

WHEN STUDENTS PASS, BUT SCHOOLS FAIL:  
THE NEGLIGENT FAILURE TO TEACH STUDENTS TO READ

Kimberly Walters-Parker

**ABSTRACT**

Most students in American schools learn to read well enough to be fully functioning members of society. Nevertheless, some students leave school—some by dropping out but others by graduating—with inadequate reading skills, despite the fact that they are capable learners. The courts have been unwilling to recognize an educational malpractice cause of action to provide a legal remedy for these students. This paper explores two frequently cited rationales for courts' declining to recognize educational malpractice generally and argues that neither should be a bar to students' receiving appropriate remedies for negligent reading instruction.

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Kimberly Walters-Parker<sup>1</sup>

INTRODUCTION

*[The patient] came in for a “tune-up.” He was 64 years old, with a “history of noncompliance,” according to the resident, and he hadn’t taken his diabetes or cardiac medications for weeks. We weren’t quite sure why. He was alert, he appeared to be intelligent and interested in getting well, and he was able to get his prescriptions filled at a reduced cost. ... He told us he would follow up with his doctor (though he couldn’t remember the doctor’s name or telephone number) and left the hospital with a handwritten discharge summary.*

*Five months later, he appeared at the community clinic. He said he was taking his medications, but he wasn’t sure of their names or how often he took them.*

*When he returned [two weeks later], the student saw him first—and made a diagnosis that no one else had considered: illiteracy. We quietly asked him to read his list of medications aloud. Haltingly, he told us he couldn’t do it. Born in the rural South, he had left school in the second grade. He lived alone. He had been able to support himself as a gas station attendant and handyman, but he had never learned to read.<sup>2</sup>*

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*“Usually, my granny helps me with it at home. She helps me with reading a lot of stuff.” That was a sixteen-year old high school junior’s explanation of how he was reading Huckleberry Finn for his English class, despite his poor reading skills. His teachers had not realized he could not read well; he always “forgot” his glasses or had a “headache” when asked to read aloud, but he came to school every day, did his homework, brought all the right materials, and never caused his teachers any trouble. Despite playing the role of student very well and making it to eleventh grade, he had the reading skills of a typical third grader.*

*Things turned out differently for this young man than for the second-grade dropout. This young man was a stellar athlete who had college recruiters knocking on his door. When he took his college admission test and scored abysmally, the school finally noticed this stellar athlete could hardly read.<sup>3</sup>*

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<sup>2</sup> Erin N. Marcus, *The Silent Epidemic—The Health Effects of Illiteracy*. 355 NEW ENG. J. MED., 339, 339, <http://content.nejm.org/cgi/content/full/355/4/339>.

<sup>3</sup> This anecdote is based on the writer’s experience as a reading specialist to whom this student was sent for tutoring. Within a few months, the student read well enough to score in the range of average on his college admission test, due for the most part to his work ethic and determination. He met the academic standards for an athletic scholarship, was an outstanding college athlete, graduated from college, and now works in a public service profession.

For people who cannot read, the ravages of their illiteracy go far beyond reading tasks most of us take for granted—reading a newspaper article to gain information, an advertisement to find items of interest, or a letter from a friend to learn about his activities. People who cannot read a newspaper cannot read a medicine label. People who cannot read an advertisement cannot read warning labels on household cleaning products. People who cannot read a letter from a friend cannot read letters from their children’s teachers. Reading *Huckleberry Finn* is the least of their worries. It may not be surprising that a person who dropped out of school in second grade cannot read well enough to monitor complicated medicines. One would expect a second-grade dropout to have deficient skills across the board. But what about the high school student who read at a third grade level? Who is responsible when capable students reach high school still unable to read well enough to manage the literacy tasks of everyday life? Who is responsible when an able learner makes only three years’ progress in eleven years of school?

Lawyers, accountants, architects, engineers, and most health care professionals go about their work knowing that if they breach standards of reasonable care, their professional negligence may result in legal action against them.<sup>4</sup> Unlike practitioners of these and other professions, public school educators apparently have no such worry, at least with regard to providing effective instruction.<sup>5 6</sup> As of 2006, no suit charging a public school educator, school, or school district with failure to provide effective instruction has been decided in the student’s favor.<sup>7</sup> Cases citing failure to deliver effective instruction fall within the broad category of educational

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<sup>4</sup> See generally Ch. 14, *Health Care Providers and Other Professionals*, 631-692, in DAN B. DOBBS, *THE LAW OF TORTS* (2000). Although such cases are generally tort actions, contract theories have been pursued in educational malpractice cases involving postsecondary institutions. Application of contract principles in the public school setting is beyond the scope of this paper.

<sup>5</sup> Sovereign immunity is recognized as a potential bar to the proposed cause of action in some jurisdictions. Since the proposed action derives from state tort law, however, sovereign immunity under the Eleventh Amendment of the United States Constitution would not bar the action unless the case arose in federal court under diversity jurisdiction. See, e.g., *Nevada v. Hall* (1979) (holding that the U.S. Constitution does not protect a state from suit on a state theory in a state court). Nevertheless, the defendant may be able to invoke state sovereign immunity as a matter of state law. Detailed consideration of the sovereign immunity issue in various jurisdictions is beyond the scope of this paper.

<sup>6</sup> Although public schools are the focus of this paper, representative private school cases are also considered.

<sup>7</sup> See Jenna Watts, *Educational Malpractice: If Our Children Aren’t Learning, Who Should Be Held Responsible?* 34 J.L. & EDUC. 167 (2005).

malpractice claims,<sup>8</sup> but this article focuses on a much narrower claim than educational malpractice generally or even the specific claim of failure to deliver effective instruction. This article focuses on the negligent failure to teach students to read.<sup>9</sup>

Defining a cause of action for negligent failure to teach students to read requires applying familiar legal doctrines to unfamiliar concepts, particularly in the areas of reading instruction methods and reading assessment. To bridge this gap, Part I of this article introduces essential concepts of reading assessment. Every effort has been made to limit the use of assessment jargon, but understanding specialized terminology is essential for understanding the legal precedents and the proposed cause of action.

Part II of this article introduces representative educational malpractice claims and identifies the two primary rationales courts state for rejecting educational malpractice claims: the chance that recognizing such a cause of action would open the floodgates of litigation and the purportedly intractable difficulties of defining negligence in the education setting.<sup>10</sup> Part II first examines the reasoning that led the court in the seminal case of *Peter W. v. San Francisco Unified School District* to conclude that recognizing an educational malpractice claim would unleash a flood of litigation.<sup>11</sup> Peter W., an eighteen-year old high school graduate, had attended public schools for twelve years and graduated from high school but had only a fifth-grade reading level.<sup>12</sup> Although his case is certainly not unique, it presents a fairly narrow set of factors: the student had normal or better intelligence, had a history of consistent attendance, and did not

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<sup>8</sup> See generally JOHN COLLIS, EDUCATIONAL MALPRACTICE: LIABILITY OF EDUCATORS, SCHOOL ADMINISTRATORS, AND SCHOOL OFFICIALS (1990).

<sup>9</sup> Cases under the general rubric of educational malpractice have posited a variety of legal theories in addition to negligence, including misrepresentation, contract, and fiduciary duty, but negligence is the most common legal theory cited. See generally TODD A. DEMITCHELL AND TERRI A. DEMITCHELL, STATUTES AND STANDARDS: HAS THE DOOR TO EDUCATIONAL MALPRACTICE BEEN OPENED? 2003 B.Y.U. EDUC. & L.J. 485.

