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## Educational Malpractice in Sex Education

Thomas G. Eschweiler

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# Comments

## EDUCATIONAL MALPRACTICE IN SEX EDUCATION

*Thomas G. Eschweiler*

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## I. INTRODUCTION

**E**DUCATIONAL malpractice, as a tenable cause of action for negligence in the educational arena, surfaced in the 1970s as a consensus grew that the nation's public schools were failing in their mandate to educate our young. Educational malpractice as a tort theory applied to multiple facets of the educational process; however, two categories of claims have emerged that focus on the failure of an educator to perform educational duties adequately. The first category of claims<sup>1</sup> comprises a failure to adequately counsel or educate, while the second category<sup>2</sup> focuses upon a failure to provide proper student evaluation and placement into appropriate educational programs.<sup>3</sup> Judicial reaction to the emergence of educational malpractice as a theory for recovery has been overwhelmingly negative<sup>4</sup> and can be summarized as a theory "beloved of commentators, but not of courts."<sup>5</sup> This Comment highlights the theories advanced in support of an educational malpractice cause of action and the rationale espoused by the courts in their rejection of the claim. Further, the Comment briefly highlights sex education and analyzes whether it is sufficiently distinguishable from classical pedagogical teaching methods to sustain itself uniquely under an educational malpractice framework.

## II. REVIEW OF CLASSICAL EDUCATIONAL MALPRACTICE

Various theories of recovery have been espoused for failure to adequately counsel or educate; they include constitutional, contractual, and misrepresentation theories as well as the traditional negligence theory.<sup>6</sup>

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1. See, e.g., *Ross v. Creighton Univ.*, 957 F.2d 410, 412 (7th Cir. 1992); *Peter W. v. San Francisco Unified Sch. Dist.*, 131 Cal. Rptr. 854, 856 (Ct. App. 1976); *Hunter v. Board of Educ.*, 439 A.2d 582, 583 (Md. 1982); *Donohue v. Copiague Union Free Sch. Dist.*, 391 N.E.2d 1352, 1353 (N.Y. 1979).

2. See, e.g., *B.M. v. State*, 649 P.2d 425, 426 (Mont. 1982); *Hunter*, 439 A.2d at 583.

3. Two other categories of claims have also arisen. These categories are: (1) failure to provide proper medical diagnosis and treatment, and (2) failure to warn or protect students from another student's illness-related dangerous proclivities. Johnny C. Parker, *Educational Malpractice: A Tort is Born*, 39 CLEV. ST. L. REV. 301, 303 (1991). These categories are distinguishable from those discussed in the body of this document; they address pre-existing medical and psychological facets within education while the two categories focused upon in this paper address the traditional, educational "classroom" dynamics between educators and their students.

4. See *Ross*, 957 F.2d at 414; *Peter W.*, 131 Cal Rptr. at 862; *Donohue*, 391 N.E.2d at 1354. But see *B.M.*, 649 P.2d at 427.

5. *Ross v. Creighton Univ.*, 740 F. Supp. 1319, 1327 (N.D. Ill. 1990), *rev'd in part on other grounds*, 957 F.2d 410 (1992).

6. Frank D. Aquila, *Educational Malpractice: A Tort En Ventre*, 39 CLEV. ST. L. REV. 323, 327-35 (1991); Karen H. Calavenna, Comment, *Educational Practices*, 64 U. DET. L. REV. 717, 726-30 (1987); John G. Culhane, *Reinvigorating Educational Malpractice Claims: A Representational Focus*, 67 WASH. L. REV. 349, 355-60 (1992).

#### A. CONSTITUTIONAL THEORY OF RECOVERY

The constitutional theory under which plaintiffs have brought educational malpractice claims is substantive due process.<sup>7</sup> The substantive due process argument is as follows: students surrender their constitutional liberty interest<sup>8</sup> for a minimally adequate education under the principle of quid pro quo. Plaintiffs in educational malpractice suits aver that due process requires an involuntarily confined student (through mandatory attendance laws) to receive a minimally adequate education by analogizing *Donaldson v. O'Conner*,<sup>9</sup> which held that due process required an involuntarily confined mental institution patient to receive minimally adequate treatment.<sup>10</sup> The due process theory of recovery has been substantially debilitated by *Youngberg v. Romeo*.<sup>11</sup> In *Youngberg*, a mentally retarded individual, involuntarily confined to a state institution, sued the state alleging violation of his constitutional rights, namely the right to safe conditions of confinement, freedom from unreasonable bodily restraint, and training within the institution.<sup>12</sup> The Court recognized the patient's liberty interest in safe conditions and freedom from unreasonable bodily restraint.<sup>13</sup> The Court, however, tepidly approached the alleged right to a "minimally adequate habilitation," which it defined to mean minimal "training and development of needed skills."<sup>14</sup> The Court cited *Harris v. McRae*<sup>15</sup> for the proposition that "a State is under no constitutional duty to provide substantive services for those within its border"<sup>16</sup> and even when a duty does exist "a State necessarily has considerable discretion in determining the nature and scope of its responsibilities."<sup>17</sup> In short, the Supreme Court was reluctant to broadly characterize a right to minimally adequate training as a constitutionally protected liberty interest.

#### B. CONTRACTUAL THEORY OF RECOVERY

The contractual theory of recovery has two alternative approaches. The first approach states that an implied contract exists between a stu-

7. Aquila, *supra* note 6, at 339-42.

8. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969) (holding that students have constitutional rights to freedom of speech and a fourteenth amendment liberty interest in education under the Due Process Clause).

9. 493 F.2d 507 (5th Cir. 1974), *vacated on other grounds sub nom. Gumanis v. Donaldson*, 422 U.S. 1052 (1975).

10. Charles M. Masner, Note, *Educational Malpractice and a Right to Education: Should Compulsory Education Laws Require a Quid Pro Quo?*, 21 WASHBURN L. J. 555, 567-71 (1982); see *Donohue*, 391 N.E.2d at 1353. But see *B.M.*, 649 P.2d at 427.

11. 457 U.S. 307 (1982).

12. *Id.* at 315.

13. *Id.* at 315-16.

14. *Id.* at 316-17 (citation omitted).

15. 448 U.S. 297, 318 (1980).

16. *Youngberg*, 457 U.S. at 317.

17. *Id.*

dent and either his teacher or school district.<sup>18</sup> The plaintiff alleges the school promised to provide a minimal level of education either implicitly, through the goals inherent in the educational process, or expressly, through statutory or constitutional provisions. In return, the plaintiff alleges he promised not to seek private education as consideration.<sup>19</sup> Alternatively, the plaintiff may aver that school attendance constitutes sufficient consideration.<sup>20</sup>

The implied contract approach suffers because of weakness in the consideration doctrine. Without the required element of consideration, promises between parties are judicially unenforceable.<sup>21</sup> States provide public education free of cost to each individual student, therefore a student has difficulty in establishing consideration in the traditional manner of a "bargained-for exchange."<sup>22</sup> Additionally, because public school attendance is obligatory, a student cannot effectively allege attendance as consideration because the student is not surrendering a legal right.<sup>23</sup> Further, the argument that sufficient consideration is established through forbearance of private education is also untenable because recognition would allow recovery only to wealthy individuals who could prove private education a viable option.<sup>24</sup> Allowing recovery for educational malpractice to only a class of wealthy individuals is particularly unpalatable.

The second alternative approach<sup>25</sup> in the contractual theory of recovery for educational malpractice focuses on the existence of a contract between the local taxpayers and the school district with the students as third-party beneficiaries.<sup>26</sup> This approach to recovery also has weaknesses. First, in order for the student to establish status as a third-party beneficiary, the student must prove an intent to benefit third parties in the contract between taxpayers and the school district.<sup>27</sup> Additionally, if

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18. Robert H. Jerry, II, *Recovery in Tort for Educational Malpractice: Problems of Theory and Policy*, 29 KAN. L. REV. 195, 197 (1981).

19. Consideration requires three conditions to be met, as defined by Justice Benjamin Cardozo, then Chief Justice of the New York Court of Appeals. A promisee must suffer a legal detriment, the detriment must induce the promise, and the promise must induce the detriment. *Allegheny College v. National Chautauqua County Bank*, 159 N.E. 173, 174 (N.Y. 1927). Black's Law Dictionary defines consideration as "[s]ome right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other." BLACK'S LAW DICTIONARY 306 (6th ed. 1990).

20. See generally Jerry, *supra* note 18, at 207.

21. RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. a (1979).

22. *Kirksey v. Kirksey*, 8 Ala. 131 (1845) (distinguishing a precondition of a gift from a bargained-for exchange amounting to consideration).

23. RESTATEMENT (SECOND) OF CONTRACTS § 73 (known commonly as the "pre-existing duty" rule which states that "[p]erformance of a legal duty owed to a promisor . . . is not consideration").

24. Joan Blackburn, Comment, *Educational Malpractice: When Can Johnny Sue?*, 7 FORDHAM URB. L. J. 117, 135-36 (1978).

25. Richard Funston, *Educational Malpractice: A Cause of Action in Search of a Theory*, 18 SAN DIEGO L. REV. 743, 761-62 (1981).

26. Third party beneficiary principles are outlined in the second Restatement of Contracts. RESTATEMENT (SECOND) OF CONTRACTS §§ 302-15.

27. RESTATEMENT (SECOND) OF CONTRACTS § 302(1)(b).

the student effectively establishes third party beneficiary status, the student must prove that he or she was the intended beneficiary at the time of contract formation.<sup>28</sup> Lastly, even in the event of establishment of contract and breach, recovery in contract is, at best, meager. The policy goal in contract remedies is directed toward protecting the plaintiff's expectation interest.<sup>29</sup> This precludes an action based on vicarious liability which is available only in tort.<sup>30</sup>

### C. MISREPRESENTATION THEORY OF RECOVERY

The misrepresentation theory includes both intentional and negligent misrepresentation. The elements needed to establish intentional misrepresentation are: (1) a false representation of fact; (2) knowledge by the defendant that the representation is false (*scienter*); (3) an intention to induce reliance by the plaintiff upon the misrepresentation; (4) justifiable reliance by the plaintiff upon the misrepresentation; and (5) damage to the plaintiff resulting from the reliance.<sup>31</sup> Proving specific intent to deceive is extremely difficult because an honest belief by an educator that a representation is accurate negates the cause of action.<sup>32</sup> Further, even if the intent to deceive element is shown, the plaintiff must still prove the student relied on the representation *and* the reliance was justifiable under the circumstances.<sup>33</sup> These elements, based heavily on factual inquiries, are extremely difficult to establish in circumstances that surround educational malpractice actions. For example, reliance on a grade report awarding passing marks in reading is not justifiable when the student cannot read at home.

The second form of misrepresentation is negligent misrepresentation. Negligent misrepresentation differs substantially from intentional misrepresentation because it lacks an intent requirement. To prove negligent misrepresentation, a plaintiff need not demonstrate an intent to provide false or misleading information. Conversely, a representation made with a good faith belief that it was true may nonetheless constitute a negligent misrepresentation.<sup>34</sup>

The elements required to establish negligent misrepresentation are: (1) knowledge by the defendant that the plaintiff sought information; (2) intent of the plaintiff to rely on the information; (3) injury to the plaintiff as

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28. Funston, *supra* note 25, at 762.

