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# TORT LAW—EDUCATIONAL MALPRACTICE NEGLIGENCE ACTION ALLOWED FOR AFFIRMATIVE MISFEASANCE—*Hoffman v. Board of Education*, 64 App. Div. 2d 369, 410 N.Y.S.2d 99 (1978)

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# NOTES

TORT LAW—EDUCATIONAL MALPRACTICE—NEGLIGENCE  
ACTION ALLOWED FOR AFFIRMATIVE MISFEASANCE—*Hoffman v.*  
*Board of Education*, 64 App. Div. 2d 369, 410 N.Y.S.2d 99 (1978).

## I. INTRODUCTION

Daniel Hoffman's school years burdened him with more educational injury than our judicial system could fully remedy. Educators in Queens, New York negligently placed him in classes for mentally retarded children for more than eleven years even though Hoffman always had normal intelligence. His severe speech impediment misled officials to believe he was retarded. After he was eighteen years old, his school system realized it had blundered. By then, his educational, psychological, and social development was permanently scarred.<sup>1</sup>

The educators' egregious carelessness had significant consequences, both for Hoffman and for school systems. Characterization as a mentally retarded person afflicted Hoffman with a deep sense of self-inadequacy.<sup>2</sup> Being treated and educated as mentally retarded diminished his incentive to learn and impeded his potential educational development. His defective self-image and feelings of inadequacy created depression, sleeplessness, and lack of appetite. Hoffman, twenty-six years old on the date of trial, had not progressed beyond his job as a part-time messenger, even though tests indicated he was capable of training in a skilled mechanical trade.<sup>3</sup>

Hoffman sued the New York Board of Education, alleging that the school system was negligent in placing him in classes for the mentally retarded and that the negligence proximately caused his injuries. A jury awarded him \$750,000. On appeal, the New York

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1. *Hoffman v. Board of Educ.*, 64 App. Div. 2d 369, 371-79, 410 N.Y.S.2d 99, 101-05 (1978). Dr. Lawrence I. Kaplan, a neurologist and psychiatrist, examined plaintiff in December 1969. He reported Hoffman as "being upset, shaking, unable to eat properly, crying, feeling depressed, not sleeping well, walking the floors, [having] no friends." Dr. Kaplan added that Hoffman's defective self-image and feelings of inadequacy resulted because he understood what he had unnecessarily undergone at school. The doctor testified that Hoffman would not overcome all the damage of years of educational deprivation and characterization as a mentally retarded person even with special education and psycho-therapeutic support. *Id.* at 378, 410 N.Y.S.2d at 105.

2. *Id.*

3. *Id.* at 380, 410 N.Y.S.2d at 106.

Supreme Court Appellate Division Second Department affirmed the trial court judgment, but reduced the verdict to \$500,000. That verdict has been appealed to the New York Court of Appeals. The appellate court held: (1) The school system was negligent in failing to follow a psychologist's recommendation to reevaluate the plaintiff's intelligence within two years after he was first placed in classes for children with retarded mental development; and (2) Hoffman was entitled to recover from the school system because he suffered diminished intellectual development and psychological injury as a result of the school employee's negligence.<sup>4</sup>

The decision represents a landmark as the first American appellate court opinion recognizing a common law right to redress for educational and psychological injuries resulting from a school system's negligence. The handful of reported educational malpractice cases<sup>5</sup> all were decided in favor of the defendant school systems. *Peter W. v. San Francisco Unified School District*<sup>6</sup> and *Donohue v. Copiague Union Free School District*<sup>7</sup> exemplified the judicial resistance to a tort of educational malpractice. Both decisions held that educators owed no duty of instructional care to students. Also, the courts concluded that the multiple factors affecting the learning process made it impossible to isolate the proximate cause of a student's educational deficiencies.<sup>8</sup>

Mr. Justice Irwin J. Shapiro, writing for the majority in the 3-2 *Hoffman v. Board of Education*<sup>9</sup> decision, distinguished this case from its predecessors. He found a discernible act of affirmative

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4. The employees' negligence was the school's responsibility under the rule of respondeat superior. *Id.* at 382, 410 N.Y.S.2d at 108.

5. *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976); *Ianniello v. University of Bridgeport*, No. 109349 (C.P. Conn. June 16, 1977); *Garrett v. School Bd.*, No. 77-8703 (D. Fla. Dec. 5, 1977); *Pierce v. Board of Educ.*, 44 Ill. App. 3d 324, 358 N.E.2d 67 (1977); *Beaman v. Des Moines Area Community College*, No. CL 15 8532 (D. Iowa March 23, 1977); *McNeil v. Board of Educ.*, No. L-17207-74 (N.J. Super. Ct. Aug. 13, 1976); *Donohue v. Copiague Union Free School Dist.*, 64 App. Div. 2d 29, 407 N.Y.S.2d 874 (1978); *Fisher v. Washington*, No. 833920 (Wash. Super. Ct. Aug. 31, 1977).

6. 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).

7. 64 App. Div. 2d 29, 407 N.Y.S.2d 874 (1978).

8. *Id.* at 33-34, 407 N.Y.S.2d at 877-78; 60 Cal. App. 3d at 824-25; 131 Cal. Rptr. at 860-61. Courts have held that school districts do owe a duty to students under certain conditions. *Tashjian v. North Colonie Cent. School Dist.* No. 5, 50 App. Div. 2d 691, 375 N.Y.S.2d 467 (1975) (to supervise playground activities that could result in physical injury); *Salyers v. Burkhardt*, 44 Ohio St. 2d 186, 339 N.E.2d 652 (1975) (to keep premises and equipment free from physical defects). The court has held that negligence for not supervising a student is to be gauged by the supervisor's ability to anticipate danger. *Lauricella v. Board of Educ.*, 52 App. Div. 2d 710, 381 N.Y.S.2d 566 (1976).

9. 64 App. Div. 2d 369, 385-86, 410 N.Y.S.2d 99, 109-10 (1978).

misfeasance by the school in its treatment of Hoffman, which contained the requisite underpinnings of a new cause of action in tort. The following facts of the case support Justice Shapiro's conclusion.

Daniel Hoffman was thirteen months old when his father died. Subsequently, the child's walking and talking regressed. In 1956, when he was four years old the National Hospital for Speech Disorders determined that he had a severe speech defect. The *nonverbal* Merrill-Palmer intelligence test administered by the hospital showed, however, that Hoffman had an I.Q. of ninety, and that he could work well into the average and even brighter range.

