases by noting that the student's parent was not asking the court to review any discretionary action taken as a result of school officials' professional judgment. Nor was the parent claiming that the school misrepresented the general quality of education the child would receive. Rather, the school had represented that it would detect and treat any learning disability. The parent in the case was found to have justifiably relied on that information.[72]

Thus, although judges are hesitant to recognize educational malpractice claims generally because of uncertainty over applicable standards of professional conduct, that objection can be overcome. This position is particularly supported by the principles illustrated in the above contract cases: (1) when standards exist, they can be applied to claims arising in an educational context, and (2) in an action brought under both tort and contract theories, judges do not have to interfere in educational decisions by setting standards of conduct.

Another judicial objection to extension of liability in educational malpractice actions is fear of a flood of litigation.[73] In

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70. *Id.* at 92-93, 454 N.Y.S.2d at 873 (citations omitted).

71. 124 Misc. 2d 817, 478 N.Y.S.2d 546 (N.Y. Civ. Ct. 1984). In *Adler*, a private school brought action to recover tuition, and the student's mother counterclaimed for breach of contract, fraudulent or negligent misrepresentation, and negligent infliction of severe emotional distress. The mother alleged that her child had been harmed by the school administrator's assertions that the school possessed a specialized facility for learning-disabled children when, in reality, no such facility existed. *Id.* at 818, 478 N.Y.S.2d at 547. Based on policy reasons cited in preceding cases, the court upheld the dismissal of the claim for negligent infliction of emotional distress, but remanded on the questions of breach of contract and fraudulent misrepresentation. *Id.* at 820-21, 478 N.Y.S.2d at 548-49.

72. *Id.* at 820, 478 N.Y.S.2d at 548.

73. *Peter W.*, 60 Cal. App. 3d at 825, 131 Cal. Rptr. at 861: "To hold [schools] to an

Montana, the one state that has allowed an educational malpractice claim,[74] no case has been brought in the two years since the first successful claim. Perhaps such a record would not be duplicated in other states were they to allow the claim. However, a plaintiff still must prove the elements of negligence in order to be successful.[75] This requirement alone will somewhat stem the feared "flood."

The foregoing analysis does not suggest that judicial recognition of educational malpractice suits by handicapped students is the only alternative for remedying negligence in handicapped education.[76] Nevertheless, alternative remedies such as administrative relief[77] should not preclude actions for negligence or breach of contract based on current standards. Judges in educational malpractice cases profess reluctant involvement in decision making regarding education, yet dismissal of these claims on policy grounds constitutes interference in decision making. Such policy choices are better left to the legislature who may be more responsive to concerns expressed by individuals involved in educating handicapped students.

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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."

74. B.M. v. State, ___ Mont. ___, 649 P.2d 425 (1982); *see* Annot., 33 A.L.R.4TH 1157 (1984).

75. *See also* Village Community School v. Adler, 124 Misc. 2d 817, 478 N.Y.S.2d 546 (N.Y. Civ. Ct. 1984). Only one educational malpractice case has occurred in New York since *Village Community School:* Torres v. Little Flower Children's Serv., 64 N.Y.2d 119, 474 N.E.2d 223, 485 N.Y.S.2d 15 (1984). *Torres* involved a general malpractice claim against an authorized child care agency and was dismissed based on the court's reluctance to decide "which educational programs might have been preferable." *Id.* at 128, 474 N.E.2d at 227, 485 N.Y.S.2d at 19.

76. Other possible remedies include provision for additional training to be supplied to the injured plaintiff or state psychological services, injunctive relief if the plaintiff's complaint reflects a continuing problem, and administrative appeal to a state review board.

77. A state could provide for appeal through administrative channels with judicial review only after the plaintiff has exhausted administrative alternatives. Particularly in that type of system, a judge would not be required to review the efficacy of educational decisions except according to standards in a statute providing for judicial review after administrative appeals. Also, an aggrieved plaintiff could be afforded relief more quickly since presumably the administrative appeal would be before an agency involved in special education. Indeed, one court recognized the existence of administrative review procedures, although it is not clear to what extent the court's opinion relied on that factor in dismissing the claim. Hoffman v. Board of Educ., 49 N.Y.2d 121, 127, 400 N.E.2d 317, 320, 424 N.Y.S.2d 376, 379-80 (1979).

III. Conclusion

The relatively new educational malpractice action has raised many issues. In claims based on functional illiteracy, judges have denied recovery based on a lack of actionable duty between the school district and the plaintiff. In many cases, the court's assertion that no duty exists may be a back door way of applying governmental immunity, even in states that have formally abolished governmental immunity. The frequently cited judicial objections to allowing an educational malpractice claim—lack of identifiable standards and undue judicial interference—are not persuasive in the context of handicapped education. Because of the extensive regulation of special education, judges do not have to make policy determinations concerning educational quality, nor are they required to oversee the daily administration of public schools by evaluating the propriety of educational procedures. Given the inapplicability of judicial objections to educational malpractice claims brought by handicapped students, it is not proper to dismiss these claims before a hearing on the merits.

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