29. RESTATEMENT (SECOND) OF CONTRACTS § 344(a) (defining expectation interest as "interest in having the benefit of his bargain by being put in as good a position as he would have been had the contract been performed").

30. Often called "imputed negligence" or "respondeat superior." The theory of vicarious liability allows a plaintiff to sue a first party for the actions of a second party based upon a unique relationship between the first and second party (such as an employer-employee relationship). W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 499 (5th ed. 1984) [hereinafter PROSSER].

31. *Id.* § 106, at 728.

32. *Id.*

33. *Id.*

34. RESTATEMENT (SECOND) OF TORTS § 552 (1981).

a result of the reliance; and (4) a relationship between the parties that justifies the plaintiff's reliance and the defendant's duty to convey information with care.<sup>35</sup> Establishment of the first element of negligent misrepresentation is relatively easy. Students attend school for the primary purpose of seeking knowledge. But for the pursuit of knowledge, education would serve no purpose in society. The remaining elements of a negligent misrepresentation claim, however, are substantially more difficult to establish.

A school district may assert that reliance does not exist unless parents had foregone a viable option such as private education or a transfer to another school.<sup>36</sup> Additionally, school districts may assert that student performance evaluation does not require special expertise exercised solely by a teacher; parents can effectively evaluate their children themselves. Therefore, reliance upon a teacher's opinion may be unjustifiable.<sup>37</sup>

In *Peter W. v. San Francisco Unified School District*,<sup>38</sup> one of the leading cases involving educational malpractice, the California Court of Appeals addressed the remaining negligent misrepresentation elements. The plaintiff in *Peter W.* was an eighteen-year-old high school graduate who brought action against the school district alleging both negligence and misrepresentation.<sup>39</sup> Under the misrepresentation theory, the plaintiff averred the school district had "falsely and fraudulently represented to plaintiff's mother and natural guardian that plaintiff was performing at or near grade level in basic academic skills such as reading and writing."<sup>40</sup> The plaintiff, however, graduated with a fifth grade level reading ability. The court, in response, summarily dismissed the negligent misrepresentation claim for public policy reasons.<sup>41</sup> The difficulty in establishing proximate cause in an educational context<sup>42</sup> and the judicial reluctance to develop a standard of care for an educator<sup>43</sup> essentially drove the dismissal. Such public policy rationales proffered by the courts virtually eliminate the tort of educational malpractice and will be discussed in greater detail under the negligence theory of recovery. Negligent misrepresentation, as a potential cause of action, therefore suffers from the difficulty of establishing justifiable reliance.

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35. Blackburn, *supra* note 24, at 133; PROSSER, *supra* note 30, § 107, at 745.

36. Blackburn, *supra* note 24, at 135-36; PROSSER, *supra* note 30, § 105, at 728.

37. Blackburn, *supra* note 24, at 136.

38. 131 Cal. Rptr. 854 (Ct. App. 1976).

39. *Id.* at 862.

40. *Id.*

41. *Id.*

42. *Id.* at 860-61.

43. *Id.* at 860.

#### D. NEGLIGENCE THEORY OF RECOVERY

Perhaps the most popular theory used in the educational malpractice arena has been traditional negligence.<sup>44</sup> The elements needed to establish negligence are: (1) the existence of a legal duty; (2) proximate causation between a breach of the existing legal duty and the resulting injury; and (3) compensable injury resulting from breach of the legal duty.<sup>45</sup>

Plaintiffs have made several attempts to establish a legal duty flowing from educators to their students.<sup>46</sup> One attempt asserted that educators assume a duty of student instruction due to the nature of their employment.<sup>47</sup> A second attempt suggested that a duty of care arises from a special relationship between educators and their students.<sup>48</sup> The third attempt analogized an already recognized duty of reasonable care in instructing and supervising students in cases involving physical injury.<sup>49</sup> In *Peter W.*, the court distinguished educational injury from cases involving physical injury<sup>50</sup> and rejected the other two attempts to establish a legal duty on the basis of public policy considerations.<sup>51</sup> The court enunciated a balancing test for determining establishment of a legal duty. Factors include: social utility versus the risks involved in the conduct, the class of people the actor is addressing, the relative ability of parties to bear the financial burden of injury, the relative ability to adopt practical means of preventing injury, the prophylactic effect of a rule of liability, and the moral imperatives judges share with the citizenry.<sup>52</sup> In declining to establish a duty, the court stated that "classroom methodology affords no readily acceptable standards of care"<sup>53</sup> and that "[w]e find in this situation no conceivable 'workability of a rule of care' against which defendants' alleged conduct may be measured."<sup>54</sup> Commentators have attempted to provide a framework for establishing a standard of care for educators.<sup>55</sup> However, no court has embraced these guidelines.

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44. See, e.g., *Ross v. Creighton Univ.*, 957 F.2d 410, 411 (7th Cir. 1992); *Peter W.*, 131 Cal. Rptr. at 856; *Hunter v. Board of Educ.*, 439 A.2d 582, 583 (Md. 1982); *B.M. v. State*, 649 P.2d 425 (Mont. 1982); *Donohue v. Copiague Union Free Sch. Dist.*, 391 N.E.2d 1352, 1353 (N.Y. 1979); *Hoffman v. Board of Educ.*, 400 N.E.2d 317, 319 (N.Y. 1979); *Poe v. Hamilton*, 565 N.E.2d 887, 888 (Ohio Ct. App. 1990).

45. PROSSER, *supra* note 30, § 30, at 164-65.

46. *Aquila*, *supra* note 6, at 332-35.

47. *Peter W.*, 131 Cal Rptr. at 858.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 859. The process of establishing a standard of care has historically been driven by public policy. Prosser defined "duty" as the expression of the sum total of policy considerations that lead the law to say that the plaintiff is entitled to protection. PROSSER, *supra* note 30, § 53, at 358.

52. *Peter W.*, 131 Cal. Rptr. at 859.

53. *Id.* at 860.

54. *Id.* at 861.

55. John Elson, *A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching*, 73 Nw. U. L. Rev. 641, 735 (1978). Elson advocates Judge Learned Hand's cost-benefit formula,  $B < P^*L$ , using the following factors: difficulty in establishing student's unique needs, ease by which educator could meet the unique needs, effects of teacher's actions to meet unique needs on ability to meet other responsibilities,

In yet another attempt to establish a standard of care for educators, some commentators have advocated use of a professional standard of care. These commentators analogize to professional standards of care established for other professions, such as medicine and law.<sup>56</sup> Establishing a professional standard of care for educators would aid the courts by providing an objective standard to measure educators.<sup>57</sup> Furthermore, expert testimony could be utilized to determine whether an educator fulfilled the minimum standard of care held by those in good standing in the profession.<sup>58</sup> Several factors encourage such an analogy. Educators are licensed to educate by their respective states,<sup>59</sup> and they are excluded from minimum-wage, maximum-hour labor statutes.<sup>60</sup> Further, an educator's work is intellectual and varied, and performance of the work requires exercise of judgment and discretion. Lastly, an educator is required to obtain a degree from an institution of higher learning.<sup>61</sup> However, in certain respects an educator's job is distinguishable from the classical professions. Educators do not establish their own hours, they do not rely on their reputations to attract clients, and their work is not specialized in one area.<sup>62</sup> Most importantly, the advocacy of a professional standard of care for educators has not been recognized by the courts.<sup>63</sup>

In addition to their unwillingness to establish a legal duty, the courts have also alluded to an inability to establish proximate cause. In *Peter W.*,<sup>64</sup> the court stated that there was no "perceptible connection between the defendant's conduct and the injury suffered, as alleged, which would establish a causal link between them within the same meaning."<sup>65</sup> However, in *Donohue v. Copiague Union Free School District*<sup>66</sup> the court stated, "As for proximate causation, while this element might indeed be difficult, if not impossible, to prove in view of the many collateral factors involved in the learning process, it perhaps assumes too much to conclude

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availability of specialized referral resources, and magnitude of the consequences to students who do not have their unique needs met. Under traditional B<P\*L analysis, the probability of harm and magnitude of loss are weighed together against the burden placed upon the actor. If the probability of harm and magnitude of loss are greater than the actor's burden of care, the actor will have an affirmative duty to act, otherwise no duty of care will be imposed upon the actor.

56. Deborah D. Dye, *Education Malpractice: A Cause of Action That Failed to Pass the Test*, 90 W. VA. L. REV. 499, 503-04 (1987/1988).

57. PROSSER, *supra* note 30, § 32, at 185.

58. *Id.* at 188.

59. For example, Texas mandates that the State Board of Education prescribe the classes of teaching certificates to be issued based on education, experience and duties, the time period for which each certificate is valid, and the requirements for issuance of an initial certificate. TEX. EDUC. CODE ANN. § 13.032 (Vernon 1991 & Supp. 1994).

60. For example, West Virginia exempts teachers from minimum wage restrictions. W. VA. CODE § 21-5C-1 (1985); Dye, *supra* note 56, at 503-04.

61. For example, Texas law requires a bachelor's degree with an academic major in education for certain teaching positions. TEX. EDUC. CODE ANN. § 13.036 (Vernon 1991).

62. Dye, *supra* note 56, at 503-04.

63. *Id.*

64. Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854 (Ct. App. 1976).

65. *Id.* at 861.

66. 391 N.E.2d 1352 (N.Y. 1979).

that it could never be established."<sup>67</sup> In light of the "but for" test for proximate cause,<sup>68</sup> the courts find potential alternative causes more palatable. For example, in *Peter W.* the court stated, "[A]chievement of literacy in the schools, or its failure, are influenced by a host of factors 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>69</sup> Fundamentally, courts struggle with causation when one student graduates illiterate while the student sitting next to her graduates with a sufficient educational background. Under these circumstances, the courts do not find comfort in faulting an educator or educational institution. Because no consensus exists among education professionals whether, or to what degree, factors present outside the classroom impact the educational process,<sup>70</sup> proximate cause looms as a formidable obstacle to establishing negligence as a cause of action for educational malpractice.

In the event proximate cause can be established, the issue of contributory negligence may still bar a plaintiff from recovery.<sup>71</sup> Although some jurisdictions provide a comparative negligence scheme,<sup>72</sup> contributory negligence, under common law, completely bars a plaintiff from recovery.<sup>73</sup>

Finally, in addition to problems with establishing a legal duty and proximate causation, courts have taken issue with the attribution and calculation of damages for a breach. Although courts have primarily dismissed educational malpractice claims on other grounds,<sup>74</sup> concern over awarding money damages for an educational injury has been voiced.<sup>75</sup> One view highlighted by commentators is that a student who failed to achieve a minimum standard of learning may not have suffered a legally compensable injury<sup>76</sup> and that, in that event, no damages should be awarded.<sup>77</sup>

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67. *Id.* at 1353-54.

68. PROSSER, *supra* note 30, § 41, at 266.

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

70. Funston, *supra* note 25, at 785 (citing M. SORGEN ET AL., STATE SCHOOL AND FAMILY § 11-3 (1973)).

71. RESTATEMENT (SECOND) OF TORTS § 463 (1977) (defining contributory negligence as "conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff's harm").

