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CAN STUDENTS SUE WHEN SCHOOLS DON'T MAKE THE GRADE? THE WASHINGTON ASSESSMENT OF STUDENT LEARNING AND EDUCATIONAL MALPRACTICE

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Abstract: Washington's Academic Achievement and Accountability Statute (AAA Statute) creates a statewide system of school accountability. It also requires that all students pass the tenth-grade level of the Washington Assessment of Student Learning standardized test (WASL) to receive a diploma. Unfortunately, when this graduation requirement takes effect in 2008, many students will not receive diplomas because they will be unable to pass the WASL before graduation. Some of these students will have met all local graduation requirements, so the only graduation requirement they will not be able to meet will be the statewide requirement that they pass the WASL. Their WASL failure will show that their school districts failed to educate them to statewide standards either by inadequately instructing them or by allowing them to pass local assessments even though they lacked essential skills. This Comment explores the viability of educational malpractice claims against school districts for compensatory damages for remedial education when students are denied diplomas based only on failing WASL scores. Such claims, based on the AAA Statute, should succeed under the Washington Supreme Court's most recent test for determining the existence of an implied private statutory cause of action. These claims should also overcome other legal and policy barriers that have led Washington and other state courts to reject educational malpractice causes of action.

Shelby[1] has attended public school in the same school district since kindergarten. Although her grades have rarely been above average, she has never failed a grade or a class. When Shelby took the Washington Assessment of Student Learning standardized test (WASL) in her tenth-grade year, she passed only the reading and listening sections, failing the math and writing sections. Shelby's failure shows that, even though she met local graduation requirements, she did not acquire the skills necessary to meet statewide standards. Beginning in 2008, students like Shelby, who cannot pass the WASL before graduation, will not receive a diploma.

The WASL is a result of Washington's extensive attempts to improve the quality of its public education system. The Washington Legislature passed the Academic Achievement and Accountability Statute (AAA

1. Hypothetical created by the author for illustrative purposes.

Statute) in 1999.[2] This statute creates both a statewide requirement that all students pass the tenth-grade WASL before graduation[3] and a statewide accountability system for schools that fail to produce students who can pass the WASL.[4] Washington's public[5] high school class of 2008 must pass all sections[6] of the tenth-grade WASL to receive a diploma.[7] In the 1999–2000 school year, eighty percent of the state's tenth graders failed at least one section.[8] Given these failure rates, a large percentage of students in the class of 2008 is likely to meet all local requirements[9] yet be unable to pass the WASL before the 2008 graduation date.[10]

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2. Ch. 388, 1999 Wash. Laws 2142–43 (codified in scattered sections of WASH. REV. CODE §§ 28A.300, .320, .630, .655).

3. WASH. REV. CODE § 28A.655.060(3)(c) (2000).

4. *Id.* § 28A.655.060(3)(i)(i).

5. Although the legislature did not specifically explain its reasoning, the graduation requirement does not apply to private school students. *Id.* § 28A.195 010(6). "The legislature hereby recognizes that private schools should be subject only to those minimum state controls necessary to insure the health and safety of all the students in the state and to insure a sufficient basic education to meet usual graduation requirements." *Id.* § 28A.195.010.

6. The Superintendent of Public Instruction must craft the following additional sections before the graduation requirement takes effect in 2008: Science, Social Studies, Art, and Health. *Id.* § 28A.655.060(3)(b)(iii).

7. WASH. ADMIN. CODE § 180-51-063 (2000). The General Educational Development (GED) credential will probably continue to be an alternative assessment and credential for students who do not receive a high school diploma. Telephone Interview with Rosemary Fitton, Coordinator for Special Projects, Office of the Superintendent of Public Instruction (Apr. 3, 2001). However, GED recipients generally earn less money, experience higher job turnover, and attain less postsecondary education than high school graduates. DAVID BOESEL ET AL., EXECUTIVE SUMMARY: EDUCATIONAL AND LABOR MARKET PERFORMANCE OF GED RECIPIENTS 6–7 (U.S. Dept. of Education 1998).

8. Keith Ervin, *Only 1 in 4 Pass Entire 4th-Grade State Test*, SEATTLE TIMES, Oct. 21, 2000, at A1.

9. For example, the Tahoma School District requires that students pass twenty-two credits including specific courses in Language Arts, Math, Science, Social Studies, Physical Education, Fine Arts, and Occupational Education. TAHOMA SCH. DIST., 2000–2001 TAHOMA SENIOR HIGH SCHOOL COURSE CATALOG 7 (2000).

10. Students will probably have several chances to pass the Washington Assessment of Student Learning test (WASL) between their tenth-grade year and their expected graduation date. Telephone Interview with Rosemary Fitton, Coordinator for Special Projects, Office of the Superintendent of Public Instruction (Apr. 3, 2001). Remediation services will probably be provided to students who were unable to pass the WASL on their first attempt. *Id.* However, some educators have expressed concern that many students in the class of 2008 who scored poorly on their fourth grade WASL will be unable to pass the tenth-grade WASL by graduation. Hunter T. George, *Delay New Requirements for Diplomas, Lawmakers Told*, SEATTLE TIMES, Feb. 20, 2001, at B4. Furthermore, sixteen is both the legal dropout age in Washington and the age at which students will first learn of their tenth-grade test results. *See* WASH. REV. CODE §§ 28A.225.010(1)(e), 28A.655.060(3)(c) (2000). Students who fail the test may drop out, believing they will not receive a diploma.

Should students who meet all local graduation requirements, but fail to pass the WASL, recover compensatory damages from their school district to pay for remedial education?[11] Student suits for educational malpractice may arise when a school district fails to educate students to WASL standards by inadequately instructing them or by allowing them to pass local assessments even though they lack essential skills.[12] In order to establish a successful claim for educational malpractice based on a state statute that contains no express cause of action, a plaintiff must show that a cause of action was implied by the law.[13] In addition, courts have traditionally insisted that plaintiffs show a workable standard of care against which a court could measure school performance, a concrete and assessable harm, and a causal connection between the school district's failure and the injury claimed.[14] Finally, the plaintiff must overcome traditional policy barriers, including hesitation to interfere with the daily judgment of school officials[15] and fear of opening floodgates of litigation against school districts.[16]

This Comment argues that students in the class of 2008 and beyond who are denied a diploma solely because they are unable to pass the WASL should be able to sue their school district and recover compensatory damages for educational malpractice under the AAA Statute. Part I describes the AAA Statute, which creates both the graduation requirement and a system through which the state evaluates school performance based on its students' WASL scores. Part II outlines the test that Washington courts use to determine whether an implied individual cause of action exists under a state statute. Part III describes traditional law and policy shields that courts have used to protect school districts from educational malpractice causes of action. Part IV argues that the AAA Statute creates an implied private cause of action for individual students and that those students should also be able to

11. Any aggrieved party may maintain an action against a school district for an injury arising out of a district's act or omission. WASH. REV. CODE §§ 4.08.110–.120 (2000).

12. A student may choose to sue the State of Washington under a variety of other theories including a challenge to the validity of the WASL test. Such claims are outside the scope of this Comment.

13. *See* Camer v. Seattle Sch. Dist., 52 Wash. App. 531, 536, 762 P.2d 356, 360 (1988).

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

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

16. *Peter W.*, 131 Cal. Rptr. at 861.

overcome traditional legal and policy barriers to educational malpractice claims.

I. THE AAA STATUTE CREATES A SYSTEM THAT MEASURES STUDENT PERFORMANCE AND HOLDS SCHOOLS ACCOUNTABLE FOR STUDENT LEARNING

The Washington State Constitution mandates that the state fund basic education for all children in Washington, but the Washington Supreme Court has not interpreted the mandate to require that public education rise to a particular level of adequacy.[17] However, since the early 1990s the Washington State Legislature has been developing a system of school accountability that relies on statewide standardized tests. The AAA Statute measures school performance by the WASL scores and holds school districts accountable for student failure as measured by those scores.[18] Furthermore, the AAA Statute requires that all students pass the tenth-grade WASL as a prerequisite for graduation.[19]

A. The Washington Constitution Supports the AAA Framework by Creating a Student Right to a Public Education

Article IX of the Washington Constitution establishes a student right to a public education.[20] It declares that the state has a "paramount duty" to make "ample provision for the education of all children" by creating a "general and uniform system of public schools."[21] The Washington Supreme Court has interpreted this to mean that the state must sufficiently fund the public school system.[22] Furthermore, the "paramount duty" language of Article IX imposes a judicially-enforceable affirmative state duty to provide a public education.[23] That duty creates a "correlative right" for all Washington children to receive a

17. WASH. CONST. art. IX, §§ 1–2; Seattle Sch. Dist. v. State, 90 Wash. 2d 476, 482, 585 P.2d 71, 76 (1978).

18. WASH. REV. CODE § 28A.655.060(3)(i)(iii) (2000).

19. *Id.* § 28A.655.060(3)(c).