<sup>10</sup> See, e.g., *Peter W. v. San Francisco Unified School District*, 131 Cal. Rptr. 854 (Cal. Ct. App. 1976).

<sup>11</sup> Although *Peter W.* is the first reported educational malpractice case involving public schools, it was preceded by the *Salter v. Natchitoches Chiropractic Clinic*, 274 So.2d 490 (La. App. 1973) (declining to exercise personal jurisdiction over an out-of-state chiropractic college because doing so “could result in a serious inconvenience and expense to our institutions of higher education if they had to defend these suits in states thousands of miles from their domiciles).

<sup>12</sup> See Collis, *supra* note 8.

present a discipline problem in the school.<sup>13</sup> This article discusses whether a potential flood of litigants with similar claims exists and whether the *Peter W.* reasoning merits the continued deference it has been given. The article then explores the argument that ascertaining negligence in the education setting is an inappropriate and unmanageable task for the judicial system.

To clarify the contours of negligent failure to teach students to read, Part III first explores the elements of negligence as they are applied in legal professional malpractice, then considers precedents for expanding current definitions of professionals to include educators.<sup>14</sup> Next, Part III addresses the issue of breach by reviewing existing professional standards for reading instruction<sup>15</sup> and considering the feasibility of using those standards to define a breach of professional duty. The role of reading assessment in determining injury to a claimant<sup>16</sup> is then explored. Finally, Part III addresses causation, particularly the challenges of determining whether a student's reading performance is a reasonably foreseeable consequence of public school educators' action or inaction.

Part III of this article concludes that a cause of action for negligent failure to teach students to read would not unduly burden the judicial system and would be judicially enforceable. In light of this conclusion, Part IV considers potential defenses to a cause of action for negligent failure to teach students to read, and Part V proposes remedies a court might consider if such an action were recognized.

#### **PART 1: THE READING INSTRUCTION AND ASSESSMENT CONTEXT**

As the author has asserted elsewhere, "Learning to read is a matter of course for most children in the United States. Parents, teachers, administrators, the public, and children themselves expect that within the first year or two of formal education, most children will learn to

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<sup>13</sup> See Collis, *supra* note 8.

<sup>14</sup> See, e.g., *Sain v. Cedar Rapids Community School District*, 626 N.W.2d 115 (Iowa 2001) (holding that a guidance counselor who provided inaccurate information about high school courses approved for National Collegiate Athletic Association eligibility was primarily a provider of information rather than educational services and thus could be held to a standard of care comparable to that of professionals in commercial settings).

<sup>15</sup> INTERNATIONAL READING ASSOCIATION, PROFESSIONAL STANDARDS FOR READING EDUCATORS (2003), [http://www.reading.org/resources/issues/reports/professional\\_standards.html](http://www.reading.org/resources/issues/reports/professional_standards.html).

<sup>16</sup> *Id.*

read.”<sup>17</sup> Thirty years of National Assessment of Educational Progress (NAEP) data support this assertion.<sup>18</sup> NAEP data for 2005 indicate that by the eighth grade, the majority of students in public schools have learned to read at functional levels.<sup>19</sup> NAEP data also reveal, however, that behind conclusory references to “the majority of students” and “most students” lie a substantial number of eighth graders whose reading skills fall below the NAEP standards for basic literacy.<sup>20</sup> Twenty-nine percent of eighth graders performed below the basic achievement level on the 2005 NAEP reading assessment.<sup>21</sup>

Ironically, the initial collection of NAEP data in 1971 coincided with the filing of the *Peter W. v. San Francisco Unified School District* educational malpractice claim in 1972.<sup>22</sup> Just as there has been little change in the judicial response to educational malpractice claims, the reading performance of nine-, thirteen-, and seventeen-year olds has been essentially flat since NAEP testing began.<sup>23</sup> The implications of these reading performance data are dire:

American youth need strong literacy skills to succeed in school and in life. Students who do not acquire these skills find themselves at a serious disadvantage in social settings, as civil participants, and in the working world. ... Meeting the needs of struggling adolescent readers and writers is not simply an altruistic goal. The emotional, social, and public health costs of academic failure have been well

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<sup>17</sup> Kimberly Walters-Parker, *The Effects of Two Reading Interventions on the Reading Motivation and Reading Achievement of Low-Performing High School Readers* (2006) (unpublished doctoral dissertation), available at <http://proquest.umi.com/login>.

<sup>18</sup> The National Assessment of Educational Progress is administered biennially by the U.S. Department of Education. NAEP links students' performance to achievement level standards, so comparisons across time and student groups are valid. The achievement levels on all NAEP tests are Basic, Proficient, and Advanced. See generally NAEP Overview, available at <http://nces.ed.gov/nationsreportcard/about/>.

<sup>19</sup> Nat'l Center for Educ. Statistics, U.S. Dep't. of Educ., *The Nation's Report Card, Reading, 2005* (2005), <http://nces.ed.gov/nationsreportcard/pdf/main2005/2006451.pdf>. For a summary of relevant data, see [http://wwwlib.umi.com/dissertations/preview\\_page/3231209/18#top](http://wwwlib.umi.com/dissertations/preview_page/3231209/18#top).

<sup>20</sup> “Literacy” in the broad sense includes not only making meaning from written text but also using writing to communicate one’s own ideas. In this article, however, literacy refers to and is used interchangeably with reading. Support for this use is drawn from Venezky: “Reading is clearly primary to any definition of literacy.... Writing, as a means of recording and communication, presupposes reading; otherwise, it is mere copying.” R.L. Venezky, *Definitions of Literacy*, in *TOWARD DEFINING LITERACY 2*, 9 (R.L. Venezky, D.A. Wagner, and B.S. Ciliberti, eds., 1990).

<sup>21</sup> Nat'l Center for Educ. Statistics, U.S. Dep't. of Educ., *supra* note 19.

<sup>22</sup> Collis *supra* note 8. Collis also notes that the *Peter W.* case was originally filed as *Peter Doe v. San Francisco Unified School District, et al.*

<sup>23</sup> Nat'l Center for Educ. Statistics, U.S. Dep't. of Educ., *supra* note 19.

documented, and the consequences of the national literacy crisis are too serious and far-reaching for us to ignore.<sup>24</sup>

Reducing a “literacy crisis” to statistical trends is less heartwarming than anecdotes about high school students who overcome reading deficits and graduate from college, but at both the micro level and the macro level, data collection and analysis are essential to addressing literacy issues.

Reading instruction is—or at least should be—an assessment-driven undertaking.<sup>25</sup> Discussion of particular methods of reading instruction are beyond the scope of this article, but even a general discussion of reading instruction and its effectiveness necessitates at least some discussion of reading assessment methods: “Given that effective instruction consists of responding to children’s needs while building on their strengths, it necessarily depends on a sensitive and continual capacity for monitoring student progress.”<sup>26</sup> This section examines three critical aspects of assessment. First, formative assessments are distinguished from summative assessments.<sup>27</sup> Next, assessment validity is distinguished from assessment reliability.<sup>28</sup> Finally, norm-referenced assessments are distinguished from criterion-referenced assessments.<sup>29</sup> Each of these aspects of assessment has applications beyond the field of reading instruction, so clarifying their meanings and establishing their importance in the context of reading instruction is essential to understanding the role they play in defining a cause of action for negligent failure to teach students to read and in proving that such negligence occurred.