72. For example, Texas provides a comparative negligence statute. TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (Vernon 1986 & Supp. 1994). Comparative negligence statutes allow recovery, although contributorily negligent, if the contributory negligence of the plaintiff is less than the negligence of the person against whom recovery is sought.

73. PROSSER, *supra* note 30, § 65, at 452.

74. *Peter W.*, 131 Cal. Rptr. at 861; *Donohue v. Copiague Union Free Sch. Dist.*, 391 N.E.2d 1352, 1354 (N.Y. 1979); *Hoffman v. Board of Educ.*, 400 N.E.2d 317, 320 (N.Y. 1979).

75. *Hunter v. Board of Educ.*, 439 A.2d 582, 585 (Md. 1982).

76. See RESTATEMENT (SECOND) OF TORTS § 7 cmt. a (defining "injury" to encompass injury of a legally protected interest as contrasted with "harm," which denotes existence of a detriment that may or may not be legally protected).

77. See RESTATEMENT (SECOND) OF TORTS § 902 (defining damages as monies awarded to one injured by the tort of another); Funston, *supra* note 25, at 782-83.

This view is buttressed by the actions of the courts. In *Peter W.*, the court stated it was uncertain whether the "plaintiff suffered injury within the meaning of the law of negligence,"<sup>78</sup> and in *Donohue* the lower court stated that "every individual is born lacking knowledge, education and experience."<sup>79</sup> *Donohue* hints at a tort doctrine that "consequential damages must be established with reasonable certainty, and must not be speculative."<sup>80</sup> Therefore, tort law does not compensate for loss of an expectancy interest.<sup>81</sup> Damages associated with classical educational malpractice are speculative by nature. For example, the lost opportunity costs due to illiteracy may be negligible if a student graduates literate and takes a minimum wage job. Yet, if that same student graduates literate and becomes a physician, the lost opportunity costs may be enormous. Because of the practical difficulty in adequately measuring opportunity loss, the law does not allow speculation on what "might have been" in ascertaining damages under a theory of negligence.

Additionally, some courts have implied that, if an injury is ascertainable, a monetary damage award is inappropriate.<sup>82</sup> If a student lacks a minimal level of knowledge, a monetary award does not address the problem: the student still lacks an education. Rather, an appropriate solution to the educational damage would be remedial training. Plaintiffs, however, have not sought equitable damage awards, but rather have sought relief through monetary means.<sup>83</sup>

Because of the lack of a suitable standard of care, an insufficient nexus to establish proximate cause, and the inability to identify injury and therefore quantify damages within a negligence context, the negligence theory for educational malpractice as a cause of action has been largely dismissed.

### III. PUBLIC POLICY AND THE REFUTATION OF EDUCATIONAL MALPRACTICE

Although some courts have dismissed educational malpractice claims by holding that plaintiffs failed to state a cause of action,<sup>84</sup> the *Donohue* court refuted the holding in *Peter W.* that a plaintiff could never bring a legitimate cause of action, stating, "It may very well be that even within the strictures of a traditional negligence or malpractice action, a complaint sounding in 'educational malpractice' may be formally pleaded."<sup>85</sup> Instead, the *Donohue* court broadly dismissed educational malpractice

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78. 131 Cal. Rptr. at 861 (citing *RESTATEMENT (SECOND) OF TORTS* § 281).

79. *Donohue v. Copiague Union Free Sch. Dist.*, 407 N.Y.S.2d 874, 880 (App. Div. 1978), *aff'd*, 391 N.E.2d 1352 (N.Y. 1979).

80. PROSSER, *supra* note 30, § 110, at 767.

81. Funston, *supra* note 25, at 783.

82. *Hunter v. Board of Educ.*, 439 A.2d 582, 585 (Md. 1982).

83. See, e.g., *Donohue*, 391 N.E.2d at 1353 (plaintiff seeking monetary damages of \$5,000,000).

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

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

claims on public policy grounds, reasoning that " 'educational malpractice' would require the courts not merely to make judgments as to the validity of broad educational policies[,] a course we have unalteringly eschewed in the past but, more importantly, to sit in review of the day-to-day implementation of these policies."<sup>86</sup> However, the court did reserve the right, under certain circumstances, to allow claims for educational malpractice.<sup>87</sup>

In *Donohue*, a high school graduate sued a school district alleging that the district had failed effectively to evaluate the plaintiff's mental ability and capacity, and that the district had failed to interview or psychologically test the plaintiff to ascertain his comprehension ability. The plaintiff averred that his lack of rudimentary ability disabled him from preparing employment applications, and therefore caused his employment difficulties. The court dismissed the suit, stating: "The heart of the matter is whether, assuming that such a cause of action may be stated, the courts should, as a matter of public policy, entertain such claims. We believe they should not."<sup>88</sup>

The court subsequently identified four categories of public policy considerations that, upon a balancing analysis, barred claims for educational malpractice.<sup>89</sup> The four public policy considerations are: (1) judicial intrusion into the educational process; (2) the social utility of education; (3) the student-teacher relationship; and (4) the economic and administrative impact upon schools.<sup>90</sup> Commentary on the application of these public policy factors to educational malpractice claims has been verbose.<sup>91</sup> However, the courts have steadfastly denied plaintiffs relief, citing public policy concerns.<sup>92</sup>

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86. *Id.* at 1354.

87. *Id.* "[T]his is not to say that there may never be gross violations of defined public policy which the courts would be obliged to recognize and correct." *Id.* (quoting New York City Sch. Boards Ass'n v. Board of Educ., 347 N.E.2d 568, 574 (N.Y. 1976)).

88. *Id.* at 1353.

89. Laurie S. Jamieson, Note, *Educational Malpractice: A Lesson in Professional Accountability*, 32 B.C. L. REV. 899, 900-03 (1991).

90. *Id.* at 901.

91. See, e.g., Aquila, *supra* note 6, at 342-50 (arguing that administrative remedies already exist for educational injuries); Calavenna, *supra* note 6, at 731-36 (stating that the existence of a cause of action will not result in a flood of litigation); Elson, *supra* note 55, at 647-92 (arguing that courts are unable to review educational malpractice adequately); Funston, *supra* note 25, at 791-810 (stating that common law adjudication is an inappropriate vehicle for educational injuries); Jamieson, *supra* note 89, at 934-42 (stating that judicial review need not be overly intrusive); Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 852-60 (1985) (arguing for recognition of a new duty not resulting in money damages, thereby removing threat of financial impact); Catherine D. McBride, Note, *Educational Malpractice: Judicial Recognition of a Limited Duty of Educators Toward Individual Students: A State Law Cause of Action for Educational Negligence*, 1990 U. ILL. L. REV. 475, 487-93 (1990).

92. Ross v. Creighton Univ., 957 F.2d 410, 414 (7th Cir. 1992); *Donohue*, 391 N.E.2d at 1354.

### A. JUDICIAL INTRUSION

As the New York Court of Appeals stated in *Hoffman v. Board of Education*,<sup>93</sup> "[o]ur decision in *Donohue* was grounded upon the principle that courts ought not interfere with the professional judgment of those . . . with the responsibility for the administration of [our] schools."<sup>94</sup> Courts have concluded that the courtroom is an inappropriate forum for evaluation of educational theories and methods.<sup>95</sup> For example, the *Hoffman* court stated:

In order to affirm a finding of liability in these circumstances, this court would be required to allow the finder of fact to substitute its judgment for the professional judgment of the board of education [sic] . . . Such a decision would also allow a court or a jury to second-guess the determinations of each of plaintiff's teachers.<sup>96</sup>

Other courts have reiterated this distaste for judicial intrusion into the educational process.<sup>97</sup> Furthermore, the judicial stance of nonintrusion has been upheld for acts of both misfeasance<sup>98</sup> and nonfeasance.<sup>99</sup>

Instead of intruding into the educational process, the courts have asserted that more appropriate remedies exist. For example, in *Donohue* the court encouraged parents to "take advantage of the administrative process . . . [to ensure] students receive a proper education."<sup>100</sup> The court in *Hunter v. Board of Education*<sup>101</sup> went even further, listing in detail a statutory, administrative scheme providing parents recourse for educational injury.<sup>102</sup> The *Hunter* court concluded that it is "preferable . . . to settle disputes concerning classification and placement of students and the like by resorting to these and similar informal measures than through the post hoc remedy of a civil action"<sup>103</sup> and that such review "may correct erroneous action in time so that any educational shortcomings suf-

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93. 400 N.E.2d 317 (N.Y. 1979).

94. *Id.* at 320.

95. *Id.*

96. *Id.*

97. *Torres v. Little Flower Children's Serv.*, 474 N.E.2d 223, 226 (N.Y. 1984), *cert. denied*, 474 U.S. 864 (1985) (stating, in denying recovery on public policy grounds, that "plaintiff's allegations would require the courts to . . . examine Board of Education policies and their implementation by school officials—the very role we have already declined to assume"); *Poe v. Hamilton*, 565 N.E.2d 887, 889 (Ohio Ct. App. 1990) (embracing the *Donohue* rationale, stating that "the professional judgment of educators in determining appropriate methods of teaching should not be disturbed").

98. Misfeasance is the improper performance of some act that a person may lawfully do. BLACK'S LAW DICTIONARY 1000 (6th ed. 1990); *see, e.g.*, *Peter W. v. San Francisco Unified Sch. Dist.*, 131 Cal. Rptr. 854, 855 (Ct. App. 1976) (plaintiff alleged school district negligently failed to provide adequate instruction).

99. Nonfeasance is the nonperformance of some act which a person is obligated or has some responsibility to perform. BLACK'S LAW DICTIONARY 1054 (6th ed. 1990); *see, e.g.*, *Donohue*, 391 N.E.2d at 1353 (plaintiff alleged school district negligently failed to retest according to district procedures).

100. 391 N.E.2d at 1355.

101. 439 A.2d 582 (Md. 1982).

102. *Id.* at 586.

103. *Id.*

ferred by a student may be corrected. Money damages . . . are a poor substitute . . . for a proper education."<sup>104</sup>

### B. ECONOMIC AND ADMINISTRATIVE IMPACT UPON SCHOOLS

A second public policy factor considered in educational malpractice cases has been the potential economic and administrative impact upon school districts. This factor is two-pronged. In one instance, courts are concerned schools will be wrongly exposed to feigned claims by disgruntled students and parents. Consider the number of students who, justly or unjustly, are unhappy with their performance or have personal animosity toward their teachers. As enunciated in *Peter W.*, holding school districts liable would "expose them to the tort claims—real or imagined—of disaffected students and parents in countless numbers."<sup>105</sup> A second area of concern, regardless of the validity of claims, is the financial burden such claims would impose upon the schools. As stated in *Ross v. Creighton University*,<sup>106</sup> "[t]he sheer number of claims that could arise if this cause of action were allowed might overburden schools."<sup>107</sup> In light of the financial crisis affecting many school districts<sup>108</sup> with already bloated staffs of non-educators, this concern is compelling.

