Reinvigorating Educational Malpractice Claims: A Representational Focus

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REINVIGORATING EDUCATIONAL MALPRACTICE CLAIMS: A REPRESENTATIONAL FOCUS

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Abstract: For the past twenty years, courts have faced a wide array of claims alleging misconduct by schools and their officials. These claims have involved diverse injuries, including: negligence in permitting functional illiterates to pass through the school system; negligent misdiagnosis of learning disabilities; and failure to deliver a promised package of educational skills and services.

The judiciary has almost uniformly refused to allow recovery, in tort or otherwise, for such injuries. Some courts have conceded that, on the pleadings, a good case might be made out. Plaintiffs have nonetheless been turned away because of courts' related concerns with untrammeled litigation and with invading the province of the legislative and administrative bodies charged with operating the schools.

This Article adopts the position that such a wastebasket approach to claims of educational injury is unjustified, and should be abandoned. The Article first attempts to sort out the various kinds of cases that courts have treated identically. It then proposes that a proper focus on the kinds of representations made in the educational setting, and plaintiff's sometimes forced reliance on those representations, can aid in the resolution of these disputes without justifying judicial fears. This emphasis on representation and reliance is justified through an examination of the role that representational notions play in other areas of tort law.

Armed with the ordnance of representation, the Article then reconsiders a wide range of educational malpractice cases, suggesting approaches and solutions to problems that have thus far evaded principled analysis.

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The objects of... primary education... would be... To enable [every citizen] to calculate for himself, and to express and preserve his ideas... in writing; To improve, by reading, his morals and faculties; To understand his duties to his neighbors and country, and to discharge with competence the functions confided to him by either; To know his rights; To exercise with order and justice those he retains...; And, in general, to observe with intelligence and faithfulness all the social relations under which he shall be placed.

— Thomas Jefferson

I. INTRODUCTION

Thomas Jefferson could not have predicted that, almost two hundred years after expressing these aspirations, the promise of public education would remain unfulfilled. Every year, thousands of students at the threshold of adulthood are graduated from high school lacking basic literacy. As the number of such students has increased, so too has the number of lawsuits filed against public and private educational institutions and those who work for them. With one voice, courts


2. The problem of illiteracy is of pandemic proportions, but attempts to fix the number of illiterates have met with limited success. In 1982, a Census Bureau study found that between 17 and 21 million adults are illiterate in English. 13% of Adults Can't Read Plain English, U.S. Tests Find, L.A. TIMES, Apr. 22, 1986, at 6. In 1985, the National Assessment of Educational Progress assessed the literacy skills of America's young adults, and the results were distressing. The study found that "only" 10 million adults were illiterate, but that 36 million could not read at an eighth-grade level, and that a total of 70 million could not read at an eleventh-grade level. Jonathan Kozol, Illiteracy Statistics: A Numbers Game, N.Y. TIMES, Oct. 30, 1986, at 31. The study also found that adults had problems performing simple tasks that require the most basic literacy: 80 percent could not read a bus schedule or calculate a tip in a restaurant; and 40 percent could not follow map directions. Id.

Part of the problem in fixing a number is definitional. Until recently, illiteracy was measured by reference to grade level completed. Experts now recognize, however, that such a barometer provides no reliable indication of whether one can actually read. Cf., 13% of Adults Can't Read Plain English, U.S. Tests Find, supra (quoting Robert Barnes, supervisor of Census Study, who blamed illiteracy in part on "longtime school policies of grade promotion based on age"). Further, what does it mean to say that one can "read"? If the focus is on the ability to make effective use of the types of information with which one is confronted daily, the estimated number of illiterates will be higher than if the question is whether the most basic reading skills have been acquired. See Kozol, supra.

By whatever means the measurement is taken, it is obvious that illiteracy is a grave national problem. Alexis de Toqueville may have been the first to observe that, because of the unique role of American courts in deciding constitutional questions, every issue of enough significance to generate laws will soon be subject to "the searching analysis of the judicial power." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 85 (1966). We shall see that the very pervasiveness of illiteracy should, under the principles of representation, make recovery for this subset of educational malpractice claims more difficult.

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have turned plaintiffs away, declining to find a cause of action for functional illiteracy.³

Illiteracy, however, is but one of a host of more-or-less related problems arising in the educational setting that has given rise to litigation. Another common allegation centers on the negligence of school personnel in diagnosing learning disabilities.⁴ Less frequent are suits alleging that an institution’s negligence has injured a third party. For


The above cases are cited together because the courts treat them all as arising under the rubric of “educational malpractice.” As I shall argue, the courts’ failure to distinguish between very different types of cases has led to injustice.

4. Claims of functional illiteracy typically call into question a school’s ability to provide a competent program of instruction, while misdiagnosis claims attempt to tie the injury to specific negligent acts or omissions. In the latter class of cases, the complaint may allege that a test, perhaps administered by a psychologist, was either incompetently given, or that the results of the test (and the attendant recommendations of the psychologist) were simply ignored. See, e.g., Doe v. Board of Educ., 453 A.2d 814, 816 (Md. 1982); Hoffman v. Board of Educ., 400 N.E.2d 317, 319 (N.Y. 1979). Other claims allege that a particular type of learning disability was not diagnosed, and that the student was therefore permitted to languish in an inappropriate classroom setting. See, e.g., D.S.W. v. Fairbanks North Star Borough Sch. Dist., 628 P.2d 554, 554 (Alaska 1981). It may also be alleged that a misplacement subjected the child to ridicule, mental anguish or a damaging loss of ego. See, e.g., B.M. v. State, 649 P.2d 425 (Mont. 1982). Cases arising under the Education of the Handicapped Act, 20 U.S.C. § 1400 (1988), may allege that the district’s refusal to fund the child’s placement was wrongful, so that reimbursement is required. See Christopher T. v. San Francisco Unified Sch. Dist., 553 F. Supp. 1107 (N.D. Cal. 1982).

As the above suggests, the line between the two sets of claims is not at all distinct. Judicial fear of starting down the dreaded “slippery slope” has caused courts to classify all such claims under

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example, a medical school has produced uninformed doctors who then injure others. With similarly impressive uniformity, courts have rejected these claims as well. All of the foregoing cases are typically classified under the rubric of "educational malpractice."

Judicial homogeneity, always surprising, is even more so in this class of cases because commentators have been almost as united on the other side of the question, and have called for recognition of the tort of educational malpractice. Such a pronounced division invites specula-

the heading "educational malpractice," thereby eliding the important distinctions between particular cases.


6. Commentators, by and large, employ a traditional negligence analysis in concluding that claims for educational malpractice should at least be recognized. See, e.g., Terrence D. Collingsworth, Applying Negligence Doctrine to the Teaching Profession, 11 J.L. & EDUC. 479, 498–501 (1982) (recognizing that the most difficult problem involves establishing causation, especially where the claim is for functional illiteracy); John Elson, A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching, 73 NW. U. L. REV. 641, 694–745 (1978) (thoroughly examining the issue of duty, concluding that educators should be held to a professional standard of care); Robert H. Jerry II, Recovery in Tort for Educational Malpractice: Problems of Theory and Policy, 29 KAN. L. REV. 195 (1981) (cannassing cases and deciding that judicial refusal to recognize a cause of action cannot be reconciled with general tort principles, and that denial of such claims should come from the legislature, if at all); Gershon M. Ratner, A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills, 63 TEX. L. REV. 777 (1985) (arguing that duty is that of a reasonable educator, and that causation can be demonstrated by comparing the education given to what other students were receiving; article also argues that characteristics of successful schools can be, and have been, identified). But see Richard Funston, Educational Malpractice: A Cause of Education in Search of a Theory, 18 SAN DIEGO L. REV. 743 (1981) (expressing doubt that duty, causation, or damages could be established for educational malpractice claims). The problem has not gone unnoticed in other common law countries. See, e.g., William F. Foster, Educational Malpractice: A Tort for the Untaught?, 19 U.B.C. L. REV. 161, 217–28 (1985) (finding debate over whether educators qualify as professionals to be beside the point, finding it clear that they possess skills and knowledge that laypersons do not); Ian M. Ramsey, Educational Negligence and the Legalisation of Education, 11 U.N.S.W. L.J. 184 (1988) (balanced assessment of the advantages and drawbacks to recognizing the cause of action, with attention given to the differences between the kinds of events that give rise to educational malpractice claims).

The topic has also spawned a number of student comments, taking both sides on the question. See, e.g., Joan Blackburn, Comment, Educational Malpractice: When Can Johnny Sue?, 7 FORDHAM URB. L.J. 117, 133–35 (1978) (arguing against general recognition of educational malpractice, but suggesting that a proper case of negligent misrepresentation should be permitted to proceed); Karim H. Calavenna, Comment, Educational Malpractice, 64 U. DET. L. REV. 717 (1987) (rejecting educational malpractice claims, in part because they might discourage potentially good teachers from entering the profession); Deborah Dye, Note, Education Malpractice: A Cause of Action That Failed to Pass the Test, 90 W. VA. L. REV. 499 (1987) (rejecting the tort in favor of administrative remedies); Daryl Andrew Nelson, Comment, Educational Malpractice, 4 GEo. Mason U. L. REV. 261 (1981) (arguing that the benefits of the cause of action outweigh the costs); Destin Shann Tracy, Comment, Educational Negligence: A Student's Cause of Action for Incompetent Academic Instruction, 58 N.C. L. REV. 561 (1980) (suggesting a limited right of action); Edward J. Wallison, Jr., Note, Nonliability for Negligence in the Public Schools—Educational Malpractice from Peter W. to Hoffman, 55 NOTRE DAME L.
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tion: Why has the judiciary been unresponsive to what appear to be effective point-by-point refutations of the arguments typically advanced in denying recovery?

Two related problems have created this blockade. First, courts fear that application of traditional negligence doctrine to the educational setting will result in an unprincipled growth of claims, because the interrelated problems of pedagogy, testing, and student motivation (to name the most obvious) are so difficult to analyze in any systematic way. This perception stems, at least in part, from the other problem; courts consistently fail to distinguish between vastly different cases. The tendency to fuse virtually all claims arising in the educational context—through the simple expedient of labelling them all “educational malpractice”—both masks important distinctions between the cases and allows wholesale (and unprincipled) judicial rejection of them.7

One could argue that too much has already been written on this subject, given that courts have continued to turn a deaf ear to commentators’ calls for recognition of the tort.8 My purpose here, how-

7. That the judicial mission should be to seek integrity in law has been perhaps most eloquently stated by Ronald Dworkin, who stated that judges must examine the precedent cases for principles into which the presenting case can be woven, and should generally decide cases within the (hazy) legal body they are able to discern. RONALD DWORKIN, LAW’S EMPIRE 239–50 (1986) (applying this principle to a case involving recovery for emotional distress). Even if this principle is applied in its simplest formulation—without taking account of situations in which the judge can extract only limited guidance from the decided cases—it is obvious that courts have been wrong in systematically denying recovery to victims of educational malpractice. As this Article demonstrates, and as at least one court has admitted, any reasonable application of settled negligence principles would allow recovery in many cases. See Donohue v. Union Free Sch. Dist., 391 N.E.2d 1352, 1353–54 (N.Y. 1979).

8. Yet the time seems ripe for a fresh examination of the issue, given that courts continue to be confronted with claims of educational malpractice, contrary precedent notwithstanding. Within little more than the past year, a new spate of decisions have been issued, all but one of which continued the almost uniform practice of outright rejection of claims for deficient education. See, e.g., Bishop v. Indiana Technical Vocational College, 742 F. Supp. 524 (N.D. Ind. 1990) (refusing to recognize claim for educational malpractice under 42 U.S.C. § 1983); Ross v. Creighton Univ., 740 F. Supp. 1319 (N.D. Ill. 1990) (rejecting claim of former student, recruited as basketball player, who claimed that he should not have been admitted, because the school knew that he would be unable to perform college-level work); Howell v. Waterford Pub. Schs., 731 F. Supp. 1314, 1317 (E.D. Mich. 1990) (interpreting § 504 of the Education of the Handicapped Act and Rehabilitation Act not to create “general tort liability for educational malpractice”); Rich ex rel. Rich v. Kentucky Country Day, Inc., 793 S.W.2d 832 (Ky. Ct. App. 1990) (upholding summary judgment in parents' suit for breach of contract and educational malpractice against private school that had not acted on recommendation of psychologist chosen by parents; court relying extensively on New York and California precedent); Poe v. Hamilton,
ever, is not to reiterate what courts already know: Such claims are supported by traditional negligence principles. Instead, I argue that judicial attention should be directed at the often-overlooked role of representations, which suffuse the law of torts. Due emphasis on the representations made in the educational setting, and on parents’ and students’ reliance on those representations, can allow sensible distinctions between cases that courts have uncritically equated. These distinctions should be useful to courts in the search for just results.

This Article begins by briefly reviewing the possible sources of duty, which, when breached, could support a claim for educational malpractice. In so doing, it also of necessity discusses the crippling limitations imposed by the judiciary on each suggested basis of duty. This Article does not attempt to show that the duty to provide a certain education can be derived from any of several different sources. Rather, it suggests that the particular source of the duty may have significance under a representational analysis.

Part III explores this representational notion. Both products liability law and the law of professional liability are looked to as instances of the central, but usually unstated, position that representational principles play in tort law. These principles provide a powerful lens through which to view the related questions of reliance, causation, and the positions and power of all players: the student, the educational institution, and the parents.

Using this representational focus as a kind of lighthouse, this Article then revisits and examines in some detail the existing jurisprudence in educational malpractice cases. Due attention to the representations present in those cases, part IV argues, can assist courts in making principled determinations. Indeed, many judges have imparted this focus to the facts before them without expressly acknowledging their representational color.

In part V, this Article moves from cases brought under common law negligence to cases involving the application of statutes, and decisions involving claims that negligence in the educational process caused injury to third parties. The aim is to show that the representational orientation can provide a useful tool for working through these

565 N.E.2d 887 (Ohio Ct. App. 1990) (court listing a host of reasons for disallowing high school student’s claim that teacher had been negligent in administering fewer than the promised number of quizzes, including immunity, presumptive failure to demonstrate causation, and public policy against recognizing educational malpractice claims). But see Malone v. Academy of Court Reporting, Nos. 90AP-264, 90AP-430, 1990 WL 250496 (Ohio Ct. App. Dec. 31, 1990) (dismissing reversal where plaintiffs suing paralegal school proceeded under breach of contract and misrepresentation, not under educational malpractice in tort).
cases and, by extension, others in which the educational system has somehow malfunctioned.

II. SOURCES OF DUTY

Claims alleging failure on the part of a school system to provide an adequate education have been part of the judicial landscape for almost two decades now. Recovery, however, has been a different matter. Plaintiffs typically find themselves turned out of court by a threshold determination that the defendant school system and its employees owe no enforceable duty to provide an education. Only those cases decided under federal statutes have disclosed a consistent exception to this blanket approach.

As with any other class of claims, educational malpractice actions have proceeded under a number of different theories, each of which bears a signature duty. A statute expressly affording a private right of action, of course, is the preferred vehicle, since it announces its own duty. It is therefore not surprising that cases decided under federal statutes, such as the Education of the Handicapped Act, that expressly authorize judicial recourse and remedy, have granted (admittedly limited) relief in appropriate cases.

Another promising strategy is to argue that constitutional and statutory provisions that do not expressly provide a private right of action nonetheless create a duty running from defendant to plaintiff. There


10. See Honig v. Doe, 484 U.S. 305 (1988); Burlington Sch. Comm. v. Massachusetts Dep’t of Educ., 471 U.S. 359 (1985); Mrs. W. v. Tirozzi, 832 F.2d 748 (2d Cir. 1987). As we will see, the more interesting question is whether the statutes may fairly be interpreted to permit recovery of money damages (and if so, to what extent) by those who have been wronged by an erroneous placement or assessment.

11. The Supreme Court has made clear that, under the Education of the Handicapped Act, 20 U.S.C. §§ 1400-85 (1988), courts are empowered to order school authorities to reimburse parents for their expenditures on private school education if the court decides that such placement is proper under the Act. Burlington School Comm., 471 U.S. at 359. In a unanimous decision, the Court held that the statutory directive to courts to “grant such relief as [they] determine is appropriate,” 20 U.S.C. § 1415(e)(2), authorizes such reimbursement. Burlington School Comm., 471 U.S. at 369. But this holding leaves many questions unanswered. See infra part V.A.

12. Following hornbook principles, courts read a given statute as fixing a standard of care only where certain requirements have been meet. First, the statute must be determined to be for the benefit of a particular class of individuals, rather than for the benefit of the state or of the community. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 222–23 (5th ed. 1984). Once that threshold has been cleared, plaintiffs must also show that they were in the class of persons for whose benefit the statute was enacted, and that the harm suffered fell within the risk against which the statute was enacted to guard. Id. at 224–25.
are at least two problems with this approach. First, the constitutional provisions, at least, are so broadly drafted that they can fairly be read as expressing a general goal of public policy, rather than as conferring specifically enforceable rights. Courts typically read such provisions unsympathetically. A second, and related problem, is that courts reluctant to recognize a claim for educational malpractice in the first place are not likely to be persuaded otherwise by a statute that they can choose not to apply.

Another possible source of duty is contract. As with statutory duty, recovery under a contract theory holds promise where courts can identify a specific undertaking to deliver a certain educational “package;” a possibility in the private school context. By contrast, implied contract claims have been infrequent and jurally disfavored.

13. None of the state constitutional provisions referring to education are highly specific. See infra part II.B.

14. See e.g., Oleszczuk v. State, 604 P.2d 637, 641 (Ariz. 1979) (stating “the more specific and narrow the duty required by the statute, the more likely it is that the duty has been narrowed from a general duty to the public to a specific duty to an individual,” the court denied the claim against the state, that had issued a driver’s license to a known epileptic).

15. A good example of this treatment is Daniel B. v. Wisconsin Dep’t of Pub. Instruction, 581 F. Supp. 585 (E.D. Wis. 1984). The court allowed the claim for declaratory relief, arising under the Education of the Handicapped Act, to survive, but rejected a claim for money damages under that Act. Also rejected were claims purportedly arising under 42 U.S.C. § 1983 (1988), for violation of constitutional rights, and state law claims for intentional misrepresentation and negligence. See infra part V.A.

16. The best chance for recovery under this theory involves claims against schools that provide specific skills, as opposed to a general education. Compare Malone v. Academy of Court Reporting, Nos. 90AP-264, 90AP-430, 1990 WL 250496 (Ohio Ct. App. Dec. 31, 1990) (improper to dismiss claim against paralegal school that had allegedly breached express promises to its students) with Paladino v. Adelphi Univ., 454 N.Y.S.2d 868, 873 (App. Div. 1982) (entering summary judgment on behalf of private school that had allegedly failed to deliver a promised level of education; court noted in dictum that the result might differ if the school had failed to perform contractually specified services, such as providing a specific number of hours of instruction).