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<sup>24</sup> GINA BIANCAROSA AND CATHERINE SNOW, *READING NEXT—A VISION FOR ACTION AND RESEARCH IN MIDDLE AND HIGH SCHOOL LITERACY: A REPORT FROM CARNEGIE CORPORATION OF NEW YORK*. Washington, DC: Alliance for Excellent Education (2004), <http://www.all4ed.org/publications/ReadingNext/ReadingNext.pdf>.

<sup>25</sup> For a discussion of various ways assessment can or should inform daily instructional decisions, see Rita M. Bean, *Developing an Effective Reading Program*, in *THE ADMINISTRATION AND SUPERVISION OF READING PROGRAMS* 3, 11-12 (Shelley B. Wepner, Dorothy S. Strickland & Joan T. Feeley, eds., 3d ed. 2002).

<sup>26</sup> NATIONAL RESEARCH COUNCIL, *PREVENTING READING DIFFICULTIES IN YOUNG CHILDREN*, 336 (1998), <http://www.nap.edu/catalog/6023.html#toc>.

<sup>27</sup> See *infra* notes 30-34 and accompanying text.

<sup>28</sup> See *infra* notes 35-36 and accompanying text.

<sup>29</sup> See *infra* notes 37-39 and accompanying text.

### **A. FORMATIVE AND SUMMATIVE ASSESSMENTS IN READING**

A 2004 report by the Alliance for Excellent Education presents fifteen recommendations for improving reading instruction for middle and high school students.<sup>30</sup> Two of those recommendations focus exclusively on assessment of students' reading development. First, the report recommends "[o]ngoing formative assessment of students, which is informal, often daily assessment of how students are progressing under current instructional practices."<sup>31</sup> Although daily assessment may sound cumbersome and impractical, formative assessments include such practices as having a student read a brief passage aloud to the teacher as a measure of oral reading fluency, asking a student to write a brief paragraph or draw a picture summarizing what he has read as a measure of comprehension, or simply asking a student what she thought about a reading selection.<sup>32</sup>

The report also recommends "[o]ngoing summative assessment of students and programs, which is more formal and provides data that are reported for accountability and research purposes."<sup>33</sup> Summative assessments include measures administered after a unit of instruction or at set intervals, such as every six weeks or at the end of each semester, and they typically guide long-term instructional and curriculum planning rather than on-the-spot instructional decisions.<sup>34</sup> Both formative and summative assessments are important sources of information as teachers monitor students' reading development progress and refine their instructional practices over time. Evidence of both formative and summative evaluation indicates active monitoring of instructional effectiveness.

### **B. ASSESSMENT VALIDITY AND RELIABILITY**

Validity and reliability are commonly used words, but in the assessment context, validity and reliability have narrow technical meanings. In assessment, "[v]alidity refers to the degree that test scores appropriately reflect the level of knowledge and skills that a test is designed to

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<sup>30</sup> Biancarosa & Snow, *supra* note 24.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

measure.”<sup>35</sup> Discussion of how various types of validity are measured is beyond the scope of this article, but for present purposes, it is sufficient to say that a test is valid when it measures what it is supposed to measure. In the assessment context, “[r]eliability is a measure of the consistency and dependability of a test score's representation of a student's knowledge or ability.”<sup>36</sup> An assessment need not be valid to be reliable; if the assessment measures the wrong construct but it measures it consistently over time, the measure is not valid but it is still reliable. In legal parlance, a reliable witness tells the truth; in assessment parlance, a reliable witness would just be one who gives the same testimony every time, regardless of the testimony's veracity.

### **C. NORM-REFERENCED AND CRITERION-REFERENCED ASSESSMENTS**

For assessment information to be useful, it must be reported in a way that informs users about the student's performance. One approach to reporting performance is to compare an individual's performance to standards or expectations called criteria.<sup>37</sup> The individual's performance is evaluated based on how closely his performance approximates the criteria or standards set out for whatever is being measured. With criterion-referenced assessment, it is theoretically possible for every individual to demonstrate mastery and theoretically possible for no individuals at all to demonstrate mastery. A common example of a criterion-referenced assessment is the driver's license test: on any given day, it is possible for every person who attempts the test to meet the standards and earn a license, but it is also possible for no drivers at all to meet the standards. The awarding of licenses is based on how closely each applicant approximates established standards for driving performance.

An alternative approach to reporting performance is to compare an individual's performance to the performances of other people who have completed the same assessment. Assessments that compare an individual to a larger group, called a norm group, are norm-

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<sup>35</sup> PEARSON EDUCATION MEASUREMENT. GLOSSARY.  
<http://www.pearsonedmeasurement.com/research/glossary.htm>.

<sup>36</sup> Id.

<sup>37</sup> Id.

referenced assessments.<sup>38</sup> If driver's license tests were norm-referenced rather than criterion-referenced, test-takers would be compared to one another rather than to a standard, and the portion of applicants falling below a set "cut score" would fail, regardless of how well they drove. A norm-referenced statistic with which many people are familiar is the percentile rank, a number representing the percentage of the norm group scoring lower than the individual whose performance is being reported.<sup>39</sup>

The percentile rank statistic gives rise to the concept of grade level performance. Because grade-level equivalents are derived from norm-referenced percentile ranks, they are a result of comparing test-takers' scores to one another. By standard assessment reporting practice, grade level is set at the fiftieth percentile, so reporting that a student is reading at a certain grade level means she scored better than roughly fifty percent of students in that grade scored (or would score if they took the test). In *Peter W.*, the plaintiff alleged that tests indicated he read on a fifth grade level when he graduated from high school. If that assertion is accurate, Peter W.'s reading test score placed him at the fiftieth percentile when compared to fifth graders.<sup>40</sup>

Another byproduct of norm-referenced reading assessment is the concept of text readability. Readability formulas provide an objective, norm-referenced means of reporting how hard a passage is to read by estimating the grade level at which the typical reader could read the text with adequate comprehension. The following passages demonstrate how a statement may be re-written with different levels of readability:<sup>41</sup>

- I like to read. Reading is fun. I read fiction books and true books. (2nd grade)

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<sup>38</sup> Id.

<sup>39</sup> Id.

<sup>40</sup> When a score is reported as a specific grade level, the reference indicates the student scored at the fiftieth percentile for that grade level. In contrast, the broad term "on grade level" includes a range of performance levels around the fiftieth percentile, typically the middle fifty percent of scores. For a more detailed explanation of grade level determinations, see <http://ststesting.com/explainit.html>.

<sup>41</sup> Lori Becker Hayes. *Righting Reading: Fayette Making Literacy at Higher Levels Priority in Budget*. Lexington Herald-Leader. March 31, 2000, at A-1. (Passages written by Kim Walters-Parker. Reported readability is the Flesch-Kincaid Grade Level measured with Microsoft Word.)