### C. SOCIAL UTILITY OF EDUCATION

A third factor in a public policy analysis is the social utility of education and its value in our society. Our society increasingly acknowledges the import of a proper education.<sup>109</sup> The lower court in *Hunter v. Board of Education*<sup>110</sup> stated:

We are aware that a serious social problem exists when . . . [a student] has not been taught to read. We are equally cognizant of criticisms of the teaching profession. The situation is even more serious when one recalls to mind the words of Thomas Jefferson that a nation cannot be ignorant and free. . . . The seriousness of a matter, however, does not mean that a solution may be found, or redress obtained, through the use of the courts.<sup>111</sup>

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104. *Id.* (quoting D.S.W. v. Fairbanks N. Star Borough Sch. Dist., 628 P.2d 554, 557 (Alaska 1981)).

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

106. 957 F.2d 410 (7th Cir. 1992).

107. *Id.* at 414.

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

109. THE NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, A REPORT TO THE NATION AND THE SECRETARY OF EDUCATION 8 (1983). The report stated that 23 million citizens and 13% of the country's seventeen-year-olds are functionally illiterate. In addition, the report stated that over a typical twelve-year education, American children spend more than eight thousand fewer hours in school than their Japanese and English counterparts. *Id.* at 21. See also Ron dePaolo, *A Nation at Risk—Still; State of American Education, ACROSS THE BOARD*, March 1993, at 16. DePaolo discusses the report "A Nation at Risk" and the nation's lack of success in meeting the report's recommendations. Only 30% of today's students take the core curriculum recommended in the report.

110. 425 A.2d 681 (Md. Ct. Spec. App. 1981), *aff'd in part, rev'd in part*, 439 A.2d 582 (Md. 1982).

111. *Id.* at 684-85 (footnotes omitted).

Therefore, although courts have acknowledged the social utility of education, they have accorded little weight in balancing this factor against other public policy considerations.

#### D. STUDENT-TEACHER RELATIONSHIP

The last public policy factor focuses on the nature of the student-teacher relationship. Because the relationship is one of unequal power, judicial attention may be appropriate under certain circumstances.<sup>112</sup> Further, in *Smith v. Alameda County Social Services Agency*,<sup>113</sup> the court recognized that the state education agency exerts considerable control over students (minors) who cannot protect themselves.<sup>114</sup> Commentators have noted that increased judicial scrutiny of situations such as these is a growing trend.<sup>115</sup>

In balancing the reluctance to intrude into the educational arena and the economic/administrative impact on the schools with the social utility of education and the student-teacher relationship, the courts have flatly refused to recognize educational malpractice as a potential cause of action.

### IV. SEX EDUCATION: WHEN, WHAT AND HOW?

It is difficult to ascertain definitively whether sex education programs in the public schools have been effective. First, since no consensus exists on the objectives of sex education, consensus on a proper evaluation standard also does not exist.<sup>116</sup> Second, any statistic presents only a single facet of information. For example, the number of annually reported cases of gonorrhea provides information on the frequency of transmission as compared to past years. However, the same statistic does not provide insight into what would have happened had sex education not been implemented.<sup>117</sup> Finally, as with all statistical data, disagreements exist regarding the extent to which correlation accurately reflects a "cause-and-effect" relationship between the variables.

Regardless of these difficulties, consensus is developing that the sexual revolution has produced some undesirable consequences.<sup>118</sup> For exam-

112. *Paladino v. Adelphi Univ.*, 442 N.Y.S.2d 38, 38-39 (Sup. Ct. 1981), *rev'd on other grounds*, 454 N.Y.S.2d 868 (App. Div. 1982); *Pierce v. Board of Educ.*, 358 N.E.2d 67, 67-68 (Ill. App. Ct. 1976), *rev'd on other grounds*, 370 N.E.2d 535 (Ill. 1977).

113. 153 Cal. Rptr. 712 (Ct. App. 1979).

114. *Id.* at 717.

115. Jamieson, *supra* note 89, at 939.

116. SORGAN ET AL., *supra* note 70, § 11-3.

117. This analysis is analogous to opportunity cost analysis in economics, accounting and finance. An opportunity cost is defined as the potential benefit that is lost or sacrificed when the choice of one course of action requires the giving up of an alternative course of action. RAY H. GARRISON, *MANAGERIAL ACCOUNTING* 43 (3d ed. 1982); J. FRED WESTON ET AL., *ESSENTIALS OF MANAGERIAL FINANCE* 64 (6th ed. 1982).

118. Wendy Cole et al., *How Should We Teach Our Kids About SEX?; Bombarded by Mixed Messages About Values, Students Are More Sexually Active Than Ever, and More Confused*, TIME, May 24, 1993, at 60 (highlighting the impact of the sexual revolution upon

ple, unwed pregnancies have risen 87% among teenagers between the ages of fifteen to nineteen<sup>119</sup> and unwed births among teens have risen 61% since 1970.<sup>120</sup> Presently, more than 40% of women in the United States become pregnant before they reach twenty years of age and more than one million teenagers become pregnant each year.<sup>121</sup> With regard to sexually transmitted diseases, one million cases of pelvic inflammatory disease occur annually,<sup>122</sup> and over 500,000 new cases of gonorrhea were reported in 1992.<sup>123</sup> Further, the rate of gonorrhea among teenage females ages fifteen to nineteen is twenty-two times higher than the rate for women ages thirty and older.<sup>124</sup> Over 100,000 new cases of syphilis were reported in 1992<sup>125</sup> and over one million new genital herpes simplex infections have been reported between 1986 and 1992.<sup>126</sup> Further, over 400,000 new cases of chlamydia were also reported.<sup>127</sup> An estimated 16.4% of the United States population now have herpes,<sup>128</sup> and approximately twenty-four million cases of human papilloma virus exist among our country's citizens, with a prevalence of the disease among teenagers.<sup>129</sup> Additionally, between January 31, 1989 and February 1, 1990, the number of AIDS cases among teenagers increased by 40%.<sup>130</sup> The question is: to what extent has sex education in the public schools contributed to the proliferation of sexually transmitted diseases and the dramatic increase in teenage pregnancies, i.e., children having children?<sup>131</sup>

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the parent-child relationship and how the erosion of past sexual norms has left a moral vacuum resulting in adolescent confusion).

119. JAMES DOBSON, THE NEW DARE TO DISCIPLINE 212 (1992) (citing FAMILY RESEARCH COUNCIL, WASHINGTON WATCH 3, CONDOM ROULETTE 1 (1992)).

120. *The Reauthorization of Title X of the Public Health Service Act: Hearing Before the Subcommittee On Health and the Environment*, 102d Cong., 2d Sess. 2722 (1992) (testimony of Charmaine Yoest, Policy Analyst, Family Research Council) [hereinafter Yoest Testimony].

121. DOUGLAS KIRBY ET AL., SCHOOL-BASED PROGRAMS TO REDUCE SEXUAL RISK BEHAVIORS: A REVIEW OF EFFECTIVENESS, PUBLIC HEALTH REPORT, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, May 1994 [hereinafter EFFECTIVENESS REVIEW].

122. DOBSON, *supra* note 119, at 209 (citing Interview with Pamela McDonnell, Sexually Transmitted Diseases Division, Center for Disease Control, U.S. Dep't of Health and Human Serv. in Atlanta, Ga. (Mar. 16, 1992)).

123. DIVISION OF STD/HIV PREVENTION, U.S. DEPT. OF HEALTH AND HUMAN SERV., PUBLIC HEALTH SERV., ATLANTA, SEXUALLY TRANSMITTED DISEASE SURVEILLANCE 13 (1992) [hereinafter 1992 STD SURVEILLANCE REPORT].

124. EFFECTIVENESS REVIEW, *supra* note 121, at 1.

125. 1992 STD SURVEILLANCE REPORT, *supra* note 123, at 6, fig. 1.

126. *Id.* at 28, fig. 33.

127. *Id.* at 177, tbl. 31.

128. Robert E. Johnson et al., *A Seroepidemiologic Survey of the Prevalence of Herpes Simplex Virus Type 2 Infection in the U.S.*, 321 NEW ENG. J. MED. 7, 8 (1989).

129. Laura A. Koutsky et al., *Epidemiology of Genital Human Papillomavirus Infection*, 10 EPIDEMIOLOGIC REV. 122, 140 (1988).

130. Denice Cora-Bramble et al., *The Sex Education Practicum: Medical Students in the Elementary School Classroom*, 62 J. SCH. HEALTH 32 (1992).

131. For example, studies have shown a stepped increase in teenage sexual activity and teenage pregnancy with the increase in sex education programs. From 1971 to 1979, premarital sex among teenage women rose from 30% to 50%. A 1986 Louis Harris Poll commissioned by Planned Parenthood found that 64% of 17-year-olds who had contraception instruction had engaged in intercourse while only 57% of 17-year-olds who did not have

## V. DISTINGUISHING SEX EDUCATION

In contrast to competing pedagogical methods of education, of which no consensus has emerged as to objective evaluation criteria,<sup>132</sup> the sciences of physiology, human reproduction, and virus and bacteria transmission share broad consensus within the medical and scientific communities.<sup>133</sup>

Sharp disagreement exists regarding when sex education should begin, what it should entail, and how (or in what forum) it should be dispersed.<sup>134</sup> This comment, however, does not address these social and political issues. Rather, the comment focuses upon the following issues: given a sex education curriculum, is the curriculum accurate? Do objective criteria exist to make such a determination? In the event the curriculum is inaccurate, does the inaccuracy create a justifiable reliance in students? Further, if a student relied upon the inaccuracy to his detriment, does a cause of action sounding in educational malpractice exist? More specifically, is the rationale espoused in the seminal educational malpractice cases<sup>135</sup> applicable or appropriate in the context of sex education malpractice? Lastly, if educational malpractice and sex education malpractice are distinguishable and actionable, what remedies should be available?

### A. NEGLIGENCE THEORY OF RECOVERY

As stated earlier, the most popular theory of recovery for educational malpractice claims has been traditional negligence. Again, negligence requires the existence of a legal duty, proximate causation between the defendant's actions and the breach of the existing legal duty, and compensable injury resulting from the breach of the legal duty.<sup>136</sup>

#### 1. Existence of a Legal Duty

Remember that three distinct theories were proposed to establish a legal duty in the educational malpractice context: (1) educators assume a duty of student instruction by nature of their employment; (2) a duty of care arises from a special relationship between educators and their stu-

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such instruction had engaged in intercourse. Jacqueline R. Kasun, *Condom Nation: Government Sex Education Promotes Teen Pregnancy*, 69 POLICY REV. 79 (1994).

132. SORGENT ET AL., *supra* note 70, § 11-3.

133. 2 CECIL TEXTBOOK OF MEDICINE 1566 (James B. Wyngaarden, M.D. et al. eds., 19th ed. 1992); 1 HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 485 (Kurt J. Isselbacher, M.D. et al. eds., 13th ed. 1994).

134. Mimi Hall, *How Far to Go on Sex Ed*, USA TODAY, Oct. 7, 1993, at 6D; Robert O'Harrow, Jr., *Fairfax County Schools Sex Education Program Takes a Conservative Turn*, WASH. POST, July 15, 1994, at C4; *Lawsuit Seeks Sex Education Guidelines*, MIAMI HERALD, Oct. 14, 1993, at 1B.