17. Typically, the breach of implied contract claims have been yoked to negligence claims, and the courts have summarily dismissed both. A good recent example of this approach is apparent in Ross v. Creighton Univ., 740 F. Supp. 1319 (N.D. Ill. 1990). There, plaintiff student had been recruited by defendant university to play basketball. The complaint alleged that Creighton had acted negligently, and in breach of contract, both by admitting a student they knew to be unable of doing college level work (he had scored 9 of 36 on the American College Test, while the average Creighton student had scored 23.2 that same year) and by then failing to provide substantial assistance that might have enabled him to “catch up.” Id. at 1322–23. The court, attempting to predict Illinois law, first rejected the claim for educational malpractice, principally because of its perception that “in education, the ultimate responsibility for success remains always with the student.” Id. at 1328. The court then rejected the claim that the university had breached its “implied duty of good faith and fair dealing.” Id. at 1331. In effect, the court held that, absent a specific contractual promise that had been breached, no action for breach of contract would survive. See also Poe v. Hamilton. 565 N.E.2d 887 (Ohio Ct. App. 1990), where plaintiff who failed a psychology course, and was therefore unable to be
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But by far the most often-tested source of duty, because the most flexible, has been common-law tort: negligence, or, on occasion, misrepresentation. Negligence doctrine seems particularly appealing, but, as stated above, courts have choked off such claims by refusing, for policy reasons, to recognize a duty to provide a non-negligent education.

This section provides a brief overview of the various duties that have been tested. For expository purposes, negligence law, which contains the bulk of cases, is treated first. The section then moves briskly through constitutional law and statutory law, taking the Education of the Handicapped Act as an example. Finally, it discusses the application of contract and misrepresentation theories to the educational malpractice context. Because the source of the duty selected is subordinated to the representational theory proposed in Section III, much of the discussion under any particular theory is deferred until after the discussion of representation.

A. Judicial Background—Rejection of Negligence Theory

The earliest case to confront the issue of educational malpractice involved a claim of functional illiteracy. In Peter W. v. San Francisco Unified School District, a student who had received his high school diploma from the defendant public school district was graduated with the reading skills of a fifth-grader. Sounding in negligence, his complaint alleged that the educators involved had failed to "exercise that degree of professional skill required of an ordinary prudent educator under the same circumstances." The alleged acts of negligence graduated with her class, claimed that, as a result of the teacher's failure to follow the board of education's rules, she was unaware that she was having problems in the course. The court dismissed both the negligence and the implied contractual claims for failure to demonstrate causation and for vague "public policy" reasons. Id. at 889. The genesis of this rejection of contract appears to be Torres v. Little Flower Children's Serv., 474 N.E.2d 223 (N.Y. 1984), cert. denied, 474 U.S. 864 (1985), discussed in detail infra part IV.B.

18. The early case of Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854 (Ct. App. 1976), see infra, notes 19-25 and accompanying text, featured a claim for negligent misrepresentation, but the court dismissed that claim for the same public policy reasons that caused it to reject the more general negligence claim. For a good, early discussion of the promise of a negligent misrepresentation theory in the educational context, which focuses on the reasonableness of reliance on representations, see Blackburn, supra note 6, at 132-37.


20. Id. at 856. Plaintiff based this claim upon a state statute that provided: [W]here a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

CAL. GOV'T CODE § 815.6 (West 1980).
included, in sum: failure to detect plaintiff's problems and to assign him to appropriate classes; permitting him both to advance from grade to grade, and ultimately to be graduated, although he did not possess the proper skills; and assigning him to unqualified instructors. Plaintiff sought damages for loss of earning capacity, inability to obtain most types of employment, and the cost of compensatory tutoring.

Inasmuch as the complaint sought recovery under a novel theory, plaintiff attempted to persuade the court to recognize a duty running from the school system and its employees to its students along three related lines. First, teachers are public employees who, by assuming the discretionary function of education, accept a duty to instruct with reasonable care. Second, a special relationship exists between students and teachers that gives rise to a duty of care. Finally, plaintiff pointed to the recognized duty to use reasonable care in instructing and supervising students in cases in which physical injury had resulted, and urged the court to extend liability to non-physical injuries such as functional illiteracy.

Although the court rejected each of these proposed sources of duty in turn, the central concern was with the "public policy considerations" militating against recognition of such a duty. After setting forth the factors generally to be considered in deciding whether to recognize a new duty, the court proceeded to consider three concerns with complaints based on functional illiteracy. First, it found no workable standard of care for educators, as "the science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught." Next, the court noted the difficulty of proving the causal connection between negligent conduct and injury. In so

21. The allegation that plaintiff was permitted to be graduated without the proper skills was based upon California Education Code § 8573, which the plaintiff alleged created a mandatory duty not to graduate students from high school without demonstration of proficiency in basic skills. 131 Cal. Rptr. at 862 n.5. That section has since been replaced by California Education Code § 51217 (West 1989), that establishes proficiency in basic skills as a prerequisite to graduation, and instructs the relevant secondary schools' board of education, within the framework established by the State Board of Education, to prescribe the required skills. As will be discussed infra part III, such a provision may be relevant under the representational theory.

22. Peter W., 131 Cal. Rptr. at 858.

23. Those considerations were: the social utility of the activity out of which the injury arises, compared with the risks of implementation; party relationship; workability of the rule in prevention of injury; ability of the parties to bear or spread the financial burden of injury; the relevant statutes and case law; the prophylactic effects of such a rule; the extension and limitation of powers placed on a public agency defendant by the law and its budget; and moral considerations of society. Id. at 859--60 (quoting Raymond v. Paradise Unified Sch. Dist., 31 Cal. Rptr. 847, 851 (Ct. App. 1963)).

24. Id. at 860--61.
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doing, it cited factors outside the classroom such as physical, neurological, emotional, cultural, and environmental problems, all of which might affect a student's performance. Finally, the court raised the trusty "flood of litigation" worry.\textsuperscript{25}

These arguments have been rejected, not only by commentators, but by some later courts as well. In \textit{Donohue v. Copiague Union Free School District},\textsuperscript{26} for example, the New York Court of Appeals followed Peter W.'s holding in turning back a functional illiteracy claim, brought under a negligence theory, but disagreed with much of the California court's reasoning. The \textit{Donohue} court found that, despite the obvious difficulties, a plaintiff might indeed be able to demonstrate that defendant caused his or her injury. It also noted that an applicable standard of care might be found.\textsuperscript{27} The claim was nonetheless rejected because of the court's refusal to interfere with pedagogical methods.\textsuperscript{28}

In short, the New York Court of Appeals recognized that the California court's stated reasons for refusing to entertain such claims were unsupportable, but still refused recovery. The New York court stated: "[T]hat a complaint alleging 'educational malpractice' might on the pleadings state a cause of action . . . does not, however, require that it be sustained. The heart of the matter is whether . . . the courts should, as a matter of public policy, entertain such claims. We believe they should not."\textsuperscript{29}

Not constrained by the need to apply the results of their logic to actual disputes, commentators have gone the extra step that \textit{Donohue} made inevitable, and have effectively and decisively refuted the substantive objections that courts have raised in denying recovery. The

\begin{itemize}
\item \textsuperscript{25} \textit{Id.} at 861.
\item \textsuperscript{27} \textit{Id.} at 1353–54.
\item \textsuperscript{28} As the court noted: "To entertain a cause of action for 'educational malpractice' would require the courts not merely to make judgments as to the validity of broad educational policies . . . but, more importantly, to sit in review of the day-to-day implementation of these policies." \textit{Id.} at 1354. As we will see, recognition of a claim for educational malpractice does not require courts to second-guess broad policy directives, and only requires "sitting in review" of specific decisions when those decisions should, based on unexceptionable tort principles, be actionable. \textit{See infra} part IV.
\item \textsuperscript{29} \textit{Donohue}, 391 N.E.2d at 1354. This result accords with Prosser's view that the law does not provide redress simply on the basis of injury. Instead, courts have looked to a number of considerations in deciding whether to provide a legal remedy. These include administrative convenience, time constraints and the availability of an alternative remedy that would be equally effective. \textit{Keeton} et al., \textit{supra} note 12, § 53.
\end{itemize}
greatest concern has been with causation. As the California court stated in *Peter W.:

[T]he achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified.\(^\text{30}\)

Causation problems are of course daunting in functional illiteracy situations. But scholars have shown that even in those cases, it may be possible to trace illiteracy to its origin.\(^\text{31}\) Further, in only a small number of cases have plaintiffs alleged that the school system's pervasive negligence so infected the educational process that illiteracy resulted.\(^\text{32}\) Rather, the attempt has been to tie educational injury to specific acts (or omissions) of negligence. In those cases, it is frivolous to argue that causation cannot be established; most courts have not, in fact, based dismissals on causal grounds.\(^\text{33}\)

Such a result is consistent with the law's general approach toward causation. The presence of a host of factors, and the attendant difficulty of isolating the defendant's misconduct as a substantial source (if not the only source) of injury recurs throughout tort law. Consider toxic tort cases in which plaintiff must show that defendant's product, and not other environmental factors, led to injury.\(^\text{34}\) Plaintiffs face a substantial burden, and do not uniformly succeed on the causation


\(^{31}\) See, e.g., Elson, *supra* note 6, at 746–54 (acknowledging that causation can indeed be the most difficult element of an educational malpractice action to establish, but pointing out that there are methods for determining causation, such as using expert testimony to demonstrate that early deficiencies in education can have ripple effects, leading eventually to illiteracy when the student is unable to comprehend what's being taught); Ratner, *supra* note 6, at 856–58 (on the causation issue, plaintiffs should be afforded a rebuttable presumption by showing that they are educable by relying on standardized test scores, that other schools are able to provide an adequate education, and that they would have succeeded to a greater extent had their schools been like other, demonstrably more successful schools).

\(^{32}\) Peter W. and Donohue are the paradigmatic functional illiteracy cases.

\(^{33}\) For a straightforward judicial recognition that causation may be provable in the educational injury context, see Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1353 (N.Y. 1979) ("[W]hile [proximate causation] might indeed be difficult . . . to prove in view of the many collateral factors involved in the learning process, it perhaps assumes too much to conclude that it could never be established.").

\(^{34}\) Innumerable pages of judicial opinions have been given over to discussions of cause-in-fact in toxic tort cases. *E.g.*, Elam v. Alcolac, Inc., 765 S.W.2d 42 (Mo. Ct. App. 1988), involved a claim by 32 plaintiffs against defendant, the owner of a local plant that had emitted chemical toxins into surrounding bodies of water and into the air. Defendant predictably argued that the circumstantial evidence tending to link exposure to illness should not have enabled plaintiffs to have reached the jury. *Id.* at 177–79. Disagreeing, the Missouri Court of Appeals noted that:
question, but they are permitted to have their claims assessed on the merits. At least insofar as causation is concerned, there is no reason why the result in functional illiteracy cases should be different.35

B. Constitutional Sources of Duty

The United States and state Constitutions might be considered promising sources of a duty to supply an adequate education. The U.S. Constitution, however, does not expressly provide the right to an education, and the Supreme Court has provided no unequivocal indication that failure to provide even a minimal skill level offends the Constitution.36 The Court has stated, however, that providing a public school education “ranks at the very apex of the function of a State.”37 Indeed, most state constitutions do expressly provide a right to an education.38

At least one state court has held that such a constitutional provision gives rise to a private right of action for negligence. In B.M. v. State,39 plaintiff student was placed in a special education program for the educable mentally retarded. Plaintiff’s mother was not informed that her child had been segregated from her peers until some nine weeks after the fact. She promptly removed the child from the program, and subsequently brought suit for negligence, both in misclassifying her

35. This Article shall have much more to say on the relation between causation and representation. Here, the point is only to make the point that cause-in-fact may indeed be possible to demonstrate.

36. In San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973), plaintiffs challenged the use of local property tax as a method of financing public school systems in Texas, claiming that disparate incomes among residents of different school districts translated into unconstitutional educational inequalities. One of the central bases for the constitutional claim was that the effective exercise of First Amendment freedoms requires education. Id. at 35. The Court first stated that “education . . . is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.” Id. The uncertainty as to whether the Court recognizes some right to a de minimus level of education arises from the Court’s later statement: “Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite . . . we have no indication that the present levels of educational expenditures in Texas provide an education that falls short.” Id. at 36–37.


38. See Ratner, supra note 6, at 814 n.138 (collecting constitutional provisions).

daughter and in segregating her from her classmates. The court found that the state constitution, as implemented by various statutes relating to both regular and special education, supported a duty of care. The Montana Constitution provided that "[e]quality of educational opportunity is guaranteed to each person of the state."\textsuperscript{40}

The Montana Constitution's declaration of educational goals is among the stronger expressions of the right. Stopping short of a guarantee, other constitutions may require "promotion" of public education,\textsuperscript{41} or that the state legislature provide "a thorough and efficient" public educational system,\textsuperscript{42} or (in language sounding least like rights are being created) that the state provide free public education.\textsuperscript{43}

One scholar argues that such statements should be construed as giving rise to private rights of action, inasmuch as they signal the state's commitment to the educational mission.\textsuperscript{44} This approach would deemphasize the general nature of the constitutional language, focusing instead on the state's announced policy of creating an educated populace. The counterargument is that the provisions are too general to be reasonably understood as giving rise to any rights at all.

A division of powers type of argument has also been invoked against judicial involvement. Simply stated, the point is that the very state legislatures that have established the constitutional "right" to an education have also charged state officials, primarily local school boards, with educational policy decisions.\textsuperscript{45} Then, almost as a corollary, the further point is made that to countenance educational malpractice claims would be to permit judicial second-guessing of legislative and administrative prerogative.\textsuperscript{46}

\textsuperscript{40} Id. at 427 (citing MONT. CONST. art. x, § 1). The procedural posture in which the case reached the court made it inappropriate to consider whether "that duty was breached here, and assuming a breach, whether the child was injured by the breach of duty . . . ." Id. The question whether the child was injured by the breach of duty came to the fore later, when the case returned to the Montana Supreme Court. The court then held that plaintiff had conceded that no injury had resulted from the defendants' negligence. B.M. ex rel. Berger v. State, 698 P.2d 399 (Mont. 1985); see supra text accompanying note 3.

\textsuperscript{41} See Ratner, supra note 6, at 816 n.145.

\textsuperscript{42} See id. at 815, n.144.

\textsuperscript{43} See id. at n.143.

\textsuperscript{44} See id. at 814–51. Ratner suggests that both substantive due process and equal protection grounds support recognition of a cause of action for educational malpractice.

\textsuperscript{45} See Tracy, supra note 6, at 591 (one "rationale offered for judicial noninterference is the constitutional and statutory delegation of educational matters to state and local administrative bodies") (citing Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1354 (N.Y. 1979) for the proposition that to recognize educational malpractice would be to flout constitutional and statutory commands that school administrative bodies run the schools).

\textsuperscript{46} This same argument has been made under several of the other theories used in an attempt to support educational malpractice claims. One notable instance is negligence, where courts have
This last point is a *non sequitur*. In the vast majority of cases, courts are not second-guessing policy choices by whatever body is charged with setting that policy; instead, they are considering a claim that the policies in question were not carried out. Consider the negligent misdiagnosis cases for example. A child is tested for learning disabilities and is said to suffer from mild retardation. The proper administrative procedure might call for periodic retesting of the child, perhaps coupled with notice to the parents of alternatives to be pursued. When the school officials charged with action under the administrative regime fail to carry out their responsibilities, and it transpires that the diagnosis was incorrect, judicial intervention is necessary precisely because the policies in question were not followed.

Moreover, in those rare instances where legislatures have failed to establish adequate procedures for the vindication of constitutional rights, courts exercise their highest function by interceding on behalf of victims. Judicial deference to legislative policy-making has no place when the legislature has abdicated its responsibilities.

**C. Statutory Guarantees of Education—The Education of the Handicapped Act**

Another possible source of duty, available in a certain subclass of educational malpractice cases, is the Education of the Handicapped Act sometimes supported their refusal to recognize a duty with a statement that such recognition would place the courts in the position of super school boards. Hunter v. Board of Educ., 439 A.2d 582, 584 (Md. 1982).

47. A related problem is whether established administrative remedies should preclude, or at least delay, access to the judiciary. Because the legislature has charged, say, a school board, with educational policy decisions, the argument is that the relevant agency should have the chance to tidy up matters before the court is brought in. As discussed infra part IV, this approach as a general matter is not incorrect, provided the administrative machinery is at least somewhat effective. But, as in other areas of law, there appears no reason to bar judicial involvement once the administrative procedures have been exhausted, or exhaustion would be futile. Mrs. W. v. Tirozzi, 832 F.2d 748, 756–57 (2d Cir. 1987) (defendants' motion for judgment on the pleadings for failure by the plaintiffs to exhaust administrative remedies under the EHA denied, where plaintiffs alleged, *inter alia*, that administrative relief would have been inadequate). See also Kenneth C. Davis, Administrative Law Treatise § 26:11 (2d ed. 1983).

48. The bellwether case here is Hoffman v. Board of Educ., 410 N.Y.S.2d 99 (App. Div. 1978), rev'd, 400 N.E.2d 317 (N.Y. 1979), in which precisely this sort of prolonged misplacement resulted from a negligent initial diagnosis. The case is discussed in detail infra part IV.A. The appellate division, although reversed by New York's Court of Appeals, had the better argument: "It ill-becomes the Board of Education to argue for the untouchability of its own policy and procedures when the gist of plaintiff's complaint is that the entity which did not follow them was the board itself." 410 N.Y.S.2d at 110.

49. Brown v. Board of Educ., 347 U.S. 483 (1954), stands as the best-recognized example of a case in which the Court unanimously exercised its constitutional function by overriding state statutes that either permitted or required racial segregation.
Act (EHA), enacted in 1968 and subsequently amended on several occasions. The Act was passed to ensure that:

[C]hildren with disabilities have available . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities . . . are protected [and] to assist States and localities to provide for the education of all children with disabilities . . . .

The Act establishes a federal-state partnership, by which federal funds become available for the fulfillment of the above goals, provided that the state meets certain eligibility requirements. States must put into effect a policy and develop a plan to grant handicapped children the right to a public education. States also are impelled to adopt a


51. Id. § 1400(c) (1988). The Act's passage was inspired by congressional findings that the educational needs of more than half of the eight million handicapped children in the United States were not being met, that parents were forced to look beyond the public school systems for education of their children with disabilities, and that state and local educational agencies had advanced to the point where federal funding could be effectively used to meet the educational needs of such children. Id. § 1400(b).


The question of what is meant by "adequate" is of course difficult to answer, and Congress did not materially contribute to the solution by requiring states to provide an "appropriate public education." 20 U.S.C. § 1412(1). The Supreme Court attempted to supply some guidance in Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 188-89 (1982):

The Act's requirement of a 'free appropriate public education' consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the child's [individual educational program]. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act.

