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Casenotes: Educational Tort Law — Cause of Action for Educational Malpractice Requires Intentional and Malicious Conduct by School Officials. Hunter v. Board of Education, 292 Md. 481, 439 A.2d 582 (1982)

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CASENOTES

EDUCATIONAL TORT LAW — CAUSE OF ACTION FOR EDUCATIONAL MALPRACTICE REQUIRES INTENTIONAL AND MALICIOUS CONDUCT BY SCHOOL OFFICIALS. *Hunter v. Board of Education,* 292 Md. 481, 439 A.2d 582 (1982).

A sixteen-year-old student, acting through his parents as next friend, filed a six-count declaration against the Montgomery County School Board and three professional employees of the Board[1] alleging negligent evaluation of the student's learning abilities.[2] The plaintiffs further alleged that the individual educators intentionally and maliciously supplied them with false information concerning the student's learning disability and altered school records to cover up their actions.[3] The Circuit Court for Montgomery County held that public policy barred the action and the court sustained the defendants' demurrer to the complaint without leave to amend.[4] The Court of Special Appeals of Maryland affirmed.[5]

The Court of Appeals of Maryland agreed with the court of special appeals that public policy barred an action for educational malpractice based on negligence principles and affirmed the lower court's decision with the exception of count II, which alleged an intentional tort.[6] The court held that public policy considerations are outweighed when the cause of action is based on intentional and malicious conduct on the part of school officials and such conduct would warrant recovery against the individual officials.[7] The court cautioned that a plaintiff will have a "formidable burden" in attempting to establish the intent

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1. Hunter v. Board of Educ., 47 Md. App. 709, 710-11 nn. 3 & 4, 425 A.2d 681, 682 nn. 3 & 4 (1981), *rev'd in part,* 292 Md. 481, 439 A.2d 582 (1982). The professional employees were the principal of the plaintiff's elementary school, an employee who conducted diagnostic testing of the plaintiff in the second grade, and the plaintiff's sixth grade teacher.
2. 292 Md. at 483-84, 439 A.2d at 583 (1982). The plaintiffs alleged the negligent evaluation caused the student to repeat first grade materials while in the second grade, and that this misplacement continued through subsequent grades causing the student "to feel 'embarrassment,' to develop 'learning deficiencies,' and to experience 'depletion of ego strength.' " *Id.* at 484, 439 A.2d at 583.
3. *Id.*
4. 47 Md. App. at 711, 425 A.2d at 682 (1981), *rev'd in part,* 292 Md. 481, 439 A.2d 582 (1982).
5. 47 Md. App. at 717, 425 A.2d at 685.
6. 292 Md. at 484-89, 439 A.2d at 583-86 (1982). The Court of Appeals of Maryland reversed the decision of the court of special appeals concerning count II. *Id.* at 490-91, 439 A.2d at 587. The case, reduced to its intentional tort aspects, is pending before the Circuit Court for Montgomery County. Hunter v. Board of Educ., No. 61-815 (Cir. Ct. Mont. Co. 1982).

   In a subsequent decision, the Court of Appeals of Maryland, by a narrow 4-3 margin, affirmatively applied *Hunter* to hold that, absent willful or malicious conduct on the part of professional school board employees, the complaint of a former student and his parents alleging negligent evaluation and placement failed to state a cause of action. Doe v. Board of Educ., 295 Md. 67 453 A.2d 814 (1982).
7. Hunter v. Board of Educ., 292 Md. 481, 490, 439 A.2d 582, 587 (1982).

necessary for such a cause of action.[8]

Under the common law, parents alone had the duty to educate their children,[9] and because of immunities, no cause of action by children against their parents existed for negligent or intentional torts.[10] Consequently, there was no cause of action for educational malpractice under the common law. Even today, no jurisdiction has upheld an action for educational malpractice based on negligence,[11] nor has any court outside Maryland held that an action for educational malpractice can be based on an intentional tort theory. However, a New York court implied in dicta that there might be liability when the alleged actions constituted "gross violations of defined public policy."[12]

In *Hunter v. Board of Education,*[13] the court of appeals rationale for allowing a cause of action for educational malpractice based on an intentional tort theory is grounded in the court's reluctance to protect individuals from liability for outrageous conduct. In the past, the court has not allowed interspousal immunity[14] or parent-child immunity[15] to preclude liability for intentional wrongdoing. *Hunter,* therefore, is a natural extension of the court's decisions allowing recovery for outrageous conduct in areas where recovery is normally precluded for public policy reasons.