20. Because the U.S. Supreme Court has held that education is not a fundamental right, a student's right to public education must be based on a state constitution. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

21. WASH. CONST. art. IX, §§ 1–2.

22. *Seattle Sch. Dist.*, 90 Wash. 2d at 518, 585 P.2d at 95.

23. *Id.* at 482, 585 P.2d at 76.

public education.[24] Recently, the Washington Supreme Court reaffirmed that all children have a "constitutionally paramount" right arising out of the state's duty to make ample provision for the education of all children.[25]

B. *The Washington State Legislature Has Progressively Developed Both a Statewide Graduation Requirement and a System of School Accountability Based on Student Test Performance*

Since 1992, the legislature has progressively amended education statutes, making schools increasingly accountable for student performance. In 1992 and 1993, the legislature made significant amendments to Washington's education statutes.[26] The amendments laid the framework for the current AAA Statute by emphasizing specific school district duties and corresponding school accountability.[27]

The 1992 amendment created only a basic plan for developing an accountability system.[28] The legislature found a need to increase student accomplishment by holding "schools accountable for their performance based on what students learn."[29] The statute created the Washington Commission on Student Learning (WCSL),[30] charged with both identifying what elementary and secondary school students need to know and developing an assessment system to measure those skills.[31] The assessment system[32] would be used as a tool for measuring student achievement, evaluating instructional practices, and initiating academic

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24. *Id.*

25. Tunstall v. Bergeson, 141 Wash. 2d 201, 221, 5 P.3d 691, 702 (2000). One commentator has suggested that an educational malpractice plaintiff might be able to state a claim based on the Washington Constitution. *See* Kelly Thompson Cochran, Comment, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. REV. 399, 419 (2000). However, Washington courts have denied attempts to establish such a claim. *Id.* at 418–19.

26. Performance-Based Education Act, ch. 141, 1992 Wash. Laws 574; Education Reform-Improvement of Student Achievement Act, ch. 336, 1993 Wash. Laws 1293.

27. *See* Performance-Based Education Act, ch. 141, § 302(1), 1992 Wash. Laws 581; Education Reform-Improvement of Student Achievement Act, ch. 336, § 202(3)(i), 1993 Wash. Laws 1299.

28. *See* Performance-Based Education Act, ch. 141, § 202, 1992 Wash. Laws 578–79.

29. Ch. 141, § 1, 1992 Wash. Laws 574.

30. Ch. 141, § 202(2), 1992 Wash. Laws 578.

31. Ch. 141, §§ 202(5)(a)–(b), 1992 Wash. Laws 578-79.

32. The Superintendent of Public Instruction eventually developed the WASL to serve as the assessment tool. *See* WASH. REV. CODE § 28A.655.030(1)(b) (2000).

support for students who did not master essential skills.[33] The amendment also declared that students must pass the high-school-level assessment[34] to receive a certificate of mastery,[35] which will become a statewide requirement for graduation in 2008.[36] Thus, the 1992 law laid the foundation for a statewide graduation requirement and a school accountability system.

The 1993 amendment added more specific structure to the accountability system. It set deadlines for the development of both "essential academic learning requirements"[37] and the statewide student assessment system.[38] The legislature also specified that the certificate of mastery needed for graduation should be attainable by age sixteen.[39] Finally, the amendment required the WCSL to develop assistance programs for schools whose students fail the statewide assessment and a state intervention system to hold consistently failing schools accountable.[40] These amendments reflect the early development of Washington's school accountability and student assessment systems.

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33. Ch. 141, § 202(5)(b), 1992 Wash. Laws 578–79.

34. The tenth-grade WASL now serves as the high-school-level assessment. *See* WASH. REV. CODE § 28A.655.030(1)(b); Office of the Superintendent of Public Instruction, *Assessment, Research, & Curriculum*, *at* http://www.k12.wa.us/assessment/WASLintro.asp (last visited July 31, 2001).

35. Ch. 141, § 202(5)(c), 1992 Wash. Laws 579.

36. In 1992, the legislature mandated no implementation date for the graduation requirement. *See id.* The Superintendent of Public Instruction promulgated the 2008 implementation date in WASH. ADMIN. CODE § 180-51-063(2)(a) (2000).

37. Education Reform-Improvement of Student Achievement Act, ch. 336, § 202(3)(a), 1993 Wash. Laws 1296. The essential academic learning requirements are very specific benchmarks based on the following general learning goals:

> [T]o provide opportunities for all students to develop the knowledge and skills essential to: (1) Read with comprehension, write with skill, and communicate effectively and responsibly in a variety of ways and settings; (2) Know and apply the core concepts and principles of mathematics; social, physical, and life sciences; civics and history; geography; arts; and health and fitness; (3) Think analytically, logically, and creatively, and to integrate experience and knowledge to form reasoned judgments and solve problems; and (4) Understand the importance of work and how performance, effort, and decisions directly affect future career and educational opportunities.

WASH. REV. CODE § 28A.150.210. *See also* Essential Academic Learning Requirements, *at* http://www.k12.wa.us/reform/EALR/standards/ealrshort.asp (last visited July 31, 2001).

38. Ch. 336, § 202(3)(b), 1993 Wash. Laws 1296–97.

39. Ch. 336, § 202(3)(c), 1993 Wash. Laws 1298.

40. Ch. 336, §§ 202(3)(h)(ii)–(iii) 1993 Wash. Laws 1299.

C. *The Current AAA Statute Completes the Development of Washington's Assessment and Accountability Systems*

In 1999, the legislature passed the current AAA Statute,[41] which retains the salient features of the 1992 and 1993 laws.[42] The new law consolidates existing accountability statutes, amends past assessment and accountability systems, and adds additional detail.[43] The current AAA Statute creates a stricter, more focused accountability structure based on WASL scores.

The statute reveals a specific legislative purpose to protect the educational opportunities of individual students. The purpose of Washington's accountability system is to improve student learning so that "each individual student" has the opportunity to develop the skills necessary to become a responsible and successful citizen.[44] Furthermore, the legislature based the accountability system on the "fundamental principle" that all public school students should have access to curriculum and instruction aligned with state standards.[45]

The AAA statute delegates duties to both the state Superintendent of Public Instruction (SPI), and a new state commission. The statute requires that the SPI maintain and continue to develop the statewide assessment system, the WASL, which students now take in the fourth, seventh, and tenth grades.[46] The tenth-grade WASL is the high school level assessment that students must pass to receive a diploma.[47] The statute also creates an Academic Achievement and Accountability Commission (A+ Commission)[48] whose primary purpose is to oversee the state accountability system.[49] The A+ Commission must identify schools and school districts "in which significant numbers of students

41. WASH. REV. CODE §§ 28A.655.005–.902; Ch. 388, 1999 Wash. Laws 2142.

42. WASH. REV. CODE §§ 28A.655.060(3)(c), .060(3)(i) (retaining accountability system and graduation requirements).

43. *See* K–12 Accountability Act, ch. 388, 1999 Wash. Laws 2142; Student Assessments Act, ch. 373, § 501, 1999 Wash. Laws 1904.

44. WASH. REV. CODE § 28A.655.005.

45. *Id.* The state standards are the Essential Academic Learning Requirements. *See supra* note 37.

46. WASH. REV. CODE § 28A.655.070(3).

47. Office of the Superintendent of Public Instruction, *Assessment, Research, & Curriculum, at* http://www.k12.wa.us/assessment/WASLintro.asp (last visited July 31, 2001).

48. The A+ Commission replaced the WCSL. WASH. REV. CODE § 28A.655.900(1).

49. *Id.* § 28A.655.020(2).

persistently fail to meet state standards,"[50] using WASL scores to evaluate school district performance.[51] The A+ Commission must also develop a system for state intervention in identified schools.[52] The ultimate goal of education reform in Washington is a statewide school accountability system that uses WASL scores to evaluate school performance.

Finally, as required by the legislature,[53] the SPI has created regulations for AAA implementation.[54] The 2007–08 school year is the first year in which high school seniors must have a state certificate of mastery to graduate.[55] Therefore, children who are in the sixth grade during the 2001–02 school year will not graduate in 2008, even if they meet all local graduation requirements, unless they pass all sections of the tenth-grade WASL.[56] However, the AAA Statute contains neither a remedial provision, nor an express cause of action, for students who are denied diplomas based on failing WASL scores.

II. WASHINGTON'S TEST FOR IMPLYING A STATUTORY PRIVATE CAUSE OF ACTION IS MORE FAVORABLE TO PLAINTIFFS THAN THE FEDERAL TEST

A student seeking redress for a denied diploma based on a failing WASL score should be able to establish an implied cause of action under the AAA Statute. To determine the existence of an implied private cause of action under a statute, the Washington Supreme Court uses a test first articulated in *Bennett v. Hardy*.[57] The court initially modeled its analysis after the U.S. Supreme Court's *Cort v. Ash* test.[58] Although federal courts have since become reluctant to allow implied private causes of action

50. *Id.* § 28A.655.030(1)(d).

