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EDUCATION MALPRACTICE: A CAUSE OF ACTION THAT FAILED TO PASS THE TEST

I. INTRODUCTION

Few of our institutions, if any, have aroused the controversies, or incurred the public dissatisfaction, which have attended the operation of the public schools during the last few decades. Rightly or wrongly, but widely, they are charged with outright failure in the achievement of their educational objectives; according to some critics, they bear responsibility for many of the social and moral problems of our society at large. Their public plight in these respects is attested in the daily media, in bitter governing board elections, in wholesale rejections of school bond proposals, and in survey upon survey.¹

“Educational malpractice,” which focuses on the quality of education, is the failure to adequately educate a student and includes the improper or inadequate instruction, testing, placement or counseling of a child.² The claim, brought by either students or parents on the minor student’s behalf or on their own behalf for loss of earnings and services, is usually based on a negligence tort theory; however, the term “educational malpractice” has been used to refer to claims based on negligent misrepresentation, intentional misrepresentation or contractual theories of recovery.³ Although inadequate education is a serious problem, the courts that have addressed this issue have refused to recognize a cause of action based on a negligence theory.⁴ While the courts have recognized that a cause

1. *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 825, 131 Cal. Rptr. 854, 861 (1976).

2. W. PROSSER & W. KEETON, *THE LAW OF TORTS* 1048 (5th ed. 1984).

3. 3 M. BINDER, *EDUCATION LAW* § 12.03(1) (1987).

4. The jurisdictions that have addressed this issue and that have not recognized a cause of action are as follows: New York—*Torres v. Little Flower Children’s Serv.*, 64 N.Y.2d 119, 474 N.E.2d 223, 485 N.Y.S.2d 15, (1984); *Hoffman v. Bd. of Educ.*, 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979); *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979); Maryland—*Hunter v. Bd. of Educ.*, 292 Md. 481, 439 A.2d 582 (1982); Florida—*Tubell v. Dade County Public Schools*, 419 So.2d 388 (Fla. 1982); Alaska—*D.S.W. v. Fairbanks North Star Borough School Dist.*, 628 P.2d 554 (Alaska 1981); California—*Smith v. Alameda County Social Serv.*, 90 Cal. App. 3d 929, 153 Cal. Rptr. 712 (1979); *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976). *See generally* 1 A.L.R. 4TH 1139. One court has found that negligent or improper placement may be actionable; however, on remand, the plaintiff admitted that she had suffered no real injury. *B.M. v. State*, 698 P.2d 399 (Mont. 1985).

of action may be based on intentional misrepresentation⁵ or in contract,⁶ no such claims against public schools for educational malpractice have been successful. This paper will discuss whether West Virginia should recognize a cause of action for "educational malpractice" as it relates to public schools⁷ and will focus primarily on a claim based on negligence.

Since the defendants in "educational malpractice" actions are usually teachers, counselors, psychologists, principals, other school employees, county boards of education and their members, and superintendents (hereinafter will be collectively called "educators"), the Governmental Tort Claims and Insurance Reform Act (hereinafter referred to as "the Act") governs the determination of liability.⁸ For purposes of the Act, a county board of education is a "political subdivision."⁹ As such, it enjoys immunity from damages in civil action for injury, death, or loss to persons and property unless the act of it or its employees falls into one of five categories.¹⁰ The pertinent category which might impose liability for educational malpractice states: "Political subdivision are liable for injury, death, or loss to persons or property caused by the negligent performance of acts by their employees while acting within the scope of employment."¹¹ Furthermore, the Act holds that an employee of a political subdivision is liable only if (1) he acted outside the scope of his employment; (2) he acted maliciously, in bad faith, or in a wanton or reckless manner; or (3) liability is otherwise expressly im-

5. *Hunter*, 292 Md. at 490, 439 A.2d at 587; *Peter W.*, 60 Cal. App. 3d at 827, 131 Cal. Rptr. at 863.

6. *Donohue*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375.

7. Public schools have been defined as elementary and secondary schools created and maintained at public expense and supported by county authorities, excluding colleges and universities. *State ex rel Kondos v. W. Va. Bd. of Regents*, 154 W. Va. 276, 279, 175 S.E.2d 165, 167 (1970). The focus of this paper is limited to public schools because in West Virginia, in 1980, 395,064 pupils were enrolled in public schools out of a total enrollment of 416,132 (these figures exclude college and university enrollment). *ALMANAC OF THE 50 STATES* 389 (1986) [hereinafter *ALMANAC*].