The majority's rationale for denying a cause of action for educational malpractice based on a negligence theory is premised upon public policy considerations.[16] Since this was a case of first impression in

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8. *Id.*
9. Note, *Donohue v. Copiague Union Free School District: New York Chooses Not to Recognize "Educational Malpractice,"* 43 ALB. L. REV. 339, 343 (1979); Comment, *Schools and School Districts — Doe v. San Francisco Unified School District, Tort Liability for Failure to Educate,* 6 LOY. U. CHI. L.J. 462, 471 (1975).
10. W. PROSSER, LAW OF TORTS § 122, at 865 (4th ed. 1971).
11. *See, e.g.,* D.S.W. v. Fairbanks N. Star Borough School Dist., 628 P.2d 554 (Alaska 1981); Smith v. Alameda County Social Serv. Agency, 90 Cal. App. 3d 929, 153 Cal. Rptr. 712 (1979); Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976); Hoffman v. Board of Educ., 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979); Donohue v. Copiague Union Free School Dist., 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979); *see also* Loughran v. Flanders, 470 F. Supp. 110 (D. Conn. 1979) (no cause of action for educational malpractice in federal district court).

    In Helm v. Professional Children's School, 103 Misc. 2d 1053, 431 N.Y.S.2d 246 (1980), the court extended its public policy argument from public schools to private schools thereby precluding educational malpractice suits against private schools. *But see* Paladino v. Adelphi Univ., 110 Misc. 2d 314, 442 N.Y.S.2d 38 (1981) (allowed a cause of action based upon breach of contract and fraudulent misrepresentation against a private school).
12. Hoffman v. Board of Educ., 49 N.Y.2d 121, 126, 400 N.E.2d 317, 320, 424 N.Y.S.2d 376, 379 (1979); *see also* Donohue v. Copiague Union Free School Dist., 47 N.Y.2d 440, 445, 391 N.E.2d 1352, 1354, 418 N.Y.S.2d 375, 378 (1979).
13. 292 Md. 481, 439 A.2d 582 (1982).
14. *See* Lusby v. Lusby, 283 Md. 334, 357, 390 A.2d 77, 88 (1978).
15. *See* Mahnke v. Moore, 197 Md. 61, 68, 77 A.2d 923, 926 (1951).
16. Hunter v. Board of Educ., 292 Md. 481, 484-89, 439 A.2d 582, 584-86 (1982).

Maryland,[17] the court of appeals relied heavily on cases decided in Alaska,[18] California,[19] and New York.[20] The court reviewed the public policy considerations put forth by the courts in these states, including the lack of a workable standard of care for teachers, the lack of certainty in establishing the cause and nature of any damages, the heavy burden which would be inflicted on the limited resources of both the public school system and the judiciary, and the possibility of the court's interference with the school board's responsibility for the administration of the public school system.[21]

Acknowledging the difficulties other courts have had in establishing legal cause and measuring damages in educational negligence actions,[22] the *Hunter* majority reasoned that money damages were inappropriate in such cases.[23] The majority also asserted that allowing negligence claims would require the court to act as monitors of both the daily functioning and the policy formulation process of the educational system.[24] The court of appeals did not want to impose this responsibility on the court system, indicating that statutory authority[25] and judicial interpretation[26] give the State Board of Education "the last word on any matter concerning educational policy or the administration of the system of public education."[27]

The *Hunter* majority additionally held that disputes concerning placement and classification of public school students should be resolved by administrative procedures.[28] The court reviewed the scheme provided by the legislature for examining placement decisions concerning handicapped children and indicated that all such decisions are reviewable by the parent, the child, and the county superintendent. The decisions are then appealable to the county board of education, the state board of education, and if appropriate, the circuit court. The court of appeals agreed with the intent of the legislature and the reasoning of the Alaska Supreme Court that it is preferable to settle disputes concerning such decisions by informal means or in administrative

17. *Id.* at 483, 439 A.2d at 583.
18. D.S.W. v. Fairbanks N. Star Borough School Dist., 628 P.2d 554 (Alaska 1981).
19. Smith v. Alameda County Social Serv. Agency, 90 Cal. App. 3d 929, 153 Cal. Rptr. 712 (1979); Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).
20. Hoffman v. Board of Educ., 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979); Donohue v. Copiague Union Free School Dist., 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).
21. Hunter v. Board of Educ., 292 Md. 481, 484-88, 439 A.2d 582, 584-85 (1982).
22. *See, e.g.,* Peter W. v. San Franscisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).
23. Hunter v. Board of Educ., 292 Md. 481, 487-88, 439 A.2d 582, 585 (1982).
24. *Id.* at 488, 439 A.2d at 585.
25. MD. EDUC. CODE ANN. §§ 2-106, 2-205 (1978 & Supp. 1982).
26. Resetar v. State Bd. of Educ., 284 Md. 537, 399 A.2d 225 (1979).
27. *Id.* at 556, 399 A.2d at 235.
28. Hunter v. Board of Educ., 292 Md. 481, 488-89, 439 A.2d 582, 586 (1982).