52. This is a vast oversimplification of how the statute actually works. While a more detailed treatment is beside the point here, a few points should be made. First, although the statute was in large part designed to provide federal funding to educate the handicapped, even qualifying programs receive only a portion of their funding from the federal government; the state must
system of procedural safeguards to ensure that handicapped children actually receive the services to which the Act entitles them. One of the most important mechanisms for protecting these statutory rights is the opportunity for "an impartial due process hearing . . . conducted by the State educational agency or by the local educational agency . . . as determined by State law or by the State educational agency."\(^5\)

How might this statutory scheme serve as the basis for an educational malpractice claim? The first question to ask is whether the child meets the statutory definition of handicapped. That definition is broad enough to include many of the children who are likely to claim injury through educational malpractice, since it includes physical disabilities,\(^5\) speech impairments,\(^5\) mental retardation, serious emotional disturbance, and other "specific learning disabilities."\(^5\) All children so afflicted are protected to the extent that they, by reason of their handicap, "need special education and related services."\(^5\)

Once it has been determined that a child meets the statutory definition, redress to the courts will be possible because the statute expressly creates a private right of action.\(^5\) There are at least two important

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\(^{53}\) Id. § 1415(b)(2). The statute also provides an absolute right of appeal, to either state or federal district court, for those who disagree with the decision made at the administrative level(s). In such a case, the court, based on the administrative records and any additional evidence the parties present, "shall grant such relief as the court determines is appropriate." Id. §§ 1415(e)(1)–(2).

\(^{54}\) Included are children with "hearing impairments, . . . visual impairments, . . . orthopedic impairments, [or] other health impairments." Id. § 1401(a)(1).

\(^{55}\) Also protected are children with "language impairments." Id.

\(^{56}\) Id.

\(^{57}\) Id.

\(^{58}\) See, e.g., Mountain View-Los Altos Union High Sch. Dist. v. Sharron B.H., 709 F.2d 28, 29 (9th Cir. 1983) (because the statute, by terms, permits the filing of a civil action, "[i]here is no doubt . . . that [it] grants a private right of action"). The more interesting question, discussed infra note 62, is whether money damages can be recovered for violation of the statute. However this question is resolved, the damage awarded is only for the cost of education; it does not substitute for the tort damage remedy, with its goal of making plaintiff whole. In White v. State, 240 Cal. Rptr. 732, 742 (Ct. App. 1987), for example, the court held that such tort damages were not recoverable.
qualifications, however. First, plaintiffs are generally required to defer judicial redress until after the administrative proceedings, including the hearing mentioned above. Second, despite the statutory language granting the court authority to "grant such relief as [it] determines is appropriate," courts have not been sympathetic to claims for damages. Some courts have declared damages inappropriate while others have limited damage actions to situations involving bad faith or intentional misconduct. The Supreme Court has made clear that reimbursement is to be granted for the cost of alternative education made necessary by the state's improper placement of the child, but has not otherwise answered the damages question.

Thus, the statute at once creates and tightly restricts the duty. Inasmuch as traditional negligence theories have proven unavailing, any prospect of relief will presumably be cheered by victims of educational malpractice. But are the results defensible? As is later contended, the prevailing judicial interpretations of these statutes have usually been sensible, under a view that pays proper attention to policy makers’ representations and communications, and to the range of options available to handicapped students and their parents. To the extent that broad recovery for damages has been foreclosed, however, the decisions are sometimes deficient.

D. Express Representations and Fraud

Despite the obvious limitations inherent in disallowing damage claims in the greatest number of cases, the EHA has provided at least some recourse to a certain class of educational malpractice plaintiffs. Another theoretically promising, but also limited, area of recovery has been recognized where courts have found express representations that

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61. See, e.g., Anderson v. Thompson, 658 F.2d 1205, 1209–14 (7th Cir. 1981) (limiting damages to cases in which a placement was made that either endangered the child’s physical health or evinced a bad-faith failure to comply with the procedural provisions of the EHA).
62. Burlington Sch. Comm. v. Maryland Dep’t of Educ., 471 U.S. 359, 371 (1985). One question left open by Burlington was whether parents who could not afford the cost of alternative education could later receive, at the state’s expense, compensatory educational services. Courts so far have held that such was proper. See White v. State, 240 Cal. Rptr. 732, 741 ( Ct. App. 1987) (“We cannot believe EHA-eligible children may obtain relief only if their parents have the financial resources to pay initially for services wrongfully denied under the EHA.”); see also Miener ex rel. Miener v. Missouri, 800 F.2d 749, 754 (8th Cir. 1986). It may be required, however, that the institution into which the parents place the child be on the list of cost-and-program-approved schools; in other words, the list from which placement ab initio would have been proper. Taglianetti ex rel. Taglianetti v. Cronin, 493 N.E.2d 29, 33 (Ill. App. Ct. 1986).
were not delivered upon. And, in something of a "flip side" to the class of affirmotive, express representations, some courts have not been opposed to claims for intentional misrepresentation.

Unfortunately for proponents of judicial recognition of educational malpractice, the greatest number of successful claims have arisen in the private educational context, where courts are in less fear of trampling upon state prerogative. Further, the success of such claims has been limited by the very theories that germinate them. In short, the cases provide scant encouragement for those seeking extensive damages for pervasive educational malpractice.

Cases such as Village Community School v. Adler support these observations. There, the mother of a student found herself defending against an action by a private school to recover tuition payments. She set up counterclaims for breach of contract, both fraudulent and negligent misrepresentation, and negligent infliction of emotional distress. In support, she alleged that the school fraudulently or negligently represented that its faculty could identify and treat children with learning disabilities, and that she had relied on these representations to her detriment. She further alleged that the school’s subsequent failure to provide such services amounted to a breach of contract, and that the same failure led to emotional distress.

The court in Adler allowed the breach of contract counterclaim to survive the motion to dismiss. The court invoked the familiar spectre of judicial oversight of the educational mission, but noted that such concerns were not present in this case: “When [the school] promised to detect learning disabilities, [it] effectively . . . made [detection] a requirement for full contract performance. In deciding whether to allow this action, this court is not required to review any discretionary actions taken as a result of plaintiff’s professional judgment.” Also permitted to survive was the claim for fraudulent misrepresentation. The court once again carefully picked through the allegations before

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64. Id. at 547.
65. Perhaps because the court decided not to allow the counterclaim for negligent infliction of emotional distress to proceed, it was somewhat less than clear in describing the precise nature of the distress. It said only this: “[The complaint] alleges that psychiatric intervention was necessary because her son received services which proved to be inappropriate and harmful when plaintiff failed to diagnose or misdiagnose his learning disability.” Id.
67. Adler, 478 N.Y.S.2d at 548.
it, noting that the representations here were solid, and therefore reasonably relied on.\textsuperscript{68}

The court made clear, however, that there would be no recovery beyond the tuition and ill-defined "consequential" damages. It is unclear whether those consequential damages would include the emotional damage that might have resulted from the school's failure to provide the services. On the one hand, the court was unequivocal in rejecting the separate emotional distress claim on the authority of earlier New York cases that had been based on claims of negligence.\textsuperscript{59} If there is no underlying cognizable negligent act, there can be no recovery for emotional distress resulting therefrom.\textsuperscript{70} On the other hand, the court did not address the question of whether such damages, or for that matter punitive damages, might be recoverable if the counter-claim for fraud were to succeed.

Similarly, in \textit{Wickstrom v. North Idaho College},\textsuperscript{71} the Idaho Supreme Court recognized that the breach of a sufficiently express promise was actionable. The college, a state institution,\textsuperscript{72} published a bulletin in which it stated that graduates of a "Maintenance Mechanic (Millwright)" course would be qualified for employment as "entry level journeymen." Plaintiffs, students who had been enrolled in the course, had not mentioned in their complaint "how the course might have failed to comply with the terms of the contract as found in the school bulletin."\textsuperscript{73} Nonetheless, they were permitted to amend their complaint to specify the ways in which the course had failed. The court thus recognized, at least in principle, that claims for breach of express promises were actionable.\textsuperscript{74}

\textsuperscript{68} For reasons not fully explained, but based on the court's reading of \textit{Donohue} and \textit{Hoffman}, the claim for negligent misrepresentation was rejected. \textit{See infra} part IV. The court had once again to deal with \textit{Paladino v. Adelphi Univ.}, 454 N.Y.S.2d 868 (App. Div. 1982). Although \textit{Paladino} rejected the intentional misrepresentation claims, it did so because the facts "fail[ed] to bear out the claim that the school made false representations to the parents." \textit{Id.} at 875. The \textit{Paladino} court's refusal to reject this class of claims out of hand created a wedge that the \textit{Adler} court then drove into the previously solid wall against educational malpractice claims.

\textsuperscript{59} \textit{Paladino}, 478 N.Y.S.2d at 548-49.

\textsuperscript{70} \textit{Adler}, 478 N.Y.S.2d at 548-49.

\textsuperscript{71} 725 P.2d 155 (Idaho 1986).

\textsuperscript{72} The court noted that the relationship between students and their colleges was contractual, regardless of whether the school was private or public. \textit{Id.} at 157 (quoting \textit{Peretti v. Montana}, 464 F. Supp. 784, 786 (D. Mont. 1979), \textit{rev'd on other grounds}, 661 F.2d 756 (9th Cir. 1981)). Of course, it is much less clear whether students at the high school or elementary school level stand in the same relation of contract to their institutions.

\textsuperscript{73} \textit{Id.} at 158.

\textsuperscript{74} The court, however, was not sympathetic to the companion tort claim. Plaintiffs had failed to comply with the notice provision applicable to claims against state entities, so the
The court did not telegraph its view as to damages, which were claimed for "lost wages, fringe benefits and anticipated increased earnings, general and punitive damages and attorney fees and costs." It appears likely that, given the contractual basis of the surviving claim, punitive damages would not be recoverable, while all of the others might properly be considered consequential. But the damage claim in this case is far different from that raised in the vast majority of educational malpractice claims, for here the damages are more easily limited as to time and source. One need only reflect on a case alleging functional illiteracy, or negligent misdiagnosis of a young child, to discern the difference. Further, there is no claim here for emotional distress. In short, recognition of claims for breach of contract or for intentional misrepresentation has not thus far assisted a significant number of educational malpractice "victims," nor is that result surprising. As to express representation, courts unwilling to interfere in the setting or implementation of educational policy can hardly be dismissal of the tort action was unexceptionable. However, the court took the time to reject—without citation to authority and in a footnote—the possibility of general claims for educational malpractice. Id. at 157 n.1.

A similar approach was in evidence in the recent Ohio case of Malone v. Academy of Court Reporting, Nos. 90AP-264, 90AP-430, 1990 WL 250496 (Ohio Ct. App. Dec. 31, 1990), where plaintiffs had been enrolled in a paralegal training course that, they alleged, failed to deliver upon the promised program in almost every possible respect. Upending the lower court's dismissal of the complaint, the court of appeals held that plaintiffs had stated a claim for misrepresentation and for breach of contract. Id. at *4. The court was impressed by the definiteness of the promises made, and noted that permitting plaintiffs to proceed would in no way disturb legislative prerogatives in regulating and accrediting private schools. Id. at *2-3. But, the court also noted that plaintiffs had not alleged educational malpractice as a basis for their complaint, and suggested that it would follow other courts in disallowing such a claim. Id. at *3.

75. *Wickstrom*, 725 P.2d at 156.


77. For a third case involving this principle of contract damages for failure to deliver a package of educational promises, see *Zumbrun v. University of S. Cal.*, 101 Cal. Rptr. 499 (Ct. App. 1972), in which it was alleged that a partial refund of tuition was owed a student who was simply not taught the final month of her sociology course. Again, though, it is important to keep in mind that plaintiff was seeking only a tuition refund, not more general damages.
expected to interpret anything short of private, consensual agreements (supported by consideration) as creating an enforceable promise. Judicial sympathy for the victims of fraud has been cabined by the twin difficulties of proving that the representation was intentional and sufficiently definite to inspire reasonable reliance.\textsuperscript{78}

III. REPRESENTATION IN T Tort

Why have courts gone to heroic lengths to avoid finding a duty to provide an adequate education, or to limit strictly any duty they are constrained to recognize? As mentioned in the introduction, this chilly reception to educational malpractice claims stems from fear that such actions, once unleashed, will lead to fertile and unruly litigation. Courts are also concerned with arrogating to the judiciary the prerogatives of the legislature. The representational model now introduced should quell those fears that are legitimate, and can also speak to the question of how best to balance the legislative and judicial functions in the educational setting. In education, as elsewhere in law, representations lie on a spectrum between the express and definite, on the one end, and the implied and subtle, on the other. Accordingly, the same considerations called into play in other areas of tort can be productively applied to those cases that happen to allege "educational malpractice." Thus, examining courts’ use of representation in other areas of tort will illuminate the judicial mistreatment of educational malpractice.

The present section has two related aims. First, by way of justifying the focus on representation in the educational setting, the representational dimension of other areas of tort is considered. The force and impact of representation, both implied and express, pervades tort law and can provide a solid structuring principle for a great number of cases.\textsuperscript{79} Medical malpractice and product liability cases have been chosen as the vehicles for making this point. Drawing these somewhat

\textsuperscript{78} See Keeton et al., supra note 12, § 107, at 741–45 (intent to deceive), § 109, at 755–58.

\textsuperscript{79} I pause here to note my debt to the work of Professor Shapo, who in 1974 convincingly applied this representational perspective to product liability law. Marshall S. Shapo, A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment, 60 VA. L. REV. 1109 (1974). His caveat in that context bears repeating here:

I . . . offer the representational analysis as an especially useful medium for attack on these problems, but I shall not claim for it the properties of a universal solvent. The issues involved are too complex, too tied with unknown aspects of behavior, and too linked to fierce arguments about the nature of our political economy for a single legal analysis to provide a panacea.

\textit{Id.} at 1116 (footnote omitted).
disparate areas of liability into relief highlights the signal importance of representation throughout the law of tort, and suggests that a similar focus in the educational malpractice cases calls many of the decisions into question. To supply a context for the discussion of representation in education cases, this section begins with these two established areas.

This section then moves to an analysis of the representations (less formally, the communications) made by school officials to students and parents. Inasmuch as this project requires analysis of the allocation of responsibility between school and parent, it undertakes a brief examination of the jurisprudence on that issue. A discussion of the reasonableness of reliance on such representations, however, is deferred until part IV, where the issue can be addressed in the context of specific cases.

A. Representation in Medical Malpractice Cases

Although the source of the duty owed by physicians to their patients is not typically cast in representational terms, it has long been clear that professionals and skilled tradespeople alike are accountable for failure to perform in accordance with the skills that define their jobs. Otherwise stated, one who holds himself out as a doctor, lawyer, or for that matter, a linoleum-tile installer implies that he will perform to the skill level required by the nature of the profession or occupation.

Of course, the same rationale that supports the notion of an implied representation suggests its limitations. Because reliance on a misrepresentation must be reasonable, recovery may be precluded where plaintiff is on notice that defendant, despite membership in a skilled profession or trade, in fact lacks or is unable to exercise those skills.

80. Garcia v. Color Tile Distrib. Co., 408 P.2d 145, 148 (N.M. 1965) ("Having undertaken to render services in the practice of a skilled trade, [defendant] impliedly warranted that it would exercise such reasonable degree of skill as the nature of the services required.").

81. See Elson, supra note 6, at 706–07 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES 165 (1850)); see also Hall v. Hilbun, 466 So. 2d 856, 871 (Miss. 1985) ("[E]ach physician has a non-delegable duty to render professional services consistent with that objectively ascertainable minimally acceptable level of competence he may be expected to apply given the qualifications and level of expertise he holds himself out as possessing and given the circumstances of the particular case.") (emphasis added).

82. A dramatic illustration of this principle is supplied by the ancient case of McKleroy v. Sewell, 73 Ga. 657 (1884). There, plaintiff continued to employ a family physician for years after discovering that the physician was an alcoholic. When the patient refused to pay the bill, the doctor sued to compel payment, and prevailed. In affirming the verdict for the physician, the Georgia Supreme Court sustained the following jury instruction: "If a man sends for a doctor, and the doctor treats the patient while he (the doctor) is intoxicated, and the patient afterwards
In almost every case, however, there is a minimal standard to which physicians must rise, or face liability. This standard accounts both for the representations that take place in the medical treatment context and for the patient's situation and protection—concerns that are also present in the educational setting.

*Hall v. Hilbun* provides a good discussion of the elements that create the standard. First, the court assumed that all physicians understand the basic "laws of medicine [that] do not vary from state to state . . . ." Further, physicians must be presumed to know (or have a way of finding out) at least as much as "minimally competent physicians in the same . . . field of practice," and must also exercise a reasonable level of skill and care in carrying out their tasks. In deciding whether the doctors discharged their responsibilities to their patients, however, the circumstances under which the medical care is rendered may be considered by the jury.

In its holding, the *Hall* court gave legal effect to a number of truths about the current practice of medicine. National standardization of training, coupled with increased access to the latest technology, makes fair the imposition of a national standard of care. At the same time, it would be a mistake to suppose that all physicians labor under the same conditions. The local, rural doctor, for example, often has neither the training nor the facilities to duplicate the quality of care delivered by physicians in large, well-funded hospitals. Patients' expectations should vary accordingly.

calls in said doctor and continues to employ him, it would be a waiver of all objection to the doctor on account of his habit of intoxication." *Id.* at 658. Could the doctor assert the plaintiff's contributory negligence or assumption of risk as a defense if the action were for malpractice? *McKleroy* was decided in the era of contributory negligence, in which any fault by plaintiff precluded recovery. The more fluid apportionment of liability that now prevails would dictate a more just result by reducing, but not precluding, plaintiff's recovery, unless a court were to decide that reasons of policy required the doctor to bear full responsibility in such a case.

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83. 466 So. 2d 856 (Miss. 1985).
84. *Id.* at 870.
85. *Id.* at 871.
86. The court summarized the rule it established:
*G*iven the circumstances of each patient, each physician has a duty to use his or her knowledge and therewith treat through maximum reasonable medical recovery, each patient, with such reasonable diligence, skill, competence, and prudence as are practiced by minimally competent physicians in the same specialty or general field of practice throughout the United States, who have available to them the same general facilities, equipment and options.

*Id.* at 873.

87. For a good practical discussion of the various computer databases available to today's doctors, see BARRY R. FURROW et al., **HEALTH LAW: CASES, MATERIALS AND PROBLEMS** 133 (2d ed. 1991).
The *Hall* court thus followed the trend of abrogating the now-discredited locality rule\(^8\)—under which the physician was held only to the standard of doctors practicing within the local area—while allowing consideration of the available medical resources as one factor in determining whether sound medical practice has been followed.\(^9\) Presumably, this provides the needed flexibility for taking into account whether, in a particular case, the patient could reasonably have expected better treatment than received.

By casting the issue in terms of “medical resources,” the court provides a surer link between representation and reliance. A patient is more justified in relying on the evidence before him or her—including hospital facilities and cost—than on location *qua* location. But due consideration to the availability of resources is to remain separate from the physician’s knowledge and care, which should not be permitted to slip below a threshold of competence.

One of the objections to recognizing a cause of action for educational malpractice is that pedagogy, unlike medicine, admits of no such standards: Good teaching is too much a matter of discretion (or “feel”) to subject teachers to liability. This argument, however, should not be taken seriously. While it is true that basic medical knowledge is more objective than pedagogy, there is something akin to a standard of good teaching, at least regarding certain core matters.\(^{90}\) If psychologists are held liable for negligent diagnosis and treatment,

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\(^8\) The court reversed the trial court’s grant of a directed verdict for defendant, which had been granted because the testimony of plaintiff’s expert was excluded. Since the exclusion was based on the aspect of the locality rule that restricted expert testimony to local physicians, the appellate court’s abrogation of the locality rule eliminated the justification for excluding the testimony. *Hall*, 466 So. 2d at 860.