8. W. VA. CODE §§ 29-12a-1 to -18 (1986).

9. *Id.* § 29-12A-3(c) (1986).

10. *Id.* § 29-12A-4 (1986).

11. *Id.* § 29-12A-4(c)(2) (1986). The other four categories impose liability for injury caused by the negligent operations of a vehicle, for injury caused by the negligent failure to keep roads in repair, for injury occurring in or around the buildings used by the political subdivisions, and for any other injury where liability is expressly imposed by section of the code. *Id.* § 29-12A-4(c) (1986).

posed.¹² Therefore, the Act imposes no block to providing a cause of action for "educational malpractice" based on negligence.¹³

II. THE CAUSE OF ACTION

The elements of negligence that must be proven by the plaintiff in his assertion of a claim of "educational malpractice" are as follows: (a) the educator owes a duty of care to the student; (b) the educator breached that duty of care; (c) the student was injured; and (d) the educator's conduct was a proximate and factual cause of the student's injury.¹⁴ Each of these elements is problematic to the plaintiff in an "educational malpractice" suit. Furthermore, even if each element could be sufficiently proven by the plaintiff, public policy reasons could prevent recognition of a cause of action.¹⁵

A. Duty Owed

The first element of negligence the plaintiff must prove is that the educator owes a duty of care. If there is no legal duty owed by one person to another, then there can be no actionable negligence.¹⁶ This element has traditionally been the downfall to a cause of action for "educational malpractice."¹⁷

The statement that there is or there is not a duty begs the essential question. Whether the plaintiff's interests are entitled to legal protection against the de-

12. *Id.* § 29-12A-5(b) (1986).

13. This assumes that for the political subdivision to be liable, the employees are acting within the scope of their employment, or for the employee to be liable, he is acting outside his scope of employment, maliciously, in bad faith, or in a wanton or reckless manner.

14. See generally RESTATEMENT (SECOND) OF TORTS § 328A (1965).

15. *Hoffman*, 49 N.Y.2d at 125, 400 N.E.2d at 319, 424 N.Y.S.2d at 378; *Donohue*, 47 N.Y.2d at 444, 391 N.E.2d at 1354, 418 N.Y.S. 2d at 377.

16. *Robertson v. LeMaster*, 301 S.E.2d 563 (W. Va. 1983).

17. See, e.g., *Peter W.*, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854. The plaintiff in *Peter W.* was a young man of normal intelligence who, although he had received his high school diploma, could not read or perform mathematics above the eighth grade level. The plaintiff claimed both negligence in failing to educate and intentional misrepresentation. *Id.* at 817-18, 131 Cal. Rptr. at 856. The court in refusing to recognize a cause of action in tort based its decision on the fact that the educator owed no duty to be certain that students achieve a particular competency in basic academic skills. This decision was based solely on public policy considerations. *Id.* at 821-22, 131 Cal. Rptr. at 858-59. The court did imply that the plaintiff could state a cause of action based on intentional misrepresentation, but had not done so since he did not prove any reliance on the misrepresentation.

Id. at 827, 131 Cal. Rptr. at 862-63.

fendant's conduct. . . . But it should be recognized that "duty" is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which read the law to say that the plaintiff is entitled to protection.¹⁸

The finding of a duty of care is dependent upon public policy considerations to such a degree that courts will refuse to recognize a legal duty of care if there are strong policy objections.¹⁹ The first court to decide an "educational malpractice" suit listed the following policy considerations as being relevant to the judicial recognition of a duty.