hearings rather than by the post hoc remedy of civil litigation.[29]

Judge Davidson, in her dissenting opinion, agreed with the majority's views concerning the viability of a cause of action for educational malpractice based on an intentional tort theory,[30] but disagreed with the decision to deny a cause of action based on a negligence theory.[31]

In establishing an applicable standard of care to determine if one has acted negligently, the question of whether public school teachers are professionals must first be confronted.[32] The majority never directly discussed this question.[33] The dissent, however, argued that public educators are professionals, based on the fact that they have special training, are certified by the state, and hold themselves out as having skills and knowledge which are not held by those outside the educational field.[34] In establishing a standard of care, the dissenting judge stated: "As professionals, [teachers] owe a professional duty of care to children who receive their services and a standard of care based upon customary conduct is appropriate."[35] Causation is considered in Judge Davidson's opinion as follows:

> There can be no question that negligent conduct on the part of a public educator may damage a child by inflicting psychological damage and emotional distress. Moreover, from the fact that public educators purport to teach, it follows that some causal relationship may exist between the conduct of a

29. *Id.*; *see* D.S.W. v. Fairbanks N. Star Borough School Dist., 628 P.2d 554, 557 (Alaska 1981).

30. Hunter v. Board of Educ., 292 Md. 481, 491-92, 439 A.2d 582, 587 (1982) (Davidson, J., dissenting).

31. *Id.* at 492, 439 A.2d at 588.

32. Berg v. Merricks, 20 Md. App. 666, 674, 318 A.2d 220, 226 (1974). *Berg* has been interpreted to indicate that the Maryland courts recognize a need for a professional standard of care to measure teacher performance; *see also* Elsom, *Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching,* 73 NW. U.L. REV. 641, 727-30 (1978).

33. The commentators are split on the issue. For support for the proposition that teachers are professionals, see Note, *Educational Malpractice: Can the Judiciary Remedy the Growing Problem of Functional Illiteracy?,* 13 SUFFOLK U.L. REV. 27 (1979). "Although definitions of a profession often exclude education, courts have described educators as professional, and public policy considerations support this proposition." *Id.* at 41. *But see* Halligan, *The Functions of Schools, The Status of Teachers and The Claims of the Handicapped: An Inquiry into Special Education Malpractice,* 45 MO. L. REV. 667, 675 (1980). In his discussion, Halligan states:

> The role of a teacher is important, even critical. But it is not professional in the sense intended by the law of malpractice. It is not a learned profession. It is governed by hierarchical bureaucracies and not by the profession itself. It is a role in which the discretion of individual performing members is closely limited and does not require trust and confidence in the same manner that the work of a physician or lawyer requires them . . . . [T]he duty of a teacher is to follow the orders of superiors.

Id. at 676-77.

34. Hunter v. Board of Educ., 292 Md. 481, 495, 439 A.2d 582, 589 (1982) (Davidson, J., dissenting).

35. *Id.* at 496, 439 A.2d at 589.

teacher and the failure of a child to learn.[36]

Thus, Judge Davidson clearly states that teachers are professionals, have a professional duty of care, and that a causal relationship might exist between a teacher's conduct and the failure of a pupil to learn.

The primary elements of a negligence action are standard of care (duty) and proximate cause (breach of duty) leading to the plaintiff's injury.[37] A plaintiff in a claim for educational malpractice who establishes the elements of a negligence cause of action should be entitled to relief and should be compensated for the injury by being placed in the same position as if the injury had not occurred. If the plaintiff is still a student, he should be offered the necessary remedial education, or the cost of procuring the remedial education, plus compensation for any emotional distress. If the plaintiff has already graduated or otherwise left the school system, he should be compensated for the difference between what he would have earned had he not been negligently taught and what he actually earns, plus the cost of remedial education and compensation for emotional distress. To determine the salary a student would have earned had he not been negligently taught, reference can be made to the many national, state, and local salary surveys conducted in most occupations.[38] The majority expressed concern for the burden educational malpractice actions could place on a school system's limited resources. This burden can be lessened through the purchase of malpractice insurance,[39] and the system's liability could be limited to the amount of premiums paid for the insurance.[40]

The prediction that school boards and courts will be inundated with suits is speculative, at best. Plaintiffs will have a heavy burden in showing causal relationship and injury, and defendants will have all the usual defenses including contributory negligence. For instance, a student's attendance, attitude, and record of performance with respect to homework will be matters of proof, as will the defendant's claim that other forces, such as homelife or peer group pressures, influence a youngster's performance in school. Refusing legitimate relief seems to imply a lack of trust in our educational system and protecting educators from legitimate causes of action seems to imply that educators are

36. *Id.*; *accord* Note, *Educational Malpractice: Can the Judiciary Remedy the Growing Problem of Functional Illiteracy?*, 13 SUFFOLK U.L. REV. 27, 45-48 (1979).