\(^9\) Under the locality rule, the defendant doctor is required to exercise “the average degree of skill exercised by [doctors] in [the same] locality or in a similar locality.” *Weinstock v. Ott*, 444 N.E.2d 1227, 1232 (Ind. Ct. App. 1983). The rule has been justified by the related perceptions that the local, rural doctor, for example, has neither the training, the knowledge, nor the resources to deliver the same level of medical care as better-positioned colleagues. In *Brune v. Belinkoff*, 235 N.E.2d 793, 798 (Mass. App. Ct. 1968), the court found that the rule was sensible at the time it was established, but noted that it was “unsuited to present day conditions,” at least in part because of the greater exchanges of information between doctors that now occur.

If the court’s observations are accurate, abrogation of the locality rule makes sense. Because the “common knowledge” of patients presumably keeps pace with information-sharing by physicians, the representations that can be implied from the doctor-patient relationship should expand correspondingly.

\(^{90}\) See *Ratner*, supra note 6, at 795 n.55. Professor Ratner approvingly cites studies identifying characteristics of successful teachers, but believes that the issue in the educational malpractice setting should be whether the *school* is doing its job of educating students.
Further, only a small percentage of cases cast as “educational malpractice” would even theoretically involve second-guessing pedagogical decisions; many involve the very same types of acts (or omissions) as one sees in the medical malpractice context. If a child is misdiagnosed as suffering from a certain learning disability, justified reliance on that diagnosis moves the student into the same position of relative helplessness as one injured by an act of medical malpractice. As will be demonstrated, however, some educational malpractice claims (particularly those alleging functional illiteracy) should fail precisely because the student (and his or her parents) are not justified in relying on the school system, nor are they helpless.

**B. Representations in Product Liability**

In its original incarnation, the principle of strict liability in tort for defective products was justified, at least in part, by a theory of implied representation. In *Escola v. Coca Cola Bottling Co.*, Justice Traynor’s memorable concurrence repeatedly emphasized the plaintiffs’ inability to inspect products for defects and their forced reliance “on the reputation of the manufacturer.” But, in holding that the manufacturer could only be held to represent the safety of the product as it left the factory (before subsequent alterations and plaintiff misuse), Traynor was also indicating that the reliance must be reasonable.

Justice Traynor’s theme sounded again in *Greenman v. Yuba Power Products, Inc.*, where his preference for strict liability finally prevailed. The language he chose in permitting the plaintiff to plead a strict liability claim is instructive: “Implicit in the machine’s presence on the market . . . was a representation that it would safely do the jobs for which it was built.” This principle requires that the representation, and not something else, led to plaintiff’s injury. Thus, plaintiff must prove that he was injured while using the product “in a way it was intended to be used as a result of a defect . . . of which plaintiff was not aware.”

The relation between representation, reliance, and causation in a defective product case can thus be captured as follows. The manufac-

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91. The better reason for not holding teachers, or their employing school districts, liable for problems like functional illiteracy has to do with the vast differences between the types of injuries that physicians typically cause, as opposed to those caused by educators. See infra part IV.
92. 150 P.2d 436 (Cal. 1944).
93. Id. at 443 (Traynor, J., concurring).
95. Id. at 901.
96. Id. (emphasis added).
turer places its product on the market. Although no express representation is made, the consumer, in no position to inspect for hidden defects, is compelled to rely upon the safety of the product. If injury then results from such a defect, a closed circuit leading to recovery is established.97

Variations on this paradigm abound. For instance, the notion of a forced, implied representation works best in the manufacturing defect cases, involving a "glitch" in a particular product that causes injury. There, of course, plaintiff's helplessness and attendant forced reliance are well-nigh abject; if the defendant is unable to detect the defect, a fortiori so is the plaintiff. Liability is therefore strict.

Design defect cases raise more complicated issues, and the liability rules that deal with these cases are, in the main, responsive to the differences between manufacturing and design defects. In a design defect case, the injured party is attempting to pin liability upon a seller for making a conscious decision to manufacture a product in a certain way, when a safer alternative exists.98 If liability were strict, liability would be imposed in every case of injury, apart from those caused by plaintiff or third parties.

As Professor Shapo has pointed out, judicial rejection of this inflexible approach reflects the common sense perception that consumers of products are well aware that the products they buy and use cannot be rendered risk-free.99 The background is thus one colored by choice, in which "it is desirable to allow citizens to choose various combinations

97. Of course, one of the most difficult problems is proving that the product did in fact cause the injury:

[It] should not be supposed that plaintiffs have had an easy time in products liability cases . . . . [T]he plaintiff must painfully trace his way from the original defect to his ultimate harm through the use and possible abuse of the product either by himself or third parties, all without running afoul of the limitations on remoteness of damage.


98. Thus, if defendant's product is manufactured to the "state of the art," a good defense to liability has been made out. For purposes of this discussion, I ignore the few (and often criticized) cases that have refused to recognize the "state of the art" defense to a claim of defective design. If such defense is not recognized, of course, liability is strict. The best known of these cases, that effectively impose strict liability for an injury-causing product, is Beshada v. Johns-Manville Prod. Corp., 447 A.2d 539 (N.J. 1982). Beshada has itself been "restrict[ed] . . . to the circumstances giving rise to its holding." Feldman v. Lederle Lab., 479 A.2d 374, 388 (N.J. 1984). Feldman subsequently was retried, resulting in a verdict for plaintiff. On cross-appeals, the New Jersey Superior Court reversed that decision, holding that the breach of duty to warn that supported the jury's verdict was unacceptable, because it was pre-empted by federal law. Feldman v. Lederle Lab., 561 A.2d 288 (N.J. Super. Ct. App. Div. 1989). The New Jersey Supreme Court disagreed and remanded the case to the appellate court for consideration of the remaining issues on appeal. Feldman v. Lederle Lab., 592 A.2d 1176 (N.J. 1991).

of utility and risk.” Thus arises the balancing required by negligence law.

In practical terms, this need to balance means that cases will be more difficult to resolve. One might wonder whether the product user truly chose a cluster of risks given the product's utility, or whether the swirl of implied representations, some of them subtle, masked or distorted certain information. Jural doubts on this issue can be resolved for defendant where plaintiff proceeded in the teeth of express warnings against the product use that caused injury. Most cases are not so simply resolved, however, because it will not be so clear that the warning covered the conduct at issue, or because the injured person may not have received the warning, or may not have understood it, or may have been unable to act upon it. Courts are well-advised, Shapo concludes, to consider all representations, and the reliance—sometimes forced—of product users on sellers. As I argue in part IV, these same considerations can be applied profitably to the educational context.

As one illustration of the difficult problems presented by representation and reasonable reliance in the products context, consider the so-called patent danger cases. Courts have struggled for years with the question of what to do where the defect and potential for injury are patent, but plaintiff nonetheless uses the product so as to encounter an obvious risk. On a basic level, such misuse may be said to defeat reliance on the manufacturer's representation and so to snap the causal chain running from manufacturer to injury. Courts originally so held.

100. Id. at 1115.
101. This presumes that the warnings are sufficiently clear to put the consumer on notice of the danger. Where this is so, recovery has been denied for a variety of reasons: the consumer's use breaks the chain of causation between the manufacturer's creation of the defect and the injury; the consumer has access to all necessary information; and the consumer is, in economic terms, the cheapest cost-avoider. Id. at 1226–28, 1296–1301. As we shall see, even if the defect is patent, or the warning clear, other justifications for imposing liability may still sway courts.
102. Id. at 1302–17. Shapo somewhat fuses these issues, which courts have been careful to keep separate. He focuses instead on data concerning consumer behavior, focusing on perceptions, intelligence, and investigation.
103. In Yaun v. Allis-Chalmers Mfg. Co., 34 N.W.2d 853 (Wis. 1948), the Wisconsin Supreme Court rejected the suggestion that liability might be based on failure to include a safety feature that might have prevented fingers from becoming trapped in a hay baler's rollers. The court thought the danger obvious to a person of "ordinary intelligence," and denied recovery for fear that "if [plaintiff's] contention were sound, every meat grinder or other machine capable of mangling fingers would be an instrument the safe use of which would be guaranteed by the manufacturer." Id. at 858; see also Campo v. Scofield, 95 N.E.2d 802 (N.Y. 1950), overruled by Micallef v. Miehle Co., 348 N.E.2d 571 (N.Y. 1976). Campo's overruling is the best known instance of the denigration of the patent danger rule. Critics of the demise of the patent danger
More recently, however, products liability doctrine has imported the narrowing of assumption of risk that has proceeded apace in negligence. The result is that plaintiffs often are able to reach the jury on the issue of the reasonableness of their conduct in encountering a known risk. Many of these cases can be justified by a generous interpretation of reasonable reliance. For example, where the user of the product is an employee, he or she may rely on a chain of safety running from the manufacturer to the employer. Constriction of the patent danger rule does not mean that plaintiffs are entitled in all cases to recover where they proceed in the face of danger. In short, judicial struggles in this area are but another

rule have echoed the same concern expressed by the court in *Yawn*; Professor Epstein, for instance, asks the following rhetorical questions: "Can any case be made out [in support of the patent danger rule]? Is the . . . rule sound if the function of the law is to provide the user of the product with information necessary to decide whether, and if so how, to use the product?" *Richard A. Epstein, Cases and Materials on Torts* 719 (5th ed. 1990).

104. Harris v. Karri-On Campers, Inc., 640 F.2d 65 (7th Cir. 1981), provides a striking illustration of the withering of assumption of risk in the product liability context. Plaintiff, injured by an explosion of propane gas, had disregarded a warning on the door of his camper to the effect that natural gas should not be connected to the gas piping system. He also thought inapplicable the instruction to test the gas line before using the system, and failed to inspect for gas leaks, although he was generally aware of the danger of propane gas. Applying West Virginia law, the court agreed with plaintiff that "there was insufficient evidence to instruct the jury on assumption of risk." *Id.* at 73. According to the court: "Harris knew of the explosive properties of propane gas and of the general dangers of gas leaks[,] but] Karri-On did not demonstrate that Harris actually knew that the gas piping system was defective or that there was a gas leak." *Id.* at 74. As to the disregarded warnings, the court stated that: "While disregard of warnings may be a part of assumption of risk, there must still be evidence that the victim subjectively knew of the defect and its dangers." *Id.* But see *Williams v. Brown Mfg. Co.*, 261 N.E.2d 305 (Ill. 1970) (remanding for factual findings on whether plaintiff had subjectively appreciated the risk of injury from using a trencher without heeding the cautionary instructions).

105. Put differently, courts have become more generous to plaintiffs in construing the assumption of risk defense. In *Messick v. General Motors Corp.*, 460 F.2d 485 (5th Cir. 1972), for example, plaintiff was permitted to "rely" on his car steering mechanism, even though he had experienced problems with it for a period of time and had actually had difficulty keeping the car on the road. In affirming the judgment for plaintiff over defendant manufacturer's objection that the conduct amounted to assumption of risk, the court effectively said that reasonableness of reliance must be assessed in light of all relevant facts, including plaintiff's unquestioned need to use the car extensively in his job.

106. It is perhaps more accurate to say that courts recognize that employees who may be aware of a product's hazard face a Hobson's choice: proceed in the face of danger, or run the risk that the employer will find someone else who will. A consideration of whether, and to what extent, this dilemma survives the enactment of modern worker protection legislation is beyond the scope of this Article.

107. Indeed, despite a sharp disagreement on whether to allow comparative negligence principles to take root in the product liability context, Justice Mosk of the California Supreme Court suggested in *Daly v. General Motors Corp.*, 575 P.2d 1162 (Cal. 1978), that recovery would be improper in cases of misconduct so extreme that reasonable reliance could not possibly be made out, such as using a power saw to trim one's fingernails. *Id.* at 1185 (Mosk, J., dissenting). Judge Mosk's willingness to disallow recovery in such extreme cases of misuse
application of the principle that reasonableness, here of reliance, is a jury question unless the court determines that reasonable people could not agree.

The central position of representation and reliance in the law of products liability is also emphasized by persistent judicial and legislative uneasiness with holding liable those "middlemen" sellers who are but conduits between the manufacturer and the consumer. A recent spate of statutes reflects the relatively disfavored status of strict liability suits against non-manufacturing sellers by requiring some showing of fault on their part before liability will be imposed. \(^{108}\) Again, this agonizing is understandable when the following question is put: Do purchasers of goods reasonably rely on the retailer as representing the goods to be free of defects? Although the answer to this question is not obvious, the intuition here is that consumers do not so rely on retailers at least in the case of sealed containers that retailers cannot inspect. Accordingly, holding retailers liable may conflict with the representational model, and must be justified, if at all, in some other way. \(^{109}\)

Of course, the analogy from product liability to educational malpractice is not complete. One stark difference is choice. Whereas the

would be endorsed by the majority, \textit{a fortiori}, inasmuch as Justice Mosk was willing to overlook the plaintiff's negligence in using a product, while the majority held that recovery should be reduced under comparative principles.


A few jurisdictions take the principle of supplier exculpation more seriously: Even where the manufacturer cannot be reached, the supplier will not be liable absent some showing of independent fault. \textit{See}, e.g., \textsc{Ga. Code Ann.} § 51-1-11.1 (Michie Supp. 1991); \textsc{Neb. Rev. Stat.} § 25-21,181 (1989); \textsc{S.D. Codified Laws Ann.} § 20-9-9 (1987).

\(^{109}\) The most famous exposition of the justifications for imposing strict liability on sellers of defective products appears in Justice Traynor's concurring opinion in Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440-44 (Cal. 1944) (Traynor, J., concurring). In brief: (1) mass sellers of consumer goods are well-positioned to absorb the cost of injuries those goods create by passing on those costs to consumers; (2) imposing strict liability on sellers increases the incentive to manufacture safer products; (3) requiring plaintiff to show negligence in causing the defect imposes an intolerably high evidentiary burden; and (4) plaintiffs are typically incapable of protecting themselves against defective products, and should not go uncompensated when injury they could not have prevented occurs. \textit{Id.} at 440-43. Of the above rationales, the first and fourth appear the most applicable to \textit{non-manufacturing} sellers of defective goods. The final justification also incorporates the element of forced reliance.
purchaser of a product is confronted with a host of decisions including price, quality, safety, and even appearance, the “consumer” of educational “services” may have little or no choice. Unless the student’s parents have enough income to select from among private and public schools, the element of choice, at least in the broad sense, is likely missing.

This very difference in the availability of choice again highlights the importance of emphasizing the related notions of representation and reliance. In the product liability context, the consumers’ ability to choose may preclude them from later arguing that the product was defective. If, for example, a choice was available between a more expensive machine expressly designed for use on slopes, and a less expensive one suitable only for level surfaces, if the cheaper one is chosen and used on a slope, the manufacturer can argue that the cheaper machine was not represented as suitable (read “safe”) for the use to which it was applied.110

But there is an inverse relation between reliance and choice. Thus, where, as in the educational context, the choices are more limited (perhaps absent altogether), the forced reliance of the plaintiff on the defendants’ course of action becomes greater. This difference suggests that plaintiffs should be in a better position in the educational context.

However, the differences between the types of injuries, and how they are incurred, moves back toward center the fulcrum between actions for defective products and actions for errors in the educational process. Defective products typically cause sudden, traumatic injury, against which it is difficult to guard once the product has been selected. Educational injuries, especially functional illiteracy, typically occur over a period of time, and can therefore be arrested in the larval stage. So the reduced availability of real choice should be counterbalanced by the plaintiffs’ increased ability to defend themselves against the type of injury constituting most educational malpractice claims.111

110. Such an argument was made by defendant manufacturer in Barker v. Lull Eng’g Co., 573 P.2d 443, 448 (Cal. 1978), and the jury responded by returning a verdict for the defendant. But the California Supreme Court reversed that judgment because the jury had not been properly instructed in the law of design defect.

111. These observations also help to explain why courts have consistently permitted suits for negligent supervision that lead to physical injuries arising in the school setting. There, the choices available to the student asked to perform an experiment or a gymnastics maneuver might be few and, to make matters worse, the types of traumatic personal injuries that can result are just like the injuries caused by defective products. A discussion of this class of cases is present toward the end of part IV.B., infra.
It is against this backdrop that I introduce the representational theory of educational malpractice. Honesty compels the concession that the following remarks bespeak “focus” more than “theory.” I hope to persuade the reader, and the courts, that due attention to the representations made in the educational context argues against categorizing claims as educational malpractice for the purpose of denying them.

C. The Role of Representation in Education

It is useful to direct this discussion by reviewing the general classes of situations that give rise to educational malpractice claims. First, there are claims that a student has been graduated from high school without the basic tools of literacy. Among a host of sources of this problem are negligent teaching, poor administration, unwarranted promotion, or failure to take appropriate steps to respond to a particular student’s learning needs. Second, there are cases alleging negligent misdiagnosis resulting in injury. These two categories overlap. For example, if the effects of one or more misdiagnoses are not quickly arrested, functional illiteracy may result.\textsuperscript{112}

Either of these unfortunate results grows from a continuous series of communications. A student’s early learning problems may be (and should be) communicated to the parents by the child’s teacher. Sometimes the problems can be solved easily, such as when a correctable physical deficiency, such as nearsightedness, is diagnosed, or a hyperactive child simply outgrows the condition.

If the problem is not so simply solved, further actions may seem wise. If the child appears unable to comprehend basic instruction, other parties—the school psychologist, medical doctors, the principal, even the board of education—may become involved in the communications that typically occur between teacher, parent, and student.

In the situation depicted above, the parent is properly armed with the information needed for action, and can assist the school and the child in solving, or at least working with, the problem that makes learning difficult. Whether the problem is physical, emotional, mental, or some combination, matters less than the ability to diagnose and to respond.

If the diagnose-and-respond model were consistently followed, there would be few educational malpractice suits, and probably none involving generic claims of functional illiteracy. Parents should be charged with the unhappy knowledge that the school system is not always successful in turning out literate graduates capable of assuming their posi-

\textsuperscript{112} See supra notes 3–4 and accompanying text.
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tions in society. This knowledge, coupled with proper concern for their child’s welfare, both provides the needed incentive for parents to assume an active, participatory role in the educational process, and belies a general argument that the parents “reasonably relied” on the school system, or its teachers, to guarantee their child’s progress. There are, however, several important problems that may cloud this portrayal.

First, the actual communicative process is in fact much noisier than depicted above. Large class size may retard, or even prevent, diagnosis of problems. Teacher recommendations for action may be ignored or misunderstood by higher-ups within the school system, or victimized by lack of resources. Parents may not be timely notified of problems. Parental apathy or misunderstanding may also stand in the way of corrective action. These kinds of problems lead to illiteracy, and, in turn, to actions for educational malpractice. In assessing the validity of such claims, courts should explore what may have gone wrong in the communications by and between all involved in the educational mission. Conducting such an inquiry will not place the judiciary in the position of second-guessing those in charge of establishing educational policy. The focus should rather be whether there has been a slip between the chosen policy and its implementation, and, if so, on the source of that slip.