- I like to read because reading is exciting. I enjoy reading fiction and nonfiction books. (7<sup>th</sup> grade)
- Because they stimulate limitless fascination, I devour innumerable fiction and nonfiction manuscripts. (12<sup>th</sup> grade)

Based on the levels assigned to these passages, the reader can see that the formula used to measure their readability considered such features as sentence length and syllables per word, although different formulas do use different metrics.<sup>42</sup>

These passages also demonstrate marked differences among print materials that are comprehensible for a typical second grader, i.e., one reading at approximately the fiftieth percentile when compared to second graders, a typical seventh grader, and a typical twelfth grader. One does not need extensive experience with readability formulas to conclude that a twelfth grade student with seventh grade reading skills will be at a distinct disadvantage compared to her classmates with grade-appropriate reading skills. As the gap between that student's reading level and the readability of her assigned reading material grows larger, the student will have increasing difficulty constructing meaning from text.

## **PART II. THE LEGACY OF FAILED EDUCATIONAL MALPRACTICE CLAIMS**

If she believed her poor reading skills were the result of negligent instruction, a twelfth grade student with second or even seventh grade reading skills might also believe she would have a valid claim of educational malpractice against parties or institutions given the responsibility of educating her. Educational malpractice cases finding educators liable for students' failure to learn, however, have been uniformly unsuccessful.<sup>43</sup>

The court in *Peter W. v. San Francisco Unified School District* presaged a long line of subsequent cases when it rejected the high school graduate's claims of negligence and

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<sup>42</sup> For a review of current models of text difficulty determinations, see ELFRIEDA H. HIEBERT, *Standards, Assessments, and Text Difficulty*, in *What Research Has to Say About Reading Instruction*, 337-369 (International Reading Association, 2002).

<sup>43</sup> See Jenna Watts, *Educational Malpractice: If Our Children Aren't Learning Who Should Be Held Responsible?* 34 J.L. & EDUC. 167 (2005).

intentional misrepresentation against a public school district.<sup>44</sup> The plaintiff in *Peter W.* presented evidence that although he had normal intelligence, had attended school regularly for twelve years, had been given average grades in his classes, and had been awarded a diploma, he had only fifth-grade reading skills.<sup>45</sup> The effectiveness of Peter's post-graduation reading tutoring was offered as evidence that the school district's negligence, rather than a lack of capacity to learn, should be blamed for Peter's poor reading performance.<sup>46</sup> The *Peter W.* court did not deny any of the plaintiff's factual allegations; nevertheless, his claim was rejected. The court cited two primary rationales for its decision. First, the court found no duty of care on the part of the school system.<sup>47</sup> Second, the court expressed concern that recognizing educational malpractice would burden public education with a flood of similar claims.<sup>48</sup> These two rationales recur in most subsequent rejections of educational malpractice claims relating to instruction.

The legacy of *Peter W.* is demonstrated in *Rich v. Kentucky Country Day*,<sup>49</sup> a representative case involving a private school alleged to have failed to identify a student's learning disability:

The issue of educational malpractice is one of first impression in Kentucky. Claims for educational malpractice have been considered and rejected in five states; California, New York, Alaska, Florida, and Maryland. (citations deleted) Montana recognized the tort of educational malpractice where a school allegedly failed to comply with a statutory requirement. Here, there is no claim Country Day failed to comply with a statute. The many problems inherent in the theory of educational malpractice were clearly set forth in *Peter W.*, as follows....<sup>50</sup>

The appellate court's decision in *Rich* proceeds to quote the trial court's decision, which in turn quoted the *Peter W.* decision at great length, including concerns about finding a judicially manageable duty of care and the potential for an onslaught of similar claims that would burden the courts. The dissimilar circumstances—*Rich* involved a private school while *Peter W.* involved

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<sup>44</sup> *Peter W. v. San Francisco Unified School District*, 131 Cal. Rptr. 854 (Cal. Ct. App. 1976)

<sup>45</sup> *Id.* at 856.

<sup>46</sup> *Id.* at 856.

<sup>47</sup> *Id.* at 861.

<sup>48</sup> *Id.* at 861.

<sup>49</sup> *Rich v. Kentucky Country Day*, 793 S.W.2d 832 (Ky. App. 1990). (holding, *inter alia*, that Kentucky does not recognize an educational malpractice cause of action in private or public schools).

<sup>50</sup> *Id.* at 834.

a public school; *Rich* involved a claim of misdiagnosis while *Peter W.* involved a typical but underperforming student; *Rich* involved general academic performance while *Peter W.* specifically addressed reading—did not deter the court from applying the reasoning of the *Peter W.* court to *Rich*.

The remainder of Part II will further examine the legacy of *Peter W.* by exploring each of these rationales, starting with a brief analysis of the prediction of an unmanageable onslaught of similar cases and then turning to the challenges of establishing a duty of care in the reading instruction context.

#### A. THE FLOODGATES OF LITIGATION RATIONALE

The court in *Peter W.* warned that recognizing the educational malpractice claim would have calamitous consequences for education institutions: “To hold [public schools] to an actionable duty of care, in the discharge of their academic functions, would expose them to the tort claims—real or imagined—of disaffected students and parents in countless numbers.”<sup>51</sup> This assertion has been cited approvingly by subsequent courts,<sup>52</sup> but no evidence was presented to support that claim in *Peter W.* and none is presented in the citing cases. Rather, the *Peter W.* court appears to have relied on anecdotal observations, and subsequent courts appear to rely on *Peter W.* For example, courts have quoted the following statement to support their predictions of a flood of litigation: “[The schools’] public plight in these respects is attested in the daily media, in bitter governing board elections, in wholesale rejections of school bond proposals, and in survey upon survey.”<sup>53</sup> Even assuming these statements were true in California in the late 1970s, continuing to rely on them year after year—for more than thirty years—and in state after state is questionable.

As a policy consideration, one must question the wisdom of denying legitimate claims out of fear that too many claims would follow or that some claims would prove not to be legitimate. In

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<sup>51</sup> *Id.* at 861.

<sup>52</sup> See, e.g., *Rich* at 835-836; *Donahue v. Copiague Union Free School District*, 407 N.Y.S.2d 847; *Helm v. Professional Children’s School*, 431 N.Y.W.2d 246; *Doe v. Yale University*, 748 A.2d 834.

<sup>53</sup> *Peter W.* at 861.

his dissent in *Doe v. Board of Education of Montgomery County*,<sup>54</sup> Judge Eldridge quoted Professor Prosser on this topic: “It is the business of the law to remedy wrongs that deserve it, even at the expense of a ‘flood of litigation,’ and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds.”<sup>55</sup> If there is a “flood” of deserving potential litigants whose reading skills are deficient as the result of negligent instruction, might recognizing the proposed cause of action serve the worthy purposes of not only addressing their injuries but also discouraging the practices that have resulted in those injuries? Particularly given the remedy for negligent failure to teach students to read proposed in Part IV of this article, it seems unlikely that a flood of undeserving litigants would step forward to claim their remedy.

Recognizing educational malpractice may be less likely to unleash a flood of litigation than some courts have supposed. If there were the potential for such a flood, policy considerations may weigh in favor of recognizing the claims rather than denying them. But even if the floodgates argument is discounted, the proposed cause of action for negligent failure to teach students to read still faces the duty of care hurdle. The next section of this article examines the *Peter W.* court’s influential argument that no judicially manageable duty of care can be established for the education context.