135. See, e.g., Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854 (Ct. App. 1976); Hunter v. Board of Educ., 439 A.2d 582 (Md. 1982); Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352 (N.Y. 1979); Hoffman v. Board of Educ., 400 N.E.2d 317 (N.Y. 1979).

136. PROSSER, *supra* note 30, § 30, at 164-65.

dents; and (3) a duty exists analogous to a recognized duty of reasonable care in instructing and supervising students in cases involving physical injury.<sup>137</sup> The first two theories were dismissed on policy grounds due to the court's inability to create a workable standard by which to measure a defendant's conduct.<sup>138</sup> The court in *Peter W.* focused on the nature of the educational process in stating that "classroom methodology affords no readily acceptable standards of care . . . . The science of pedagogy itself is fraught with different and conflicting theories."<sup>139</sup> Sex education is distinguishable from the "science of pedagogy"<sup>140</sup> in that sex education is not a methodology or theory upon which reasonable persons disagree. Rather, sex education is fundamentally an impartation of well-defined, understood information. As such, the impartation of this information is either factually accurate or not. Further, objective criteria exist to measure the accuracy of such an impartation. Therefore, since sex education is not "fraught with different and conflicting theories,"<sup>141</sup> a standard of care may be established for educators in this context, thereby giving rise to a legal duty.

The third attempt to establish a legal duty through analogy to a recognized duty of reasonable care in instructing and supervising students in cases involving physical injury failed because the court distinguished educational injury from physical injury.<sup>142</sup> However, in the case of sex education, reliance upon inaccurate information may give rise to a physical injury.<sup>143</sup> Therefore, in a sex education context, educational injury may equal physical injury. A closer analysis of the development of a duty of reasonable care in instructing and supervising students in cases involving physical injury provides greater insight into its potential applicability to educational malpractice in sex education.

In *Bellman v. San Francisco High School District*,<sup>144</sup> a seventeen-year-old girl was physically injured while participating in a physical education class. In affirming the decisions of the lower courts,<sup>145</sup> the California Supreme Court ruled that a standard of care defined by an "ordinary prudence" standard created a legal duty.<sup>146</sup> Therefore, a legal duty ex-

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137. *Peter W.*, 131 Cal. Rptr. at 857-58.

138. *Id.* at 861.

139. *Id.* at 860.

140. Pedagogy is defined as the art, science, or profession of teaching. WEBSTER'S NEW COLLEGIALE DICTIONARY 844 (1973).

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

142. *Id.* at 858.

143. Joel B. Korin et al., *Civil Liability for the Transmission of AIDS*, N. J. LAW., Jan./Feb. 1989, at 40 (highlighting liability for transmission of sexually transmitted disease based on theories of negligence, battery, misrepresentation and products liability); Linda K. Burdt et al., *The Real Fatal Attraction: Civil and Criminal Liability for the Sexual Transmission of AIDS*, 37 DRAKE L. REV. 657 (1988) (discussing injury from transmission of AIDS with physical manifestations of weight loss, persistent fever, lymph node enlargement, bumps and blotches on the skin, and in some cases forgetfulness, impaired speech and seizures).

144. 81 P.2d 894 (Cal. 1938).

145. *Id.* at 896.

146. *Id.* at 897.

isted for school districts to ensure that "ordinary prudence" be used in instructing students when physical injury is a potential consequence. The court ruled that the issue of whether "ordinary prudence" was exercised is a factual one, resolved by the factfinder: "What is ordinary care depends upon the circumstances of each particular case and is to be determined as a fact with reference to the situation and knowledge of the parties."<sup>147</sup> This principle was reaffirmed in *Dailey v. Los Angeles Unified School District*.<sup>148</sup> Although the facts in *Dailey* concerned negligent supervision,<sup>149</sup> the court revisited the question of the legal duty of school districts. The court stated: "This uniform standard to which they are held is that degree of care 'which a person of ordinary prudence, charged with (comparable) duties, would exercise under the same circumstances.' "<sup>150</sup> Additionally, a multitude of jurisdictions have held educators and education administrators personally liable for personal injuries of students.<sup>151</sup>

In short, the reasoning for denying educational malpractice claims centered on the inability to create a standard of care in education and the lack of physical injury.<sup>152</sup> Sex education malpractice can be readily distinguished from educational malpractice because a workable standard of care can be developed through objective criteria and because sexual malpractice may result in physical injury.

## 2. Causation

Courts have also asserted that an inability to establish a causal link between a breach of a duty and a compensable injury prohibits a claim in educational malpractice.<sup>153</sup> This view has been strongly criticized by commentators,<sup>154</sup> and perhaps the best view is that taken by the court in *Donohue*, which stated that "while [causation] might . . . be difficult . . . to prove . . . it perhaps assumes too much to conclude that it could never be established."<sup>155</sup> However, the *Donohue* court rejected the claim on lack

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147. *Id.*

148. 470 P.2d 360 (Cal. 1970).

149. *Id.* at 361 (physical education instructor failed to supervise properly during the noon lunch hour).

150. *Id.* at 363 (quoting *Prikle v. Oakdale Sch. Dist.*, 253 P.2d 1, 2 (Cal. 1953)).

151. See generally, Annotation, *Personal Liability of Public School Executive or Administrative Officer in Negligence Action for Personal Injury or Death of Student*, 35 A.L.R.4TH 272 (1985 & Supp. 1993); Christopher Bello, Annotation, *Personal Liability of Public School Teacher in Negligence Action for Personal Injury or Death of Student*, 34 A.L.R.4TH 228 (1984 & Supp. 1993).

152. *Peter W.*, 131 Cal. Rptr. at 854.

153. *Id.* at 861.

154. See, e.g., Elson, *supra* note 55, at 747. Elson states:

[T]he fallacy in the *Peter W.* court's approach is that, in granting defendant's motion to dismiss, the court ruled as a matter of law that plaintiff could under no circumstances prove that defendant's conduct caused his inability to read beyond a fifth grade level. This is a misreading of the common law principles of causation in negligence cases.

*Id.*

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

of causation on its facts.<sup>156</sup> The lack of consensus among education professionals was cited as a fundamental stumbling block in establishing the existence of causation.<sup>157</sup> Yet, as stated above in the discussion of a legal duty, sex education is not fraught with the vagaries of educational theories. What causes injury in sex education malpractice claims is well established.<sup>158</sup> One example is contraction of a sexually transmitted disease. Therefore, the focus in sex education malpractice claims is whether a sufficient nexus exists between the injury and a breach of a legal duty.

A claim under a theory of educational malpractice arises under a diverse set of factual circumstances. Students receive instruction under a sex education curriculum. They either rely upon their instruction or they do not. This is an issue for the factfinder to determine. It would certainly be dubious for a school district to assert that students do not or should not rely upon an educator's instruction because an underlying goal of the educational process is for students to rely and act upon the instruction received in school.

A hypothetical fact pattern perhaps best distinguishes a claim in sex education malpractice with regard to the issue of proximate cause. A fourteen-year-old virgin attends sex education classes where various forms of sexual intercourse are discussed. In the course of instruction, the teacher states that although abstinence prevents contraction of sexually transmitted diseases ("STDs"), in reality, teenagers have sex and should therefore have "safe sex" with a condom. No discussion ensues on exactly what is "safe sex." The child obtains a free condom through a school condom provision program, uses it with a partner, and contracts an STD. Under traditional "but for" analysis, a factfinder may, under certain circumstances, find that "but for" the sex education instruction regarding intercourse, "safe sex," and the provision of free condoms, the child would not have participated in a sexual act and therefore would not have contracted the sexually transmitted disease. Certainly, the circumstances surrounding sex education malpractice are substantially distinguishable from the facts surrounding traditional educational malpractice claims. Therefore, the issue of proximate cause may rightly be determined by the factfinder.

A development in the theory of proximate causation also fundamentally changes the proximate-cause analysis used in *Peter W. and Donohue*. In *Mitchell v. Gonzales*<sup>159</sup> the California Supreme Court adopted a "substantial factor" test for establishing proximate causation in negligence ac-

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156. *Id.*

157. Peter W., 131 Cal. Rptr. at 860-61.

158. CECIL TEXTBOOK OF MEDICINE, *supra* note 133, at 1566; HARRISON'S PRINCIPLES OF INTERNAL MEDICINE, *supra* note 133, at 485; SEXUALLY RELATED INFECTIOUS DISEASES: CLINICAL AND LABORATORY ASPECTS (Tsieh Sun, M.D. ed., 1986) (discussing various sexually transmitted diseases and highlighting causes of both bacterial (i.e. gonorrhea, chlamydia) and viral (i.e. herpes, HIV) infections and present stages of research in preventing each infection).

159. 819 P.2d 872 (Cal. 1991).

tions.<sup>160</sup> This "substantial factor" test replaced the previous, traditional "but for" analysis and finds support in Section 431 of the Restatement.<sup>161</sup> The "substantial factor" test not only "subsumes the 'but for' test"<sup>162</sup> but extends to factual circumstances where a similar, but not identical, result would have occurred without the defendant's actions.<sup>163</sup> The new test also extends to instances where a defendant has made a clearly proven, but insignificant contribution to the resulting injury.<sup>164</sup>

Some commentators have suggested that under a "substantial factor" test for causation even traditional educational malpractice claims may survive.<sup>165</sup> Certainly, the adoption of the "substantial factor" test, arguably a substantially more lenient standard than the traditional "but for" test, would provide relief even under circumstances where school districts assert that a student would have certainly contracted a sexually transmitted disease, or become pregnant, without their "safe sex" instruction. This broad view, embraced by both the Restatement and the California Supreme Court, may indeed ensure establishment of adequate proximate causation, especially in light of the fact pattern illustrated above where, arguably, proximate cause may be established under traditional "but for" causation analysis.

A second issue with respect to proximate causation is contributory negligence. Undoubtedly, the issue of whether a student's actions in contracting a sexually transmitted disease or becoming pregnant constitutes contributory negligence is highly relevant. Generally, contributory negligence addresses a plaintiff's actions that fall below a standard of care.<sup>166</sup> However, the standard of care is a reasonable person standard, which has a "sliding scale" for both gravity of consequences and age and maturity of the actor.<sup>167</sup> This standard is succinctly highlighted by the court's statement in *Dailey v. Los Angeles Unified School District*:<sup>168</sup> "Nevertheless, adolescent high school students (in present sex education, this includes elementary and junior high students) are not adults and should not be expected to exhibit that degree of discretion, judgment, and concern for the safety of themselves and others which we associate with full maturity."<sup>169</sup> The court added: "We should not close our eyes to the fact that . . . boys of seventeen and eighteen years of age, particularly in groups where the herd instinct and competitive spirit tend naturally to relax vigi-

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160. *Id.* at 878-79.

161. RESTATEMENT (SECOND) OF TORTS § 431 (1977).

162. *Mitchell*, 819 P.2d at 878.

163. *Id.*

164. *Id.*

165. Albert C. Jurenas, *Will Educational Malpractice Be Revived?*, 74 ED. LAW REP. 449 (1992).

166. PROSSER, *supra* note 30, § 65, at 451.

167. *Id.* § 53, at 356-59.

168. 470 P.2d 360 (Cal. 1970).