The second problem is closely related to the first, and arises where the educational entity lacks, or has only rusty, mechanisms for combating problems. The ability to diagnose a problem loses significance if no further action can be taken. In such a case, parents are placed in a position of forced reliance—not unlike that of victims of defective

113. A striking example of the failure of school officials to heed the diagnostic warning of one of its employees is found in Hoffman v. Board of Education, 400 N.E.2d 317 (N.Y. 1979), where the school district allegedly ignored a recommendation by the school’s psychologist to reevaluate the child within two years. Perhaps as a result, the child, who turned out to possess normal intelligence, remained in a classroom for retarded children for more than ten years.

114. See, e.g., Collingsworth, supra note 6, at 492–94, where the suggestion is made that true policy choices may be protected by immunity, even where traditional governmental immunity has been removed, but that the implementation of the chosen policy should be subject to judicial scrutiny: “Decisions that would probably be immune include such things as curriculum choice, range of special programs, and what educational theory to implement . . . . But if due to negligent test administration, a child is mistakenly placed in [a] special class and suffers harm, this action would not be immune.” Id. at 494.

Not all commentators are so ready to insulate decisions on basic policy from judicial review. Professor Ratner, for example, having first identified common characteristics present in “successful schools,” then proceeds to call for policies designed to achieve those characteristics. See Ratner, supra note 6, at 800, 809.

As noted supra part II.B., judicial second-guessing of legislative policy determinations is required where constitutional rights would otherwise be compromised.
products or of a negligently performed operation—and should be per-
mitted judicial recourse. In an appropriate case, a court might
even properly excuse the injured party from the usual requirement of
exhaustion of administrative remedies.

I do not mean to suggest that recourse to the courts is the preferred
response. Rather, a rational, multi-step process of handling such
problems (whatever their source) should be encouraged. At the first
level, informal assessment and attendant communication to parents
resolves many problems. At subsequent, increasingly more formal
levels, all concerned parties should work towards arresting the devel-
opment of potentially serious injury while forging a solution accepta-
table to all involved. As a healthy by-product of such a process, parents,
teachers and administrators have a forum in which different views
may be percolated—in service of the communication that is central to
a well-run educational system.

D. The Role and Responsibility of Parents in Education

Until now, clarity of exposition has dictated deferral of one of the
stickiest problems of all—deciding how best to allocate responsibility
for education between the state and the parent. No easy answer sug-
gests itself. Historically, the responsibility for educating children
rested with the parent. It was not until the nineteenth century that
states began to enact compulsory education laws. Indeed, free public

115. Some of the cases arising under the EHA highlight this problem. For example, in Keech
v. Berkeley Unified School District, 210 Cal. Rptr. 7 (Ct. App. 1984), the plaintiff parents
complained that their child's psychiatric problems were negligently diagnosed. They therefore
sought damages for the additional hospitalization costs, attorney's fees, and emotional distress
alleged to have resulted. Aware of California precedent disallowing recovery under common law
negligence for educational injuries, plaintiffs sought damages under both the EHA and the
California Education Code. The court's summary rejection of plaintiff's claim was not properly
sensitive to the injury suffered; an injury which differs little from the type of harm often seen in
475 N.E.2d 454 (N.Y. 1984); see also infra part IV.A.

A particularly vexing problem is presented where mechanisms do exist within a school district
that might cure a problem, but either the parents or the school officials fail to take advantage of
them. This situation might arise from parental ignorance, official laxity, or from some
combination of the two. Again, failures in the communications between and among those
responsible may create or exacerbate the problem. As will be shown throughout this Article,
the circumstances under which the injury occurs are of dispositive significance under a
representational model.

116. See supra note 47.

117. The provenance of this tradition is the Roman Empire, which placed responsibility for
educating children on the father, or head of the household. The still-current term paterfamilias
testifies to the Roman origin of the concept. See James C. Easterly, Parent v. State: The
Challenge to Compulsory School Attendance Laws, 11 Hamline J. Pub. L. & Pol'y 83, 84
(1990) (citing J. Thomas, Roman Law, An Introduction to Legal Systems 13 (1968)).
education was not provided until well after the United States was formed.\textsuperscript{118}

Compulsory education laws were followed, in due course, by legal challenges to the states' rights to control the education of children.\textsuperscript{119} These challenges forced the Supreme Court to adjust the balance

\textsuperscript{118} The responsibility for educating children clearly falls to the several states (and to the parents), \textit{not} to the federal government. The right to an education is nowhere mentioned in the Federal Constitution, and public education was the exception rather than the rule in the early days of the Republic. See State v. Newstrom, 371 N.W.2d 525, 531 (Minn. 1985). In Brown v. Board of Education, 347 U.S. 483 (1954), the Court sketched out the development of public education in the United States, which did not begin until the nineteenth century. \textit{Id.} at 489 n.4.

\textsuperscript{119} The best-known of these challenges eventually came before the Supreme Court, but state courts had taken up the cause long before. The early decisions reveal, for the most part, an extraordinary deference to the rights of parents that is startling to the contemporary reader. It is perhaps not too much to say that parents were permitted to micromanage their children's education; they could refuse, for example, to allow the child to study certain subjects. See, \textit{e.g.}, Morrow v. Wood, 35 Wis. 59 (1874), in which a parent's decision not to allow his son to study geography was permitted by the court to override the inclusion of that subject among the required curriculum: "[W]e can see no reason whatever for denying to the father the right to direct what studies, included in the prescribed course, his child shall take." \textit{Id.} at 64. But in stating that the parent's right to control the education of his (for these decisions spoke of the father) child must be given effect, even to the point of working idiosyncratic changes in the course of study, the court failed to consider the irresolvable conflict thereby created between educational policy-makers and parent. Again, from \textit{Morrow}:

[T]he school board [has the statutory power] to make all needful rules and regulations for the organization, gradation and government of the school, and power to suspend any pupil \ldots for non-compliance \ldots and it is not proposed to throw any obstacle in the way of the performance of these duties. But these powers and duties can be well fulfilled without denying to the parent all right to control the education of his children. \textit{Id.} at 66. How is the conflict to be resolved? Perhaps the courts were simply not yet comfortable with accommodating the rising state interest in education with the traditional view that the parents were responsible. \textit{See also} Trustees of Schs. v. People \textit{ex rel.} Van Allen, 87 Ill. 303 (1877) (issuing \textit{mandamus} to compel school trustees to admit candidate to high school who had passed entrance examinations in all subjects but grammar, which his father did not want him to study); School Bd. Dist. No. 18 v. Thompson, 103 P. 578 (Okla. 1909) (child's parents could keep child out of singing lessons; state constitution gave board of education right to prescribe a course of study, but not the absolute power to require study of all branches in opposition to parental wishes). \textit{But see} State v. Webber, 8 N.E. 708, 713 (Ind. 1886) (giving short shrift to the father's naked assertion that the study and practice of music was not in the best interest of his son, the Supreme Court of Indiana stated: "The arbitrary wishes of the [father] must yield and be subordinated to the governing authorities of the school \ldots and their reasonable rules and regulations for the government of the pupils \ldots ").

Unlike the state court cases, those that the Supreme Court considered involved a true conflict between deeply held family values and the school system's perceived requirements. The interference with curricular decisions present in the above cases did not come before the Court. \textit{See, e.g.}, Plyler v. Doe, 457 U.S. 202 (1982) (state exceeded its powers in denying access to public schools for children of illegal aliens); Wisconsin v. Yoder, 406 U.S. 205 (1972) (state exceeded its powers in applying its compulsory education statute to Amish children beyond the eighth grade); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (suggesting in dictum that the state enjoyed broad regulatory authority regarding schools); Meyer v. Nebraska, 262 U.S. 390 (1923) (state exceeded its powers in enacting a law forbidding the teaching of any language other than English until the student had completed the eighth grade).
between permissible state regulation, on the one hand, and parental interest in educating their children according to their own beliefs, on the other.¹²⁰

Confusion has beset this judicial enterprise. Nonetheless, the Supreme Court and the state courts have made clear that the state has wide latitude with regard to the educational mission. It may require children to attend school, and may impose regulations, if clear and reasonable, upon those parents who choose to educate their children at home.¹²¹ Nonetheless, limits on the state's authority remain. In Wis-

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¹²⁰ These cases have spawned a good deal of rhetoric on the obligations and interests of the parent and the state, and on the interest of the child. A "sampling" of such pronouncements follows, but these statements do not go far toward resolving disputes in particular cases. In Plyler v. Doe, 457 U.S. 202, 220–21 (1982), the Supreme Court's refusal to allow Texas to exclude from public education the children of illegal aliens was closely linked to its perception that the children were victims who should not be made to suffer for their parents' misdeeds. The Court found that denial of a right so basic (and necessary) as education would offend the basic principle that "legal burdens should bear some relationship to individual responsibility or wrongdoing." *Id.* at 220 (quoting Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 175 (1972)). In Wisconsin v. Yoder, 406 U.S. 205, 212–14 (1972), faced with the complicating factor of the family's freedom of religion, the Court noted that "a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests . . . and the traditional interest of parents . . . ." In Blackwelder v. Safnauer, 689 F. Supp. 106, 130–31 (N.D.N.Y. 1988), the district court did an impressive job of lining up Supreme Court cases that, taken together, stress (1) the importance of an adequate education to an informed citizenry; (2) the right of the child to be provided with such an education; and (3) the (sometimes) competing interest of the parent, which, especially when fundamental beliefs are involved, are also to be accorded substantial weight. If these cases stand for anything, it is that the weighing is difficult.

¹²¹ In reaching their decisions, courts have assumed that the state may require school attendance and may impose reasonable regulations as to education. *Yoder*, 406 U.S. at 213 ("There is no doubt as to the power of a State . . . to impose reasonable regulations for the control and duration of basic education."); *Pierce*, 268 U.S. at 534 (permissible to require education).

States must, however be properly sensitive to the parents' rights to direct the education of their children. See e.g., *Meyer*, 262 U.S. at 400–01 (in annulling a Nebraska statute that forbade teaching foreign language in the schools until the child had completed the eighth grade, the Court, by Justice McReynolds, noted that "it is the natural duty of the parent to give his children education suitable to their station in life" and went on to hold that the statute was an impermissible attempt by the legislature "to interfere . . . with the power of parents to control the education of their own").

Of course, any regulation that the state chooses to impose must be sufficiently clear to give notice to parents of what is required; otherwise, convictions for violating the statute cannot stand. See e.g., Blackwelder v. Safnauer, 689 F. Supp. 106, 121–28 (N.D.N.Y. 1988) (statute that required that students receive an education "substantially equivalent to the instruction given . . . at the public schools" not unconstitutionally vague); State v. Moorhead, 308 N.W.2d 60, 63–65 (Iowa 1981) (use of phrase "equivalent instruction by a certified teacher" did not make the statute unconstitutionally vague); State v. Newstrom, 371 N.W.2d 525, 532–33 (Minn. 1985) (striking down statute that required home school teacher's credentials be "essentially equivalent" to those required of public school teachers).
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*cons v. Yoder,*122 for example, the Supreme Court permitted "the traditional interest of parents" in the educational and religious upbringing of their children to prevail over a state statute that required compulsory education after the eighth grade.123

What emerges from these cases, involving a conflict of interest between parent and school, is that the responsibility is shared. Such a "fuzzy" result cannot solve the problem of who bears responsibility for educational malpractice, but the insight gained from reviewing these cases can be profitably welded to the representational analysis to suggest an approach. The states, by their own enactment and rigorous enforcement of compulsory education laws, have declared themselves responsible for providing at least the ingredients for education. As I have argued throughout, one such ingredient is information. In the first instance, the schools must provide parents with sufficient information to enable informed action, so as to arrest incipient injury.124 Once provided, such knowledge shifts the focus to the parents, who share responsibility for education. They must then involve themselves in the problem-solving process.

One complication may affect this assignment of responsibility. What if the family is dysfunctional, so that messages sent to the parents do not result in action?125 In this case, the interests of the child and the school may be on one side, aligned against a negligent, ineffective or absent parent. Otherwise stated, the interest of the child is paramount, and if the parents cannot or will not advance that interest, the breach must be otherwise filled.126 But how?

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123. Id. at 219–29.
124. Again, this assumes that the problem in question has not hardened into injury. In some cases, the injury is immediate, so that the question of "arresting" the harm does not arise. See infra part IV.
125. Just as parents are on notice of the potential for illiteracy, so too should schools recognize that many families cannot, or do not, assume a responsible role in the education of their children. While a determination of whether a given family is unable to participate in the education of its children can only be made on a case-by-case basis, studies tend to support the conclusion that children in single parent households receive less education than their two-parent counterparts. Susan Chira, *Making the Grade in College: Major in Table Tennis*, N.Y. TIMES, June 29, 1988, at C4. Furthermore, the number of children in one-parent households is substantial and on the rise. In 1989, the Census Bureau released the following figures: in 1988, 19 percent of white children were in one-parent households, while for black children, the figure was 54 percent. Both of these figures represented substantial increases from the 1980 figures. Spencer Rich, *Single-Parent Families Increase; 54% of Black Children Live in Such Households*, *Study Finds*, WASH. POST, Feb. 16, 1989, at A7.
126. Essentially the same point was made by Justice Douglas in his partial dissent in *Yoder*, 406 U.S. at 241 (Douglas, J., dissenting), in which he rejected the contention that the parents of Amish children should have the undisputed right to withdraw their children from school after
Many states now have legislation requiring schools, and other entities, to report possible cases of child abuse to appropriate authorities.\textsuperscript{127} By analogy, would it make sense to require follow-up action by the school where it becomes clear that the parents are not cooperating with the school to advance their child’s education? To impose such a responsibility would be to give content to the state’s duty to make a reasonable effort to educate its citizenry.\textsuperscript{128} This emphasis on commu-

\textsuperscript{127} These statutes first appeared in the 1970s. They typically require a wide range of people who come into contact with children to report to the relevant agencies any suspected cases of child abuse or neglect. \textit{See, e.g.}, CAL. PENAL CODE § 11166 (West Supp. 1991), which requires “any child care custodian” who knows “or reasonably suspects” abuse to report “immediately or as soon as practically possible” to a child protective agency. Separate sections of the \textit{California Penal Code} define “child care custodian” to include trained teachers, § 11165.7, and “child abuse” to include “neglect.” § 11165.6. \textit{See also} FLA. STAT. ANN. §§ 415.504 (West 1986 & Supp. 1991); ILL. ANN. STAT. ch. 23, §§ 2053–54 (Smith-Hurd Supp. 1991); MD. FAM. LAW CODE ANN. §§ 5-701 to 705 (Supp. 1991); MICH. STAT. ANN. §§ 25.248(1)–(3) (Callaghan Supp. 1991); N.J. STAT. ANN. §§ 9:6-8.9, 9:6-8.10(a) (West Supp. 1991); TEX. FAM. CODE ANN. §§ 34.01–02 (West 1986 & Supp. 1991); WASH. REV. CODE ANN. § 9.69.100 (West 1988).

As drafted, these statutes do not seem broad enough to require reporting parents who fail to assume responsibility for their child’s education. The Illinois statute is typical, defining “neglect” to include failure to provide food or medical treatment, “or other care necessary for his or her well-being.” ILL. ANN. STAT. ch. 23, §§ 2053, § 3 (Smith-Hurd Supp. 1991). Although the latter clause could be interpreted as including parental failure to participate in the education of their children, the tenor of the statutes suggests that no such application was indicated. Even statutes such as New York’s that include in their definition of neglect, failure to supply “adequate . . . education in accordance with the provisions of the education law,” N.Y. EDUC. LAW ART. 65, PART I, are concerned only with the child’s attendance, not with the adequacy of parental involvement in the educational process. 48 N.Y. JURISPRUDENCE 2D \textit{Domestic Relations} § 1875 (1985). But the New York statute provides a good model for an expansion that would require the school district to intercede on the child’s behalf when reports and recommendations go consistently unheeded.

This focus on the welfare of the \textit{child} might avoid results such as that reached in Washington v. City of New York, 442 N.Y.S.2d 20 (App. Div. 1981), in which the father of a violent child did not cooperate, and in fact obstructed, the district’s attempt to evaluate and to place the child in a suitable educational environment. The Appellate Division of the Supreme Court properly disallowed recovery for damages, but the problem that gave rise to the lawsuit—that the child did not attend school for some 14 months—went unremedied. The court was correct in stating that the father’s failure to pursue administrative remedies should not be transformed into a damages action, but what were the responsible school officials doing during that time?

\textsuperscript{128} Under standard tort principles, the negligence of the parents might be considered a superseding cause of the child’s injury in such a case, thereby relieving the school of liability.
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communication and involvement by all parties as a way of averting problems (and suits for educational malpractice) dovetails with the school's essential mission of providing a setting in which education can flourish.

IV. RE-EXAMINATION OF EDUCATIONAL INJURY CASES: CRITICAL APPLICATION OF THE REPRESENTATIONAL FOCUS

How can the foregoing focus on representation and communication in learning assist courts in the determination of cases? When educational malpractice claims are considered within this representational framework, sensible distinctions between cases are possible. This Article now revisits the educational malpractice cases decided under the common law.

A. The New York Cases: Negligence Reconsidered

Because New York has the most developed body of jurisprudence on what might be called "educational injury," the present section analyzes a host of that state's decisions. It begins with a discussion of a trio of cases that grappled with the issue of educational malpractice in the public school setting. Taken together, these decisions provide a useful vehicle for illustrating the application of a representational approach. All three were resolved at both the trial and two appellate levels, so that, taken together, the decisions provide a rich source of legal debate. Of equal interest, the cases involve vastly different sorts of facts—differences that may be dispositive under a representational model.

1. Claims of Functional Illiteracy

Donohue v. Copiague Union Free School District was the first of the three, and presented a set of facts and allegations least likely to engender sympathy, and most likely to arouse judicial fear. Donohue represents the paradigmatic "functional illiteracy" case, in which a student alleges, blunderbuss, that the education was deficient in a wholesale way. Such negligence, however, should not be considered "superseding" if it is foreseeable—which it is. See KEErTON et al., supra note 12, § 44, at 303–11.


130. Plaintiff alleged that:

[The school system] failed to evaluate the plaintiff's mental ability and capacity . . . failed to provide adequate school facilities, teachers, administrators, psychologists, and other
As noted in part II.A., the *Donohue* court held that the plaintiff’s allegations failed to state a claim. Although the court recognized that a plaintiff might be able to make out the elements of a negligence claim, recovery was denied on vague “public policy” grounds.\(^{131}\)

The court was probably right in disallowing the claim, but for the wrong reasons. Under a representational model, denial of recovery would be based on the sobering realities of the school system. Schools operate within budgetary constraints. The quality of teaching is uneven from one school to another (and within a particular school). Diagnostic tools are difficult to interpret. Each teacher is responsible for many students,\(^ {132}\) and student ability and motivation play important roles in the success of the educational mission. It is simply not realistic to argue that schools “hold themselves out” as able to deliver graduating classes of students equipped with skills necessary to succeed beyond the classroom.\(^ {133}\)

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personnel trained . . . failed to teach the plaintiff in such a manner so that he could reasonably understand what was necessary under the circumstances . . . [and] failed to adopt the accepted professional standards and methods . . .