51. *Id.* § 28A.655.035(1)(b).

52. *Id.* § 28A.655.060(3)(i)(iii). The A+ Commission has recommended interventions including withholding of funds, reorganization of district personnel, removal of schools from district jurisdiction, abolition or restructuring of school districts, and authorization of student transfers. WASHINGTON STATE ACADEMIC ACHIEVEMENT AND ACCOUNTABILITY COMMISSION, *Accountability System Recommendations* 5 (Nov. 2000). The Washington Legislature had not passed these suggested interventions into law as of July 31, 2001.

53. WASH. REV. CODE § 28A.655.070(3).

54. *See, e.g.*, WASH. ADMIN. CODE § 180-51-063 (2000).

55. *Id.* § 180-51-063.

56. *Id.* § 180-51-063; *see also supra* note 10.

57. 113 Wash. 2d 912, 920–21, 784 P.2d 1258, 1261–62 (1990).

58. 422 U.S. 66, 78 (1975).

under federal statutes, the Washington Supreme Court evaluates state causes of action more favorably to plaintiffs. This divergence is due to the Washington court's refusal to isolate legislative intent as the sole consideration in determining whether a cause of action exists under a state statute.[59] In fact, the court presumes that the legislature is aware of the doctrine of implied statutory causes of action, thereby finding a cause of action when the legislature is silent on the subject.[60]

A. The U.S. Supreme Court Has Narrowed the Cort *Test for Determining the Existence of Implied Federal Statutory Causes of Action*

In 1975, the U.S. Supreme Court applied a four-factor test to determine the existence of an implied private cause of action under a federal statute.[61] The Court asked whether Congress created the statute for the plaintiff's special benefit, whether Congress explicitly or implicitly indicated an intent to create or deny a private remedy, and whether allowing the plaintiff a private remedy was consistent with the statute's underlying purpose.[62] Finally, the Court determined whether the action was one traditionally relegated to state law, thus making a federal implied cause of action inappropriate.[63]

In subsequent cases, the Court narrowed the test by reducing it to a primary consideration of legislative intent.[64] For example, in *Touche Ross & Co. v. Redington*,[65] the Court treated the question of legislative intent as controlling.[66] Because Congress was silent as to the existence of an implied private cause of action, the Court refused to find one.[67] Two years later, in *Middlesex County Sewerage Authority v. National Sea*

59. *Bennett*, 113 Wash. 2d at 920–21, 784 P.2d at 1261–62.

60. Tyner v. State Dep't of Soc. & Health Serv., 141 Wash. 2d 68, 80, 1 P.3d 1148, 1155 (2000) (quoting *Bennett*, 113 Wash. 2d at 919–20, 784 P.2d at 1261 (quoting McNeal v. Allen, 95 Wash. 2d 265, 274, 621 P.2d 1285, 1290 (1980) (Brachtenbach, J., dissenting))).

61. *Cort*, 422 U.S. at 78.

62. *Id.*

63. *Id.*

64. Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 87–88 (2001).

65. 442 U.S. 560 (1979).

66. *Id.* at 568.

67. *Id.* at 571.

Clammers Ass'n,[68] the Court stated that it must consider statutory language and legislative history to determine legislative intent.[69] Because the statute in *Middlesex* provided other remedies and the court found no intent to provide a private damages claim, the Court held there was no implied statutory private cause of action for damages.[70] Based on this strict test, federal courts rarely find an implied private right of action under a federal statute.

B. *The Washington Supreme Court's* Bennett *Test More Readily Permits Plaintiffs To Establish Implied Causes of Action Under Washington Statutes*

In *Bennett v. Hardy*,[71] the Washington Supreme Court articulated its test for determining whether an implied cause of action exists under a state statute.[72] The court retained the first three factors of the *Cort* test,[73] but, unlike the U.S. Supreme Court, it did not require any affirmative legislative intent to create a private cause of action. Thus, it considered (1) whether the plaintiff was one for whose "special benefit" the statute was created; (2) whether legislative intent explicitly or implicitly supported creating or denying a remedy; and (3) whether implying a remedy was consistent with the underlying purpose of the legislation.[74] Most significantly, legislative silence as to the presence or absence of a private cause of action did not preclude such an action.[75] The court reasoned that when a statute has created a right by requiring certain conduct, a court should devise a remedy for injured persons though the statute specifies none.[76] Therefore, a plaintiff can more easily establish an individual private cause of action under a Washington statute than under a federal statute.

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68. 453 U.S. 1 (1981).

69. *Id.* at 13.

70. *Id.* at 13–14.

71. 113 Wash. 2d 912, 784 P.2d 1258 (1990).

72. *Id.* at 920–21, 784 P.2d at 1261–62.

73. The fourth factor of the *Cort* test, determining whether action is traditionally relegated to state law, is not relevant to state claims. *Id.* at 921 n.3, 784 P.2d at 1261 n.3.

74. *Id.* at 920–21, 784 P.2d at 1261–62.

75. *Id.* at 919–20, 784 P.2d at 1261.

76. *Id.* at 920, 784 P.2d at 1261 (quoting RESTATEMENT (SECOND) OF TORTS § 874A (1979)).

In *Tyner v. State Department of Social & Health Services*,[77] the Washington Supreme Court applied the *Bennett* test to Washington's Child Abuse Statute. If the Department of Social and Health Services (DSHS) receives a report of suspected child abuse, it must investigate, issue a report, and, when necessary, refer such a report to the court.[78] The *Tyner* court held that the Child Abuse Statute provided an implied private cause of action for a father who suffered lack of contact with his children resulting from negligent investigation by DSHS officials.[79]

First, the court reasoned that the purpose section of the statute established accused parents as part of the class for whose special benefit the statute was created.[80] The statutory language emphasized the importance of the bond between parent and child, stating that any intervention into a child's life is also an intervention into the parent's.[81] Therefore, the plaintiff met the first prong of the *Bennett* test.[82] Second, the court found that the legislature supported implying a remedy.[83] Notwithstanding that the statute and legislative history were "silent as to this point,"[84] the court presumed the legislature was "aware of the doctrine of implied statutory causes of action."[85] The court concluded that by recognizing the deep importance of the parent-child relationship, the legislature intended a judicial remedy for parents if the DSHS invaded that interest.[86] Finally, the court held that an implied cause of action for damages for parents was consistent with the underlying purpose of the Child Abuse Statute.[87] The Child Abuse Statute has two purposes: to protect children and to preserve the integrity of the family.[88] Although the state argued that a cause of action for accused parents

77. 141 Wash. 2d 68, 1 P.3d 1148 (2000).

78. WASH. REV. CODE § 26.44.050 (2000).

79. *Tyner*, 141 Wash. 2d at 82, 1 P.3d at 1155.

80. *Id.* at 78, 1 P.3d at 1154.

81. *Id.* (quoting WASH. REV. CODE § 26.44.010 (2000)).

82. *Id.* at 80, 1 P.3d at 1154.

83. *Id.* at 80, 1 P.3d at 1154–55.

84. *Id.* at 80, 1 P.3d at 1155.

85. *Id.* (quoting Bennett v. Hardy, 113 Wash. 2d 912, 919–20, 784 P.2d 1258, 1261 (1990) (quoting McNeal v. Allen, 95 Wash. 2d 265, 274, 621 P.2d 1285, 1290 (1980) (Brachtenbach, J., dissenting.))).

86. *Id.*

87. *Id.*

88. *Id.*

would create conflicting caseworker responsibilities,[89] the court found that the statute creates a hierarchy of interests and that hierarchy allows for accomplishment of both purposes.[90] Therefore, finding all three prongs of the *Bennett* test satisfied, the court held that under the Child Abuse Statute the DSHS owes a duty of care to parent suspects when investigating allegations of child abuse.[91]

Justice Talmadge and two other Justices dissented, complaining that the majority failed to discuss the procedural protections for accused parents defined in the Child Abuse Statute.[92] The dissent argued that the legislature did not create a private cause of action because procedural protections—including written notification of allegations and investigative findings, opportunity for written response, agency review, and adjudicative hearings—all safeguarded parents[93] while recognizing that the primary goal of the statute was to ensure protection of abused children.[94] Accordingly, no general duty should exist towards accused parents,[95] but only a specific duty to follow the statute's procedural provisions.[96] Furthermore, the dissent argued that a general duty would create a conflict for investigators because sensitivity to parental interests would deter caseworkers from aggressively investigating child abuse.[97] Therefore, the dissenting justices concluded that the legislature did not intend to create an implied statutory private cause of action for parents.[98]

Tyner is the Washington Supreme Court's most recent determination of the existence of an implied statutory private cause of action. The court continues to consider *Bennett*'s three factors and presumes the legislature

89. *Id.* at 81, 1 P.3d at 1155. The state argued that the duty to protect children from abusers and the duty to protect parents from being falsely accused created conflicting responsibilities. *Id.*

90. *Id.* at 79, 1 P.3d at 1154.