169. *Id.* at 364.

lance, are not accustomed to exercise the same amount of care for their own safety as persons of more mature years."<sup>170</sup>

In addition, the fact that a student has contracted a sexually transmitted disease or become pregnant does not necessarily establish contributory negligence. For example, condoms may break in circumstances absent negligence.<sup>171</sup> Even if a school district could prove that a student did not follow instructions sufficiently, the California Supreme Court ruled in *Bellman v. San Francisco High School District*<sup>172</sup> that, "while the evidence shows that the respondent received injury because she did not do the exercise correctly, this does not necessarily convict her of contributory negligence, nor absolve the school district from liability."<sup>173</sup> Clearly, contributory negligence does not act as an absolute bar to recovery, especially in light of that fact that many states have enacted comparative negligence statutes.<sup>174</sup>

#### a. Strict Liability for Ultrahazardous Activities

Yet another issue involving the concept of proximate cause and contributory negligence is strict liability for ultrahazardous (or inherently dangerous) activities.<sup>175</sup> The central issue is: Can sex or sex education today be categorized as an inherently dangerous activity? If so, what impact does it have upon liability in the context of sex education malpractice?

The theory of strict liability in tort for ultrahazardous activities is approximately 130 years old, and was birthed in English common law.<sup>176</sup> It revolves around the core question whether, in situations where no physical trespass exists, one can be held strictly liable.<sup>177</sup> The original doctrine, which held that one is *prima facie* answerable for all damage occurring as a natural consequence of one's actions, was confined to activities that were extraordinary or abnormal.<sup>178</sup> In America, strict liability for ultrahazardous activities evolved as well.<sup>179</sup> The First Restatement of Torts defined an "ultrahazardous activity" as one which involves a risk of seri-

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170. *Id.*

171. See DOBSON, *supra* note 119, at 210 (stating that condoms have an annual failure rate of 15.7% in preventing pregnancy).

172. 81 P.2d 894 (Cal. 1938).

173. *Id.* at 897.

174. See, e.g., Texas Comparative Negligence Statute, TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (Vernon 1986 & Supp. 1994).

175. RESTATEMENT (SECOND) OF TORTS § 519. According to subsection (1) of Section 519, "[o]ne who carries on an abnormally dangerous activity is subject to liability for harm to the person . . . resulting from the activity, although he has exercised the utmost care to prevent the harm." *Id.* § 519(1).

176. *Fletcher v. Rylands*, 159 Eng. Rep. 737 (1865), *rev'd*, *Fletcher v. Rylands*, L.R. 1 Ex. 265 (1866), *aff'd*, *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868); PROSSER, *supra* note 30, § 78 at 545.

177. Strict liability is imposed upon an actor absent either an intent to interfere with a legally protected interest or a breach of a duty to exercise reasonable care. Strict liability is often referred to as liability without fault. PROSSER, *supra* note 30, § 75, at 534.

178. See *Fletcher*, L.R. 1 Ex. at 279-80; *Barker v. Herbert*, 2 K.B. 633, 645 (1911).

179. See RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (1977).

ous harm to a person that cannot be eliminated by the exercise of utmost care *and* that is not a matter of common usage.<sup>180</sup>

The Second Restatement of Torts supplanted the first Restatement's definition of ultrahazardous activity with six factors: (1) existence of a high degree of harm; (2) likelihood that the resulting harm is great; (3) inability to eliminate risk by the exercise of reasonable care; (4) extent to which the activity is not a matter of common usage; (5) inappropriateness of the activity to the place where it is carried on; and (6) extent to which its value to the community is outweighed by its dangerous attributes.<sup>181</sup> No one factor is considered determinative; rather, each factor should be weighed in determining whether strict liability should be applied.<sup>182</sup> Therefore, although the first Restatement may not have considered sex education an ultrahazardous activity due to its prevalence in educational curricula ("common usage"), the second Restatement only looks to common usage as one factor in considering the applicability of strict liability. For example, in an analogous context, the California Supreme Court in *Bellman v. San Francisco High School District*,<sup>183</sup> did not find common usage determinative in holding that gymnastics can be considered ultrahazardous for purposes of strict liability: "In deciding whether the employees of the appellant used ordinary care it was proper for the jury to consider not only whether the exercise was inherently dangerous but also whether they should have allowed or required the respondent to take instruction in tumbling."<sup>184</sup>

Certainly the transmission of HIV or another sexually transmitted disease poses a great harm to a child. Further, evidence provided earlier on effectiveness of condoms<sup>185</sup> demonstrates the inability to eliminate risk by the exercise of reasonable care.<sup>186</sup> The remaining factors may come under close scrutiny and will be hotly contested.

The existence of a high degree of risk and the factors that constitute such high risk vary greatly. For example, a one percent chance of failure in the aviation industry is considered a high degree of risk. In practice, this factor is measured on a sliding scale that inversely tracks the degree of harm. For harm that is not serious, a large degree of risk will be required to classify an activity as ultrahazardous. For harms that are serious (*i.e.*, those resulting in death), in contrast, a low degree of risk is suffi-

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180. RESTATEMENT (FIRST) OF TORTS § 520 (1934).

181. RESTATEMENT (SECOND) OF TORTS § 520, cmts. e & f.

182. PROSSER, *supra* note 30, § 78, at 555.

183. 81 P.2d 894 (Cal. 1938).

184. *Id.* at 897.

185. The FDA requires that condom manufacturers list both the ideal and use effectiveness rates of their products. Studies show that ideal effectiveness rates vary from 97% to 98.5% and use effectiveness rates vary between 64% to 97%. Therefore, even under ideal circumstances, condoms have greater than a 1% chance of failure. Nancy E. Dirubbo, *The Condom Barrier*, 1987 AM. J. NURSING 1306, 1309.

186. For example, the graphic condom demonstrations given in sex education classes to teach students how to use condoms are not sufficient to eliminate the risk of transmission of an STD. DOBSON, *supra* note 119, at 212.

cient. The risk associated with condom effectiveness is well known,<sup>187</sup> and since infection results in serious physical injury and possibly death, this factor may push the decisionmaker to categorize sex education as an ultrahazardous activity.

The last two Restatement factors are strong functions of public policy. Whether sex education instruction is an appropriate activity in public school classrooms is a challenging question, one this comment does *not* seek to answer. The extent to which the value of sex education to the community outweighs its dangerous attributes is another issue that is at the core of today's sex education debate. This factor boils down to the following questions: Does sex education instruction work? If so, are the casualties of sex education low enough to justify its continuance? Further, are the casualties barred from recovery?<sup>188</sup>

These factors are currently fiercely debated. Most importantly, scholars are posing these questions and collecting data in an effort to aid in a reexamination of sex education. Due to uncertainty regarding how courts will consider these factors, however, it is speculative, at best, whether strict liability in tort for ultrahazardous activities may effectively be applied as a theory for sex education malpractice.

#### b. Strict Liability in Warranty

Yet another issue involving the concept of proximate cause and contributory negligence is strict liability in warranty under the products liability doctrine. Although this theory was initially confined to sellers who provided products for human consumption without privity of contract,<sup>189</sup> the theory expanded beyond products for human consumption (*i.e.*, food and drink) to products for intimate bodily use.<sup>190</sup> The theory then exploded in applicability in *Henningsen v. Bloomfield Motors, Inc.*<sup>191</sup> when the New Jersey Supreme Court held not only the manufacturer, but also the automobile dealer, liable under the implied warranty doctrine.<sup>192</sup>

Under this theory, an assertion by a sex education instructor that sex with a condom is "safe sex" may place the instructor in the shoes of *Henningsen*'s automobile dealer. Although the instructor did not participate in the manufacture of the condoms, the instructor did make statements

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187. Dirubbo, *supra* note 185, at 1309.

188. These questions track some of the same legal policy questions that were faced during the industrial revolution. For example, regarding railroads, could the hazards implicit in the industry be overlooked because of the common good provided by the industry? A second example may be use of chemical agents by the United States government during the Vietnam War. Was the compelling objective of quickly defeating the North Vietnamese forces in order to prevent future destruction of property and human life sufficient to bar veterans, who suffered harm from such action, from recovery?

189. *Mazetti v. Armour & Co.*, 135 P. 633 (Wash. 1913).

190. *Graham v. Bottenfield's, Inc.*, 269 P.2d 413 (Kan. 1954) (stating that a complaint against a distributor of hair products for an alleged breach of implied warranty was a sufficient cause of action).

191. 161 A.2d 69 (N.J. 1960).

192. *Id.* at 96-97.

that amount to an implied warranty that the product was safe for a particular use. This theory is fraught with numerous weaknesses,<sup>193</sup> yet courts have consistently shown remarkable creativity<sup>194</sup> in analogizing existing legal doctrines to address what the courts perceive as otherwise unredressable wrongs.

### 3. Injury

The third element required under the negligence theory of recovery is existence of a compensable injury resulting from breach of a legal duty. Injury associated with sex education malpractice may vary widely depending upon what, in fact, occurs. A first array of damages occurs if pregnancy results; a second array of damages is incurred if a sexually transmitted disease is conveyed. A combination of such damages may be recovered in the event of both pregnancy and conveyance of a sexually transmitted disease.

In cases where unwanted pregnancies occur, actions are separated into three categories:<sup>195</sup> wrongful conception,<sup>196</sup> wrongful birth,<sup>197</sup> and wrongful life.<sup>198</sup> In cases of wrongful conception, in addition to recovery of all medical costs associated with the pregnancy and of birth and post-birth expenses, courts have ruled that parents may recover damages for mental anguish and emotional distress.<sup>199</sup> In cases of wrongful birth, courts have invoked public policy to justify a refusal to act boldly in the absence of precedent. Reluctant to encourage abortion, courts have allowed recovery for parents' mental and emotional distress.<sup>200</sup>

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193. For example, the public school classroom is not a commercial establishment and the instructor is not expressly selling a product. Certainly the instructor's compensation is not a direct function of a student's reliance.

194. Whether judicial creativity is socially constructive is another issue this comment does not seek to address.

195. Gregory G. Sarno, Annotation, *Recoverability of Compensatory Damages for Mental Anguish or Emotional Distress for Tortiously Causing Another's Birth*, 74 A.L.R.4TH 798, 804 (1989 & Supp. 1994).

196. Wrongful conception is an action brought by parents of a child for negligence leading to conception. *Id.*

197. Wrongful birth is an action brought by parents of a child for negligence leading to birth with genetic defects or other abnormalities. *Id.*

198. Wrongful life is an action brought by parents of a child on behalf of the child for negligence leading to the child's impaired life. *Id.*

199. See, e.g., Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982) (stating that compensatory damages are not limited to medical expenses, but include physical pain and suffering and mental anguish resulting from a physician's negligence in removing the patient's Fallopian tubes); Smith v. Gore, 728 S.W.2d 738 (Tenn. 1987) (ruling that damages for emotional distress or mental anguish are recoverable only for the period of time extending from discovery of the pregnancy due to the physician's negligence in a failed tubal ligation until termination of pregnancy). But see Macomber v. Dillman, 505 A.2d 810 (Me. 1986) (holding that damages due to pain and suffering, loss of earnings, and loss of consortium are not recoverable for a failed tubal ligation).