131. *See supra* part II.A.

132. As the appellate division stated in *Donohue*: “Public education involves an inherent stress between taking action to satisfy the educational needs of the individual student and the needs of the student body as a whole.” *Id.* at 879.

133. Professor Elson focuses on the individual teachers, rather than on the school system as a whole. In addressing the issue of teacher competence, he is drawn into the discussion of whether teaching should be accorded professional status. Although a detailed and empirically rich analysis of the feasibility of holding teachers to a professional standard of care provides little support for doing so, he states that a similar difficulty attends the work of psychiatrists and psychologists, who are nonetheless held to a professional negligence standard. Elson discusses a series of factors that traditionally have been considered in deciding whether to accord a particular occupation professional status, including public trust and reliance on teachers’ educational judgments. *Elson, supra* note 6, at 722–32. One can agree with Elson’s hedged conclusion that teachers should be considered professionals, even if that conclusion requires the questionable assumption that the public relies “upon teachers’ educational judgments.” *Id.* at 731. This status, however, tells little about whether, in a particular case, plaintiff was justified in relying on one or more teachers, or on the school system in general.

Too much ink has been spent on debating whether teachers are professionals. In the first place, courts and legislatures do, in fact, consider teachers to be professionals, at least when they aren’t worrying about educational malpractice claims. *See, e.g.*, Georgia Professional Standards Act, Ga. Code Ann. §§ 20-2-981 to 89 (Michie 1987); Ill. Rev. Stat. ch. 122, ¶¶ 24 to 25 (1989) (“School boards may require teachers in their employ to furnish from time to time evidence of continued professional growth.”) (emphasis added); Felton v. Secretary, United States Dept’ of Educ., 739 F.2d 48, 49 (2d Cir. 1984) (“[T]he City has made sincere and largely successful efforts to prevent the public school teachers and other professionals whom it sends into religious schools from giving sectarian instruction . . . .”) (emphasis added); Rolfe v. County Bd. of Educ., 282 F. Supp. 192, 199 (E.D. Tenn. 1966) (“Teachers are professional persons.”).

Second, *who cares* whether teachers are considered professionals? They should be liable for failing to satisfy the minimum standards of their occupation, as are lawyers, bricklayers, and
Admittedly, the above argument appears highly cynical. A well-functioning educational system is presumably a desideratum, so why assume to the contrary so as to deny recovery? The short answer to this criticism is that it confuses description with approval. That school systems are beset by the above problems is of course a source of great concern.

More centrally, recognition of the above problems separates the generic educational malpractice claim from prototypical medical malpractice or product liability claims. If it is difficult to find an implied representation that schools will deliver a particular package of skills, then reliance on the educational system is also difficult to make out. At this point the connection between reliance and causation becomes apparent. Because parents are not justified in relying on schools, their conduct in allowing a child to complete a full public education without having attained the basic tools of literacy and numeracy may break the causal chain between institutional incompetence and injury to the child. This principle has two significant, and related, implied limitations, however. First, parents must be equipped with a sufficient quantum of knowledge upon which to act. Second, the school must be responsive to the parents' concerns. Judicial recourse should be permitted only upon a strong showing that the parental efforts to work toward a solution were consistently frustrated by the school's inaction.

In *Donohue* then, as in virtually all functional illiteracy cases, recovery seemingly should not be granted. But it is important to examine all possible sources of representation. Plaintiff was able to allege that defendant school system had violated a particular section of the Education Law which required "that each pupil who continuously failed or who was listed as an 'under-achiever' be evaluated to ascertain the physical, mental and social causes of the under-achievement and to further determine if the pupil might benefit from special educational programs."134

In the appellate division, the majority and the dissent disagreed on the effect of this section. The majority stated that the section was not intended to confer a private right of action upon plaintiff, and that, in

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any event, the plaintiff's dismal report cards provided notice to both him and his parents that he qualified as an "under-achiever" and could therefore demand the special testing mandated by the statute. Justice Suozzi's dissent emphasized that the statute was non-discretionary and imposed upon the school district a responsibility both to test the plaintiff and not to "merely promote [him] in a perfunctory manner from one year to the next."135 Although their dispute was not phrased in terms of reliance on representations, that was in fact the basis of the judges' disagreement. The question is whether, by pushing plaintiff through the grades despite several failures, the school system was impliedly representing that the skills of literacy and numeracy were being acquired. Despite the statute, the answer is almost certainly no. The failing grades should themselves have placed the student, and his parents, on notice that he was well behind his classmates, and should have triggered an inquiry long before plaintiff had been graduated and found himself functionally illiterate and unemployable.

Arguably, the result should be different where the state mandates that certain minimum scores be achieved on periodic tests before the student is permitted to advance to the next grade (or subject) level.136 In those cases, the school district (and perhaps the state) can be found to misrepresent the student's progress by advancing him or her despite the unsatisfactory scores. States could presumably avoid this problem by drafting legislation which makes the testing diagnostic, communicates the child's status to the parent, and makes known a policy of social promotion.137

135. Id. at 884 (Suozzi, J., dissenting).
136. States have begun moving in this direction. See, e.g., FLA. STAT. ANN. § 229.57 (West 1989), which directs the commissioner of education to implement a program of statewide assessment testing, and to establish minimum performance standards in core subject areas. When the Commissioner adopted a plan conditioning receipt of a diploma on the passing of a test (in furtherance of the statute, which required testing in grades 3, 5, 8 and 11), the predictable constitutional challenges erupted. See Debra P. v. Turlington, 644 F.2d 397 (5th Cir. 1981), on remand, 564 F. Supp. 177 (M.D. Fla. 1983), aff'd, 730 F.2d 1405 (11th Cir. 1984) (rejecting equal protection challenge to statute, but delaying implementation for period of four years to cure notice problem). Missouri has enacted similar legislation, empowering the commissioner of education to insure that all school districts put into place a program of competency testing in English, reading, mathematics and social studies. MO. REV. STAT. § 160.257(1) (1991). The statute further provides that "[d]istrict testing programs may include minimum promotion standards," id. § 160.257(3), but then goes on to confuse that requirement by adding that the tests "shall give due consideration to the research on the influence of cultural diversity on testing performance." Id. Is this latter language fuel for a lawsuit enjoining use of the tests on the grounds that no such consideration was provided? No reported cases have yet emerged.
137. Of course, this suggestion leaves to one side the important question of whether social promotion is desirable policy. The observation has been made that rotte promotion of students in turn creates illiterate college students and employees: "‘As long as high schools feel impelled to graduate everybody who sits patiently in class for four years and colleges act like vacuum
2. **Negligent Misdiagnosis of Problems Affecting Students’ Ability to Learn**

The salutary effect of providing full information to the parent or guardian is nowhere clearer than in cases alleging that a misdiagnosis of plaintiff’s abilities (or disabilities) led to a tragic misplacement and resulting injury. The alleged malpractice in *Hoffman v. Board of Education*, 138 presents just such a case. There, an IQ test was administered to plaintiff by a “clinical scientist” who worked for the defendant school board. Because he scored seventy-four, plaintiff was placed in a class for the mentally retarded, for which the “cutoff” score was seventy-five.139 The clinical scientist, who determined that plaintiff’s low score was largely attributable to a speech problem, provided the following written evaluation that accompanied the test score: “[Daniel] needs help with his speech problem in order that he be able to learn to make himself understood. Also his intelligence should be reevaluated within a two-year period so that a more accurate estimation of his abilities can be made.”140

Plaintiff’s mother was told neither that her son had received a score just one point below the cutoff, nor that the internal rules of the school administration gave her the right to a retesting. Further, she was not shown the written evaluation or told of its recommendation of retesting. Such retesting did not in fact occur for some eleven years, at which time plaintiff’s IQ score was in the normal range, at 94.141

Based on the foregoing, plaintiff alleged that defendant had been negligent in testing and subsequently placing him in a class for the mentally retarded, and in refusing to follow adequate procedures for the recommended retesting of plaintiff’s IQ. Significantly, the injuries alleged were not of “functional illiteracy;” rather, plaintiff alleged “mental anguish” at having been classified as retarded.142

A representational model suggests that a different result from that reached in *Donohue* may be compelled in *Hoffman*. Whereas *Donohue* presents an overall indictment of the school system for a failure to educate the plaintiff properly, the foundation of the complaint in *Hoff-
man is that information highly relevant to a parent’s decision on available courses of action affecting her child was withheld, and that the defendant supplied only part of the story. Such allegations are replete with negligent misrepresentation, and plaintiffs should at least be allowed to prove their case. Questions of plaintiff’s failure to conduct further inquiries will, of course, properly be raised by defendant to diminish or possibly to defeat recovery. But such failure, while relating to the reasonableness of reliance, should not bar recovery on the theory that no affirmative misrepresentations were made. The special relationship between the school, acting in loco parentis, and the family gives rise to a duty to disclose.  

The final case in the "New York trilogy," Snow v. State, presents a still stronger case for the plaintiff, both sympathetically and analytically. There, plaintiff was a deaf child who, like Hoffman, was given an IQ test that could not take into account his infirmity. Based on the results of that test, plaintiff was placed in state institutions for the retarded, where he remained for a total of some nine years. During that time, his IQ was tested only once more. The record was replete with statements by plaintiff’s teachers to the effect that he was "very bright," "functioning at a level which is well above mental retardation," and did "not belong at . . . any . . . school for the mentally retarded."
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The trial judge\textsuperscript{146} found that plaintiff's prolonged detention in institutions and "educational" programs manifestly unsuitable for him were caused by negligence in initial evaluation and "inordinate delay in re-evaluating his true level of intelligence."\textsuperscript{147} Such negligence would, of course, be traceable to staff psychologists and teachers, thus imposing vicarious liability on the state.\textsuperscript{148} The appellate division did not quarrel with the court of claims' determination that the state had been negligent, but was faced with the consistent unwillingness by the court of appeals to countenance claims of educational malpractice. The court found the case distinguishable from \textit{Hoffman} principally because there was no evidence of initial misdiagnosis in that case and because the "failure to have re-evaluated Daniel Hoffman's intelligence constituted a justifiable exercise of judgment in view of his teacher's [sic] daily observations ..."\textsuperscript{149} Here, by contrast, the record revealed that plaintiff's teachers had, in fact, made observations impugning the accuracy of the original diagnosis, and that the state had discovered plaintiff's deafness. Thus, failure to re-test "constituted a discernible act of medical malpractice ... rather than a mere error in judgment vis-a-vis claimant's educational progress."\textsuperscript{150}

Perhaps surprisingly, these attempts at distinguishing \textit{Hoffman} apparently impressed the court of appeals, which tersely affirmed the decision, and upheld plaintiff's claim. Presumably the court believed that casting the claim as one involving medical, rather than educational, malpractice, avoided the problems raised in the earlier cases. But it is difficult to see why the judgments in \textit{Hoffman} should be any less subject to judicial scrutiny than those in \textit{Snow}. In each case, persistent failure in judgment by educators, rather than by psychologists or doctors, were alleged to have led to the injuries suffered.\textsuperscript{151} The court of claims in \textit{Snow}, by stressing the institutional differences between traditional public schools and state institutions for the men-

\textsuperscript{146} Because the claim was brought against the state, it was initially considered by the New York Court of Claims, which sits without a jury. N.Y. JUD. LAW § 9 (Consol. 1988).
\textsuperscript{147} \textit{Snow}, 469 N.Y.S.2d at 960.
\textsuperscript{148} \textit{Id.} at 963.
\textsuperscript{149} \textit{Id.} at 964.
\textsuperscript{150} \textit{Id.}
\textsuperscript{151} It is frequently stated that professionals, such as doctors, are not liable for "mere errors in judgment." Elson, supra note 6, at 733 n.353 and cases cited therein. But an error in judgment can only be made if the professional has sufficient knowledge upon which to act. Thus, professionals may be liable for failing to arm themselves with such knowledge, thereby leading to a "failure to exercise any professional judgment." \textit{Snow}, 469 N.Y.S.2d at 962.
tally retarded, actually put forth a more persuasive rationale for permitting recovery than did the appellate division, although a representational theory was not expressly used. The court of claims focused on the mission of the two institutions in which plaintiff had been detained in finding that the malpractice was medical, rather than educational:

This finding is substantiated by the very nature of the Willowbrook State School. The patients are under continuous treatment. They receive continuous medical, as well as, psychological treatment. Even Willowbrook's records, belie the State's assertion that it is merely a school . . . . [I]t is clear that [Claimant's Exhibit '1'] is a hospital or medical and not a school record. Also, the payment for Donald's treatment was made under his father's medical plan.

While the court of claims can be criticized for attaching totemic significance to the form of malpractice, some of the facts to which it directed attention are significant within the context of a representational theory. In particular, during his nine-year institutional confinement, plaintiff had little contact with his parents, who relied upon the state to educate (to the extent believed possible) and treat their son. Moreover, the repeated observations, by both teachers and psychologists, that plaintiff was of above average intelligence were not communicated to his parents.

These facts suggest a comparison to actionable medical malpractice, in which a patient may be relatively helpless, either because of a lack of information or simply because the exigencies of treatment do not permit an exchange of relevant information in the first place.

Consider, also, the similarity between Snow and the paradigm products liability case discussed earlier. Because of the vast informational advantage defendant enjoys over plaintiff, plaintiff is more or less helpless to protect herself or himself, and must rely upon defendant to do so, either by manufacturing a safe product, or (as here) by supplying sufficiently detailed information so as to enable a real choice. When injury results from defendant's dereliction of such duties, the closed circuit justifying recovery has been established.154

152. In support of its conclusion, the court of claims cited then section 120 of the Mental Hygiene Law which listed both of the institutions in which plaintiff was detained as "State Institutions for mental defectives," and stated the function of such institutions as including "the care, treatment, training and education of the mental defectives of the state . . . ." Id. at 961 n.*. Of course, the language of the foregoing section does not answer the question of how best to characterize the malpractice.

153. Id. at 961 (quoting from the decision by the court of claims).

154. See supra part III.B.
In *Snow*, of course, it was open for the State to argue that plaintiff’s parents should have monitored their son’s condition more diligently, and that the prolonged period of detention weakens the analogy between this case and one brought for more traditional medical malpractice. Even if these claims are valid, however, they are properly raised as defenses, and cannot operate to bar the claim.

**B. Further Applications of the Representational Model: Express Representations, Contract, and State Statutory Duties**

The criticisms levelled against the cases above apply with still greater force to cases involving expressly assumed (contractual) and statutory duties. Consider *Torres v. Little Flower Children’s Services*, involving claims for both breach of contract and negligence. When plaintiff was seven, he was abandoned and placed in the care of the New York City Department of Social Services (DSS), which, pursuant to statute, accepted responsibility for his care. DSS, in turn, placed plaintiff with defendant Little Flower Children’s Services, a state-authorized child care agency. The agency assumed a contractual obligation to provide for the arrangement, as needed, of “religious training, education and vocational training.” As the dissent pointed out, the contract also required Little Flower to provide services in accordance with applicable statutes, rules and regulations of various state welfare agencies.

Because defendant’s successful motion for summary judgment precluded full development of the facts, comprehensive knowledge of plaintiff’s problems is hard to come by. Nonetheless, for purposes of the appeal, the court assumed that partially because of a language problem, plaintiff had difficulty in learning how to read. Accordingly, he underwent a psychological study that determined him to be of “borderline retarded” intelligence (although he was performing at his grade level in mathematics).

Plaintiff was nonetheless permitted to remain in a regular classroom, as Little Flower “felt that the public school was equipped to deal with this type of learning disability.” Moreover, defendant did not attempt to provide supplemental reading instruction. Five years after the psychological test was administered, Little Flower took plain-

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156. Although the contract was between DSS and Little Flower, it was agreed that plaintiff was a proper third-party beneficiary of that contract. *Id.* at 225, 230.
157. *Id.* at 224.
158. *Id.* at 230 (Meyer, J., dissenting).
159. *Id.* at 224 (majority opinion).

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tiff to a reading specialist for a further evaluation to be used in establishing a program for plaintiff after his graduation from eighth grade. The specialist determined that plaintiff was not retarded, but suffered from a complex learning disability extremely difficult to remedy. Nonetheless, he recommended a certain method of dealing with plaintiff’s problems. This recommendation went unheeded. Little Flower provided tutoring for plaintiff, but only for a short time.\textsuperscript{160}

Plaintiff did not advance beyond the ninth grade, and subsequently brought suit alleging that the negligence and breach of contract by DSS and Little Flower resulted in his functional illiteracy. Significantly, the suit originally named the Board of Education and the grammar school principal, but these parties were subsequently dropped.\textsuperscript{161} Presumably, plaintiff’s attorney was trying to avoid close comparison between this suit and \textit{Hoffman}.

The shift in parties and in theory did not impress the court of appeals. In a four to three decision, the court held that the same considerations of public policy that had driven the results in the earlier cases squarely alleging educational malpractice applied with equal force where the responsibilities of a legal custodian were in question. In either case, the court held, judicial involvement would result in impermissible interference in the policy decisions that educators must constantly make.\textsuperscript{162}

This decision is surely in error. Plaintiff was not complaining, except incidentally, of the decisions of the educational institutions involved. Rather, he argued that the defendants' failure to monitor those decisions was actionable. Indeed, the defendants had rights to administrative reconsideration of the educators' decisions, but did not avail themselves of these. The defendants' failure to take adequate steps to protect a child entrusted to them violated statutory duties, a common law duty, and, in the case of Little Flower, contractual obligations as well.

While the decision is perhaps palatable on its facts (because the steps the agencies took in assisting the child may have been reasonable), the result of the court’s decision is that the helpless child is without any remedy at all. The educational institution is essentially immune from suit, and the custodian can then use the court’s reluctance to recognize any claims arising from negligence in the educa-

\textsuperscript{160} It is more accurate to state that the plaintiff stopped attending the tutoring sessions because they were conducted at a location that required a 45 minute walk in each direction. \textit{Id.} at 225.

\textsuperscript{161} \textit{Id.}

\textsuperscript{162} \textit{Id.} at 226.
tional process to insulate itself from liability that it should properly bear.\textsuperscript{163}

The representational model requires a different approach. Although the school board (and individual educators) might be able to point to the availability of administrative review of the board’s decisions as a prerequisite to judicial involvement, plaintiff cannot then be whip-sawed by the custodian’s failure to take advantage of those same remedies. By agreeing to act as custodian for a ward of the state, one represents, often expressly, that one will at least protect the child’s best interests. Failure to do so should be actionable.\textsuperscript{164}

Of course, the presence of a guardian in \textit{Little Flower} makes the case both different and in some ways easier than the typical educational malpractice case. Yet the special concerns implicated by an express, consensual agreement, as in \textit{Little Flower}, have broad application to the private school setting. That setting may strengthen the case for recovery, because of a possible additional layer of express representations.