In 1957, a certified school psychologist examined him. He recommended that Hoffman be placed in classes for children with retarded mental development (CRMD) because he had scored seventy-four on the primarily *verbal* Stanford-Binet intelligence tests. An I.Q. of seventy-five was the cut-off point at which a child would be considered of normal intelligence. The psychologist also reported that Hoffman had a severe speech defect and monogoloid features.<sup>10</sup> Hoffman, in fact, was not a Monogoloid. The psychologist conceded in his report, however, that his determination might not be conclusive, and that he doubted some of the results. Therefore, he recommended that "his [Hoffman's] intelligence should be reevaluated within a two-year period so that a more accurate estimation of his abilities could be made."<sup>11</sup>

The psychologist's recommendation was not followed until 1969 when Hoffman was eighteen years old. He was given a Wechsler Intelligence Scale for Adults (W.A.I.S.) test which showed that his I.Q. was ninety-four and that his intellectual potential was at least bright normal.<sup>12</sup> The school claimed that I.Q. tests had not been given during the thirteen-year interim because Hoffman had been consistently scoring poorly on achievement tests.<sup>13</sup> The teachers had assumed that he had remained retarded. The school also claimed that it had not interpreted the psychologist's term "re-

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10. *Id.* at 371-77, 410 N.Y.S.2d at 101-04. "[T]he angles on each side of [Hoffman's] eyes formed by the junction of the upper and lower lids were somewhat greater than is usual among occidental children. Also, he had unusually large ears, a characteristic he had inherited from his mother." *Id.* at 371, 410 N.Y.S.2d at 101. "Down's Syndrome (popularly known as Mongoloidism) is associated with a variable constellation of stigmata, caused by chromosomal abnormality, as stated in Stedman's Medical Dictionary (Fourth Lawyers' Edition, 1976; p. 1382). . . ." *Id.* at 371 n.1, 410 N.Y.S.2d at 101 n.1.

11. *Id.* at 373, 410 N.Y.S.2d at 102 (emphasis omitted).

12. *Id.* at 376, 410 N.Y.S.2d at 104.

13. Expert witnesses on both sides agreed that achievement tests are not the definitive tests of intelligence. *Id.* at 381 n.6, 140 N.Y.S.2d at 107 n.6.

evaluate" to mean "retest." The term had been interpreted to mean "observe."<sup>14</sup> Worse yet, Mrs. Hoffman was never informed that the reason her son was placed in CRMD classes in 1957 was that his I.Q. had missed the cut-off by one point. Furthermore, the school never told her that she had the right to demand the school to retest her son.<sup>15</sup>

During the thirteen-year ordeal, Hoffman's only real handicap, a speech impediment, was not improved. Mr. Justice Shapiro concluded:

Defendant's affirmative act in placing plaintiff in a CRMD class initially (when it should have known that a mistake could have devastating consequences) created a relationship between itself and plaintiff out of which arose a duty to take reasonable steps to ascertain whether (at least, in a borderline case) that placement was proper.<sup>16</sup>

The *Hoffman* decision portends increasing litigation about the duty of instructional care that school systems owe to students. The advent of educational malpractice suits could be exacerbated by the mounting dissatisfaction with the quality of education provided in the nation's classrooms.<sup>17</sup> Even some education officials admit that many of our schools are not demanding that basic reading and writing skills be learned.<sup>18</sup> Since the mid-1960's, academic achievement tests have revealed a downward spiral in the ability of school children,<sup>19</sup> and there are an estimated twenty-three million American adults who cannot perform such basic skills as reading a train schedule.

As courts accept educational injuries as worthy of redress, bases for educational malpractice, in addition to the affirmative

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14. *Id.* at 381, 410 N.Y.S.2d at 107.

15. *Id.* at 374-75, 410 N.Y.S.2d at 102-03. Mrs. Hoffman testified at trial that it had never dawned on her to request that her son be retested. She had never taken him to psychiatrists because she said that she had never heard of them. *Id.* at 376, 410 N.Y.S.2d at 104. The decision notes that Mrs. Hoffman's education had stopped at the junior high school level. She had come to the United States from Germany when she was three years old. *Id.* at 376 n.4, 410 N.Y.S.2d at 104 n.4.

16. *Id.* at 383, 410 N.Y.S.2d at 109 (citations omitted).

17. See, e.g., Armbruster, *The More We Spend the Less Children Learn*, N.Y. Times, Aug. 28, 1977, § 6 (Magazine), at 9, col. 1, adapted from E. ARMBRUSTER, CHILDREN'S CRIPPLED FUTURES: HOW AMERICAN EDUCATION HAS FAILED (1977); Jacoby, *The End of a Dream: Illiteracy Invades the Middle Class*, N.Y. Times, Dec. 7, 1978, § C (Home Section), at 1, col. 1; *Teaching Children at Home*, TIME, Dec. 4, 1978, at 78.

18. NEWSWEEK, Sept. 5, 1977, at 82.

19. Armbruster, *supra* note 17.

misfeasance rationale relied on in *Hoffman*, are likely to emerge. Lawyers may turn to dignitary torts,<sup>20</sup> misrepresentation,<sup>21</sup> or analogies to medical malpractice<sup>22</sup> in formulating the foundations of a case. Another avenue for recovery lies in state constitutions and statutes that mandate minimum quality standards for public education.<sup>23</sup> The potential range of theories supporting a cause of action for educational malpractice suits deserves closer analysis in light of the *Hoffman* breakthrough.

## II. OVERCOMING THRESHOLD PROBLEMS

Prior to *Hoffman*, educational malpractice cases were uniformly resolved in the school systems' favor. Courts held that schools did not owe a duty of instructional care to students, and that it was virtually impossible to calculate to what extent the schools' acts or omissions proximately caused the students' educational injury. Undoubtedly, these threshold problems will continue to inhibit the expansion of legal bases for recovery beyond the *Hoffman* rationale of affirmative misfeasance. Although these threshold problems will be raised by courts that are reluctant to allow recovery based on an expanded tort of educational malpractice, the nature of these problems bears reexamination.