200. See, e.g., Naccash v. Burger, 290 S.E.2d 825 (Va. 1982) (holding that a refusal to allow recovery for emotional distress, although not directly resulting from tortious conduct, would pervert principles of justice). The cases dealing with wrongful birth, however, have been directed primarily toward a physician's failure to advise of appropriate testing during pregnancy. These cases were not functions of sexually transmitted disease infection.

In cases of wrongful life, where a child suffering from a genetic or other defect sues for damages, courts have held that the child cannot recover damages for emotional distress because of the difficulty in measuring the damage in light of the initially impaired existence.<sup>201</sup>

Although emotional distress damages are recoverable, courts have overwhelmingly rejected attempts by parents to recover child-rearing costs.<sup>202</sup> A vast majority of courts have rejected the "benefits rule" which advocates full recovery<sup>203</sup> and have instead embraced the "limited damages rule" which prohibits recovery of child-rearing costs.<sup>204</sup> Using public policy, these courts have argued that children should not be treated as property and that costs of child-rearing are speculative in nature.<sup>205</sup>

Note that courts have held that *both* parents may recover emotional distress damages resulting from pregnancy caused by negligence. Therefore, both the male and female student would have a legally compensable injury within a sex education malpractice context in cases involving pregnancy.

The contraction of a sexually transmitted disease results in damages due to medical expenses incurred in treatment of the disease. Damages associated with emotional distress and mental anguish may also be recovered.<sup>206</sup> Compensatory damages for emotional distress and mental anguish have also been awarded to plaintiffs solely as compensation for the fear of contracting a venereal disease.<sup>207</sup> These damage awards have also included monies for pain and suffering.<sup>208</sup> In the highly publicized

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201. See *Procanik v. Cillo*, 478 A.2d 755 (N.J. 1984) (holding that the child's distress and suffering were incognizable).

202. *Johnson v. University Hosp.*, 540 N.E.2d 1370 (Ohio 1989) (holding that parents may not recover costs of child-rearing due to the physician's negligence in improperly performing a sterilization procedure). *But see Marciiniak v. Lundborg*, 450 N.W.2d 243 (Wis. 1990) (rejecting the limited recovery rule and stating that juries routinely make more complex damage assessments and that, therefore, child-rearing costs are not too speculative). See Russell G. Donaldson, Annotation, *Recoverability of Cost of Raising Normal, Healthy Child Born as a Result of Physician's Negligence or Breach of Contract or Warranty*, 89 A.L.R.4TH 632, 650-51 (1989 & Supp. 1994).

203. Donaldson, *supra* note 202, at 645.

204. *Id.*

205. *Id.* at 649.

206. See *Kerins v. Hartley*, 21 Cal. Rptr. 2d 621 (Ct. App. 1993) (holding that a patient may recover damages for emotional distress from a physician who operated upon the plaintiff while infected with Human Immunodeficiency Virus (HIV) without giving notice to the plaintiff). *But see Doe v. Doe*, 519 N.Y.S.2d 595 (Sup. Ct. 1987) (holding a wife could not recover damages for emotional distress from her husband for conveyance of HIV in a fact-specific ruling).

207. *Chiles v. Chiles*, 779 S.W.2d 127 (Tex. App.—Houston [14th Dist.] 1989, writ ref'd) (holding that emotional distress damages are not recoverable). *But see Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993) (overruling *Chiles* and allowing emotional distress damages); *see also Gary Taylor, Divorcing Wife Gets \$500,000 for Distress*, NAT'L L.J., Jan. 25, 1988, at 3 (wife provided expert testimony as evidence of traumatic stress syndrome and pain and suffering due to husband who paid women for sexual favors).

The cases to date have focused solely on transmission of the HIV virus. Because HIV is a precursor to AIDS, which is fatal, it is possible that such damage awards may be limited to potential HIV transmission and would not extend to fear of contraction of other sexually transmitted diseases.

208. *Twyman*, 855 S.W.2d at 619; Taylor, *supra* note 207, at 3.

case of *Aetna Casualty & Surety Co. v. Sheft*,<sup>209</sup> Rock Hudson's lover sued Hudson's estate for emotional distress and mental anguish due to potential conveyance of HIV.<sup>210</sup> The plaintiff had met Hudson in 1982 and had a sexual relationship with the actor until 1985. In 1984, Hudson was diagnosed with AIDS and the plaintiff was not given notice. A jury awarded the plaintiff \$14.5 million in compensatory damages,<sup>211</sup> which included monies for emotional distress and mental anguish even though, at the time of the verdict, no evidence existed that the plaintiff had contracted the AIDS virus.<sup>212</sup>

Therefore, injury may be shown without proof of conveyance of a sexually transmitted disease.<sup>213</sup> Undoubtedly, legally compensable injury exists for which courts have allowed recovery in the case of both unwanted pregnancy and transmission of sexually transmitted diseases. Further, some courts have recognized legally compensable injury resulting simply from exposure to AIDS without any proof of conveyance. This again illustrates the substantial distinguishing characteristics of a cause of action sounding in sex education malpractice, in contrast with traditional education malpractice actions.

## B. PUBLIC POLICY REVISITED

The three elements required for the establishment of a negligence claim may arguably be met in the context of sex education malpractice. In *Donohue*, however, the court conceded that, although an educational malpractice cause of action may be stated, public policy considerations prohibit such a cause of action from proceeding.<sup>214</sup> The public policy considerations coalesced into four categories: (1) judicial intrusion in the educational process; (2) the social utility of education; (3) the student-teacher relationship; and (4) economic and administrative cost considerations.<sup>215</sup>

### 1. Judicial Intrusion

As stated in *Hoffman*,<sup>216</sup> courts rebuffed educational malpractice claims, reasoning that the courtroom was an inappropriate forum for the evaluation of educational theories and methods.<sup>217</sup> Further, courts have commented that remedies outside judicial remedies were more fitting for

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209. 989 F.2d 1105 (9th Cir. 1993).

210. *Id.* at 1106. According to testimony in the case, "[s]everal seconds after [the announcement that Rock Hudson had AIDS], Christian blacked out from fear. He also lost sleep, had nightmares, sweated excessively, lost weight, became anxious and short tempered, and occasionally vomited . . ." *Id.*

211. *Id.*

212. *Id.* at 1109.

213. Again, this may be limited to exposure to the AIDS virus, HIV.

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

215. *Id.* at 1354; Jamieson, *supra* note 89, at 900-03.

216. *Hoffman v. Board of Educ.*, 400 N.E.2d 317, 320 (N.Y. 1979).

217. *Id.*

"educational injuries."<sup>218</sup> Such reasoning appears to be readily distinguishable in the sex education context. Evaluation of sex education curricula need not focus upon educational theories or methods, but rather may focus upon technical accuracy.<sup>219</sup> Additionally, such evaluation may be achieved with technical experts, focusing upon objective criteria. Further still, it appears that a legal duty in the sex education context can clearly be established. If a breach of a legally recognizable duty resulting in a legally compensable injury does indeed exist, the courtroom is the appropriate forum for redress, for a primary function of the legal system is to address such wrongs.<sup>220</sup>

With respect to propriety of the remedy, sex education malpractice is further distinguishable from classical educational malpractice actions in that the former results in physical injury as opposed to an amorphous educational injury. For example, a correction of a school district's erroneous sex education practice will not address a plaintiff's injury. The injury associated with sex education malpractice closely mirrors that of classical medical malpractice which appropriates financial remedies for its victims. Therefore, under both prongs of analysis which courts have pursued in rebuffing claims in classical educational malpractice, judicial intrusion is not a concern in the context of sex education malpractice because of the action's distinguishing characteristics.

## 2. Social Utility of Education

Public policy considerations involving the social utility of education have not been addressed in detail by the courts. Although courts have noted the integral nature of education and freedom in a democratic republic,<sup>221</sup> they have been reticent to tap its import as a mandate for judicial activism. However, sex education again appears to distinguish itself uniquely from classical pedagogy since its application and manner of dissemination is accorded substantial freedom.<sup>222</sup> Its impact on societal welfare, furthermore, is greater simply because physical injury (*i.e.*,

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218. *Donohue*, 391 N.E.2d at 1355.

219. Certainly, absence of technical accuracy would not be rebuffed as merely a diverse educational method. Such evaluation would be appropriate both for written materials and the instructor's delivery of the material.

220. PROSSER, *supra* note 30, § 1, at 3.

221. See *Hunter v. Board of Educ.*, 425 A.2d 681, 684-85 (Md. Ct. Spec. App. 1981), *aff'd in part and rev'd in part*, 439 A.2d 582 (Md. 1982).

222. Although the Sex Information and Education Council of the United States ("SIECUS") provides guidelines for sex education, entitled *Guidelines for Comprehensive Sexuality Education*, each school district is free to determine individually what form of sex education curriculum is appropriate. O'Harrow, *supra* note 134, at C4.

Presently, sex education curricula are extremely diverse. Curricula such as "Teen-Aid" and "Sex Respect" are "conservative" and focus primarily on abstinence as a means of avoiding pregnancy and contraction of sexually transmitted disease. DOBSON, *supra* note 119, at 213. Curricula such as "Learning About Sex: The Contemporary Guide for Young Adults" and "Changing Bodies, Changing Lives" are substantially more progressive and focus upon practicing "safe-sex" to avoid pregnancy and disease. Dana Mack, *What the Sex Educators Teach*, COMMENTARY, N. Y. 1993, at 33.

pregnancy or STD contraction) is more tangible than educational injury and its cost (in dollars) is more readily cognizable.

A review of statistics illustrating the pervasiveness of sexually transmitted diseases among this country's citizens will catch the attention of the courts.<sup>223</sup> The direction in which such information will drive the courts, however, is difficult to predict. Such statistics may result in one of two divergent responses.

One potential scenario results in the court analyzing the data, proclaiming a crisis among our young, and subsequently shielding instructors, curriculum developers, school districts, and others from liability to thereby provide maximum flexibility in addressing the crisis. Such action would necessarily flow from a court that envisions the public school system as an institution responsible for the sexual well-being of the adolescent population within our society. Although the judiciary has historically been slow to wrench such responsibilities from families that have traditionally dealt with such issues, it is not inconceivable to imagine that courts will envision a larger role for schools with regard to the sexuality of our adolescents.<sup>224</sup>

A second avenue the court may take results in the court analyzing the data, proclaiming a crisis among our young, and subsequently ensuring accurate dissemination of sex education information to vulnerable minors in order to address the crisis. Such action would most likely flow from a court that perceives a more limited role for public institutions within the private lives of its citizens. A court that views an expansion of government functions pessimistically might question why public schools are addressing sex education and may require that, if a public school does provide sex education,<sup>225</sup> the curriculum and its dissemination must be technically accurate. This could be easily accomplished without substantial judicial activism by simply analogizing sex education malpractice to established medical malpractice law.

Therefore, it is uncertain how the social utility factor of public policy will impact a court's analysis of whether a cause of action may exist sounding in sex education malpractice.

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223. For example, unwanted pregnancies are up 87% and unwed births up 61% among teenage girls, DOBSON, *supra* note 119, at 212; 500,000 new cases of gonorrhea were reported in 1992, 1992 STD SURVEILLANCE REPORT, *supra* note 123, at 13; and over 1,000,000 new herpes infections have occurred since 1986. Approximately 16.4% of the U.S. population has herpes, which is presently incurable. Johnson et al., *supra* note 128, at 7.