## **B. THE NO DUTY OF CARE RATIONALE**

The California court in *Peter W.* analyzed the negligence claim under that state’s rules: “According to the familiar California formula, the allegations requisite to a cause of action for negligence are (1) facts showing a duty of care in the defendant, (2) negligence constituting a breach of the duty, and (3) injury to the plaintiff as a proximate result.”<sup>56</sup> The *Peter W.* court did not analyze the second element—breach—or the third element—injury as a proximate result of the breach—because it found no enforceable legal duty of care on the part of the school system: “Unlike the activity of the highway or the marketplace, classroom methodology affords no readily

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<sup>54</sup> *John Doe et al. v. Board of Education of Montgomery County, Maryland*, et al. 453 A.2d 814 (Md. 1982) (holding that Maryland does not recognize educational malpractice).

<sup>55</sup> *Id.*, citing W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 12 at 51 (4<sup>th</sup> ed. 1971).

<sup>56</sup> *Peter W.* at 857.

acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught....<sup>57</sup> As was the case with the floodgates rationale, this assertion by the *Peter W.* court has been cited approvingly by a series of other courts,<sup>58</sup> but its current validity is questionable.

Even thirty years later, the fine points of classroom instruction are probably still elusive to laypersons, but it would not be accurate to say that “classroom methodology affords no readily acceptable standards of care, or cause, or injury,”<sup>59</sup> and surely there is no pedagogical iteration or instructional theory that questions that “what a child should be taught” includes being taught to read. The *Peter W.* court’s statement no longer withstands scrutiny, particularly in view of the great and growing emphasis on accountability in education, much of which is focused on reading instruction.<sup>60</sup> If Peter W. were pursuing his case in 2007, identifying judicially manageable standards for reading instruction would pose no barrier to his claim.<sup>61</sup> Nevertheless, Peter W. would still have to persuade the court that those standards could support a cause of action against the school system for its negligent failure to teach him to read. Part III of this paper explores how that argument might be fashioned.

### **PART III: DEFINING THE NEGLIGENT FAILURE TO TEACH STUDENTS TO READ**

Two years after the decision in *Peter W.*, a New York court decided the case of *Donohue v. Copiague Union Free School District*, concluding that no duty of care runs from educators to students, even though “[t]his determination does not mean that educators are not ethically and legally responsible for providing a meaningful public education for the youth of our State.”<sup>62</sup> The *Donohue* court reasoned that the court system is not an appropriate forum for determining whether those responsibilities have been met, in part because too many factors besides those

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<sup>57</sup> Id. at 860.

<sup>58</sup> See *Donohue*, *supra* note 52.

<sup>59</sup> See *generally* DEMITCHELL & DEMITCHELL, *supra* note 9.

<sup>60</sup> Id.

<sup>61</sup> This statement is not intended to suggest that all teachers and/or all schools do or should adhere to a single set of reading instruction standards, nor is it intended to suggest that judicial application of reading instruction standards is recommended or even appropriate. Rather, it is intended to indicate that reading instruction standards developed and validated by professionals in the field are readily available.

<sup>62</sup> *Donohue*, *supra* note 52 at 878.

controlled by educators influence students' achievement.<sup>63</sup> In his dissent in *Donohue*, Justice Suozzi rejected that familiar line of reasoning: "Whether the failure of the plaintiff to achieve a basic level of literacy was caused by the negligence of the school system, as the plaintiff alleges, or was the product of forces outside the teaching process, is really a question of proof to be resolved at a trial."<sup>64</sup>

This article adopts the position argued by Justice Suozzi: a plaintiff who establishes that she has not achieved a basic level of literacy and alleges negligent instruction is to blame should have access to the legal system. It has been argued that taking such a role in education is not appropriate for the courts, but in view of the courts' role in policing professional work other than classroom teaching, that argument seems disingenuous. "Courts are right to avoid day-to-day supervision of schools, but they have not explained why legal liability for breach of a specific standard of care would entail supervision of schools any more than a physician's liability would entail supervision of the medical profession."<sup>65</sup>

Inasmuch as a cause of action for negligent failure to teach students to read is envisioned not as an entirely new cause of action but as a type of professional negligence, the elements of the proposed cause of action must generally parallel the elements of other types of professional negligence. Following a consideration of whether a professional negligence standard is applicable to educators and an overview of the elements of legal malpractice, each element will be considered in the reading education context.

#### **A. ARE EDUCATORS PROFESSIONALS?**

Determining whether educators are "professionals" in the legal sense is foundational to an application of professional negligence standards to educators. It has been noted, however, that a "surprising amount of uncertainty surrounds the basic definition of a professional for

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<sup>63</sup> Id. at 884.

<sup>64</sup> Id. at 879.

<sup>65</sup> Dobbs, *supra* note 4, at 692

malpractice purposes.”<sup>66</sup> On the national level, the indicators of a professional are clearly delineated,<sup>67</sup> but few professional negligence cases are addressed at the national level.<sup>68</sup> Professional negligence cases are typically addressed at the state level, so one might expect state legislatures to define professional for legislative purposes. As one commentator has noted, however, state legislatures appear reluctant to do so.<sup>69</sup> Given the dearth of legislative definitions, the courts have had to fashion their own definitions or avoid the issue altogether. One commentator has identified three alternatives courts have taken to avoid clearly defining “professional”:

[S]ometimes [the courts have] decided that no liability existed based strictly on *policy grounds*. Other times they have concluded that the defendant is or is not a professional with little or no reasoning in support. Sometimes, as in the cases involving physicians and lawyers, the decision simply rests on precedent.<sup>70</sup> (emphasis added)

The same commentator concluded that, “[t]he decision to disallow a tort action for educational malpractice is not based on a principled definition of professionalism or the lack of it but, rather, on pragmatic policy grounds.”<sup>71</sup>

It has been observed that teachers and schools are held liable for their education-related actions in what looks like professional negligence under certain circumstances. For example, “schools or teachers are subject to liability for injuries caused by negligently maintained premises, a negligently conducted chemistry lab, and for dangerous playground equipment or negligent supervision.”<sup>72</sup> Closer analysis reveals, however, that the duty of care standard in those situations

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<sup>66</sup> Michael J. Polelle, *Who’s on First, and What’s a Professional?*, 33 U.S.F.L. Rev. 205, 205 (1999).

<sup>67</sup> See Labor Management Relations Act, 29 U.S.C. §152(12) (1995) (providing “[A]ny employee engaged in work predominantly intellectual and varied, as opposed to routine mental, manual, mechanical, or physical work; involving the consistent exercise of discretion and judgment in its performance; of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, physical processes.”)

<sup>68</sup> Polelle, *supra*, note 66.

<sup>69</sup> *Id.* at 218.

<sup>70</sup> *Id.* at 217.

<sup>71</sup> Dobbs, *supra* note 4, at 213.

<sup>72</sup> *Id.* at 689.

is only that of a reasonable prudent person under all the circumstances: no higher standard is applied based on the teacher's employment status, training, responsibilities, etc. In situations drawing on the teachers' employment status, training, and responsibilities, such as teaching and testing, negligence standards are not generally applied at all.<sup>73</sup> Teachers have been effectively insulated from claims of professional negligence arising in the context of performing their primary task, teaching.

Because the primary rationales for not recognizing educators as professionals are based on policy reasons rather than on the nature of the work itself, the courts' historic resistance to recognizing teachers as professionals is not an insurmountable barrier to courts' recognizing the proposed negligent failure to teach students to read cause of action. This article proceeds under the supposition that if all other elements of this claim can be established, a court will at some point recognize the proposed cause of action.