The social utility of the activity out of which the injury arises, compared with the risks involved in its conduct; the kind of person with whom the actor is dealing; the workability of a rule of care, especially in terms of the parties' relative ability to adopt practical means of preventing injury; the relative ability of parties to bear the financial burden of injury and the availability of means by which the loss may be shifted or spread; the body of statutes and judicial precedents which color the parties' relationship; the prophylactic effect of a rule of liability; in the case of a public agency defendant, the extent of its powers, the role imposed upon it by law and the limitations imposed upon it by budget; and finally, the moral imperatives which judges share with their fellow citizens — such are the factors which play a role in the determination of duty.²⁰

Various theories have been proposed by plaintiffs supporting an educator's owing a duty of care, including one suggesting a constitutionally imposed duty. The plaintiff in *Donohue v. Copiague Union Free School Dist.* advanced the theory that New York's State Constitution²¹ imposed a duty on educators to provide a minimum level of education.²² The court, however, stated that the Constitution requires the legislature only to maintain and support a public school system; therefore, there is no duty of care on which to base a negligence action.²³

West Virginia's Constitution is distinguishable since it qualifies the public school system to be provided: "The legislature shall pro-

18. W. PROSSER & W. KEETON, *supra* note 2, at 356, 358.

19. See *infra* text beginning note 57.

20. *Peter W.*, 60 Cal. App. 3d at 822, 131 Cal. Rptr. at 859 (quoting *Raymond v. Paradise Unified School Dist.*, 218 Cal. App. 2d 1, 8-9, 31 Cal. Rptr. 847, 851 (1963)).

21. N.Y. CONST. art. XI, § 1 states that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."

22. *Donohue*, 47 N.Y.2d at 443, 391 N.E.2d at 1353, 418 N.Y.S.2d at 377.

vide, by general law, for a thorough and efficient system of free schools."²⁴ The West Virginia court defined a "thorough and efficient" system as one that "develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically."²⁵ Basic education skills, such as literacy, are recognized elements of a thorough and efficient system and should be developed in every child according to his or her capacity.²⁶ Thus, not only must the legislature provide a free school system, but also a quality school system within financial constraints. According to this, it would seem that West Virginia could recognize a constitutionally imposed duty of care on the educator.²⁷ However, Maryland's constitution has a similar provision, and the court, nevertheless, refused to recognize a cause of action for "educational malpractice."²⁸

Statutory duty exists only when the purpose of the statute is the protection of an individual, if he is a member of the protected class of people, from a particular harm.²⁹ A statute that merely confers a benefit upon the general public³⁰ or offers guidelines³¹ does not give rise to a legally recognized duty. West Virginia education statutes, being similar to the California's education statutes listed in *Peter W.*,³² likewise offer only guidelines; thus, West Virginia's statutes would also not impose a duty.³³

A third theory of establishing a duty of care, that if breached by the educator may give rise to a cause of action, is based on the

24. W. VA. CONST. art. XII, § 1.

25. *Pauley v. Kelly*, 162 W. Va. 672, 705, 255 S.E.2d 859, 877 (1979).

26. *Id.*

27. It should be noted that *Bailey v. Truby*, 321 S.E.2d 302 (W. Va. 1984) distinguished this case on the grounds that *Pauley* related to finances rather than the specifics of day-to-day implementation of policy. *Id.* at 317

28. *Doe v. Bd. of Educ.*, 295 Md. 67, 453 A.2d 814 (1982).

29. *Hurley v. Allied Chemical Corp.*, 262 S.E.2d 757 (W. Va. 1980); *Funston, Education Malpractice: A Cause of Action in Search of a Theory*, 18 SAN DIEGO L. REV. 743, 776 (1981).

30. *Donohue v. Copiague Union Free School Dist.*, 64 A.D.2d 29, 37-38, 407 N.Y.S.2d 874, 880 (1978), *aff'd*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).

31. *Peter W.*, 60 Cal. App. 3d at 826, 131 Cal. Rptr. 862.

32. *Id.*

33. See generally W. VA. CODE ch. 18 (1984).

idea that educators, like physicians and lawyers, are professionals and as such owe a duty of care to their students. Support for this theory can be found in dicta in *Donohue*³⁴ and in various West Virginia statutes. The phrase "professional personnel," for purposes of the West Virginia education statutes, is defined as persons who are licensed or certified by the State, including professional educators³⁵ (classroom teachers, principals, supervisors, and central office administrators).³⁶ Furthermore, teachers are thought to be professionals³⁷ as that term is used in excluding professionals, executives, or administrators from the application of the minimum wage maximum hours statute.³⁸ The West Virginia Labor-Management Relations Act³⁹ lists the following criteria for the determination that an employee is a professional: (1) the work must be mostly intellectual and varied; (2) the work must require the exercise of judgment and discretion; (3) the result must be incapable of being standardized as to time; and (4) the work must require knowledge acquired by advanced specialized study at an institution of higher learning. By these criteria, it could be argued that educators are professionals.