The paucity of precedent for a legal duty of instructional care is not necessarily fatal to an educational malpractice cause of action. The word "duty" is not sacrosanct in itself,<sup>24</sup> and the courts' paramount concern is whether the plaintiff's interests ought to be protected against the defendant's conduct. Assuming that a duty can be established, the breach of that duty must be the proximate cause of the injury to the student. The rule that causation must be shown beyond a mere possibility does not require, however, that a plaintiff demonstrate causation by direct and positive evidence absolutely excluding every other cause.<sup>25</sup> The proper analysis requires that causation be shown by direct or circumstantial evidence weighing in favor of the plaintiff's theory. The evidence must demonstrate a reasonable probability that the defendant's negligence or unskillfulness was a substantial factor in bringing about the harm.<sup>26</sup>

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20. See notes 52-55 *infra* and accompanying text.

21. See notes 56-68 *infra* and accompanying text.

22. See notes 39-45 *infra* and accompanying text.

23. See notes 69-88 *infra* and accompanying text.

24. 60 Cal. App. 3d at 824, 131 Cal. Rptr. at 860.

25. Annot., 13 A.L.R.2d 11, 22 (1950).

26. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 241 (4th ed. 1971). A de-

Despite the existence of these general legal arguments that can overcome threshold duty and causation problems, some courts have crystallized particular objections to educational malpractice recovery. These objections fall into several categories that are familiar to students of emerging torts. Not surprisingly, these objections are refutable by equally familiar counter arguments. A brief summary of these arguments as particularized by the *Donohue* court will serve as a starting point for discussing the expanded bases of educational malpractice.

In *Donohue*, the court analyzed several social policy reasons for concluding that there was no legal duty of care running from educators to students.<sup>27</sup> The following were among the considerations discussed by the court: (1) *Moral* considerations arising from society's view of the teacher-pupil relationship, and the degree to which courts should be involved in regulating that relationship; (2) *economic* considerations about the ability of school districts to respond in damages; (3) *administrative* considerations about the ability of the courts to cope with a flood of new litigation, the probability of feigned claims, and the difficulties inherent in proving the plaintiff's case; and (4) *jurisdictional* considerations about the power of the courts to test the efficacy of educational programs and oversee administration of the public school system. These considerations are refutable by several familiar counter arguments.

*Moral* considerations about the sanctity of the teacher-pupil relationship should not preclude a court from fulfilling the common law tort objectives of compensating injured victims, spreading the risk, and deterring potential wrongdoers. As the *Hoffman* court indicates, educational entities cannot be insulated from legal responsibilities and obligations common to all other governmental enti-

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fense which demonstrated that the plaintiff was largely responsible for his own learning deficiencies would clearly undermine the charge against the school district. The plaintiff, for example, may be a truant or may defy special instruction being provided for his benefit. A student of normal intelligence who quietly, stubbornly, or intentionally turned a deaf ear upon instruction and summoned no initiative to learn would likely be considered contributorily or comparatively negligent.

27. 64 App. Div. 2d at 33-36, 407 N.Y.S.2d at 877-79. In *Donohue*, the plaintiff graduated from high school without the ability to read or write. After he was fired from a job because of his educational deficiencies, Donohue sued the school district for \$5 million, charging (1) that the school district breached its obligation to properly educate him and (2) that the school's failure to evaluate, test, or assist him in overcoming his learning problems violated state constitutional and statutory mandates. Brief for Plaintiff-Appellant at 4, 11, *Donohue v. Copiague Free School Dist.*, 64 App. Div. 2d 29, 407 N.Y.S.2d 874 (1978).

ties.<sup>28</sup> Also, although the court in *Donohue* was unwilling to grant redress for a student's failure to reach certain educational objectives, the court did acknowledge that "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."<sup>29</sup>

The *economic* concern that school districts' functions will be curtailed by liability for tortious conduct is easily rebutted. Schools can obtain public insurance to cover tortious liability. The courts' interest in increasing governmental care for the welfare of those who may be injured by governmental maladministration is evidenced by the abrogation of governmental immunity.<sup>30</sup> Although some would argue that increased premium costs will decrease the funds which could be used toward improving the quality of education, the desirable goal of spreading the risk of educational injury justifies the cost of such insurance. Furthermore, one study reveals that there may not necessarily be a correlation between the quality of education and the amount spent to provide that education.<sup>31</sup>

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28. 64 App. Div. 2d at 386, 410 N.Y.S.2d at 110.

29. 64 App. Div. 2d at 35, 407 N.Y.S.2d at 878. The idea that there is a trust relationship between the school and the student was presented in Comment, *The Rights of Children: A Trust Model*, 46 *FORDHAM L. REV.* 669, 695-96 (1978). The writer explains that the state, as settlor of the trust, reposes in the school, as trustee, the duty to provide the student's education until he is prepared to enter society. As beneficiary of the trust, the student could demand the school to justify its management of his education. He could petition for court supervision of the trust if the school's actions damaged his intellectual development or infringed upon any of his constitutional rights. The student's rights would be held in trust until he could manage his own affairs.

30. See, e.g., *Ayala v. Philadelphia Bd. of Pub. Educ.*, 453 Pa. 584, 305 A.2d 877 (1973). An overwhelming majority of states have abrogated governmental immunity.

Under the doctrine of governmental immunity, public employees, as a general rule, are personally liable for injury resulting from "discretionary" conduct within the scope of their employment. They do not, however, face liability for suits resulting from "ministerial" acts. W. Prosser defines discretionary acts as those which require personal deliberation, decision, and judgment. Ministerial acts are those done in obedience to orders or in the performance of a duty in which the government employee is left no choice of his own. W. PROSSER, *supra* note 26, at 988-89. Prosser warns, however, that the distinction is not definite or clear. He suggests that the test should be whether the government employee acted with proper motives and with due care and diligence in performance of his official duties. He should not suffer for an honest and reasonable mistake in carrying out his responsibilities, nor escape liability for official negligence because he has been charged with that responsibility. *Id.* at 989-91. This test would be appropriate for resolving educational malpractice cases.

31. A recent study conducted in Los Angeles showed that when one school dis-

Fear of *administrative* burdens that might result from fraudulent or numerous claims should not stop a court from adjudicating a legitimate and redressable injury.<sup>32</sup> "The Judiciary can intelligently sift the wheat from the chaff and . . . succinctly deal with any attempted fraudulent scheme or claim. . . ."<sup>33</sup> The difficulty of proof in educational malpractice cases may discourage many malcontents from bringing suit. Claims will also be dropped because the prospects of monetary recovery would not be commensurate with the expense and time of litigation. Presumably, since only the most meritorious claims could surmount the obstacle of proving proximate cause, capricious suits unable to do so will not flood the courts.