The door to professional negligence for teachers may have been opened by the Supreme Court of Iowa in *Sain v. Cedar Rapids Community School*.<sup>74</sup> Although *Sain* involved a high school guidance counselor rather than a classroom teacher, principal, school board, or school district, the *Sain* decision still reflected a departure from traditional deference to educators in the execution of their professional responsibilities. *Sain* extended the tort of negligent misrepresentation from commercial transactions to include counselor-student transactions.<sup>75</sup> The court observed that "those same characteristics which exist when a person is found to be in the business of supplying information to others also exist in the case of a high school counselor."<sup>76</sup>

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<sup>73</sup> Id. at 692.

<sup>74</sup> See *Sain*, *supra* note 14.

<sup>75</sup> Id. at 126

<sup>76</sup> Id. at 126. (The court identifies several common characteristics: "The counselor and student have a relationship which extends beyond a relationship found in an arm's length transaction. It is advisory in nature and not adversarial. The school counselor does not act for his or her own benefit, but provides information for the benefit of students. Furthermore, in matters that involve matriculation from high school to college, a high school counselor clearly assumes an advisory role, is aware of the use for the information, and knows the student is relying upon the information provided. Additionally, the counselor is paid by the school system to provide such advice, and has an indirect financial interest in providing the information. Thus, the counselor does not provide gratuitous information that the counselor would not expect the student to rely on. Furthermore, the information is not incidental to some more central function or service provided by the counselor.)

Based on the similarities between the professional functions, the *Sain* court concluded that it “discern[ed] no reason why a high school counselor should not fall within the category as a person in the profession of supplying information to others to support the imposition of a duty of reasonable care in the manner he or she provides information to students.”<sup>77</sup> Extending professional negligence to include instruction will require a similar finding that the instructional context is similar enough to other professional contexts for existing standards to be applied without fashioning an entirely new cause of action.

### **B. ELEMENTS OF PROFESSIONAL NEGLIGENCE**

Since professional negligence claims are usually pursued in state courts and the reader is likely familiar with legal malpractice, this section reviews the elements of legal malpractice in a representative state. Although not every version of these elements is identical, the conceptual framework is consistent across jurisdictions.<sup>78</sup> In *Marrs v. Kelly*, the Supreme Court of Kentucky delineated the parameters of legal malpractice in the state:

A plaintiff in a legal malpractice case has the burden of proving (1) that there was an employment relationship with the defendant/attorney; (2) that the attorney neglected his duty to exercise the ordinary care of a reasonably competent attorney acting in the same or similar circumstances; and (3) that the attorney’s negligence was the proximate cause of damage to the client. (citation omitted) ... To prove that the negligence of the attorney caused the plaintiff harm, the plaintiff must show that he/she would have fared better in the underlying claim; that is, but for the attorney’s negligence, the plaintiff would have been more likely to succeed.<sup>79</sup>

The first element, the existence of an employment relationship, limits the scope of legal malpractice claims to the lawyer-client relationship. Legal malpractice claims arise only when there is a “breach of a duty created by the contract or by the relationship with the client,”<sup>80</sup> not every time a lawyer becomes liable—even to a client—for any other reason. Courts require expert testimony to address the second element, neglecting to exercise ordinary care as compared to a

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<sup>77</sup> *Id.* at 126.

<sup>78</sup> *Dobbs*, *supra* note 4, at 1388.

<sup>79</sup> 95 S.W.3d 856 (2003).

<sup>80</sup> *Dobbs*, *supra* note 4, 1385.

reasonably competent attorney in the same or similar circumstances.<sup>81</sup> The expert addresses the standard of care under the circumstances and, if necessary, evaluates whether the lawyer's behavior comported with that standard.<sup>82</sup> The third element, establishing that the attorney's negligence proximately caused the damage of which the plaintiff complains, has been called "the trial within a trial" and "the case within the case."<sup>83</sup> In addition to having to prove that she suffered a legally cognizable harm, the plaintiff may have to recreate the first trial to demonstrate that but for her lawyer's malpractice, she would have presented additional evidence and been more likely to prevail in the original case.

A detailed analysis of various forms of professional malpractice is beyond the scope of this paper, but this framework is adequate for analogizing the elements of a negligent failure to teach students to read cause of action.

### **C. PROFESSIONAL NEGLIGENCE IN THE READING INSTRUCTION CONTEXT**

#### **1. THE EDUCATOR-STUDENT RELATIONSHIP**

On its face, the relationship between the student and his teacher(s), the school administrators, and the school district seems quite unlike the relationship between attorneys and most of their clients: unlike most clients, a student does not select the teacher; unlike most clients, the student does not pay the teacher; and unlike most clients, the student has little or no control over the course of his interaction with the education system—compulsory school attendance extends through the student's sixteenth birthday, and if the student wants to graduate from high school, she has to pass classes chosen by the school.

Differences between the educator-student and lawyer-client relationships are clear. Rather than weighing *against* holding educators to standards comparable to those of lawyers and other professionals, however, the differences may actually weigh *in favor* of holding educators to comparable standards. Students do not pay their teachers, but the public does. Should the public not have an expectation of reasonable services for students? If students were able to choose

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<sup>81</sup> Id. at 1385.

<sup>82</sup> Id. at 1389.

<sup>83</sup> Id. at 1391.

their teachers, they might assume some of the risk of choosing a bad teacher—but students do not make those choices. And the fact that students are required to attend school and take certain classes surely obligates the education system to provide a reasonable quality of service in return. Admittedly, the analogy is somewhat strained, but no more so than the reasoning that led the *Sain*<sup>84</sup> court to extend the reach of negligent misrepresentation from commercial relationships to the guidance counselor-student relationship. As a result of that decision, high school counselors are on notice that they need to exercise great care when they advise students,<sup>85</sup> an outcome that commends the court’s decision.

## 2. DEFINING THE DUTY OF CARE IN EDUCATION

Finding professional negligence in the education setting also requires defining an analogue to the “duty to exercise ordinary care of a reasonably competent attorney acting in the same or similar circumstances.”<sup>86</sup> In their reasoning for rejecting education malpractice claims, courts often cite the assertion from the *Peter W.* decision that “classroom methodology affords no readily acceptable standards of care, or cause, or injury.”<sup>87</sup> Given the current emphasis on accountability in education, that assertion no longer deserves the deference it has been given.

For example, the International Reading Association (IRA) has developed standards of professional knowledge for classroom teachers of reading, paraprofessionals (i.e., instructional assistants, tutors), reading specialists, teacher educators (college professors who instruct pre-service teachers), and administrators.<sup>88</sup> Detailed discussion of these standards is beyond the scope of this article, but a sample will be presented here to demonstrate how the IRA standards define minimum acceptable levels of professional knowledge, an essential component of evaluating a professional negligence claim. Part I of this paper discussed the technical nature of reading assessment at length. Because the expertise needed to select, administer, and interpret

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<sup>84</sup> See *supra* note 7 and accompanying text.

<sup>85</sup> See, e.g., Guidance Counselor Liability for “Negligent Misrepresentation”, in *SAI Report*, September 2001, School Administrators of Iowa. <http://www.sai-iowa.org/901Report.html>.

<sup>86</sup> See Marris *supra* note 79.

<sup>87</sup> *Peter W.* at 869.