However, in the context of professional malpractice, "professional" has not been defined by West Virginia courts. In other jurisdictions, a "professional" act for purposes of malpractice insurance means an occupation that requires specialized knowledge, labor, or skill and entails work that is predominantly mental or intellectual, as opposed to physical or manual.⁴⁰ Again, by this def-

34. "If doctors, lawyers, architects, engineers and other professionals are charged with a duty owing to the public whom they serve, it could be said that nothing in the law precludes similar treatment of professional educators." *Donohue*, 47 N.Y.2d at 443-44, 391 N.E.2d at 1353, 418 N.Y.S.2d at 377. The court, however, refused to recognize a cause of action, for to entertain one would be against public policy.

35. W. VA. CODE § 18A-1-1(b) (1984).

36. *Id.* § 18A-1-1(c) (1984).

37. 52 Op. Att'y Gen. 207 (1967).

38. W. VA. CODE § 21-5C-1 (1985). This statute is analogous to 29 U.S.C. § 213(a)(1) which expressly includes "any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools" as a professional.

39. W. VA. CODE § 21-1A-2(c) (1985). This statute is similar to 29 U.S.C. § 152(12).

40. *Marx v. Hartford Accident & Indem. Co.*, 183 Neb. 12, 157 N.W.2d 870 (1968); *Atlantic Mut. Ins. Co. v. Continental Nat'l Am. Ins. Co.*, 123 N.J. Super. 241, 302 A.2d 177 (1973). See also *Horn v. Burn & Roe*, 536 F.2d 251, 255 (8th Cir. 1976) ("professional" used in statutes of limitations for professional negligence).

inition, teachers would seem to be professionals. Yet there are differences between teachers and physicians, lawyers, and architects that may preclude being considered professionals in the sense of professional malpractice. Teachers, for example, are not able to fix their own hours, they do not rely on their reputations to attract clients, and their education (excluding a teacher in a higher education) is not as specialized in one area. Therefore, a teacher may be considered a professional employee for certain purposes, but not for the purpose of imposing a duty of care in professional malpractice actions.⁴¹

Regardless of whether a court in West Virginia accepts one of the above theories of duty owed a student, the court is very likely still not to recognize a cause of action because of public policy considerations.⁴²

B. Breach of Duty and Standard of Care

Since no duty of care has ever been found, the courts have not adequately addressed the remaining elements of negligence, including the issue of breach of duty. Assuming a court has recognized that educators owe a legal duty to their students, the court must adopt a standard of care by which to determine whether the educator has breached that duty. The reasonable prudent person standard has been used in tort cases where physical injury occurs due to lack of supervision by an educator, since watching over children to insure their safety is a familiar experience for most people. However, this standard is inappropriate in "educational malpractice" actions, since most persons by their ordinary experiences are not familiar with the strategies and complexities of teaching.⁴³ Therefore, some form of heightened standard is desirable if a cause of action is recognized.

41. Probation officers are considered professionals for purposes of W. VA. CODE § 21-5C-1 (1985), *Rohrbaugh v. Crabtree*, 266 S.E.2d 914 (W. Va. 1980), yet they are not subject to malpractice claims.

42. See *supra* text accompanying note 20.

43. *Peter W.*, 60 Cal. App. 3d at 824, 131 Cal. Rptr. at 860-61. ("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.").

Most commentators correctly suggest that a professional standard of care, such as a reasonable prudent teacher standard, should be adopted, especially if a professional duty is recognized.⁴⁴ However, the courts have not adopted such a professional standard among educators and, as stated, even fail to recognize a duty based upon a professional relationship. Assuming such a standard is adopted, expert testimony would be necessary. Again, this is problematic because not only laymen, but also educators, disagree on the appropriate philosophies and methods of teaching.⁴⁵ Therefore, an expert could easily be located to support each side's case.⁴⁶ Also, because states and districts could approach teaching in a somewhat different manner, a locality rule would seem necessary. It should be noted that West Virginia no longer applies the locality rule in medical malpractice suits because physicians from the same area are reluctant to testify against a colleague.⁴⁷ There is no reason to believe educators would react any differently.