224. Courts have been moot with respect to the broadening of functions in the public schools such as hot lunch programs, student counseling, post-school day care, etc. Perhaps the best example is the court's allowance of attempts by school districts to provide free condoms to students for the goal of preventing the further spread of sexually transmitted diseases. See, e.g., Alfonso v. Fernandez, 584 N.Y.S.2d 406, 413 (Sup. Ct. 1992).

225. Presently, private schools are not required to provide sex education instruction. Although no data was found comparing public and private schools, it may be interesting to note the rate of conveyance of sexually transmitted diseases among students not presently receiving sex education instruction, and to compare those findings against findings for children receiving comprehensive sex education that follows the SIECUS guidelines.

### 3. Student-Teacher Relationship

Educational malpractice cases have paid lip service to the student-teacher policy consideration; no court, however, has discussed this issue rigorously. In *Smith v. Alameda County Social Services Agency*,<sup>226</sup> the court stated that increased judicial attention to state agency actions is a healthy means to "safeguard against arbitrary actions that endanger the best interests of the child."<sup>227</sup> Although it granted no relief, the court implicitly focused upon the alleged injury (namely that prospective parents were discouraged from adopting the plaintiff) and its amorphous, nonphysical nature. The court further buttressed this implication by analogizing to *Peter W.* and distinguishing *Elton v. County of Orange*,<sup>228</sup> stating that *Alameda* did not deal with regulations designed to protect the health and safety of children.<sup>229</sup> An implication therefore exists that increased judicial scrutiny may be warranted in situations revolving around the health and safety of minors. This further serves to distinguish between classical educational malpractice claims and claims of sex education malpractice due to the unique physical nature of the sex education malpractice injury.

From a practical standpoint, the fact that society wants to encourage students' reliance upon a teacher's instructions, and given the gravity of the consequences of student reliance upon inaccurate information, it is logical to require accuracy in the dissemination of sex education information. If instructors are not required to be accurate in both their curricula and their methods of impartation, how can student reliance be achieved in parallel, academic areas? This policy further supports recognition of sex education malpractice as a cause of action.

Therefore the student-teacher policy consideration should not provide a substantial limitation, but rather support a recognition of sex education malpractice as a cause of action.

### 4. Economic and Administrative Impact Upon Schools

To reiterate, the economic and administrative policy factor in classical educational malpractice is two-pronged: courts are concerned with feigned claims by disaffected students or parents<sup>230</sup> and with the financial burden that these claims, whether real or bogus, would have upon financially strapped school districts.<sup>231</sup>

The first concern with feigned claims is a strong function of the proximate cause weakness and the vagueness associated with educational injury that are inherent in educational malpractice claims. Because

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226. 153 Cal. Rptr. 712, 716-19 (Ct. App. 1979).

227. *Id.* at 717.

228. 84 Cal. Rptr. 27 (Ct. App. 1970) (holding that state officials had a duty to protect children placed in foster homes).

229. *Alameda*, 153 Cal. Rptr. at 718.

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

231. *Ross v. Creighton Univ.*, 957 F.2d 410, 414 (7th Cir. 1992).

causation in classical educational malpractice is intangible, and because experts do not agree on the efficacy of competing pedagogical methods,<sup>232</sup> such a concern appears valid. Again, however, a claim in sex education malpractice is distinguishable from classical educational malpractice because the causation element in a claim for sex education malpractice focuses upon the nexus between injury and a breach in duty after a breach of a legal duty and a legally compensable injury have been established. The identification of injury in sex education malpractice claims may be precisely determined. In addition, the establishment of a breach of a legal duty may be based upon an analysis of objective criteria. These requirements serve as an effective "filter" to remove baseless claims. Therefore the first prong analysis of the policy is not a concern and is inapplicable.

The second concern with the financial burden that such an action may place upon schools has been criticized by commentators. As one commentator states,

the fact that some teachers [or school districts] may be forced to defend themselves in court against unjustified educational claims of students does not, in itself, warrant denying access to the courts for all students with educational grievances against their teachers or school administrators. Principles of fairness, equality, and individual justice basic to the common law would be undermined if the interest of a class of potential defendants in avoiding the inconvenience of the judicial process were given priority over the interest of a class of potential plaintiffs in securing a judicial hearing for their otherwise valid claims for relief.<sup>233</sup>

Although not explicit, the concern with finances appears to be a strong function of whether a valid injury exists. This may explain why a court may readily accept hearing a case that involves such complexities as medical malpractice. It may also serve to distinguish sex education malpractice because a tangible, legally compensable injury exists. Sheltering a school district from liability if, in fact, the district caused such an injury would be nothing short of a miscarriage of justice.<sup>234</sup>

The public policy factors that were accorded substantial authority in preventing a claim in traditional educational malpractice are not compelling due to the distinguishing nature of a claim sounding in sex education malpractice. The possibility of establishing a standard of care and the existence of a tangible, physical injury make impotent the assertions that such public policy considerations preclude recovery.

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232. *Peter W.*, 131 Cal. Rptr. at 860-61; M. SORGEN ET AL., *supra* note 70, § 11-3.

233. Elson, *supra* note 55, at 653-54.

234. Although not a rigorous legal analysis, one may also accord great weight to a sympathetic fact pattern. A young child, beleaguered with a potentially terminal disease due to reliance upon a school district's instruction, may have a substantially greater chance of maintaining a claim for recovery than another attempting recovery within traditional educational malpractice.

## VI. CONCLUSION

Educational malpractice was an attempt to address a perceived crisis among our young. Courts were not prepared to find a legal duty flowing from educators to their students, were unconvinced that causation could be established, and were unpersuaded that a compensable educational injury existed.<sup>235</sup> In addition, to drive the proverbial "stake in the heart," courts reasoned that, even if a cause of action could be established, no recovery would be provided based upon a plethora of public policy considerations.<sup>236</sup>

Sex education was birthed in the public schools long before the sexual revolution. However, its rapid expansion into comprehensive sexuality programs did not occur until the sexual revolution of the 1960s. Such growth into areas traditionally relegated to American families has been a source of bitter dispute. The social and political implications of such actions are still reverberating as "family values," "moral drift," and other buzzwords, while used to castigate leaders advocating such concepts only a few years ago, are presently being embraced by our political leaders.<sup>237</sup> Although many have focused upon whether sex education ought to be provided, what sex education ought to entail, and when sex education ought to begin, little attention has been given to addressing, from a legal standpoint, the casualties of reliance upon inaccurate sex education curricula. With the rage of "safe sex" campaigns<sup>238</sup> that are not, in fact, safe,<sup>239</sup> it is not difficult to argue that our nation's adolescent population has been lulled into a false sense of security. Such misguided reliance has

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235. *Peter W.*, 131 Cal. Rptr. at 860-61.

236. *Id.* at 859; *Donohue v. Copiague Union Free Sch. Dist.*, 391 N.E.2d 1352, 1354 (N.Y. 1979).

237. Janet Singleton, *Out-of-Wedlock Birth is No Valid Indicator*, USA TODAY, Sept. 23, 1992, at 11A (stating, "we've had one of the worst race riots in history, and the economy is doing a flaming kamikaze. We need a distraction. Let's start talking about people's mamas. That's where Quayle came in. Who better to lead a sideshow than a clown?"); *Conservatives, Liberals Focus on Declining Values*, STATE JOURNAL-REGISTER, Sept. 14, 1994, at 6. The latter article states:

In 1992, when Dan Quayle decried TV character Murphy Brown's trendy decision to have a child without bothering to have a husband, he was ridiculed for bashing single mothers . . . . In 1994, the very same theme—the alarming rise in fatherless children, the importance of intact families, the need for personal responsibility—has become a powerful message of Bill Clinton.

*Id.*

238. Mimi Hall, *Condoms, Schools: A Civics Lesson; Battle Rages Over Safe Sex vs. Abstinence*, USA TODAY, Nov. 19, 1991, at 3A (highlighting arguments for "safe sex" messages). "Dan Quayle keeps saying, 'Abstinence, abstinence' . . . . says Ali Zarrinnam, 17, a Los Angeles high school senior. 'Magic knows kids aren't going to stop and listen to abstinence,'" *Id.*

239. Although, one may properly state that sex with a condom is "safer" than unprotected sex, the assertion that sex with a condom is "safe" is subject to considerable debate. Barbara Reynolds, *Don't Get the Wrong Message From Magic*, USA TODAY, Nov. 15, 1991, at 11A (commenting on safe sex).

Magic as the messenger of safe sex is troubling. First, there might be safer sex, but there is no such thing as safe sex, either physically or emotionally. In preventing pregnancy, condoms have a 14% to 20% failure rate. If condoms

resulted in increased sexual activity, increased pregnancies, and increased contraction of sexually transmitted diseases among our young.<sup>240</sup> The victims of such inaccuracies, children who look to their instructors for truth, have suffered a great harm.

Sex education malpractice as a new cause of action may serve to redress such wrongs. Although similar to claims in classical educational malpractice that have been rejected by the courts, sex education malpractice is uniquely distinguishable. A claim in sex education malpractice is distinguishable from classical educational malpractice claims because a legal duty may be clearly and cleanly established. While the science of pedagogy is fraught with conflicting theories, the sciences of human reproduction and of infectious disease and their transmission are well-known and share broad consensus within the medical community, thus providing clear, objective criteria by which to apply a legal duty. A claim in sex education malpractice is further distinguishable because causation is not muddled by a myriad of societal factors, but rather focuses upon whether a student relied upon inaccurate information. Further still, a claim in sex education malpractice is unique due to its tangible, physical, and legally compensable injury. Thus, concerns over whether a vague, ill-defined educational injury exists are immaterial.

Sex education malpractice claims are further distinguishable from past educational malpractice actions because the public policy considerations that prompted a rejection of such claims are either inapplicable altogether or wholly unpersuasive. Because the legal issues do not surround evaluation of educational theories and methods, but rather focus on clearly defined legal duties, concerns about unnecessary intrusion by the courts into the educational system are unfounded. Further, because the remedy is not for an educational injury, but rather for a physical injury, courts need not meddle in the intricacies of educational remedies. Additionally, since the social utility of education and reliance upon instruction are bedrock principles that society should foster, requiring accuracy in dissemination of such information is critical and therefore worthy of enforcement. Lastly, concern over an adverse economic and administrative impact upon school districts is unpersuasive because the specificity of injury and objective criteria available to define a legal duty effectively filter feigned claims from potential adjudication. Preclusion of a remedy for vulnerable children suffering a legally compensable injury directly caused by a breach of a clearly defined legal duty for reasons of inconvenience makes a mockery of our system of justice and should be avoided.

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aren't so hot at preventing life, how did they become perfect preventing death?

*Id.*

240. See DOBSON, *supra* note 119, at 212 (stating that unwed pregnancies among teens is up 87%); Yoest Testimony, *supra* note 120, at E2722 (unwed births are up 61%); EFFEC-TIVENESS REVIEW, *supra* note 121, at 339 (more than one million teens get pregnant each year).