<sup>88</sup> International Reading Association, *supra* note 15.

assessments is critical to delivering effective reading instruction, a standard for assessment knowledge will serve as an exemplar. Figure 1 presents IRA Standard 3, which addresses Assessment, Diagnosis, and Evaluation, and shows how Standard 3 is applied to two professional capacities, classroom teacher and administrator.<sup>89 90</sup> This standard is a typical component of a summative assessment, measuring a teacher's reading assessment knowledge and use of assessment to guide reading instruction. Even without extensive knowledge of reading instruction or reading assessment, one can infer that standards such as this do articulate judicially manageable standards. With the added support of expert testimony, it is difficult to imagine a judge or jury having any more difficulty applying these standards than they might have applying standards in any number of professional negligence causes of action.

Standard 3: Assessment, Diagnosis, and Evaluation <sup>91</sup>		
Use a variety of assessment tools and practices to plan and evaluate effective reading instruction		
Element	Instructional Capacity	
3.1	Classroom Teacher	Administrator
Use a wide range of assessment tools and practices that range from individual and group standardized tests to individual and group informal classroom assessment strategies, including technology-based assessment tools.	Select and administer appropriate formal and informal assessments, including technology-based assessments. Understand requirements for technical adequacy of assessments and select technically adequate assessment tools. Interpret the results of these tests and assessments.	Understand the role of assessment in the delivery of excellent reading instruction. Working with reading professions, they can develop appropriate building- and district-wide assessment plans.

Figure 1. International Reading Association, Standards for Reading Professionals. Standard 3, Assessment, Diagnosis, and Evaluation; Element 3.1.

<sup>89</sup> International Reading Association, *supra* note 15.

<sup>90</sup> Three instructional capacities (paraprofessional reading specialists/literacy coaches and teacher educators) were omitted: paraprofessionals are unlikely to be held to any standard of professional negligence, reading specialists/literacy coaches are not present in the majority of public schools, and teacher educators do not typically have instructional responsibilities for K-12 students, so a negligent failure to teach students to read cause of action would not likely be applied to them.

<sup>91</sup> International Reading Association, *supra* note 15.

Instructional standards such as the IRA standards discredit a key rationale courts have consistently given for finding that educators do not have a duty of care in performing their instructional duties with regard to teachers of reading. A cause of action for negligent failure to teach students to read should not be denied based on a finding of no duty of care if that finding is predicated on a lack of judicially manageable professional standards for reading educators.

Because cases claiming negligent instruction have historically not survived the duty element of the negligence analysis, there is no body of case law to discuss regarding the breach of the duty of care. If we operate under the assumption that the standards presented here can support a finding of a duty of care, however, demonstrating a breach of that duty would be tied to those standards or some comparably valid set of standards. For example, if the plaintiff could demonstrate that the teachers in the defendant school met fewer than fifty percent of the reading instruction standards while teachers in a comparable school in the same community met seventy-five percent of the reading instruction standards over the same time period, the plaintiff would have produced evidence to support his argument that the defendant school had breached its duty of care to the student(s).

### **3. ASSESSING THE PLAINTIFF'S INJURY**

Again because of the history of claims of this type being rejected on the duty element, there is no body of case law around which to build a discussion of injury resulting from negligent instruction. As noted by Imber and van Geel,<sup>92</sup> however, cases claiming a "failure to learn" are usually cases claiming a failure to learn to read. Although injury can include an array of harms, the injury in the proposed cause of action would be the claimant's poor reading performance. Reading performance is eminently measurable, but that does not mean that defining an actionable standard for injury would be an easy task.

Setting the standard at complete inability to read would be far too low to be meaningful to plaintiffs or society. Complete inability to read is actually quite an unlikely outcome for students currently attending school; although some students develop reading skills at a slower pace than

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<sup>92</sup> MICHAEL IMBER & TYLL VAN GEEL, EDUCATION LAW (2d ed. 2000).

others and some students choose to read very little, virtually no students remain non-readers as they progress through school.<sup>93</sup> Alternatively, one might be tempted to argue that all students should be reading “on grade level,” but the earlier discussion of norm-referenced reading assessments<sup>94</sup> indicated that if a norm-referenced assessment were used, a group of students would always be “below grade level.” With norm-referenced measures, it is statistically impossible for all students to be reading on grade level at the same time, so those measures would be inappropriate measures for determining injury based on poor reading performance.

In view of these considerations, criterion-referenced measures<sup>95</sup> that compare each reader’s performance to a set of performance standards would be the most appropriate type of assessment for measuring injury in the form of poor reading skills. It is possible to set an acceptable achievement level standard and then consistently compare students’ performances to that standard over time. In addition to being criterion-referenced, appropriate tests would need high levels of validity and reliability: reading tests to be used as legal proof would need to measure precisely what they supposed to measure (validity), and they would need to do so consistently over time (reliability). Highly valid and reliable criterion-referenced reading assessments are widely available to reading professionals. Neither availability nor cost would not present a significant barrier to collecting evidence of injury. For example, the *Degrees of Reading Power* test<sup>96</sup> is a widely used criterion-referenced test, and the *Scholastic Reading Inventory*<sup>97</sup> provides both criterion-referenced and norm-referenced scoring.

Determining the performance level threshold for defining injury would require the skills and input of not only reading professionals but policy analysts, psychometricians, and statisticians. That task is beyond the scope of this paper.

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<sup>93</sup> NAEP, *supra* note 10.

<sup>94</sup> See *supra* notes 34 -36.

<sup>95</sup> See *supra* notes 34 -36.

<sup>96</sup> Touchstone Applied Science and Associates, Inc. <http://www.tasaliteracy.com/drp/drp-main.html>.

<sup>97</sup> Scholastic, Inc. <http://teacher.scholastic.com/products/sri/overview.htm>.

#### 4. DEMONSTRATING CAUSATION

The plaintiff in a negligence cause of action must prove causation in fact and proximate cause.<sup>98</sup> In other words, the plaintiff must prove that the defendant's acts caused the plaintiff's injuries, and the plaintiff must persuade the court or jury that the defendant's conduct not only in fact caused the plaintiff's harm but was a reasonably significant cause.<sup>99</sup> Given the complexities of reading as a cognitive process, the challenges of demonstrating proximate cause in the proposed negligent failure to teach students to read cause of action appear daunting.<sup>100</sup> In addition to the cognitive difficulties some readers encounter, a host of other issues may stand in the way of a student's learning to read. How formidable a barrier those difficulties pose varies from case to case and over time. The *Peter W.* decision again provides an often cited passage:

The 'injury' claimed here is plaintiff's inability to read and write. Substantial professional authority attests that achievement of literacy in the schools, or its failure, are [sic] 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.<sup>101</sup>

The court's concern that it could not identify a particular cause of Peter W.'s reading difficulty from among a constellation of factors would be justified only if one expects to be able to narrow the cause of each particular injury to one particular cause.

As one commentator has observed, "Nothing is the result of a single cause in fact.... In fact there are always many causes that meet the but-for test, some represented by negligent conduct, some not."<sup>102</sup> This observation seems quite appropriate in the present context. Multiple-cause torts are not novel in the judicial system, so why would the fact that literacy achievement is "influenced by a host of factors" derail this cause of action?

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<sup>98</sup> Dobbs, *supra* note 4, at 271.

<sup>99</sup> *Id.* at 271.