91. *Id.* at 82, 1 P.3d at 1155.

92. *Id.* at 93, 1 P.3d at 1161 (Talmadge, J., dissenting). Justices Guy and Smith joined the dissent. *Id.* at 89, 1 P.3d at 1159. Although the majority in *Tyner* did not discuss procedural protections, the Washington Supreme Court noted in an earlier case that a court should not find an implied cause of action where the statute has provided an adequate remedy. Cazzanigi v. Gen. Elec. Credit Corp., 132 Wash. 2d 433, 445, 938 P.2d 819, 825 (1997).

93. WASH. REV. CODE §§ 26.44.100, .125 (2000).

94. *Tyner*, 141 Wash. 2d at 95–96, 1 P.3d at 1163 (Talmadge, J., dissenting).

95. *Id.* at 96, 1 P.3d at 1163 (Talmadge, J., dissenting).

96. *See id.* at 98, 1 P.3d at 1164 (Talmadge, J., dissenting).

97. *Id.* at 98–99, 1 P.3d at 1164 (Talmadge, J., dissenting).

98. *Id.* at 96, 1 P.3d at 1163 (Talmadge, J., dissenting).

is "aware of the doctrine of implied statutory causes of action."[99] The *Tyner* dissenters believed Washington courts should continue to consider the presence or absence of statutorily-defined procedural protections for the plaintiff in deciding whether to find a cause of action for damages.[100] Therefore, a court could consider all of these factors when determining the existence of an implied private cause of action for damages under a Washington statute.

III. WASHINGTON AND OTHER STATE COURTS HAVE DENIED EDUCATIONAL MALPRACTICE CLAIMS FOR BOTH LEGAL AND POLICY REASONS

State courts nationwide have almost uniformly denied educational malpractice claims.[101] Educational malpractice plaintiffs wishing to sue under a state statute must first show that the legislature implied an individual cause of action.[102] Then, the plaintiff must show a workable standard of care, a failure to meet that standard of care, a comprehensible and assessable harm, and a causal connection between the school district's failure and the resulting harm.[103] Finally, a plaintiff must overcome traditional policy concerns including hesitation to substitute the court's judgment for that of school officials, reluctance to interfere with the day-to-day workings of schools, and fear that a flood of litigation could result.

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99. *Id.* at 80, 1 P.3d at 1155 (quoting Bennett v. Hardy, 113 Wash. 2d 912, 919–920, 784 P.2d 1258, 1261 (1990) (quoting McNeal v. Allen, 95 Wash. 2d 265, 274, 621 P.2d 1285, 1290 (1980) (Brachtenbach, J., dissenting.))).

100. *Id.* at 93, 1 P.3d at 1161 (Talmadge, J., dissenting).

101. Only Montana has allowed a claim for educational malpractice to survive summary judgment. *See* B.M. v. Montana, 649 P.2d 425, 427 (Mont. 1982) (holding that state owes duty of care to child in testing and special education placement).

102. *See, e.g.*, Camer v. Seattle Sch. Dist., 52 Wash. App. 531, 762 P.2d 356 (1988); Camer v. Brouillet, No. 10227-3-I, slip op. (Wash. App. June 7, 1982).

103. These are the basic elements of a prima facie case of educational malpractice. However, courts uniformly treat them as threshold policy barriers to establishing an implied cause of action. *See, e.g.*, Peter W. v. S.F. Unified Sch. Dist., 131 Cal. Rptr. 854, 859 (Cal. Ct. App. 1976); Donohue v. Copiague Union Free Sch. Dist., 391 N.E. 2d 1352, 1353–54 (N.Y. 1979).

A. *Washington Courts Have Denied Educational Malpractice Claims Because Individual Student Plaintiffs Were Unable to Establish a Private Cause of Action*

Student plaintiffs have twice attempted to establish an educational malpractice cause of action under Washington statutes.[104] Division One of the Washington Court of Appeals denied both claims.[105] In each case, the court determined that the relevant statutes created no cause of action or duty to individual students; thus, the court was wholly unwilling to allow these educational malpractice claims to advance.[106]

1. *The Court of Appeals Denied a Private Cause of Action for Educational Malpractice Because Plaintiffs Did Not Show They Had an Individual Right to an Adequate Education*

In *Camer v. Brouillet*,[107] an unpublished case, plaintiffs sued on the theory that the Superintendent of Public Instruction (SPI) had failed to implement the Student Learning Objectives Law correctly.[108] In applying the legislative intent prong of the *Cort* test, the court recognized an additional requirement for implying a private cause of action: the plaintiffs must show legislative intent to create a school district duty owed to *individual students*.[109] This requirement arose out of a "traditional rule" that a statutorily imposed duty on public officials is owed only to the public as a whole[110] except when the legislature shows an intent to protect certain people.[111] Those people may bring an action in tort for a violation of the statute.[112]

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104. *Camer*, 52 Wash. App. at 532, 762 P 2d at 358; *Brouillet*, No. 10227-3-I, at 4.

105. *Camer*, 52 Wash. App. at 538, 762 P.2d at 360; *Brouillet*, No. 10227-3-I at 5.

106. *Camer*, 52 Wash. App. at 537, 762 P.2d at 360; *Brouillet*, No. 10227-3-I at 5.

107. No. 10227-3-I, slip op. (Wash. App. June 7, 1982).

108. *Id.* at 2; *cf.* WASH. REV. CODE § 28A.58.092 (1981).

109. *Brouillet*, No. 10227-3-I at 4.

110. *Id.* (quoting Baerlein v. State, 92 Wash. 2d 229, 231, 595 P.2d 930, 931 (1979) (citing Halverson v. Dahl, 89 Wash. 2d 673, 676, 574 P.2d 1190, 1192 (1978))). This traditional rule is also called the "public duty doctrine." Kristi Anderson Bjornerud, Comment, *The Uncertain Scope of Sovereign Immunity in Washington After* Savage v. State, 71 WASH. L. REV. 1069, 1074–75 (1996).

111. Bjornerud, *supra* note 110 at 1074–75.

112. *Brouillet*, No. 10227-3-I at 4.

To determine whether the statute in question created an individual cause of action, the court examined legislative history.[113] The purpose of the Student Learning Objectives Law was to promote efficient management of quality education and guide student attainment of objectives without consequences for individual students.[114] Accordingly, the court reasoned that the language and legislative history were devoid of any legislative intent to create a duty to *individual* students.[115] The court rejected the plaintiff's attempt to establish an implied private cause of action because the statutory duty was owed only to the general public.[116]

2. *Plaintiffs Have Been Unable To Establish a Cause of Action for Educational Malpractice Based on Other Washington Education Statutes*

In *Camer v. Seattle School District*,[117] the court rejected an educational malpractice claim based on an implied cause of action under Washington statutes[118] because the plaintiff could not meet the elements of the *Cort* test and alternative administrative remedies were available.[119] At that time, one statute required students to study the Washington Constitution as a prerequisite for high school graduation.[120] Another mandated a one-semester course in state history and government.[121] The Seattle School District had provided neither course of study to the individual plaintiffs.[122] In this pre-*Bennett* case, the court determined that no private cause of action existed under these statutes.[123]

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113. *Id.* at 4–5.

114. *Id.* at 4.

115. *Id.* Because the *Brouillet* case was pre-*Bennett*, the court applied the *Cort* test without the presumption that the legislature was aware of the doctrine of implied rights of action. *Id.*

116. *Id.* at 5; *accord* Peter W. v. S.F. Unified Sch. Dist., 131 Cal. Rptr. 854, 862 (Cal. Ct. App. 1976) (holding that statutory enactments were directed to attainment of optimal education results but not safeguards against particular injury); Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1353 (N.Y. 1979) (holding that state constitution provided general directive but was never intended to impose duty flowing directly from local school district to individual pupils).

117. 52 Wash. App. 531, 762 P.2d 356 (1988).

118. WASH. REV. CODE §§ 28A.02.080, 28A.05.050 (1987).

119. *Camer*, 52 Wash. App. at 537–38, 762 P.2d at 360.

120. WASH. REV. CODE § 28A.02.080 (1987).

121. *Id.* § 28A.05.050.

122. *See Camer*, 52 Wash. App. at 536, 762 P.2d at 360.

123. *Id.*

The court used the federal *Cort* test to determine whether a private cause of action existed that would allow students to sue when school districts failed to provide statutorily-mandated courses.[124] The test was identical to that applied later in *Bennett*, but it did not include the presumption that the legislature was aware of the doctrine of implied causes of action.[125] The court assumed, *arguendo*, that the legislature enacted the statute for the special benefit of the plaintiffs.[126] However, the court then concluded that the statutory language was devoid of any express or implied legislative intent to create a private cause of action for damages and that the student plaintiffs did not establish legislative intent to the contrary through legislative history.[127] Finally, the court found that an implied cause of action would not be consistent with the purposes of the legislative scheme.[128] The court reasoned that the legislative purpose was to establish general guidelines for producing the constitutionally-mandated "ample" education[129] for Washington children, to be administered within the discretion of local school districts.[130]

In the course of its application of the *Cort* test, the court noted that the administrative process provided a proper chain of accountability and that administrative sanctions adequately eliminated a need for an individual right of action.[131] In addition, the legislature had limited judicial review to persons who had been specifically aggrieved by a decision or order of a school official or board.[132] Therefore, existing administrative remedies and legislative limitation of judicial review implied that an individual cause of action for damages was inappropriate.