Thus, although the courts have thus far not set a standard of care for educators in "educational malpractice" suits, one would have to be adopted before a plaintiff will be successful, and that standard of care should at least be higher than the ordinary prudent person standard.

C. Injury

Although it cannot be argued that a plaintiff who graduates from high school and is unable to understand simple English is not harmed in some manner,⁴⁸ courts have refused to recognize the failure of educational achievement as a legal injury in "educational malpractice" suits.⁴⁹ Because every person is born without knowledge, ed-

44. Comment, *Educational Malpractice*, 124 U. PA. L. REV. 755 (1976); Elson, *A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching*, 73 Nw. U.L. REV. 641 (1978). Cf. Funston, *supra* note 29.

45. *Peter W.*, 60 Cal. App. 3d at 825, 131 Cal. Rptr. at 860-61.

46. Arguably the discrepancies among experts are not a problem since this happens in medical malpractice cases, with the jury deciding whom to believe.

47. *Paintiff v. Parkersburg*, 345 S.E.2d 564 (W. Va. 1986).

48. *Donohue*, 47 N.Y.2d at 443, 391 N.E.2d at 1354, 418 N.Y.S.2d at 377.

49. *Donohue*, 64 A.2d at 35, 407 N.Y.S.2d at 880; *Peter W.*, 60 Cal. App. 3d at 826, 131

ucation, and experience, it is argued that the harm suffered amounts to a lack of expectancy or deprivation of benefits, which is not a compensable injury in tort law.⁵⁰

D. Causation

Even if the failure of educational achievement were recognized as a legal injury, the plaintiff must still prove that the educator's breach of duty was a factual and proximate cause of his injuries.⁵¹ Causation in fact, whether using the "but for" or the "substantial factor" test, is very difficult to prove given the multiplicity of mental, physical, social, economic, and other factors which affect a child's ability to learn, together with the uncertainty as to the impact of each of these factors on learning.⁵²

Furthermore, "[f]ailure to learn does not bespeak a failure to teach."⁵³ This statement reflects the problem of proving proximate cause: there are so many factors outside the educator's control that could be the cause of the child's inability to learn.⁵⁴ Variables affecting a child's learning or nonlearning include attendance; attentiveness; family environment, such as whether he is often left alone to watch TV or whether his parents are having marital problems; family support, such as whether someone checks on his progress and homework or whether he receives reinforcement; and the child's health, such as whether he is abused mentally or physically.⁵⁵ Until these variables can be controlled, an educator should not be held liable when the child does not obtain a certain level of achievement. According to one court, the level of learning that the child might have reached if the educator had not breached his duty is incapable

50. Funston, *supra* note 29, at 783-84.

51. Although the court suggests that injury may be recognized, it does point out that proximate cause would be difficult, if not impossible, to prove. *Donohue*, 47 N.Y.2d at 443, 391 N.E.2d at 1353-54, 418 N.Y.S.2d at 377. *See also*, Funston, *supra* note 29, at 784-90 (causation is the greatest impediment in "educational malpractice" suits).

52. Funston, *supra* note 29, at 786.

53. *Donohue*, 64 A.2d at 39, 407 N.Y.S.2d at 881.

54. *Id.*; *Peter W.*, 60 Cal. App. 3d at 825, 131 Cal. Rptr. at 861.

55. 5 INTERNATIONAL ENCYCLOPEDIA OF EDUCATION RESEARCH AND STUDIES 2438-39 (1985).

of assessment; therefore, determining proximate cause is beyond the courts' ability.⁵⁶

III. RELEVANT POLICY CONSIDERATIONS: BARRING "SUCCESSFUL" CLAIMS

As stated to this point, a plaintiff asserting an "educational malpractice" claim will have great difficulty proving each of the four elements of negligence. However, even if a plaintiff succeeds, the court may and should refuse to recognize a cause of action for public policy reasons.⁵⁷ Among the policy considerations are the damaging effect of awards and litigation on already low funds,⁵⁸ the impact of a flood of litigation, the improper involvement of the courts in the administration of schools, and the belief that the proper relief is to be achieved through the administrative agencies.⁵⁹

County school boards already suffer from lack of funds for education; thus, if West Virginia recognizes a cause of action for "educational malpractice," the cost of litigation and awards would probably affect the quality of education because of the resulting reduction of available revenue. This problem of the county boards of education has been acknowledged by the state legislature.