The court's *jurisdictional* concern about interfering with the administration of the public school system is unjustified. The court's intervention in areas beyond the judiciary's traditional bailiwick has been appropriate where there has been legislative inaction leading to constitutionally unjust conditions.<sup>34</sup> Courts have intervened on behalf of mentally ill and retarded people to protect those persons' constitutional right to treatment.<sup>35</sup> Judicial action was also necessary to enforce state statutory mandates to provide suitable free public education and equal protection to disabled or exceptional children who were not receiving suitable public education.<sup>36</sup> The formulation of educational policy pertaining to the qual-

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trict spent \$150 more per pupil than another for grades 9 and 12, only trivial differences of knowledge between students resulted. M. YUDOF & D. KIRP, *EDUCATIONAL POLICY AND THE LAW* 617 (1974).

32. *Ayala v. Philadelphia Bd. of Pub. Educ.*, 453 Pa. 584, 595, 305 A.2d 877, 883 (1973).

33. *Park v. Chessin*, 88 Misc. 2d 222, 231-32, 387 N.Y.S.2d 204, 211 (Sup. Ct. 1976), *modified on other grounds*, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977).

34. Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428, 429-30 (1977). See also, Comment, *Poirier v. Town of Plymouth, The Hidden Defect Rule, and New Patterns of Tort Law Reform in Massachusetts*, 1 W. NEW ENG. L. REV. 537 (1977).

35. *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974), established a constitutional right to treatment based on due process. The court held that civil commitment deprives noncriminals of their liberty unless the government provides them some treatment. *Id.* at 784-85. See *Donaldson v. O'Connor*, 493 F.2d 507, 520 (5th Cir. 1974), *vacated and remanded on other grounds*, 422 U.S. 563 (1975).

36. *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.C. Cir. 1972); *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), *amended*, 343 F. Supp. 279 (E.D. Pa. 1972). These cases concern children who did not require institutionalization, but who received unsuitable public education because the school systems were not equipped to provide for their special needs.

ity of instruction may be more appropriately and effectively implemented by school officials or legislators than by judges. Adjudication of educational negligence, however, is a substantive matter more appropriately left to the courts.

Resolving matters of educational malpractice is not qualitatively different from other actions in tort which are reviewed every day by a judge and jury. It is the court's role to remedy and deter injuries that result directly from educators' carelessness and unacceptable misfeasance.

There are also social reasons why courts should be prompted to hear educational malpractice cases like *Hoffman* where there has been heedless placement of a student. Some studies indicate that a student's contribution to society may ultimately suffer if a school carelessly overlooks that student's placement. Social scientists contend that inappropriate placements predictably lead to severe frustration and other emotional disturbances which impede learning and erupt into antisocial behavior.<sup>37</sup> As a corollary, some studies show that students with learning problems are more likely to become school dropouts than other students. Furthermore, it is acknowledged that school dropouts are more likely to become juvenile delinquents.<sup>38</sup> More diligence by educators in placing students might, presumably, help curb the number of emotionally unbalanced individuals and juvenile delinquents. A school system could be making a valuable contribution to society by accounting for each student's particular educational needs.

In the wake of *Hoffman*, courts hearing educational malpractice suits will be more willing to evaluate the merits of future suits on the strengths of competing legal arguments rather than freely dismiss them based on unexamined social policy arguments. As more courts explore various bases for liability, they will encounter many potential sources from which an educational malpractice tort can be established. In addition to the affirmative misfeasance relied on by the *Hoffman* court, analogies to medical malpractice, extension of dignitary torts, theories of misrepresentation, and state constitutional and statutory provisions requiring a minimum standard of public education all provide possible sources for expanding the emerging tort of educational malpractice.

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37. Levinson, *The Right to a Minimally Adequate Education for Learning Disabled Children*, 12 VAL. L. REV. 253, 271-72 (1978).

38. *Id.*

### III. ANALOGY TO MEDICAL MALPRACTICE

Although the majority in *Donohue* would not recognize a cause of action for educational malpractice, Mr. Justice Joseph A. Suozzi wrote a compelling dissent. He argued that dismissing the complaint against the defendant school would sanction misfeasance in the education system. He maintained that educational malpractice could be analogized to medical malpractice based on misdiagnosis.<sup>39</sup> Justice Shapiro also alluded to this analogy in his *Hoffman* opinion.<sup>40</sup> Just as physicians are expected to diagnose and treat specific conditions of patients. Justice Suozzi argued that school authorities should be expected to detect and diagnose the nature and extent of a student's learning problems by appropriate and accepted testing procedures. Thereafter, they should take or recommend remedial measures to deal with the student's problem. *Donohue*, according to Justice Suozzi, had a valid cause of action. Justice Suozzi's rationale deserves attention.

Misdiagnosis by a physician may occur because "(a) the physician fails to discover a disease which the patient has or (b) he tells a patient who is free of disease that he has a condition from which he does not actually suffer."<sup>41</sup> Failure to administer the appropriate tests to make a correct diagnosis has prompted numerous medical malpractice suits.<sup>42</sup> Similar standards could be applied in the cases of misdiagnosed educational malpractice cases. Suits could result either because the community's accepted method of evaluating a student's educational abilities was not employed or because the student's educational ability was assessed wrongly, as was the situation in *Hoffman*.

The student would have the burden of proving that the educators had a responsibility to evaluate, that is diagnose, his intelligence and provide him appropriate instruction.<sup>43</sup> If the school breached that responsibility, the student would have to show that

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39. 64 App. Div. 2d at 44, 407 N.Y.S.2d at 884 (Suozzi, J., dissenting).

40. 64 App. Div. 2d at 385, 410 N.Y.S.2d at 110.

41. A. HOLDER, *MEDICAL MALPRACTICE LAW* 71 (2d ed. 1978).

42. *Id.* at 77.