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124. *Id.* at 536–37, 762 P.2d at 360 (quoting Cort v. Ash, 422 U.S. 66, 78 (1975)).

125. *Id.*

126. *Id.* at 537, 762 P.2d at 360.

127. *Id.*

128. *Id.*

129. *Id. See also supra* Part I.A.

130. *Camer*, 52 Wash. App. at 537, 767 P.2d at 360.

131. *See id.* (citing WASH. ADMIN. CODE 180-16-195(3) (1986)).

132. *Id.* The court cited WASH. REV. CODE § 28A.88.010 (1987), since amended and recodified as WASH. REV. CODE § 28A.645.010 (2000). Although the amended statute permits citizens to appeal school district decisions to Superior Court, the statute does not apply to tort claims because neither school boards nor school district officials have authority to decide such claims. WASH. REV. CODE § 28A.645.010 (2000); Derrey v. Toppenish Sch. Dist., 69 Wash. App. 610, 615, 849 P.2d 699, 702 (1993).

B. *Early Cases in California and New York Provide Examples of Other Legal and Policy Reasons Why Courts Have Denied Educational Malpractice Claims*

Two seminal educational malpractice cases illustrate other state courts' reasons for barring implied private causes of action for educational malpractice. In *Peter W. v. San Francisco Unified School District*,[133] a California high school graduate sued his school district because he had been allowed to graduate from high school though he could only read at a fifth-grade level.[134] However, the court found that the plaintiff failed to state a cause of action based on either common law negligence[135] or the California Code.[136] Likewise, in a New York case, *Donohue v. Copiague Union Free School District*,[137] a graduate who was unable to read sufficiently to complete an employment application sued his school district under both the state constitution[138] and common law negligence.[139] Although the New York court was careful not to eliminate the possibility that a properly argued educational malpractice claim could survive, this particular claim was dismissed based on policy considerations.[140]

These seminal educational malpractice cases reveal a consistent set of legal and policy concerns that an educational malpractice plaintiff must overcome to establish a cause of action.[141] Courts have been unable to create a definite standard of care for educators. They have recognized the difficulty in proving a comprehensible and assessable educational harm

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133. 131 Cal. Rptr. 854 (Cal. Ct. App. 1976).

134. *Id.* at 856.

135. *Id.* at 861.

136. *Id.* at 862. The court rejected claims based on the California Code because, it reasoned, a statute could impose liability only when it is designed to protect against a "particular kind of injury," and the court did not consider failure of educational achievement to be a particular injury under tort law. *Id.* Also, the court determined that the statutes did not create a duty to individual students because they were generally administrative and not protective of individuals. *Id.*

137. 391 N.E.2d 1352 (N.Y. 1979).

138. *Id.* at 1353 ("The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." (quoting N.Y. CONST. art. XI, § 1)). The court dismissed the claim because this clause was intended as a "general directive" but not intended to impose a duty "flowing directly from a local school district to individual pupils." *Id.*

139. *Id.*

140. *Id.* at 1354.

141. Katherine Lush, *Expanding the Rights of Children in Public Schools*, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 95, 113–14 (2000).

and have acknowledged that schools often are not solely to blame for a student's failure to learn. Furthermore, policy concerns have included the judiciary's hesitation to become involved in day-to-day school administration,[142] its reluctance to interfere with the professional judgment of administrators and educators,[143] and its unwillingness to open a floodgate to costly litigation.[144] Therefore, even if a Washington plaintiff could establish an implied private cause of action for educational malpractice under the AAA Statute pursuant to the *Bennett* test, that student must also overcome these legal and policy barriers.

1. *To Establish Educational Malpractice Claims, Plaintiffs Must Show a Workable Standard of Care, a Concrete and Assessable Harm, and a Causal Connection Between School Failure and the Student Harm*

Courts have cited several legal reasons, although couched in public policy terms, for denying educational malpractice causes of action. First, courts have rejected educational malpractice claims based on the lack of a workable standard of care. In *Peter W.*, the court noted that the challenged classroom methodology afforded no readily acceptable standard to assess against the duty owed to students.[145] The court held that there existed "no conceivable 'workability of a rule of care'" against which the school's alleged misconduct could be measured, because a variety of conflicting theories existed that suggest how or what a child should be taught.[146] However, the *Donohue* court noted that creation of a standard by which to measure school performance would not pose an "insurmountable obstacle."[147]

Courts also have found it very difficult to establish a comprehensible or assessable educational harm. In *Peter W.*, the court observed that on occasions when courts have sanctioned new areas of tort liability, the wrongs and injuries involved were both comprehensible and assessable.[148] Peter W.'s claim that he had failed to achieve academically

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

143. Camer v. Seattle Sch. Dist., 52 Wash. App. 531, 537, 762 P.2d 356, 360 (1988).

144. Peter W. v. S.F. Unified Sch. Dist., 131 Cal. Rptr. 854, 861 (Cal. Ct. App. 1976).

145. *Id.* at 860–61.

146. *Id.* (quoting Raymond v. Paradise Unified Sch. Dist., 31 Cal. Rptr. 847, 851 (Cal. Ct. App. 1963)).

147. *Donohue*, 391 N.E.2d at 1353.

148. *Peter W.*, 131 Cal. Rptr. at 860.

simply did not offer the concrete and assessable injury required.[149] Thus, the *Peter W.* court could not be certain that the plaintiff had suffered an injury within the law of negligence.[150] Furthermore, though it did not elaborate, the *Camer* court also believed that the children did not suffer actual damage or injury when they could not take classes in Washington government.[151]

Finally, courts have denied educational malpractice claims because they have been concerned that inadequate instruction and student promotion despite lack of skills are not the only causes for student failure. The *Peter W.* court noted that "physical, neurological, emotional, cultural, [or] environmental" factors could influence a child's learning, such that no perceptible causal connection existed between the defendant's conduct and the injury suffered.[152] Still, the *Donohue* court admitted that, although the causation element might be difficult to prove, "it perhaps assumes too much to conclude that it could never be established."[153]

2. *Public Policy Concerns Have Led Courts To Deny Educational Malpractice Causes of Action*

Courts also have rejected educational malpractice claims based on public policy concerns. Courts have been reluctant to allow a private cause of action if the court must impose its own judgment on school authorities or interfere with the everyday administration of a school by determining which instructional practices or curricula are effective. The *Peter W.* court emphasized that "pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught."[154] Similarly, the *Donohue* court recognized that to entertain a cause of action for educational malpractice, courts would not merely make broad educational policy judgments, but more importantly, would also review their day-to-day implementation.[155] This involvement would cause blatant interference with the administration of the public school

149. *Id.*

150. *Id.* at 861.

151. Camer v. Seattle Sch. Dist., 52 Wash. App. 531, 538, 762 P.2d 356, 360 (1988).

152. *Peter W.*, 131 Cal Rptr. at 861.

153. Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1353–54 (N.Y. 1979).

154. *Peter W.*, 131 Cal. Rptr. at 860–61.

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

system.[156] Due to such concerns, the *Camer* court concluded that the internal administrative review was the proper forum for the plaintiffs' complaint.[157] Nevertheless, the *Donohue* court conceded that extreme situations may exist where a court must intervene.[158]

Finally, courts have feared the possible flood of litigation that might result from finding an implied private cause of action for damages based on educational statutes. For example, the *Peter W.* court worried that holding schools to an actionable duty of care when a student failed to achieve would expose them to real or imagined tort claims of disaffected students.[159] Parents and students "in countless numbers" might burden school and society "beyond calculation."[160]

Legal and public policy issues have played a crucial role in denying implied private rights of action for educational malpractice claims. Washington courts have, and will likely continue to consider the barriers set forth in these seminal educational malpractice cases. As a result, even if a Washington plaintiff could establish an individual statutory private cause of action for educational malpractice under the AAA Statute, that student would also have to overcome these legal and policy barriers.

IV. WASHINGTON COURTS SHOULD ALLOW EDUCATIONAL MALPRACTICE CLAIMS FOR STUDENTS WHO MEET LOCAL GRADUATION REQUIREMENTS BUT FAIL THE WASL

Unfortunately, a large number of students in the class of 2008 are likely to fail the tenth-grade Washington Assessment of Student Learning (WASL).[161] Some of these students will find that passing the WASL is the only graduation requirement they cannot satisfy. These students should be able to establish an implied private cause of action against their school district for compensatory damages to pay for remedial education. By applying the *Bennett* test to the Academic

156. *Id.*

157. Camer v. Seattle Sch. Dist., 52 Wash. App. 531, 537, 762 P.2d 356, 360 (1988) ("Courts and judges are normally not in a position to substitute their judgment for that of school authorities, nor are we equipped to oversee and monitor day-to-day operations of a school system." (internal citations omitted)).