The Legislature finds and declares that the political subdivisions of this state are unable to procure adequate liability insurance coverage at a reasonable cost due

56. *D.S.W.*, 628 P.2d at 556.

57. *Donohue*, 64 A.2d at 39, 407 N.Y.S.2d at 881. The court acknowledges the possibility of successfully pleading a cause of action. However the court, relying on the public policy analysis in *Peter W.*, likewise refused to recognize a duty of care owed by the educator. In *Donohue* the plaintiff graduated from high school without the basic skills necessary to fill out an employment application. That same year the New York court had another chance to rule on an "educational malpractice" claim. *Hoffman*, 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376. Although the facts could have been easily distinguished, thus recognizing a cause of action, the court merely followed the reasoning of *Donohue* and stated that such a claim is against public policy. In *Hoffman* the defendants failed to retest the plaintiff although a psychologist had previously recommended such retesting. As a result, the plaintiff was kept in a special education class for ten years even though he was of average intelligence.

58. Of the fifty states and the District of Columbia, West Virginia ranked forty-one in expenditures for public schools in 1984, spending only \$2,587.00 per pupil. *ALMANAC*, *supra* note 7, at 389.

59. *Hunter v. Bd. of Educ.*, 47 Md. App. 709, 425 A.2d 681 (1981); *Hoffman*, 49 N.Y.2d at 127, 400 N.E.2d at 319, 424 N.Y.S.2d at 379-80; *Donohue*, 47 N.Y.2d at 445, 391 N.E.2d at 1354, 418 N.Y.S.2d at 378.

to: The high cost in defending such claims, the risk of liability beyond the affordable coverage, and the inability of political subdivisions to raise sufficient revenues for the procurement of such coverage without reducing the quantity and quality of traditional governmental services.⁶⁰

To help reduce the adverse affects of potential awards on available funds, the Act provides that no punitive or exemplary damages may be awarded,⁶¹ and, although there is no limitation on compensatory damages for plaintiff's economic loss, there is a limit for noneconomic loss set at five hundred thousand dollars (\$500,000.00).⁶² Thus, if West Virginia should recognize a cause of action for "educational malpractice," a plaintiff's award would be limited by the Act.

The second policy consideration advanced by courts is that recognition of a cause of action will release a flood of litigation by dissatisfied parents and students, possibly ranging from the illiterate plaintiff who graduates to the gifted student who receives a "D" in a class.⁶³ The enormous number of potential plaintiffs, a result of compulsory education laws and free public school systems, is far greater than the number for any other types of malpractice.⁶⁴ However, "[i]t is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation'. . . ."⁶⁵ Nevertheless, one cannot ignore the fact that the time and expense involved with such litigation would invariably take away from the quality of education if a cause of action is recognized.

Courts have recognized that since the legislature empowers the board of education with the duty to set the educational policies and review the day-to-day implementation of such policies,⁶⁶ recognition

60. W. VA. CODE § 29-12A-2 (1986).

61. *Id.* § 29-12A-7(a) (1986).

62. *Id.* § 29-12A-7(b) (1986).

63. *Hunter*, 47 Md. App. at 712, 425 A.2d at 684; *Peter W.* 60 Cal. App. 3d at 825, 131 Cal. Rptr. at 861.

64. Funston, *supra* note 29, at 796.

65. W. PROSSER & W. KEETON, *supra* note 2, at 56.

66. W. VA. CODE § 18-2-5 (1984). *See also*, POLICIES, RULES AND REGULATIONS OF THE WEST VIRGINIA BOARD OF EDUCATION 2320, 2321 [hereinafter RULES] which implements W. VA. CODE § 18-9A-22 (1984) and provides that the county superintendent shall prepare a four year County Plan for Education Excellence to be amended and renewed annually. This plan must be submitted to the State Department of Education upon approval of local boards. Annual on-site evaluations must be made by the State Board of Education to assure compliance

by the courts of a cause of action for "educational malpractice" would be an unlawful intrusion into this decision making process.⁶⁷ Similarly, the West Virginia Supreme Court of Appeals has stated that the state board of education has the power to determine the educational policies of the public schools, and the courts cannot control such actions relating to educational policies unless they are unreasonable or arbitrary.⁶⁸ Thus, a West Virginia court will probably strongly weigh this policy consideration when deciding whether to recognize a cause of action for "educational malpractice."