43. In *Donohue*, educators could have referred to the plaintiff's report card for a clear record of his educational deficiencies. A review of his grades would have indicated that the student needed remedial assistance. Out of his 23 marks in high school, he failed seven times with grades below 65. Thirteen of his grades were between 65 and 70, and only three grades were above 80. Such a record should prompt a school system to administer evaluative tests. Record on Appeal at 48, *Donohue v. Copiague Union Free School Dist.*, 64 App. Div. 2d 29, 407 N.Y.S.2d 874 (1978).

the failure to provide appropriate instruction injured him. The educator, like the physician, would not hold himself out as a miracle worker. He would not be liable merely because the student had not learned, despite the appropriate action administered by the school system. As with medical malpractice suits, the plaintiff would not win his case for negligence merely because proper treatment was unsuccessful. Educational misdiagnosis would comport with the rule that professionals should ascertain all the relevant facts prior to making a professional judgment.<sup>44</sup> A consensus would have to be reached on the professional standards of care which would be required of educators.<sup>45</sup>

A number of courts have recognized that teaching is a profession which requires a standard of expertise from its practitioners beyond the competence of laymen.<sup>46</sup> Educators' professional standing has also been compared to that of physicians, lawyers, and other professionals.<sup>47</sup> The Georgia legislature has enacted a statute which states that teaching is a profession, "with all the similar rights, responsibilities and privileges accorded other legally recognized professions."<sup>48</sup> Although some writers contend that teaching

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44. *Moore v. Tremeling*, 78 F.2d 821, 824 (9th Cir. 1935).

45. In *Conley v. Board of Educ.*, 143 Conn. 488, 123 A.2d 747 (1956), the court held that "[a] board [of education] has the right to demand that a teacher know his subject and that he be capable of arousing and holding the interest of his pupils and maintaining discipline." *Id.* at 492, 123 A.2d at 752. A proper certificate to teach is evidence of a teacher's qualifications, and a teacher's license to teach may be revoked in some jurisdictions for neglect of duty, for incapacity to teach, or for practicing the profession fraudulently, beyond its authorized scope, or with gross negligence. *See, e.g.*, N.Y. EDUC. LAW § 6511 (McKinney 1972).

46. *See, e.g.*, *Fowler v. Young*, 77 Ohio App. 20, 30, 65 N.E.2d 399 (1945). *See also Elson, A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching*, 73 NW. U.L. REV. 641, 725 (1978).

47. T. ROADY & W. ANDERSON, *Foreword to PROFESSIONAL NEGLIGENCE* at vi (1960); R. STRICKLAND, J. PHILLIPS, & W. PHILLIPS, *AVOIDING TEACHER MALPRACTICE, A PRACTICAL LEGAL HANDBOOK FOR THE TEACHING PROFESSION* 64 (1976); Comment, *Professional Negligence*, 121 U. PA. L. REV. 627, 630-33 (1973).

The court in *Crawfordsville v. Hayes*, 42 Ind. 200, 209-10 (1873), held: "A teacher, doubtless like a lawyer, surgeon, or physician, when he undertakes an employment, impliedly agrees that he will bestow upon that service a reasonable degree of learning, skill, and care."

The common standard applied to professionals has been reasonable care and the measure of skill and knowledge ordinarily possessed by a member in good standing of his profession. *See Johnston v. Rodis*, 151 F. Supp. 345, 346 (D.C. Cir. 1957) (physician); *Gambert v. Hart*, 44 Cal. 542, 552 (1872) (attorney); *Gammel v. Ernst & Ernst*, 245 Minn. 249, 255, 72 N.W.2d 346, 368 (1955) (accountant). For the standard applied to architects and engineers, see Bell, *Professional Negligence of Architects and Engineers*, 12 VAND. L. REV. 711, 716 (1959).

48. GA. CODE ANN § 32-838 (1978).

should not be granted "professional" status,<sup>49</sup> one could persuasively argue that educators should be held to a professional standard of care. They undergo a certification procedure comparable to other professionals; there is a process of formal training and specialized knowledge necessary prior to practice; and there is a set of intellectual, practical, and ethical standards of performance that is defined by members of the profession.<sup>50</sup> There is reason to propose, therefore, that students be entitled to a thorough and careful evaluation of their abilities and needs as conditions and attending circumstances permit, with such diligence and methods as are usually approved and practiced by educators of the same judgment and skill under similar circumstances.<sup>51</sup>

#### IV. OTHER BASES OF LIABILITY— DIGNITARY TORTS AND MISREPRESENTATION

Establishing a tort for educational malpractice may be supported by analogy to the "dignitary" torts of false imprisonment, malicious prosecution, infliction of mental distress, libel, and slander. The harm in these torts is not physical injury, but damage to self-respect and resulting mental distress.<sup>52</sup> For example, although the law was slow in accepting infliction of mental distress as a tort, because it seemed too speculative, a yardstick was devised to allow recovery in extreme cases.<sup>53</sup> Such strict standards would be essential for educational malpractice suits in order to thwart spurious claims. This may be partially achieved by relying on expert testimony. One commentator appropriately indicates,<sup>54</sup> however, that expert testimony need not be required. Juries could presume that a student suffered a compensable loss if they found that the student was denied the minimum instruction customary to the profession.<sup>55</sup>

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49. See Elson, *supra* note 46, at 729-30 n.340.

50. *Id.* at 730 n.340 and accompanying text.

51. This is a variation of the standard commonly applied for cases of medical malpractice. See A. HOLDER, *supra* note 41, at 71.

52. D. DOBBS, *THE HANDBOOK OF THE LAW OF REMEDIES* 509 (1973).

53. W. PROSSER, *supra* note 26, § 12, at 56, explains that the rule is as follows: "There is liability for conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind." Examples provided, *id.* at 56-58, include spreading a false rumor that the plaintiff's son hanged himself, prolonged course of hounding by extreme methods, and taking advantage of a person's highly sensitive disposition.