In \textit{Paladino v. Adelphi University},\textsuperscript{165} for example, parents of an elementary school student sued his private school under breach of contract and misrepresentation theories. The student was enrolled in the school from the nursery level through fifth grade. While in fifth grade, the student’s learning problems prompted his parents to have him independently tested. The tests showed that the student was several grades below level in central learning areas, and the school subsequently validated that assessment by refusing to promote him to the sixth grade. Plaintiffs thereupon enrolled their son in public school, and brought suit against the private institution. The complaint alleged that the school “breached its agreement by failing to provide quality

\textsuperscript{163} The court did state, in passing, that the liability of the agency might be expanded if the contract expressly so provided. \textit{Id.} at 227. Given the majority’s shrink-wrap reading of the contract, however, it is doubtful that plaintiffs will be able to prevail under this theory, either. A similar approach was evident in the appellate division’s holding in Paladino v. Adelphi Univ., 454 N.Y.S.2d 868 (App. Div. 1982). \textit{See infra} notes 165–76 and accompanying text.

\textsuperscript{164} It may be thought that this principle also requires liability on the part of parents who fail to act in their child’s best interests, as by failing to take advantage of available administrative remedies. Certainly the child’s lack of power vis-a-vis his or her parents is evident. Other considerations, such as the need to accord parents maximum flexibility in child-raising, may somewhat counterbalance the urge to impose liability here. Another problem, explored in \textit{supra} part III.D, is that, at least after a period of time, the school may be properly charged with notice that a family is dysfunctional, so that the school may incur an obligation to act.

In any event, the connection between the liability of a parent and that of a state agency can be overemphasized. After all, by agreeing to take a child into its care, a state-approved agency assumes certain contractual obligations that are (probably) missing in the parent-child context. Those contractual obligations fit within the representational model being advanced here.

\textsuperscript{165} 454 N.Y.S.2d 868 (App. Div. 1982).
education, qualified and expert teachers, [and] necessary tutorial and supportive skills." Also alleged were causes of action purportedly sounding in both negligent misrepresentation and deceit.

Constrained by the unambiguous holdings of the New York Court of Appeals in Hoffman and Donohue, the appellate division reversed the trial court's denial of summary judgment. The court noted that recognition of a claim for breach of contract would yield the very result New York courts had feared in the negligence context—judicial second-guessing of the establishment and implementation of educational policy and methodology.\(^{167}\)

The court then turned to the claims of misrepresentation and found that these fared no better, but for different reasons. Although the complaint apparently was inartful in separating the claim of negligent misrepresentation from that of deceit, the former was bottomed on the more general “promise” of the school to deliver an education superior to that available in public school, while the deceit claim centered on the school’s alleged failure to keep parents informed on their son’s progress for the purpose of keeping him enrolled.\(^{168}\)

The claim sounding in deceit appears to have been rejected only because the facts established during discovery “fail[ed] to bear out the claim that the school made false representations to the parents.”\(^{169}\) In short, the parents’ allegations that the school had failed to keep them apprised of their son’s learning difficulties were simply untrue, and the court chronicled the storm signals that periodically had been sent home.\(^{170}\)

As to the negligent misrepresentation claim, the court summarily stated that such claims “ought not be actionable.”\(^{171}\) The court’s rejection of that claim, although not explained, may well have been justified by the principle that a misrepresentation requires more than mere “puffing,”\(^{172}\) as well as by the hard facts of the case. Promises to deliver “a greater education . . . than that offered by the school system in the . . . community,” and to deliver an education “of the highest quality” are not taken as affirmative representations by reasonable

\(^{166}\) Id. at 870.
\(^{167}\) Id. at 870–72.
\(^{168}\) The claim for deceit also alleged reliance: “[I]t is claimed that these representations were made with the intent to deceive plaintiffs in order to keep [their son] enrolled at the school and that plaintiffs relied upon such representations by continuing [his] matriculation.” Id. at 874.
\(^{169}\) Id. at 875.
\(^{170}\) Id. at 874–75.
\(^{171}\) Id. at 874.
\(^{172}\) See, e.g., Vulcan Metals Co. v. Simmons Mfg. Co., 248 F. 853 (2d Cir. 1918).
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people. Furthermore, the promise to provide "personalized and individualized instruction in the basic academic skills when required" was met. It is fair to say that, in light of the generality of the allegations, the complaint could just as easily have been made against a public school.

Nonetheless, judicial reluctance to validate claims of negligent misrepresentation may lead to unjust results in other cases. If, for example, a private school represented itself as having a certain student/teacher ratio, and that ratio were greatly exceeded, no reason appears why a claim should not be permitted, both on contractual and representational grounds. Presumably, the court's fear of permitting any claim sounding in negligence accounts for its lack of analysis here.

One of the court's comments, however, did hint that recovery might be possible under certain circumstances. The court suggested that the private school setting may justify a breach of contract claim where "certain [contractually] specified services, such as . . . a designated number of hours of instruction" were promised but not delivered.

The New York court's holding was buttressed by the decision in the Maryland case of Hunter v. Board of Education, in which that state's supreme court refused to allow plaintiffs to avoid dismissal by characterizing what was essentially a malpractice claim as a breach of contract action. There, the parents of a grade school student brought suit against the local school board, the school principal, a board employee who had diagnosed the student, and the student's sixth-grade teacher. The complaint stated a wide range of allegations, including negligent misdiagnosis, intentional misrepresentation and demeaning the child.

Borrowing heavily from the logic and language of the New York and California cases denying recovery in cases alleging educational malpractice, the court upheld the lower court's dismissal of those portions of the claim that smacked of negligence, but reinstated that por-

174. Id. at 874–75.
175. Accord Helm v. Professional Children's Sch., 431 N.Y.S.2d 246 (App. Div. 1980). There, in a terse per curiam opinion, the First Department of the Appellate Term of the Supreme Court affirmed the dismissal of a cause of action for educational malpractice against a private school. Reliance was placed upon Judge Wachtler's concurring opinion in Donohue v. Copiague Union School District, 391 N.E.2d 1352, 1355 (N.Y. 1979), in which he noted the daunting problem of proving causation in such cases.
176. Paladino, 454 N.Y.S.2d at 873.
177. 439 A.2d 582 (Md. 1982).
178. Id. at 583 (by "furnish[ing] false information to [the parents] concerning the student's learning disability").
tion alleging intentional misrepresentation. Predictably, the dissenting opinion likened educational malpractice claims to claims against other professionals, and therefore saw no reason to deny that class of actions.

Although the court did not expressly focus on representation and reasonable reliance, these considerations infused the holding. The court emphasized the availability and superiority of administrative remedies, noting that the legislature had spoken in favor of "these and similar informal measures." Under a representational model, such procedures are indeed of importance, but not just because the legislature has so decreed. The point can be illustrated by returning to the medical malpractice case. When one is injured by negligence on the operating table, a state may have administrative procedures providing for the imposition of discipline against the doctor. However, no one seriously suggests that the availability of such a procedure should bar the injured party from judicial recovery. The reason is clear enough. Administrative procedures cannot make the injured person whole. At the time of the negligent diagnosis, treatment, or operation, the patient is typically helpless. An administrative procedure that attempts to correct the situation that has led to the patient's mistreatment simply comes too late.

179. The court stated that it "in no way intend[ed] to shield individual educators from liability for their intentional torts. It is our view that where an individual engaged in the educational process is shown to have wilfully [sic] and maliciously injured a child entrusted to his educational care, such outrageous conduct greatly outweighs any public policy considerations which would otherwise preclude liability so as to authorize recovery." Id. at 587.
180. Id. at 588-89.
181. Id. at 586.
182. For example, Florida's comprehensive physician disciplinary statute sets forth some 38 separate grounds for action against physicians, including: "Gross or repeated malpractice or the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances." FLA. STAT. ANN. § 458.331(1)(t) (West 1991). The statute also sets forth a wide range of disciplinary actions that can be taken if the grounds for action are substantiated. These include "[r]evocation or suspension of a license" or "[r]efund of fees billed to and collected from the patient." Id. § 458.331(2). But the patient wants (and is entitled to) more than a refund.
183. Such helplessness is hard to dispute when the negligence takes place on the operating table. More difficult cases are presented in areas such as informed consent, where it may be argued that the patient can ask for the information needed. See Richard A. Epstein, Medical Malpractice: The Case for Contract 27-34 (1979). Even here, though, the physician's superior knowledge and the intimidation that many patients experience argue persuasively for a duty to disclose, bottomed again on the patient's basic lack of power. See Canterbury v. Spence, 464 F.2d 772, 782 n.27 (D.C. Cir. 1972) ("Duty to disclose . . . is a duty to volunteer, if necessary, the information the patient needs for intelligent decision. The patient may be ignorant, confused, overawed by the physician or frightened by the hospital, or even ashamed to inquire.").
In contrast, the types of injury that ground most educational malpractice claims occur over a period of time. A student does not become functionally illiterate because of one specific act. Even where an act of negligent misdiagnosis causes a gross misplacement of the student, prompt correction of the situation may prevent injury. Where adequate administrative procedures are in place, these may provide a superior alternative to the time-consuming judicial process. To return to an earlier example, if the parents have the right—and are so informed—to a re-evaluation of a child diagnosed as needing special education, such re-evaluation can prevent the injury before it occurs. Thus, state-sponsored administrative procedures are indeed significant, not because they can fairly be interpreted as trumping the judiciary, but because they can have the salutary effect of rendering resort to it unnecessary.

The logic of the above distinction suggests its own limits; limits that were impliedly recognized by the court in *Hunter*. The court correctly noted that intentional acts, including misrepresentation and something akin to intentional infliction of emotional distress were actionable.\(^1\) This holding is plainly correct, as an intentional wrong places the plaintiff in the same helpless position as the patient injured by medical malpractice.\(^2\)

The consistent imposition of liability for negligent supervision of students resulting in physical injury can also be accommodated by an emphasis on representation and reliance. Where the school's negligent act causes immediate physical harm to a student, the obvious helplessness of the student closely parallels that of the patient injured by the negligently performed operation, or that of a consumer injured by a defectively manufactured product, and recovery should be possible. Indeed, courts consistently recognize claims for inadequate supervision leading to personal injury. The interesting question in these cases is whether the defendant acted reasonably under the circumstances, with due regard for the role of the educator.

Consider, for example, *Berg v. Merricks*.\(^3\) There, a Maryland appellate court writing before *Hunter* assumed that physical education

\(^1\) *Hunter*, 439 A.2d at 583 (defendant was alleged to have provided plaintiffs with false information, to have “alter[ed] school records to cover up their actions,” and to have “demean[ed] the child”).

\(^2\) Of course, where a wrong can be administratively corrected before the student is harmed, a court may properly require that such procedures be exhausted before resort to its own offices. Such administrative procedures may have the desired effect of placing a school board's conduct under scrutiny, and of providing a plaintiff with a chance to convince the authorities of the need for special or proper placement, before the questioned action ripens into injury.

teachers owe their charges a duty of care in terms of discretion, instruction, and supervision. In Berg, a student became paralyzed as a result of poor execution of a trampoline exercise. In reviewing the trial judge's grant of directed verdicts for the physical education teacher and the school principal, the court assumed the presence of a duty. It also fixed the duty of care owed by the physical education instructor as the standard recognized in the teaching of high school gymnastics. However, a review of the evidence persuaded the court that no negligence had actually taken place, and the directed verdicts were therefore upheld.

V. REPRESENTATIONAL FOCUS: EXTENDED APPLICATIONS

The foregoing discussion demonstrates that representational notions are at work in other areas of tort law, as well as in the educational setting. Also, a proper focus on communication and reasonable reliance can animate the decisional law of educational malpractice, even though that term encompasses claims arising out of many different facts and legal theories.

In this final section, the representational light shines on two other classes of cases that, frankly, have little to do with each other. But this very dissimilarity supports a pervasive emphasis on representation and reliance.

A. Applying the Representational Model to the Education of the Handicapped Act

As noted earlier, the class of students designated as "handicapped" by the Education of the Handicapped Act (EHA) begin their lawsuits on surer footing than those who seek recovery under a common law theory, because the statute itself establishes the duty that courts otherwise have been loath to find. This ab initio advantage has spurred some injured parties to attempt to mix statutory and common law claims for relief. For the most part, however, courts have been stingy when it comes to awarding damages under the statute, and have

187. Id. at 227.
188. Id. at 223. Negligence had been charged against the physical education teacher, the principal, the school superintendent, the county, the school board, and individual board members. The court found, as a matter of law, that none of those who were proper parties to the suit were negligent, and that the others (the school board and its members, and the county) were immune from suit.
not permitted plaintiffs to invoke common law theories, principally negligence, to collect the full damages they seek.\footnote{190}

This Article now turns to a consideration of claims arising under the EHA. One might begin by asking why this Article discusses the EHA at all, inasmuch as the statute speaks for itself. The response is that courts faced with educational malpractice claims not brought under the EHA could learn valuable lessons from the statute. The statutory scheme, with its emphasis on communication between parent and school authorities, its administrative procedures, and its ultimate resort to the judiciary, is generally consistent with a representational perspective. Further, as suggested above, the EHA also merits treatment because of plaintiffs’ repeated attempts to join claims under the EHA with other theories of recovery.

As noted earlier, the statute requires that the relevant authority—typically the local school board—first identify, then take steps to provide, an “appropriate” education to handicapped children.\footnote{191} Devising such a program involves working up an “individualized education program” for the student, tailored to that student’s idiosyncratic needs. In an ideal situation, the statute provides incentive for school officials and parents to enter into agreements concerning the child’s education.\footnote{192}

Where such agreement is not reached, or where the parents are otherwise dissatisfied with the district’s decision, the statute provides a grievance procedure designed to resolve those differences. The right to judicial redress follows this grievance procedure.\footnote{193} As stated in part II.C., this layered method of dealing with placement questions is pref-

\footnote{190. In Johnson v. Clark, 418 N.W.2d 466 (Mich. Ct. App. 1987), the court used just such a one-two punch to disallow plaintiff’s common law and statutory claims. In a textbook example of circular reasoning, the court first stated that no common law duty to teach properly existed and then, without considering plaintiff’s arguments that such a duty should be recognized, the court dismissed the damages claim arising under the Education of the Handicapped Act with the observation that, since Congress did not intend for the statute to provide a private cause of action, there could be no “common-law duty to test and evaluate special education students apart from the duties already imposed by statute.” \textit{Id.} at 468.}

\footnote{191. \textit{See supra} notes 51–52 and accompanying text.}

\footnote{192. Cases in which such agreements have been reached are hard to come by for the obvious reason that the agreements themselves render litigation unnecessary. Sometimes, however, agreements are initially struck, but then collapse because of changed circumstances, which may include a new intransigence on one party’s part. \textit{See, e.g.,} Doe v. Anrig, 692 F.2d 800, 802–03 (1st Cir. 1982), \textit{on remand}, 561 F. Supp. 121 (D.C. Mass. 1983), \textit{aff’d}, 728 F.2d 30 (1st Cir. 1984), in which the parents of a child with Down’s Syndrome and the school district forged an agreement whereby the cost of residential placement would be shared by parents and school. The agreement disintegrated, however, when the parents subsequently requested a full re-evaluation of their son’s status.}

\footnote{193. \textit{See supra} note 53 and accompanying text.}
erable to allowing a problem to mushroom to the point where the harm done is irreversible. The statute reflects this wisdom by implicitly requiring exhaustion of administrative remedies before filing suit.194

Typically, suits under the EHA seek only declaratory or injunctive relief; in effect, they ask the court to second-guess the placement decision reached by the school officials.195 An interesting question arises when the complaint also seeks damages. The problem in deciding whether to recognize a damage claim under the EHA is that the statute is itself ambiguous, providing that the court is empowered to grant such relief as it deems appropriate. Literally construed, this language would support the awarding of damages. Focus on the purposes of the statute, however, has led many courts to decide that, absent exceptional circumstances, "appropriate relief" is limited to overruling the administrative agency's placement decision.

Exceptional circumstances have been defined as including two paradigm situations: The physical well-being of the student would be jeopardized unless the parents take some action; or the school district acted in bad faith by refusing to follow (or delaying) established procedures or by willfully misplacing the student. Even faced with such circumstances, however, courts typically allow recovery only for out-of-pocket expenses incurred as a direct result of the district's malfeasance. Examples include cost of transportation, reimbursement for private tuition, and (perhaps) cost of services.196

Daniel B. v. Wisconsin Department of Public Instruction197 provides a nice illustration of the operation of the statute. In Daniel B., parents brought suit under the EHA, the due process clause of the Fourteenth

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194. 20 U.S.C. § 1415(e)(2) (1988) (grants the right to bring a civil action only to those aggrieved by the findings of the relevant educational institutions).

195. See, e.g., Diamond v. McKenzie, 602 F. Supp. 632 (D.D.C. 1985) (granting permanent injunction, requiring placement of child in certain program); Garrity v. Gallen, 522 F. Supp. 171, 240–41 (D.N.H. 1981) (granting injunctive relief to class action plaintiffs requiring, inter alia, individually based community placements, appropriate medical services, and decent living conditions). In Taylor v. Honig, 910 F.2d 627, 628 (9th Cir. 1990), the court stated the general view that "injunctive or other prospective relief is ordinarily the remedy . . . and damages are usually inappropriate."

196. See supra note 61, discussing Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981). For a criticism of the approach taken in Anderson, see Doe v. Brookline School Commission, 722 F.2d 910, 919–21 (1st Cir. 1983). The Doe court, en route to holding that reimbursing parents for the interim costs of placement was permissible, cited a number of cases in which other courts had permitted such reimbursement where the "circumstances were sufficiently compelling." Id. at 920.

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Amendment, misrepresentation, and intentional infliction of emotional distress, claiming that the school district failed to provide the appropriate education for their son's needs, causing him to regress to a state of semi-autism. They also sought reimbursement for a diagnosis to reveal these problems, and claimed that defendants had "misrepresented to them that a teacher designated to oversee [the child’s] education was a certified special education teacher; and that the defendants refused to permit [his] parents to observe his classroom conditions or to furnish information concerning him." Defendants responded with a motion to dismiss all but the claim that the student's placement was inappropriate for the most recent year.

The student, identified as handicapped, was enrolled in a private school during the 1975-76 school year. His parents then moved him to a public school, allegedly because the Superintendent of Schools represented to them "that the district had better facilities and personnel to provide an individual program for [him]. Relying upon these representations, [his] parents enrolled him in the [public] schools in 1976."

The parents from time to time objected to the district's allegedly inadequate or inappropriate treatment of their son's problem, but took no formal steps until the 1982-83 school year, when they pursued the proper administrative steps for declaratory relief and damages. They filed the federal action after losing on administrative appeal.