Another strong policy consideration against recognizing a cause of action is the court's belief that the proper avenue of relief is through nonjudicial remedies,⁶⁹ such as the administrative review and appeal.⁷⁰ The West Virginia Board of Education has provided a grievance procedure to handle public complaints when a state law or state board policy, rule, or regulation has allegedly been violated. The complainant must first informally discuss the concern with the proper school administrator, usually the principal. If a satisfactory result cannot be reached, then a formal written appeal must be filed with that same administrator. Upon further unsatisfactory results, the complainant has a right of appeal to the county superintendent, county board of education, and state superintendent in that order.⁷¹ These administrative agencies provide a more expedient resolution of the case⁷² and a more appropriate remedy, that of remedial education instead of money damages.⁷³ Another nonjudicial remedy involves the parent's right (a student has the same right if he is eighteen years or older) to inspect the school records and challenge any inaccuracies the parent believes the records contain.⁷⁴ Thus a parent, if active in his child's education, has the opportunity to

67. *Hunter*, 292 Md. at 487-88, 439 A.2d at 585; *Donohue*, 64 A.2d at 37, 407 N.Y.S.2d at 879.

68. *Detch v. Bd. of Educ.*, 145 W. Va. 722, 117 S.E.2d 138 (1960).

69. See generally 3 M. BINDER, EDUCATION LAW § 12.03(3) (1987).

70. *Hoffman*, 49 N.Y.2d at 127, 400 N.E.2d at 320, 424 N.Y.S.2d at 379-380; *Donohue* 47 N.Y.2d at 445, 391 N.E.2d at 1355, 418 N.Y.S.2d at 378.

71. RULES, *supra* note 66, at 7211.

72. *D.S.W.* 628 P.2d at 557.

73. *Id.*

74. RULES, *supra* note 66, at 4350.

compare his child's records with his own perceptions of his child's performance in school. An aggrieved parent could also proceed to have the teacher's performance evaluated which could lead to the teacher's dismissal — a remedy which, when coupled with receiving remedial education, satisfies the plaintiff and prevents further incidents.

A final policy consideration that has not been cited by a court but that may play a part in a West Virginia court's decision is that recognition of "educational malpractice" would discourage quality teachers from practicing in West Virginia for fear of being sued. Even though the teacher would not be named as a defendant,⁷⁵ there is still the stigma involved with such a suit, the loss of credibility, and the time spent helping in the defense.

Possible policy arguments favoring a recognition of a cause of action for "educational malpractice" are as follows: nonjudicial remedies may not be adequate; malpractice suits would deter school boards from hiring incompetent teachers; suits would deter poorer students from seeking a career in education; and county officials would be forced to conduct structured competency-based testing every year to ensure that students are not being promoted prematurely. However, these same results can be achieved by less drastic means such as requiring higher scores on the National Teachers Exam, higher grade point averages for certification, and stricter screening of education majors before the student teaching experience. Furthermore, higher quality education could be achieved if Board of Education members were required to have at least a bachelor's degree in education.

IV. CONCLUSION

If and when a West Virginia court is first faced with a claim for "educational malpractice," it should look to other courts for guidance because their analysis and discussion have been thorough. The court should also look to the Act, not only because it would apply to the situation if a cause of action is recognized, but also

75. W. VA. CODE § 29-12A-7(b) (1986).

because it reflects the legislature's attempt to limit the liability of political subdivisions because of their inability to pay large awards and to defend numerous suits; such intent is a major policy consideration.

Furthermore, because recognition of a cause of action would force the courts to decide on the day-to-day implementations of the education policy set by the legislature and in the control of the boards of education, because administrative remedies would be faster and more appropriate to enable the student to gain the highest level of knowledge based on his capabilities, and because of the difficulties that plague each element of negligence, the court should not recognize a duty of an educator to a student and should not recognize a cause of action for "educational malpractice."

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