<sup>100</sup> See, e.g. BENNETT SHAYWITZ, KENNETH PUGH, ANNETTE JENNER, ROBERT FULBRIGHT, JACK FLETCHER, JOHN GORE & SALLY SHAYWITZ, *The Neurobiology of Reading and Reading Disability (Dyslexia)*, in HANDBOOK OF READING RESEARCH, VOL. III. 229-249, Michael Kamil, Peter Mosenthal, P. David Pearson & Rebecca Barr, eds. (2000); and SUSAN R. GOLDMAN & JOHN RAKESTRAW, Jr., *Structural Aspects of Constructing Meaning from Text*, 311-335, same volume.

<sup>101</sup> *Peter W.* at 861.

<sup>102</sup> Dobbs, *supra* note 4, at 410.

Certainly factors outside the school setting affect a child's reading development—some for the better and some for the worse, some negligent and some not—but to deny a causal connection between the school's actions and a student's poor reading strains credibility. Would the school not take credit for "causing" the reading skills of those students who did learn to read well? Would they brush aside parents' compliments for their effective instruction as readily as they brushed aside complaints of ineffective instruction? At the very least, by continuing to enroll Peter W. and represent that he was performing well in school, the school was the cause of Peter W.'s *not* enrolling in another school where his needs could have been met.

Ironically, Peter W. presents what is arguably the best evidence that his poor reading performance was attributable to the school. After he graduated from high school, Peter W. pursued tutoring and improved his reading achievement. Doubtless, some students get a new perspective on academics after they graduate, and that may have happened in Peter W.'s case. But with no evidence that the school attempted to identify and address Peter W.'s reading instruction needs, the school would be hard pressed to say that it had met its duty of care, had such a duty been found.

The Peter W. example is not intended to suggest that plaintiffs in this cause of action would need to seek a remedy on their own to prove their claim that the school(s) had neglected their duty. Rather, it is intended to demonstrate to the uninitiated that it is entirely possible for a student with normal intelligence, reasonable attendance, and reasonably compliant behavior to graduate from high school unable to read well enough to be a full participant in our society.

#### **IV. DEFENSES**

If a negligent failure to teach students to read cause of action were recognized, several defenses would be available to defendants. Contributory negligence or comparative fault would be one likely defense. Under a comparative fault approach, if a court concluded that the plaintiff was at least partly at fault for her poor reading, her recovery would normally be reduced

proportionately.<sup>103</sup> Given that the cause of action proposed here does not contemplate monetary recovery, it is unlikely the proposed remedy would be limited unless it was determined that the plaintiff's comparative fault significantly outweighed the defendant's.

Since the alleged cause of the plaintiff's inability to read is inadequate or ineffective action on the part of the defendant, a claim of negligent failure to teach a particular student to read would be stymied by evidence that the educator or school made reasonable efforts to address the students' reading instruction needs. Undoubtedly, there are situations in which schools identify a student's needs and attempt a variety of interventions to little or no avail: there is no guarantee the instruction will be effective. In those, situations, however, the school can demonstrate it made a reasonable effort to address the student's needs, and surely could not be held to have breached its duty of care. Schools cannot reasonably be expected to guarantee effectiveness; they can, however, reasonably be expected to ensure effort on their own part.

#### **V. REMEDIES**

The proposed cause of action is not envisioned as a financial windfall for victims or a monetary punishment for school systems: the proposed remedies do not involve punitive damages or other cash awards for the claimant. Rather, the proposed remedies are compensatory instructional services for the student whose needs were not adequately addressed and provision of reasonable attorney's fees in successful cases.

The overarching goal of compensatory instructional services is to put the plaintiff in the "position he would have been in but for the malpractice,"<sup>104</sup> or, in this cause of action, but for the negligent failure to teach him or her to read. Alternatives are available for accomplishing this goal, not only in terms of the types of services but also in terms of service providers. School systems are in the business of delivering instructional services: they have the infrastructure in place to address the needs of aggrieved individuals. If they do not have personnel with the skills to address those needs, a court order to deliver compensatory services would surely provide an

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<sup>103</sup> Dobbs, *supra* note 4, at 1399.

<sup>104</sup> Dobbs, *supra* note 4, at 1405.

incentive for them to find someone with those skills or provide appropriate training to their own employees.

In addition to services from the public school system themselves, school districts can establish or expand existing partnerships with private corporations and professionals to provide supplementary educational services. No Child Left Behind legislation<sup>105</sup> increased public awareness and acceptance of commercial supplementary educational service providers<sup>106</sup> by offering supplementary services to students whose schools demonstrate a need for additional support. Similar services could be offered as part of the compensatory services for successful litigants.

Given that traditional instruction has already proven unsuccessful with persons who can satisfy the criteria for compensatory services, the services are not limited to those he would have received under normal conditions. An adult who has not developed effective literacy skills may need a variety of psychological assessments to determine whether and to what extent he can benefit from the compensatory services; he may need special materials or technology to assist him in his efforts to develop his literacy skills; he may need a particular type of literacy skills to achieve full participation in society. Furthermore, since adults are likely to have family and work responsibilities, flexible hours, flexible settings, and online instructional services would be essential. All of these services would be available to the successful plaintiff as compensatory services.

It may be argued that “more of what didn’t work” is not much consolation to the plaintiff, but compensatory services may be fashioned in a variety of ways, and the public or private provider would have a strong financial incentive to deliver the most effective instruction possible. In addition, providing compensatory services gives the injured plaintiff an incentive to pursue his

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<sup>105</sup> For a thorough analysis of No Child Left Behind legislation, see EDUCATIONAL LEADERSHIP, themed issue, “NCLB: Taking Stock, Looking Forward,” Association for Supervision and Curriculum Development, November 2006.

<sup>106</sup> For a discussion of supplementary educational services programs, see Innovations in Education: Creating Strong Supplemental Educational Services Programs, U.S. Department of Education [http://www.ed.gov/admins/comm/suppsvcs/sesprograms/report\\_pg7.html](http://www.ed.gov/admins/comm/suppsvcs/sesprograms/report_pg7.html)

claim sooner rather than later. If monetary awards were available for lost wages, for example, delaying the claim could reap the plaintiff a larger settlement since he would have suffered longer. That kind of outcome is counter to the policy rationale underlying the proposed cause of action. If the individual's harm is that she cannot read adequately, teaching her to read is a true remedy for that harm.

### **CONCLUSION**

Reading is a foundational skill for personal care and fulfillment, continued learning, civic participation, and economic opportunity. Students who are denied the opportunity to develop their reading skills to their fullest potential should have some legal recourse against the institution(s) that failed to address their needs. Historically, claims of this nature have fallen on deaf ears, as courts have found that educators have no duty of care in their delivery of instruction. That reasoning has been based on the difficulty of identifying judicially enforceable standards for instruction and a fear of a flood of litigation if such a cause of action were recognized. This article has demonstrated that judicially enforceable standards for reading instruction are readily available, and that a flood of litigation is an unlikely result of recognizing a cause of action for negligent failure to teach students to read. Defenses are proposed that would insulate educators from unjustified claims, and compensatory services are proposed as a remedy. This proposed cause of action is not intended to expose educators to unwarranted litigation, nor is it intended to put a drain on the education system. This proposed cause of action is intended to ensure that as many citizens as possible have the foundational skills they need to meet their own goals and to be contributing members of our society. Surely public policy has room to accommodate those goals.

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