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

159. *Peter W.*, 131 Cal. Rptr. at 861.

160. *Id.*

161. *See supra* note 8 and accompanying text.

Achievement and Accountability Statute (AAA Statute), these students should be able to assert a private cause of action and also overcome the traditional legal and public policy barriers to educational malpractice claims.

A. Individual Students Who Fail the WASL Should Be Able To Establish an Educational Malpractice Cause of Action Under Washington Law

Applying the *Bennett v. Hardy*[162] test to the AAA Statute should imply a cause of action because the legislature created the statute especially for student benefit,[163] legislative history does not preclude an implied cause of action for students,[164] and implying a private cause of action is consistent with the underlying purpose of the AAA Statute: school accountability.[165] Furthermore, the AAA statute provides no administrative remedy for students who do not receive a diploma because of their inability to pass the WASL and neither students nor parents have any procedural rights under the statute that otherwise would protect them.[166] Consequently, students who satisfy all local graduation requirements but cannot pass the WASL should have an implied private cause of action against their school districts under the AAA Statute for damages to pay for remedial education.[167]

1. Student Plaintiffs Should Be Able To Establish an Individual Cause of Action for Educational Malpractice by Applying the Bennett *Test to the AAA Statute*

Students should be able to apply the *Bennett* test to the AAA Statute to establish a cause of action. First, the purpose statement of the AAA Statute reveals that the legislature created the statute for the special benefit of Washington students. The purpose of Washington's accountability system is to improve student learning so that each student has the opportunity to develop the skills necessary to become a

162. 113 Wash. 2d 912, 784 P.2d 1258 (1990).

163. *See* WASH. REV. CODE § 28A.655.005 (2000).

164. *See supra* Parts I.B., I.C.

165. *See* WASH. REV. CODE § 28A.655.005.

166. *See id.* § 28A.655.060(3)(c).

167. *See infra* Part IV.A.1.

responsible and successful citizen.[168] The legislature also declared that the accountability system should be based on "a fundamental principle"[169] that *all* public school students have access to curriculum and instruction that is aligned to state standards.[170] This intent to benefit individual students through the development of specific skills was notably absent in the statute requiring Washington government coursework, on which the plaintiffs relied in *Camer v. Seattle School District No. 1*.[171] The legislature intended the AAA Statute to especially benefit individual students, so the statute should satisfy the first prong of the *Bennett* test.

Second, the legislative intent behind the AAA Statute does not expressly preclude an individual implied cause of action for students. As established in *Tyner v. Department of Social and Health Services*,[172] when a statute and its legislative history are silent on this point, Washington courts presume that the legislature is aware of the doctrine of implied causes of action.[173] Like the Child Abuse Statute in *Tyner*,[174] there is no mention in the AAA Statute's legislative history of either allowing or precluding a private cause of action for damages for educational malpractice. Unlike the pre-*Bennett* cases, *Brouillet*[175] and *Camer*,[176] when a current court interprets the AAA Statute, the legislature's silence raises a presumption that it did not intend to preclude private causes of action for students. Furthermore, Washington courts should find that the AAA Statute creates a school district duty to educate individual students adequately because the avowed purpose of the AAA Statute is to create a school accountability system, ensuring that both individual students and schools meet state standards.[177] A student

168. WASH. REV. CODE § 28A.655.005.

169. *Id.*

170. *See id.* § 28A.150.210; *see also* Essential Academic Learning Requirements, *at* http://www.k12.wa.us/reform/EALR/standards/ealrshort.asp (last visited July 31, 2001).

171. 52 Wash. App. 531, 762 P.2d 356 (1988); *see also* WASH. REV. CODE §§ 28A.02.080, 28A.05.050 (1987).

172. 141 Wash. 2d 68, 1 P.3d 1148 (2000).

173. *Id.* at 80, 1 P.3d at 1155 (quoting Bennett v. Hardy, 113 Wash. 2d 912, 919–20, 784 P.2d 1258, 1261 (1990) (quoting McNeal v. Allen, 95 Wash. 2d 262, 274, 621 P.2d 1285, 1290 (1980) (Brachtenbach, J., dissenting))).

174. *Id.*

175. Camer v. Brouillet, No. 10227-3-I, slip op. (Wash. App. June 7, 1982).

176. Camer v. Seattle Sch. Dist., 52 Wash.App. 531, 762 P.2d 356 (1988).

177. *See* WASH. REV. CODE § 28A.655.005 (2000).

right to an adequate education does not appear to arise from the Washington Constitution. However, a student right to an education that meets state standards logically follows from the AAA statutory duty just as the "paramount duty"[178] to provide for a system of public schools created a "correlative" student right to a public education.[179] Thus, a court could infer, as it did in *Tyner*, that the legislature recognized that an individual cause of action could protect this right.

Third, the underlying purpose of the AAA Statute supports the establishment of a student's implied cause of action for educational malpractice. The legislature enacted the AAA Statute as an attempt at education reform through school accountability.[180] The entire accountability system emphasizes the importance of school district responsibility for the quality of education that it provides for each student.[181] This emphasis on school accountability to benefit individual students through the development of specific skills did not underlie the statutes mandating Washington government coursework on which the *Camer* plaintiffs depended.[182] Nor did this emphasis inspire the Student Learning Objectives Law on which the *Brouillet* plaintiffs relied.[183] In contrast, the AAA Statute's underlying emphasis on school accountability for individual student skill level logically supports school accountability to individual students through implied individual causes of action, thereby satisfying the third prong of the *Bennett* test. Accordingly, individual student plaintiffs who are unable to pass the WASL but would otherwise receive a diploma based on local graduation requirements should meet all three prongs of the *Bennett* test.

2. *Under the AAA Statute, School Districts Have a Duty To Educate Individual Students to WASL Standards*

The school district's duty to provide an education adequate to meet state standards does not merely extend to the general public like the

178. WASH. CONST. art. IX, § 1.

179. Seattle Sch. Dist. v. State, 90 Wash. 2d 476, 482, 585 P.2d 71, 76 (1978). Even if a school district were to argue that its duty is to the Superintendent of Public Instruction and the A+ Commission, *Tyner* revealed that Washington courts are willing to recognize duties to more than one entity within a single statute. Tyner, 141 Wash. 2d at 79, 1 P.3d at 1154; *see also infra* Part IV.A.2.

180. *See supra* Part I.C.

181. *See* WASH. REV. CODE §§ 28A.655.005, .035, .060(1), .060(3)(c), .060(3)(i) (2000).

182. *See id.* §§ 28A.02.080, 28A.05.050 (1987).

183. *See id.* §§ 28A.58.090, .092, .750 (1981).

Student Learning Objectives Law in *Brouillet*.[184] It extends also to individual students. The essential academic learning requirements, referenced throughout the AAA Statute, are based on student learning goals that focus on specific, individual abilities that each school district must achieve for "all students."[185] In addition, the statute was created to ensure that "each *individual student* will be given the opportunity to become a responsible citizen and successfully live, learn, and work in the twenty-first century."[186] Furthermore, the legislature declared a fundamental principle that "*all public school students*" have access to educational opportunities that are aligned with the standards.[187] Finally, the legislature created a very individual consequence when it decided to make the WASL a high-stakes test by denying a diploma to a student who fails,[188] indicating the legislature intended that each student should be educated to a level such that he or she can pass the WASL.

Early Washington educational malpractice cases should not deter a court from finding that the AAA Statute creates an individual implied cause of action. The plaintiffs in *Camer* and *Brouillet* did not suffer an individual consequence like the loss of a diploma.[189] Furthermore, the constitutional duty to provide ample education discussed in *Camer* is far more general than the particular statutory duty to educate individual students adequately for them to pass the WASL.[190] In addition, this case can be distinguished from *Peter W. v. San Francisco Unified School District*,[191] in which the court called California's education statutes generally "administrative" but not "protective" of individuals because they did not safeguard against an individual injury of any kind.[192] Unlike the plaintiff in *Peter W.*, a Washington child would suffer an individual, concrete, and easily proven harm if denied a diploma. Furthermore, the language of the AAA statute is more focused on results for individual

184. Camer v. Brouillet, No. 10227-3-I, slip op. at 4–5 (Wash. App. June 7, 1982).

185. WASH. REV. CODE § 28A.150.210 (2000).

186. *Id.* § 28A.655.005 (emphasis added).

187. *Id.* (emphasis added).

188. *Id.* § 28A.655.060(3)(c).

189. *See* Camer v. Seattle Sch. Dist., 52 Wash. App. 531, 532–33, 762 P.2d 356, 358 (1988); *Brouillet*, No. 10227-3-I at 2.