54. See Elson, *supra* note 46, at 757-58.

55. C. MCCORMICK, *HANDBOOK OF THE LAW OF DAMAGES* § 14, at 53-54

Misrepresentation has been suggested as another basis of liability against the school system which grants a diploma to a student who cannot read or write. The elements of misrepresentation are: (1) A false representation; (2) which is made with the intention of inducing another to rely, or is made without any belief in its truth, or is made recklessly or carelessly whether it be true or false;<sup>56</sup> (3) the plaintiff was justified in relying on the misrepresentation;<sup>57</sup> and (4) damage proximately resulted.<sup>58</sup>

In determining whether reliance is justified, courts often look to whether the relationship between parties invites confidence, such as family, business, or professional relationships or a great disparity in knowledge, intelligence, or training.<sup>59</sup> Also, the plaintiff's perception of the defendant's interest in making the representation may control whether the reliance was justified. Courts have determined that reliance is justified when the plaintiff perceives that the defendant would have no interest nor gain any advantage in making a misrepresentation. If the representation is made by one who is apparently disinterested, the other party may be off his guard.<sup>60</sup>

Courts have recognized a family-type relationship between students and educators by applying the doctrine of *in loco parentis*.<sup>61</sup> That relationship should justify a student's belief that

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(1935). The author explains that certain elements of injury are said to be presumed. The jury is allowed to infer the existence and extent of certain injury from the fact of the wrongdoing. Elements of damage may be proven circumstantially as well as directly. Arguments could be made that inferring educational harm circumstantially would leave room for fabrication and for subjectivity in awarding damages. The defendant in an educational malpractice suit is spared from subjective speculation and prejudice because the jury must follow an objective standard of care established for educators. The objective standard distinguishes educational negligence claims from claims of mental distress. Claims of mental distress depend on a subjective determination of how outrageous the conduct is believed to be, regardless of whether any independent legal standard of conduct has been violated. See Elson, *supra* note 46, at 758 n.448, citing W. PROSSER, *supra* note 26, § 12, at 55-60.

56. W. PROSSER, *supra* note 26, § 107, at 699.

57. *Id.*

58. F. JAMES & O. GRAY, MISREPRESENTATION (pt. 1), 37 MD. L. REV. 286, 289 (1978).

59. *Id.* (pt. 2), at 491-92.

60. *Id.*

61. Actually the phrase *in loco parentis* expresses nothing save that the school has certain rights and duties to children in its care. When a court rules that a certain act by a school official is performed *in loco parentis* the court is actually concluding that the act was permissible. When a court rules that an official superseded his powers *in loco parentis*, the court is ruling

the diploma presented by his educators represents his success in reaching a prescribed educational proficiency. A student is being deceived when he receives a diploma even though educators know he should not receive it or when educators carelessly present the diploma without any belief in whether the student has earned it. The courts should consider whether it would be an intentional misrepresentation to grant a diploma to a student who failed competency tests<sup>62</sup> that were required for graduation, and also, whether it would be a negligent misrepresentation to habitually promote and grant a diploma to a student, like Donohue, whose grades were clearly on the verge of failure.<sup>63</sup>

In 1970, Stuart Sandow, a research fellow at the Educational Policy Research Center of Syracuse University hypothesized a case in which a nineteen-year-old student received a high school diploma even though he could not read above the seventh grade level. The student's lawyers argued that the school failed in its obligation to provide the learning skills it implied the student received by awarding him the diploma.<sup>64</sup> Sandow posed the case to 200 lawyers in positions as legal counsel for various state offices of education, members of house committees, deans of law schools, lawyers of private firms that represent schools, and counsel for leading private corporations in peripheral educational activities for profit.<sup>65</sup>

Many of Sandow's respondents theorized that a mandated quality of education would ensue from the action,<sup>66</sup> and eighty-five percent foresaw an increase in the quality of education following the decision.<sup>67</sup> Ninety percent, however, acknowledged that the same results might be achieved through legislation.<sup>68</sup>

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that the specific act was not legally permissible. Most simply, the phrase . . . is no guide to action, but solely a conclusionary label attached to permissible school controls. . . .

W. HAZARD, *EDUCATION AND THE LAW* 215 n.1 (1971).

62. For a discussion of competency tests, see notes 77-78 *infra* and accompanying text.

63. See note 43 *supra*.

64. S. SANDOW, *EMERGING EDUCATION POLICY ISSUES IN LAW: FRAUD I* (1970) (research conducted at Educational Policy Research Center Syracuse University).

65. *Id.* at 3.

66. *Id.* at 32.

67. *Id.* at 28-31.

68. *Id.* at 31-32. In addition to the tort of misrepresentation, 80% of Sandow's respondents predicted the case would arise and succeed in five years on a theory of negligence or implied contract. *Id.* at 20.

## V. ESTABLISHING A MINIMUM QUALITY OF EDUCATION

All children are clearly entitled to equality of educational opportunity.<sup>69</sup> The proposition that school systems must provide a certain minimum quality of education, however, is not as well settled in the law. Nevertheless, the Supreme Court has recognized the importance that the quality of education plays in influencing a child's decision to enter or remain in school,<sup>70</sup> or in advancing the student's economic and social success and development as a citizen.<sup>71</sup> The classic expression in this regard came in *Brown v. Board of Education*<sup>72</sup> in which the Court heralded education as the most important function of state and local governments. In *San Antonio Independent School District v. Rodriguez*<sup>73</sup> the Court acknowledged that innovative thinking about the methods of education is necessary to assure a higher level quality and greater uniformity of opportunity.<sup>74</sup>

This case law in itself may be insufficient precedent to impose

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As it happened, the *Hoffman* decision did rely on the negligence theory. An implied contract theory may not be so farfetched, considering that students have been referred to as consumers of schooling, who may be expected to demand certain rights and satisfaction as do other consumers of other products. Also, educators talk about education as a product and not just a process. See Sugarman, *Accountability Through the Courts*, 85 SCH. REV. 233, 236 (1974). See also Note, *The ABC's of Duty: Educational Malpractice and the Functionally Illiterate*, 8 GOLDEN GATE L. REV. 293, 312 (1978); Note, *Educational Malpractice: Can the Judiciary Remedy the Growing Problem of Functional Illiteracy*, 8 SUFFOLK L. REV. 27, 31 (1979).

69. 20 U.S.C. § 1701 (1976).

70. *Gaston County v. United States*, 395 U.S. 285, 295-96 (1969).

71. [T]he State is not concerned with the maintenance of an educational system as an end in itself, it is rather attempting to nurture and develop the human potential of its children . . . to expand their knowledge, broaden their sensibilities, kindle their imagination, foster a spirit of free inquiry, and increase their human understanding and tolerance.

*Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972) (White, J., concurring). See also *Serrano v. Priest*, 5 Cal. 3d 584, 610, 96 Cal. Rptr. 601, 619, 487 P.2d 1241, 1257 (1971).