198. The due process claims would have been redressable under 42 U.S.C. § 1983 (1988), had the court found them cognizable. The alleged due process violations were as follows: (1) denial of "information about Daniel's education and the opportunity to observe his education and progress"; (2) failure to notify the parents of their legal rights and remedies; and (3) failure to provide the parents with free representation at the administrative hearing. Daniel B., 581 F. Supp. at 588. The court rejected the premise underlying the third claim, finding that the Constitution did not require the right to counsel in this circumstance. Id. at 589-90. As to the others, the court followed the logic of cases such as Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981), in which the court ruled that, where the EHA is implicated, that statute itself provides the exclusive remedy. Anderson, 658 F.2d at 1216-17. Inasmuch as the court in Daniel B. followed the prevailing view that, absent exceptional circumstances, only injunctive relief is available for violations of the EHA, it was but a short step to the position that no other statute could be used to supply a damage remedy that the EHA declined to provide. The court then closed the syllogism by invoking the Supreme Court's more general pronouncement, in Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981), that an action under § 1983 is not available "where the governing statute provides an exclusive remedy for violations." Daniel B., 581 F. Supp. at 589 (quoting Maine v. Thiboutot, 448 U.S. 1, 22 n.11 (1980)). As discussed infra, this position becomes untenable if the alleged misrepresentations kept the plaintiffs from pursuing their statutory rights under the EHA until injury had occurred.


200. Id.

201. Id.
The district court was not sympathetic. As to the request for declaratory relief, the court held that such a claim was not properly before it as to any year other than the current one, because of the parents' failure to seek administrative redress during the years between 1976 and 1982.\footnote{Id. at 588.}

Invoking the common refrain that the EHA does not support a right to damages, the court next dispatched that request. Neither of the two exceptions was met. The child's placement did not raise a serious risk of injuring him physically and the district had not acted in bad faith, since it had fully complied with the relevant procedures for the year in which the parents had gone through the proper channels.\footnote{Id. at 590-91.}

Because the district court also dismissed the constitutional claims, all that remained was the placement decision for the 1982-83 year, and the pendent state claims for intentional misrepresentation and intentional infliction of emotional distress.\footnote{Daniel B., 581 F. Supp. at 592 (citing Girardier v. Webster College, 563 F.2d 1267, 1276-77 (8th Cir. 1977)).} But the court exercised its discretion to disallow these state claims, noting that they would require a jury trial and massive discovery, and that the court would thereby be drawn into the educational malpractice issue.\footnote{Daniel B., 581 F. Supp. at 591-92.}

The court can be criticized for failing to appreciate the significance of the claim for intentional misrepresentation. If the basis of that claim was that the school district intentionally prevented the parents from acquiring vital information concerning their son's progress, they may indeed have had a difficult time monitoring that progress, and may not have realized the extent of the problem for quite some time.

The district's deliberate silence should perhaps itself have triggered some action on the part of the parents: Again, it is preferable to attempt resolution of such problems at the earliest time. It might have been well, however, for the court to have granted plaintiffs leave to replead, specifying any actions defendants took to keep them in the dark. In a sufficiently egregious case—as where the defendants provide continued assurances, or misrepresent a teacher's qualifications or what is going on in the classroom, and then prevent the parents from verifying these actions—judicial oversight may well be necessary as a

\footnote{Plaintiffs also claimed invasion of privacy under the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232(g) (1989). The court also dismissed that claim, holding that the statute "does not provide private litigants with a damage remedy in a federal court." Daniel B., 581 F. Supp. at 592 (citing Girardier v. Webster College, 563 F.2d 1267, 1276-77 (8th Cir. 1977)).}
deterrent. Courts would not even need to work a doctrinal change to achieve such a result, because intentional misconduct on this scale certainly amounts to bad faith.

It appears that in granting a limited class of damages (where they allow damages at all), courts are on the right track but have perhaps not gone far enough. If parents and the school district are acting in good faith according to the statutory mandate, those mechanisms should prevent injury. If the district is stonewalling, or misrepresenting essential facts, however, injury will occur until the problem is remedied.

In such a case, there is no reason not to grant all recovery determined to stem from the conduct that allows a damage award in the first place. For example, if a deliberate misrepresentation early in a child's schooling resulted in a lengthy misplacement, why should damages for such misplacement not be recoverable? Such a student might miss years of appropriate schooling (in defiance of the statutory mandate), and would then presumably suffer both pecuniary (as in lost wages, and the cost of schooling to compensate for the years lost) and emotional loss. That parents are sometimes permitted to recover out-

206. Where the relief sought under the EHA is for damages only, the familiar maxim that resort to foreseeably futile administrative remedies will not be required should apply, but may not change the result. Loughran v. Flanders, 470 F. Supp. 110 (D. Conn. 1979), involved an attempt by a learning disabled minor to recover damages against defendant school board for negligently failing to implement an appropriate educational program earlier in his school career. Significantly, the district court did not have before it an equitable action requesting that the student be placed in a given program, because by the time of the decision the parties had agreed on an educational program. Rather, plaintiffs sought “one million dollars in monetary damages for the alleged negligence of the defendants in failing to implement an appropriate educational program earlier in the plaintiff's school career.” Id. at 111.

Since the administrative procedure was “designed only to handle parental challenges to the evaluation and/or placement of a child suffering from learning disabilities,” id. at 112–13, the court held that exhausting state remedies would be an empty exercise, and therefore would not be required. This result, however, hardly helped the plaintiffs, for in the next breath the court disallowed the claim for damages, noting that the Act was “devoid of even the slightest suggestion that Congress intended for it to serve as a vehicle through which to initiate a private cause of action for damages.” Id. at 114. In so holding, the court relied in large measure on Cort v. Ash, 422 U.S. 66 (1975), in which the Supreme Court set forth four factors to aid in determining whether Congress intended to create a private damage remedy in a statute not expressly providing one. These factors are: (1) whether the plaintiff is a member of a class for whose benefit the statute was enacted; (2) whether there is any legislative intent to create or deny such a remedy; (3) whether implication of a private right of action is consistent with the underlying purposes of the legislative scheme; and (4) whether the cause of action sought is one traditionally left to state law. Cort, 422 U.S. at 78.

207. It is also possible, of course, that the parents may be acting in bad faith. In such a case, even if damages might otherwise be justified under one of the exceptions, they might properly be disallowed or reduced.
of-pocket expenses will be little consolation in the face of such staggering injury.

Two objections to the above proposition are apparent. First, awarding damages is inconsistent with the statute's more limited purposes of ensuring an appropriate educational placement for handicapped students. A related quarrel is that permitting such damages would circumvent the state's express policy of refusing to recognize claims for educational malpractice. Neither of these objections, now treated seri-\-atim, is compelling.

It may well be that Congress did not expect courts to award damages under the EHA. If so, courts should refuse to allow damage claims in all cases. Once courts decide to create exceptions, however, their decision to limit the damages that are recoverable when an exception is met appears arbitrary.\textsuperscript{208} Again, in a case involving "bad faith," the school district should not be able to escape the full responsibility for what its culpable conduct has wrought. If the results are unpalatable, Congress can always amend the Act.

The second objection is a bit trickier. Setting aside the central point that courts should recognize a cause of action for educational malpractice, federal courts must not place financial burdens upon state courts that the states themselves have declined to impose. This argument has both constitutional and fairness aspects. The Eleventh Amendment argument has not impressed courts, probably for the reasons set forth in the margin.\textsuperscript{209} In response to the more general point that to permit the recovery of damages against state entities would be to saddle them with intolerable financial burdens, two observations are offered.

\textsuperscript{208} See Doe v. Brookline Sch. Comm., 722 F.2d 910, 920 (1st Cir. 1983) (criticizing the "exceptional circumstances" approach that some courts have taken and stating that "[t]hese exceptions must be based on the premise that [the statute does not create] a complete bar to reimbursement").

\textsuperscript{209} The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. What does this mean? As the court stated in Ceis v. Board of Education, 774 F.2d 575 (3d Cir. 1985), "[i]t is well-settled . . . that despite its . . . seemingly ambiguous language, the eleventh amendment constitutionalizes a . . . far-reaching principle of state sovereign immunity." \textit{Id.} at 580 (citations omitted).

For a host of related reasons, the Eleventh Amendment is not likely to pose a problem in educational malpractice suits. First, the amendment applies only to states themselves, not to subdivisions of the state. Lincoln County v. Luning, 133 U.S. 522 (1890). Typically, it is these subdivisions, or agents thereof, that are the primary defendants in such suits. Further, the Eleventh Amendment's immunity is not available where the state officials in question act beyond their statutory authority, in a manner violative of federal rights. Even assuming that the relevant parties in suits brought under the EHA qualify as state officials, their wrongful actions under the Act would presumably take them without the amendment's
First, the state receives federal funding for the education of its handicapped students only if the conditions set forth in the statute are met. So, for example, if a state did not wish to draw up individualized educational programs for the students, any program the state might establish for the handicapped would presumably forfeit federal funding. By the same reasoning, any state unwilling to accept the consequences of failure to comply with the statutory mandate should also be prepared to do without federal funding.  

But more importantly, the very structure of the statute ensures that liability will not be imposed absent intentional misconduct. The focus is on diagnosis, communication, and placement, and the grievance procedure, in which parents are assigned a pivotal role, is designed to prevent the kind of injury that gives rise to educational malpractice suits. Bluntly put, any state that finds itself, its agencies, or its employees liable for a damage claim under the EHA has only itself to blame.

**B. Claims Involving Injury to Third Parties**

Almost all claims arising under the educational malpractice umbrella allege injury, however caused, to a student attending the school in question. Additionally, however, there is also a frightening incubus; a tiny group of cases claiming that an institution’s negligent education of its charges caused injury to a third person who sought the student’s services. It might be alleged, for example, that a medical school so negligently taught its future doctors that they were ill-equipped to minister to their patients. A claimant so alleging would sue both the doctor and the medical school that “miseducated” him or her.  


What’s more, the state may waive its immunity. It can be reasonably maintained that, by accepting federal funding under the EHA, which empowers the court to grant whatever relief it deems apt, the state is impliedly consenting to a waiver of immunity.


210. This proposition may smack of “blackmail” to some, just as there were critics of the plan to withhold federal highway funding from states that did not adopt a drinking age of 21. But 23 U.S.C. § 158 (1988), which provided for the withholding of five percent of state highway funds for failure to adopt this drinking age, withstood constitutional attack under both the Tenth and Twenty-first Amendments. South Dakota v. Dole, 483 U.S. 203 (1987).

211. Moore v. Vanderloo, 386 N.W.2d 108 (Iowa 1986), discussed in detail in this section, is such a case.
and large, missed the point in issuing rote dismissals. The same focus on the communicative, representational aspect of these claims—and on the injured party's corresponding reliance—that has so far directed this Article can also inform decisions in these third-party cases.

In Moore v. Vanderloo, the patient of a chiropractor brought suit against the chiropractor, Vanderloo, as well as against the manufacturer of an oral contraceptive she had been taking and the chiropractic college, Palmer College of Chiropractic (Palmer), that Vanderloo had attended. Vanderloo settled before trial, while Ortho, the manufacturer, won at trial. The portion of the Iowa Supreme Court's decision of concern for present purposes is the appeal from the granting of Palmer's motion for summary judgment.

Plaintiff suffered a debilitating stroke after undergoing chiropractic manipulation of her neck. At the time, she had been using Ortho's birth control pill for some ten years. Although the court's summary of the complaint is somewhat opaque, apparently the combination of birth control pills and chiropractic manipulation allegedly caused the stroke. The source of Vanderloo's negligence was also unclear, but Palmer College was alleged to have breached an express warranty running to plaintiff, and negligently failed "to properly research and teach Vanderloo the risk of stroke from chiropractic manipulation of the neck."

The court promptly characterized the negligence claim as seeking relief for educational malpractice, and noted that almost all courts that had considered the tort had rejected it. Recognizing that this case involved facts far afield from those grounding most other educational malpractice claims, the court nonetheless parrotted the concerns of those cases: the difficulty of ascertaining proper teaching methodology; the uncertainty of causation and damages; the unwillingness of the judiciary "blatantly to interfere with the internal operations and daily workings of an educational institution"; and refusal "to interfere with legislatively defined standards of competency."

These objections, considered antiseptically, are no more compelling here than in the more garden-variety educational malpractice claims

212. Id.
213. She had also used another manufacturer's pill for the five years preceding that, and was a heavy smoker. Id. at 111.
214. It might be that Vanderloo was negligent in the way he manipulated plaintiff's neck, or in not appreciating the possible synergy between use of birth control pills and stroke, or in failing to take plaintiff's medical history. The more interesting question here, however, involves the negligence of Palmer College of Chiropractic.
215. Vanderloo, 386 N.W.2d at 111.
216. Id. at 114-15.
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already considered, and it seems unnecessary to reiterate this Article's criticisms here. Two points, however, should be added. First, it is not suggested that the court interfere with the legislature's licensing function, but judicial recognition that the state has limited resources for policing ongoing compliance with licensing requirements suggests, if it does not entail, that supplemental private actions are desirable. Second, the court is correct in noting that there is difficulty in demonstrating causation in these cases, and, we shall see, this difficulty is bound up with the problem of showing reasonable reliance.

The court's logic in dismissing the express warranty claim was more sound. The "sources" of the express warranty were the diploma awarded Vanderloo, which was claimed to "constitut[e] an express warranty of his competence by Palmer College to the public," and advertising material provided by Palmer trumpeting the safety of chiropractic manipulation.217 This claim was rejected for reasons that can be accommodated by a representational focus. The Uniform Commercial Code, which the court applied by analogy, finds an express warranty only where the seller makes a promise to the buyer and that promise "becomes part of the basis of the bargain."218

The court then noted that plaintiff was not a "buyer" in relation to Palmer, and that her admission that she never read any of Palmer's literature defeated the reliance necessary to establish the warranty as forming part of the basis of the bargain.219 The court justifiably feared that, absent reliance or privity, recognition of an express warranty would create vast liability against all educational institutions.220

Clearer focus on the representations made by Palmer College, and the reliance by plaintiff, would have resulted in a more streamlined decision, but one identical in result. The chiropractor had been graduated from Palmer some four years before the incident giving rise to the lawsuit. It simply distorts common understanding and common sense to maintain that patients rely on the degree-granting institution rather than on the professionals themselves. What if the chiropractor had forgotten what he had learned? Had failed to keep abreast of recent developments? Had simply applied too much pressure? The causal intervention of the doctor (or lawyer, or architect, for that matter) is

217. Id. at 112.
218. Id. (citing IOWA CODE § 554.2313(1)(a) (1977)) (emphasis omitted).
219. Id.
220. The court declined to consider a related claim arising under implied warranty, since neither plaintiff's oral arguments nor briefs raised the issue. The court suggested, however, that its discussion of express warranty "also would seem to apply to an implied warranty theory." Id. at 113.
both obvious and enormous, so that it runs counter to reality to main-
tain that the school was somehow relied upon.

The story does not end so neatly. While reasonable patients rely on 
their doctors, in some cases reasonable doctors may, in turn, have 
relied on their schools to provide them with the basic tools of “liter-
acy” for their profession. The court in Vanderloo feared this very type 
of case. In justifying its dismissal of educational malpractice suits for 
third-party injury cases, the court cited the burden that would other-
wise be created: “[A]ny malpractice case would have an educational 
malpractice action within it. For example, a doctor or attorney sued 
for malpractice by a patient or client might have an action over against 
his or her educational institution for failure to teach the doctor or 
attorney how to treat . . . the client’s problem.”221

Vanderloo settled his dispute with Moore, so the possibility of this 
“action over” never arose. Where it does arise, this two-tiered system 
of liability that the Vanderloo court feared actually seems best to com-
port with the representations and the (perhaps forced) reliance 
involved.

Swidryk v. Saint Michael’s Medical Center,222 involved just such a 
“doctor bites hospital” situation. Plaintiff was a first-year resident 
sued for malpractice in connection with the delivery of a baby. He 
filed suit against the hospital in which the injury occurred, and against 
the Director of Medical Education at the hospital, who was allegedly 
“negligent in failing to supervise adequately the intern and resident 
program,” and who “breached a contractual duty . . . by failing to 
provide a suitable environment for a medical educational experi-
ence.”223 In granting defendant’s motion for summary judgment, the 
court began promisingly by “dispos[ing] of the technical distinctions 
between similar causes of action . . . to achieve substantial justice.”224 
The court did less well in the achievement of justice.

The opinion splits neatly into two sections. In the first, the court 
simply ran through the myriad justifications that courts have used in 
almost uniformly turning away claims for educational malpractice.225

In the second, the court recognized that the factual situation before 
it differed from that of most educational malpractice cases, but 
decided that those differences did not call for a changed result. The 
most pointed arrow in the court’s quiver was the comprehensive statu-

221. Id. at 115.
223. Id. at 642.
224. Id.
225. Id. at 643–44.
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tory and regulatory scheme that "New Jersey has enacted... to insure that proper medical education is provided within the State." Simply stated, the court believed that the state legislature's reliance on a state board of medical examiners, a state board of higher education, and the advisory graduate medical education council displaced judicial authority to impose liability on properly licensed institutions.

Under the analysis followed throughout this Article, the result in this case may well be unfair. The resident most likely had little ability to affect the conditions under which he labored, and was therefore compelled to rely on the competence of the hospital's policy-makers. Interestingly, this helpless position is not entirely dissimilar from that of the patient undergoing an operation.

Does this mean that the licensing scheme is irrelevant? Perhaps not. It should be open for the hospital to argue that it was following the procedures set forth in the applicable regulations, and, if those regulations are sufficiently detailed, perhaps compliance should operate as a complete defense. Further, if the resident knew of the problems for a reasonable period of time but did nothing to correct them internally or to bring them to the attention of the relevant authority, the resident may move sufficiently far from the "helpless patient" paradigm to justify reducing any recovery on comparative negligence principles. Any court inclined in this direction should balance the notoriously difficult conditions under which residents work against their obligation to their patients to protect them from a situation the residents find unsafe.

VI. CONCLUSION

Because the problems that beset the educational system are woven into the social fabric, solutions are hard to come by. Legislatures, removed from the school systems for which they bear responsibility, can do little more than establish broad boundaries within which the educational mission is to be carried out. It then devolves upon local school boards, school officials, teachers, and parents to work out the "details" for an enlightened education, one that will enable children one day to assume their place in the national and global society.

Sensitive to the difficulty of the educators' task, courts have almost universally adopted a "hands off" approach. Better to have those directly involved in the educational process work toward solutions than to interpose the divisive judiciary. This approach is tempting.

226. Id. at 644. The court set forth several of the provisions that it believed expressed a legislative preference to keep the courts out of the daily operations of graduate medical education.
but amounts to abdication. Courts must recognize that the disputes they have broad-brushed as "educational malpractice" take in a spectrum of cases so wide that rote dismissal is unfair.

This Article has attempted to convince the judiciary that proper attention to representations, often implied, and the forced reliance of parents and children on those who provide education will sometimes support recovery for educational injury. This result is neither radical nor surprising, since it follows from unexceptional (and unexceptionable) tort principles that courts do not otherwise question.

This position is reached with some unease. Permitting private suits by those who perceive themselves somehow wronged by the educational process may saddle the school systems with additional financial burdens, at least in the short run. It would be far preferable for the school, broadly defined, to seek internal solutions to its problems.

But neither schools nor legislatures are solving these problems, so the judiciary must. The special urgency of judicial action in the educational setting is as clear now as ever:

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 . . . . 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. 227

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