190. *Compare supra* notes 128–130 and accompanying text *with supra* notes 184–188 and accompanying text.

191. 131 Cal. Rptr. 854 (Cal. Ct. App. 1976).

192. *Id.* at 862. This holding rested on the court's characterization of harm as a student's failure to achieve academically. *Id.*

students than the clause of the New York constitution studied in *Donohue v. Copiague Union Free School District.*[193] The AAA Statute is distinguishable from earlier bases for student claims because it focuses on the individual student. As a result, Washington courts should find that the school district's duty to educate adequately extends to the individual student.

A school district might contend that its only duty under the AAA Statute is to provide *an opportunity* for students to achieve all of the essential academic learning requirements.[194] From this perspective, the WASL merely measures whether the student has absorbed and can reiterate the information taught. If a child fails the WASL, the school might argue that the student failed to learn the required materials even though the school fulfilled its duty by adequately providing an opportunity to learn those materials.[195] However, a student could reply that her ability to achieve all local graduation requirements reflects that she either mastered, to the satisfaction of the school district, the skills actually taught, or that the school district allowed her to pass despite a lack of skill. In either case, the school district should be responsible under the AAA Statute for failing to develop the student's individual abilities adequately for her to pass the WASL.[196]

3. *Because the AAA Statute Offers Neither Alternative Remedies Nor Procedural Protections to Students, an Implied Cause of Action for Educational Malpractice Should Exist*

Neither administrative remedies nor statutorily defined procedural protections would preclude an educational malpractice claim based on an implied private cause of action under the AAA Statute. While the majority did not address alternative remedies in *Tyner*, the *Camer* court mentioned the existence of administrative remedies as a reason for denying a cause of action in Washington courts.[197] The A+ Commission's recommended intervention strategies do not include

193. 391 N.E.2d 1352 (N.Y. 1979).

194. *See supra* note 37.

195. The Fifth Circuit has held that competency exams resulting in diploma sanctions must fairly reflect what is taught. Debra P. v. Turlington, 644 F.2d 397, 403–06 (5th Cir. 1981). However, no federal or state court has imposed this restriction in Washington.

196. *See* Arthur L. Coleman, *Excellence and Equity in Education: High Standards for High-Stakes Tests*, 6 VA. J. SOC. POL'Y & L. 81, 84 (1998).

197. Camer v. Seattle Sch. Dist., 52 Wash. App. 531, 537, 762 P.2d 356, 360 (1988).

administrative remedies for students who have completed all local graduation requirements but have been denied a diploma.[198] The AAA Statute requires the A+ Commission to create a system to intervene in schools and school districts in which significant numbers of students persistently fail to meet WASL standards.[199] Yet unlike *Camer*, in which a positive administrative ruling requiring Washington government courses might benefit one of the Camer children,[200] any administrative action intended to improve a school district would not help a student who had already been denied a diploma.[201] Even if a school were to improve, the remedy would simply be too late; it could not impact a student who no longer attends the school.[202]

Additionally, the *Tyner* dissent relied heavily on the fact that procedural protections were defined in the Child Abuse Statute.[203] Even though the dissent argued that adequate procedural rights provided to children or parents in a statute might preclude the finding of an implied cause of action,[204] neither the AAA Statute nor the A+ Commission provides specific procedural protections for individual students[205] like those for accused abusers in the Child Abuse Statute.[206] Furthermore, in *Tyner*, accused parents like the plaintiff were not intended to be the primary beneficiaries of the Child Abuse Statute, but merely secondary

198. WASHINGTON STATE ACADEMIC ACHIEVEMENT AND ACCOUNTABILITY COMMISSION, *supra* note 52, at 5.

199. WASH. REV. CODE § 28A.655.060(3)(i)(iii) (2000).

200 *Camer*, 52 Wash App. at 537, 762 P.2d at 360.

201. Even though the Office of the Superintendent of Public Instruction has acknowledged that it will provide remedial educational services to eleventh and twelfth-grade students who initially fail the tenth-grade WASL, those remedial services do not extend to students whose graduation date has passed. Telephone Interview with Rosemary Fitton, Coordinator for Special Projects, Office of the Superintendent of Public Instruction (Apr. 3, 2001)

202. No one has suggested that a school improved by the AAA system would invite deprived students to return to receive an improved education. Telephone Interview with Rosemary Fitton, Coordinator for Special Projects, Office of the Superintendent of Public Instruction (Apr. 3, 2001).

203. Tyner v. State Dep't of Soc. & Health Servs., 141 Wash. 2d 68, 93, 1 P.3d 1148, 1161 (2000) (Talmadge, J., dissenting).

204. *See id.*

205. Although the "Accountability Policies" section of the AAA Statute mentions that the A+ Commission must consider procedural issues in its deliberations, this section specifically deals with state strategies for intervening in failing schools and school districts. *See* WASH. REV. CODE 28A.655 035(1)(c) (2000). Therefore, it is likely that the procedural considerations mentioned here would apply to institutional intervention into schools and not to individual students.

206. *See supra* note 93 and accompanying text.

beneficiaries within the hierarchy of interests.[207] However, the legislature explicitly intended students to be the primary beneficiaries of the AAA Statute,[208] making an even stronger case that the legislature intended to protect students by allowing tort remedies. Thus, because no statutorily-defined procedural rights exist for students, the primary beneficiaries of the AAA statute, a court should not allow an argument like the one proposed by the *Tyner* dissent to prevent students from seeking compensatory damages for remedial education.[209]

B. A Student Who Has Satisfied All Local Graduation Requirements Should Overcome Legal and Policy Barriers to Establishing a Cause of Action for Educational Malpractice

An individual student who has met all local graduation requirements but has failed to pass the WASL should overcome traditional legal and policy barriers to educational malpractice claims. The AAA Statute creates a standard of care against which courts can measure school performance. Additionally, a denied diploma is a concrete and assessable harm, and a student who has met all local graduation requirements can show a causal connection between the denied diploma and the school district's failure to educate adequately. Furthermore, WASL scores could prevent the court from having to interfere with the judgment of administrators because they provide a reliable measure of school performance. Finally, a court could impose limitations that would alleviate concern that a flood of litigation might result.

1. A Student Who Has Met All Local Requirements Could Establish a Standard of Care, a Concrete Harm, and a Causal Connection Between School Failure and the Denied Diploma

A student who has completed all local requirements could show all of the elements necessary to establish an educational malpractice claim. The

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207. *Tyner*, 141 Wash. 2d at 92–93, 1 P.3d at 1161 (Talmadge, J., dissenting).

208. *See* WASH. REV. CODE § 28A.655.005.

209. One author has suggested protections to eliminate the risk of inappropriately denying post-graduation opportunities based on test scores. These protections include: (1) establishing compensatory supports to ensure adequate opportunities to master tested materials, (2) providing multiple opportunities to take the test, and (3) considering academic factors other than test scores that may affirm or challenge high stakes conclusions derived from test scores. Coleman, *supra* note 196, at 109–10.

Donohue court admitted that a court might create a standard of care,[210] but in Washington the court need not do so because the legislature has concluded that the WASL is a workable standard.[211] The WASL sets a measurable standard of care by reliably assessing a student's mastery of the essential academic learning requirements.[212] The state itself relies on the WASL to determine the adequacy of the education provided by school districts, establishing the WASL's validity as an assessment tool.[213] A Washington student who has met all local graduation requirements could present failing WASL scores, indicating the school's failure to adequately educate to a level mandated by statewide standards. Unlike the plaintiff in *Peter W.*, a Washington student would not have to establish a "correct" pedagogy against which the court would measure the school district's performance[214] because the school district's failure, as defined by the legislature, would be evident in the student's failing WASL scores.

An assessable educational harm will exist when a student does not pass the tenth-grade WASL and therefore does not graduate. The harm of not receiving a high school diploma places a student at a serious disadvantage for future employment opportunities.[215] Individuals with high school diplomas make as much as nineteen percent more per hour than those without.[216] This harm has a more concrete and provable impact than either the failure to achieve academically, claimed in *Peter W.*,[217] or the failure to learn about Washington government, claimed in *Camer*.[218] Accordingly, a student who is denied a diploma based solely on his or her WASL scores should be able to establish a concrete and assessable harm sufficient to overcome this legal barrier.

Courts have resisted recognizing an implied statutory cause of action for educational malpractice out of concerns that inadequate education is

210. Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1353 (N.Y. 1979).

211. WASH. REV. CODE § 28A.655.035(1)(b)(i).

212. *Id.* § 28A.655.030(1)(b).

213. *Id.* § 28A.655.035(1)(b)(i).

214. *See* Peter W. v. S.F. Unified Sch. Dist., 131 Cal. Rptr. 854, 860–61 (Cal. Ct. App. 1976).

215. Jamie M. McCall, *Now Pinch Hitting for Educational Reform: Delaware's Minimum Competency Test and the Diploma Sanction*, 18 J.L. & COM 373, 380 (1999).