72. 347 U.S. 483 (1953). The court said:

Today, education is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

*Id.* at 493.

73. 411 U.S. 1 (1973).

74. *Id.* at 58.

a duty upon school systems to provide a minimum quality of education. The cases certainly indicate, however, that a minimal quality of instruction is desired from school systems. To conclude that school systems have the right to provide an equally mediocre educational opportunity to all children would contravene our society's penchant for excellence.<sup>75</sup>

Some state constitutions and statutes provide a more fertile ground for developing the argument that school systems must provide a certain quality of education and that students have a right to demand that quality. A system of public schools is constitutionally mandated in each state.<sup>76</sup> In some states, the language which prescribes school systems also indicates the quality of system that the legislators desire. In Illinois and Virginia, a system of "high qual-

75. Some cases concerned with constitutional issues of equal educational opportunity are pertinent in regard to discussing a minimum quality of education. *See Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Van DuSartz v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971); *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1977); *Robinson v. Cahill*, 118 N.J. Super. 223, 303 A.2d 273 (1973).

76. Each state constitutionally mandates a system of public schools within its borders. The language used in the constitutions to prescribe a system of public schools may be an indication of the quality of education that legislators desire. The following survey categorizes states according to the type of system that has been constitutionally mandated:

A system of high quality is called for in ILL. CONST. art. X, § 1, and VA. CONST. art. VIII, § 1. A thorough and uniform system is called for in COLO. CONST. art. IX, § 2, and IDAHO CONST. art. 9, § 1. A thorough and efficient system is called for in MD. CONST. art. VIII, § 1, N.J. CONST. art. VIII, § 4, OHIO CONST. art. VI, § 2, PA. CONST. art. 3, § 14, and W. VA. CONST. art. XII, § 1. A general uniform and thorough system is called for in MONT. CONST. art. XI, § 1. A complete and uniform system is called for in WYO. CONST. art. 7, § 1. A general, suitable, and efficient system is called for in ARK. CONST. art. 14, § 1. A general and efficient system is called for in DEL. CONST. art. X, § 1. An efficient system is called for in KY. CONST. § 183, and TEX. CONST. art. VII, § 1. An adequate education is called for in GA. CONST. art. VIII, ch. 2-49, § 1. A uniform system is called for in ARIZ. CONST. art. 11, § 1, FLA. CONST. art. IX, § 1, IND. CONST. art. 8, § 1, MINN. CONST. art. XIII, § 1, NEV. CONST. art. 11, § 2, N.M. CONST. art. XI, § 1, N.C. CONST. art. IX, § 2, OR. CONST. art. VIII, § 3, S.D. CONST. art. VIII, § 1, UTAH CONST. art. X, § 1, WASH. CONST. art. 9, § 2, and WIS. CONST. art. X, § 3. A liberal system is called for in ALA. CONST. art. XIV, § 256. One or more of the following terms is used to describe the system called for in the following states. Free public, state wide, common, or general system: ALASKA CONST. tit. 14, ch. 03, § 14.03.010, CAL. CONST. art. IX, § 5, CONN. CONST. art. 8, § 1, HAWAII CONST. art. IX, § 1, IOWA CONST. art. 9, § 12, KAN. CONST. art. 6, § 1, LA. CONST. art. VIII, § 1, ME. CONST. art. 8, § 1, MASS. CONST. ch. 5, § 2, MICH. CONST. art. 8, § 2, MISS. CONST. art. 8, § 201, MO. CONST. art. IX, § 1(a), NEB. CONST. art. 7, § 1, N.H. CONST. pt. 2, art. 83, N.Y. CONST. art. 11, § 1, N.D. CONST. art. VIII, § 148, OKLA. CONST. art. XIII, § 1, R.I. CONST. art. XII, § 1, S.C. CONST. art. XI, § 3, TENN. CONST. art. 11, § 12, and VT. CONST. ch. 11, § 68.

ity" is mandated. Other states, such as New Jersey and Ohio, require "thorough and efficient" educational systems. The Georgia Constitution calls for "an adequate education," and New York requires "a system of free common schools." A student who could prove that his educational deficiencies resulted from the poor quality of the school system could construct a stronger argument for relief in Illinois and Virginia than in another state which has not clearly defined the quality of education required.

An increasing number of states have adopted minimum competency tests<sup>77</sup> as a means of preventing the habitual, social promotions that enable illiterates to graduate from high school. As of June 1, 1979, New York high school students, for example, will not receive a diploma unless they pass basic competency tests. The successful completion of these tests supposedly represents competency in the curriculum of "four years or their equivalent in grades above grade eight."<sup>78</sup> It would be a statutory violation to grant a diploma to a student who failed the basic competency tests in a state like New York which mandates success on those tests as a prerequisite to receiving a diploma.

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77. The following states do or will require successful passing of competency tests for graduation. The year following the name of the state indicates when that legislation is effective: Arizona, 1976; California, 1981; Colorado, local option; Delaware, 1981; Florida, 1979; Georgia, 1982; Hawaii, 1983; Idaho, 1982; Maryland, 1982; Nevada, 1982; New Mexico, 1981; New York, 1981; North Carolina, 1979; Oregon, 1978; Tennessee, 1982; Utah, 1980; Vermont, 1981; Virginia, 1981; and Wyoming, 1980. See NEW YORK STATE EDUC. DEP'T, *COMPETENCY TESTING IN THE 50 STATES*, at J-13, table 2 (1979). More states are discussing whether to use the tests.

Thirty states have adopted minimum competency tests to determine whether basic skills have been acquired by students prior to graduation. As explained above, 19 states, at the time of publication, used the tests as a prerequisite to graduation. *Id.* at J.-2.

The tests, however, have been criticized in some states as too easy, in other states as too difficult, and in other states as culturally biased or as too narrow to accurately measure school experience. The National Education Association has proposed an evaluation of whether the exams should be continued. See Goldman, *Teacher Union Chiefs Urge a Halt to the Use of Competency Tests*, N.Y. Times, July 4, 1978, at 4, col. 6. See also Goldman, *Comment Sought on Graduation Standards*, N.Y. Times, Nov. 21, 1978, § C (Science Times), at 6, col. 3.