216. *Id.* Courts have recognized the impact of a failure to graduate by declaring a property interest in a high school diploma. *See, e.g.*, Debra P. v. Turlington, 644 F.2d 397, 403 (5th Cir. 1981) (quoting Goss v. Lopez, 419 U.S. 565, 574 (1975)).

217. *Peter W.*, 131 Cal. Rptr. at 862.

218. Camer v Seattle Sch Dist., 52 Wash. App. 531, 536, 762 P.2d 356, 359–60 (1988).

not the only cause for student failure.[219] However, as the *Donohue* court noted, causation in an educational malpractice case is not impossible to prove.[220] Because a student could satisfy all local graduation requirements, the court could be certain that one of two things has happened. In one instance, the student will have passed all local graduation requirements despite "physical, neurological, emotional, cultural, [and] environmental" factors,[221] thus impugning the school's inadequate instruction. Alternatively, the school district will have allowed the student to pass local requirements, despite a lack of skill, without remedial or special education assistance geared toward the WASL. In either case, the school district will be responsible for the student's failure to learn, making compensatory damages for remedial education appropriate.

A court could also alleviate the causation dilemma by allowing the "substantial factor" test to prevail.[222] That is, if a court, like the *Peter W.* court, feels that both school and external factors have caused the student's failure, the court could determine that "'two causes concur to bring about an event and either one of them operating alone could have been sufficient to cause the result.'"[223] A school district could then be found fully liable for compensatory damages for remedial education because the school district was a "substantial factor" in a child's educational injury, even if a school district was not the most significant or sole cause.[224] Accordingly, the legal concern that a student would be unable to show causation should not preclude Washington courts from allowing students to establish an implied cause of action under the AAA Statute.[225]

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219. *Peter W.*, 131 Cal. Rptr. at 861.

220. Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1353–54 (N.Y. 1979).

221. *Peter W.*, 131 Cal. Rptr. at 861.

222. Albert C. Jurenas, *Will Educational Malpractice Be Revived?*, 74 WEST EDUCATION LAW REPORTER 449, 454–55 (1992).

223. *Id.* at 455 (quoting Mitchell v. Gonzales, 819 P.2d 872, 876 (Cal. 1991) (quoting Thomsen v. Rexall Drug & Chemical Co., 45 Cal. Rptr. 642, 647 (1965))).

224. *Id.*

225. Additionally, Washington follows a rule of comparative negligence, allowing juries to allocate responsibility for an injury between the plaintiff and the defendant. WASH. REV. CODE § 4.22.005 (2000). Therefore, a court or jury could attribute fault fairly between the student and the school district. *See also* 6 HON. GEORGE T. SHIELDS, WASH. PATTERN INSTRUCTIONS, *in* WASHINGTON PRACTICE 106–07 (1989) ("[R]educe the total damages you find to have been sustained by the plaintiff, by the percentage of [plaintiff's] contributory negligence.").

School districts may also hypothesize that two students could receive an identical education, even sitting next to each other in every class throughout the students' educational careers. If one student can pass the WASL and the other cannot, how can the district be blamed for inadequate education? However, in using the WASL tests to evaluate school performance, the Washington State Legislature has acknowledged that school districts carry some responsibility for actual student learning, not merely teacher output of information.[226] This responsibility includes preparing students with both the substantive and exam-taking skills to complete the tenth-grade WASL successfully. The most basic obligation of educators is to meet the needs of students as they find them, accounting for their varying backgrounds and abilities.[227] Under the affirmative legislative mandates and duties of the AAA Statute, school districts cannot skirt their responsibility to educate *each* child simply by lamenting learning differences.

2. *A Student Who Meets Local Graduation Requirements Should Also Be Able To Overcome Traditional Public Policy Concerns That Have Led Courts To Deny Educational Malpractice Claims*

A student who has passed all local graduation requirements but failed the WASL and who seeks compensatory damages for remedial education should be able to overcome traditional public policy concerns. In allowing an implied private cause of action for educational malpractice under the AAA statute, a court would not have to substitute its judgment for that of school authorities[228] or interfere with the everyday workings of school administrators. Because the A+ Commission and the legislature are both willing to make evaluative decisions based on the objective WASL assessment system,[229] courts should not hesitate to rely on that system as a measure of both individual student mastery of the essential academic learning requirements and overall school performance. Unlike the *Peter W.* and *Donohue* courts, Washington courts would not have to prescribe specific pedagogy because the AAA Statute and the WASL provide a standard against which to measure school performance. Courts would simply be insisting that school districts meet those standards

226. *See supra* notes 44–45 and accompanying text.

227. Coleman, *supra* note 196, at 84.

228. *See* Camer v. Seattle Sch. Dist., 52 Wash. App. 531, 537, 762 P.2d 356, 360 (1988).

229. WASH. REV. CODE § 28A.655.035(1)(b)(i) (2000).

imposed by the legislature.[230] Therefore, courts would not need to substitute their judgment for that of school authorities.

Furthermore, Washington courts would not have to interfere with everyday school administration because the plaintiff would already be outside the school system. Presumably, the AAA Statute's accountability system should continue to reform the day-to-day workings of schools.[231] Relief could be limited to compensatory damages for remedial education and would be appropriate only when the accountability system had not yet succeeded in a specific school district. A court could limit damages even further by insisting that the school district pay fees directly to the institution[232] where the child would attend remediation courses. While an implied private cause of action would encourage school districts to reform a failing school quickly, a private remedy for students already outside the school system would in no way require the court to dictate exactly how a district should improve its failing school. A cause of action would simply provide a separate remedial scheme that would avoid the problems anticipated by the *Donohue* and *Camer* courts.[233]

Finally, courts have been concerned with the flood of litigation that could result from an implied cause of action for educational malpractice. Presumably, a Washington court would be just as reluctant as the *Peter W.* court to allow recovery for a student's lost employment opportunities resulting from an inadequate education.[234] However, awarding only costs of compensatory education would offer a fair remedy that would not unreasonably burden school districts. Thus, by limiting damages to funding for compensatory education, courts would reduce the number of plaintiffs willing to sue. Disaffected students who solely sought retaliation against their districts would have no motivation to sue unless they actually wished to meet WASL standards. Furthermore, only

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230 In other contexts, courts have relied on test scores to make conclusions that the court could not reach without outside evaluation *See* Chapple v. Ganger, 851 F. Supp 1481, 1497 (E.D. Wash. 1994) (using test scores to determine extent that student's diminished performance was result of automobile accident). In addition, one commentator has suggested that educational malpractice claims should follow medical and legal malpractice standards: courts should accept evidence from experts in the profession to prove causation and harm. Lush, *supra* note 141, at 112.

231 *See supra* notes 46–52 and accompanying text.

232. Washington State's community college system might be an appropriate setting for a remediation program Although some might suggest that the public school system could provide post-twelfth grade remediation, it is important to remember that the court is providing the remedy because the school has failed in its duty to adequately educate.

233. *See supra* notes 154–158 and accompanying text.

234. *See* Peter W. v. S.F. Unified Sch. Dist., 131 Cal. Rptr 854, 861 (Cal. Ct. App. 1976).

students who could satisfy all other graduation requirements would be able make out an educational malpractice cause of action. Therefore, the causation requirement itself could limit the number of students who could successfully bring the implied cause of action.

Finally, though the graduation requirement does not take effect until 2008, if WASL test scores do not improve significantly before that deadline, there may be a large number of students who could claim that the school district caused their failure. This Comment demonstrates the type of liability that a school district could face if it fails to solve this problem before 2008. School districts might begin to alleviate the problem by insisting that teachers honestly assess a student's abilities when determining passing or failing grades for a particular course. Furthermore, if the number of students who satisfy local requirements far exceeds the number who can pass the WASL, the Superintendent of Public Instruction may want to reconsider the standards or provide for multiple alternative methods of assessment.[235]

V. CONCLUSION

In Washington State, the legislature has shown dedication to improving the skill level of Washington students by introducing a new and innovative school accountability system. As part of this system, the legislature has chosen to deny high school diplomas to students who cannot pass a statewide assessment test. Unfortunately, students often are not solely to blame for their failure. The need for school accountability necessarily acknowledges that many schools fail to educate their students adequately. Therefore, students should be able to seek the only remedy that will do them any good: compensatory damages from their school district for remedial education.

These students should be able to achieve this goal by establishing an implied private cause of action for educational malpractice under the AAA Statute, which is responsible for creating the WASL assessment and accountability system. The AAA Statute expresses a clear school district duty to individual students while insisting on school accountability. The Washington Supreme Court applies the *Bennett* test to determine the existence of an implied private cause of action. Also, a denied diploma is a very concrete and individual harm that cannot be remedied by later school improvement. Thus, the unique convergence of

235. *See supra* note 211.

the AAA statute, the *Bennett* test, and the absence of insurmountable legal or policy barriers should allow a student to successfully sue his or her school district for damages to fund a remedial education.