78. E.g., 8 N.Y. CODE R. & REGS. ch. I, § 3.45 (1962) (diplomas). No high school diploma shall be conferred which does not represent four years or their equivalent in grades above grade eight, and no such diploma shall be conferred upon a pupil who has not achieved a passing rating in each of the basic competency tests established by the commissioner.

## VI. THE RIGHT TO A MINIMALLY ADEQUATE EDUCATION SUITING A STUDENT'S PARTICULAR NEEDS

Recent federal legislation provides school systems with a detailed description of what constitutes an appropriate education for a handicapped or learning disabled student.<sup>79</sup> Schools can determine a student's particular educational needs by administering evaluative tests. Faithful use of such tests could be one means by which school systems could obviate potential negligence suits. Many school systems must administer evaluative tests as a quid pro quo for federal financing for education.

School systems which receive federal funding for education have an affirmative duty to identify and help learning disabled children.<sup>80</sup> The Education for All Handicapped Children Act<sup>81</sup> provides financial assistance to states to identify, locate, and evaluate the handicapped and learning disabled. In exchange for the funds, the school system must provide each child "a free appropriate education suited to his individual needs."<sup>82</sup> Thus, a student who was not given evaluative tests could bring a federal cause of action if his educational deficiencies resulted from his school system's breach of its duty. It is also axiomatic that when a school system gives evaluative tests, it must do so with care.

Rights to an appropriate education suited to a student's individual needs have also been preserved by case law. The United States Supreme Court, in *Lau v. Nichols*,<sup>83</sup> established that equality in educational opportunity must include provisions in some cases for the particular needs of students. A Pennsylvania district court held in *Frederick L. v. Thomas*,<sup>84</sup> that children with special educational needs should be given the right to evaluative tests. The same court said in *Fialkowski v. Shapp*<sup>85</sup> that it was "not inconsistent with *Rodriguez* to hold that there exists a constitutional

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79. Education for All Handicapped Children Act of 1975, Pub. L. 94-142, 89 Stat. 773 (1975). For a more complete discussion of the act, see Levinson, *supra* note 37, at 276.

80. *Mattie T. v. Holladay*, No. 75-31-S (N.D. Miss. July 28, 1977).

81. See note 79 *supra*.

82. *Id.*

83. 414 U.S. 563, 566 (1974). The *Lau* case centered on equality of educational opportunity for non-English speaking children. See also OFFICE OF EDUCATION, U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, PUB. NO. (OE) 76-00004, *The Education of Adolescents 1* (1976).

84. 408 F. Supp. 832 (E.D. Pa. 1976).

85. 405 F. Supp. 946 (E.D. Pa. 1975).

right to a certain *minimum* level of education. . . ."<sup>86</sup> The court also said that retarded children may be a suspect class who warranted greater judicial scrutiny than applied in *Rodriguez*.<sup>87</sup> These cases clearly protect the learning disabled from the omissions that occurred in *Hoffman* and *Donohue*.

Mr. Justice Brennan, dissenting in *Rodriguez*, discussed the inextricable link of education to the enumerated rights of free speech and participation in the electoral process.<sup>88</sup> Arguably, misdiagnosed or undiagnosed learning disabled students are being denied the special instruction that they require to exercise certain constitutional rights. The ability to read and express oneself is invaluable for effectively executing the right of free speech. Also, the ability to read is an important step toward participating not only in the electoral process, but also in passing driving tests which enable a person to exercise his right to travel. These issues are not raised to sustain an independent source of conclusive reasoning to be used against a school system. These issues are raised for the school's and the court's circumspection of the rights of all students, including the learning disabled.

## VI. CONCLUSION

A successful educational malpractice suit derives its strongest support from a clear, affirmative act of negligence or misfeasance as the *Hoffman* case presented. Although the *Hoffman* court was able to place a monetary value on the damage that occurred, the remedy could take other than monetary forms. A student may be allowed to remain at school to receive remedial help rather than be habitually pushed through to graduation. A court could order a school district to provide a year's tuition at a private or special school<sup>89</sup> or transfer the student to another public school of his

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86. *Id.* at 958 (emphasis added).

87. *Id.* at 958-59.

88. See Levinson, *supra* note 37, at 259 (citing 411 U.S. 1, 62-63 (1973) (Brennan, J., dissenting)).

Constitutional protection has been given to other rights which are not explicitly enumerated. Privacy was recognized in *Roe v. Wade*, 410 U.S. 113 (1973), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Griswold v. Connecticut*, 381 U.S. 479 (1965). Procreation was recognized in *Skinner v. Oklahoma*, 316 U.S. 535 (1942). Travel was recognized in *Shapiro v. Thompson*, 394 U.S. 618 (1969). Access to the criminal justice system was recognized in *Griffin v. Illinois*, 351 U.S. 12 (1956).

89. *In re Peter H.*, 66 Misc. 2d 1097, 323 N.Y.S.2d 302 (1971). The court held that a physically handicapped child who made no progress at public school in spe-

choice. As one writer suggests<sup>90</sup> the promise to compensate victims may not be the most valuable result of such suits. More importantly, school systems may be forced to confront their limitations and take steps to decrease the number of nonlearners.

Judicial intervention in the administration of education is appropriate where there is an unjustified educational harm that should be deterred and can be remedied. Courts must confront the issues presented in educational malpractice and must not stand idly behind refutable social policy arguments.

As Justice Suozzi suggests, there should be a tort of educational malpractice analogous to medical misdiagnosis. School systems would be responsible for evaluating or diagnosing a student's particular needs and providing the appropriate educational treatment. School systems must also recognize that granting a diploma to a student who cannot read or write may constitute intentional or negligent misrepresentation. Overlooking or ignoring any student who needs special attention may encroach upon his enumerated rights of free speech, travel, and participation in the electoral process. Another source for redress might ensue from injury proximately caused by a violation of statutory mandates and administrative duties to provide for a student's special needs.

Above all, educators must regard their instructional duties toward students with the care and diligence of trained professionals or accept the legal consequences for carelessness. Whatever theory supports the cause of action, and whatever remedy is employed, providing a better quality of education would benefit both the individual student in terms of his own educational development and the society at large in terms of a more highly educated populace. Courts should welcome this opportunity to raise the quality of education in the United States.

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cial classes, but who benefitted from one year at a private school should be granted one-year's tuition at the private school.

90. See S. SUGARMAN, *supra* note 68, at 246.