37. *See generally* W. PROSSER, LAW OF TORTS § 30 (4th ed. 1971).

38. *E.g.*, Bureau of Labor Statistics, U.S. Dep't of Labor, Area Wage Survey: Baltimore, Maryland, Metropolitan Area, Bulletin No. 3000-38 (1980) (available from Depository Libraries).

39. MD. EDUC. CODE ANN. § 4-105 (1978 & Supp. 1982) (authorizes purchase of insurance by county boards of education).

40. If a county board of education purchases insurance with a minimum liability coverage of at least $100,000 per occurrence, the "board may raise the defense of sovereign immunity to any amount claimed above the limit of its insurance policy . . . ." *Id.* § 4-105(d).

lesser professionals than lawyers,[41] doctors,[42] architects,[43] accountants,[44] building contractors,[45] and surveyors,[46] all of whom can be held liable for professional malpractice.

The majority held that there were adequate internal administrative procedures for review of student placement and classification.[47] Furthermore, the majority feared that permitting a negligence cause of action would force the courts to monitor both the daily functioning and the policy formulation process of the educational system.[48] The dissent disagreed and stressed that merely because "the Legislature has delegated authority to administer a particular area to certain administrative agencies should not preclude judicial responsiveness to individuals injured by unqualified administrative functioning. In recognizing a cause of action . . . this [c]ourt would . . . provide a remedy to a person harmed by the negligent act of another."[49] The dissent disputed the adequacy of the available administrative procedures and stressed the need for a cause of action to meet the deficiency.[50] The dissent's argument is more persuasive since the internal procedures relied upon by the majority are not appropriate to remedy the harm caused by a misplacement or a misclassification which occurred years in the past. Rather, they are designed to review recent placement decisions and classifications.

While the court's decision is in accord with the decisions of the other three jurisdictions which have decided the question,[51] several commentators argue for allowing a cause of action for educational malpractice based on negligence.[52] Such a cause of action should be permitted with the remedy restricted to remedial education and limited damages. Damages should be available only for lost wages while the

41. *E.g.,* Mumford v. Staton, Whaley & Price, 254 Md. 697, 255 A.2d 359 (1969).
42. For physicians, surgeons, and other medical personnel, see the cases cited in 18 M.L.E., *Physicians & Surgeons* § 31 (1961 & Supp. 1982).
43. *Cf.* Steelworkers Holding Co. v. Menefee, 255 Md. 440, 258 A.2d 177 (1969).
44. *E.g.,* Feldman v. Granger, 255 Md. 288, 257 A.2d 421 (1969).
45. Crockett v. Crothers, 264 Md. 222, 285 A.2d 612 (1972).
46. *Cf.* Downs v. Reighard, 265 Md. 344, 289 A.2d 299 (1972).
47. Hunter v. Board of Educ., 292 Md. 481, 488-89, 439 A.2d 582, 586 (1982).
48. *Id.* at 488, 439 A.2d at 585.
49. *Id.* at 497-98, 439 A.2d at 590 (Davidson, J., dissenting).
50. *Id.* at 497, 439 A.2d at 590.
51. D.S.W. v. Fairbanks N. Star Borough School Dist., 628 P.2d 554 (Alaska 1981); Smith v. Alameda County Social Serv. Agency, 90 Cal. App. 3d 929, 153 Cal. Rptr. 712 (1979); Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976); Hoffman v. Board of Educ., 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979); Donohue v. Copiague Union Free School Dist., 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).
52. Note, *Donohue v. Copiague Union Free School District — New York Chooses Not to Recognize "Educational Malpractice,"* 43 ALB. L. REV. 339, 358-59 (1979); Note, *Nonliability for Negligence in the Public Schools — "Educational Malpractice" from Peter W. to Hoffman,* 55 NOTRE DAME LAW. 814, 831-33 (1980); Note, *Educational Malfeasance: A New Cause of Action for Failure to Educate?*, 14 TULSA L.J. 383, 400 (1978).

student is being re-educated or for the difference between wages earned and wages that would have been earned if the plaintiff had been properly educated originally, plus compensation for any emotional distress. In this way, frivolous or fraudulent cases will be discouraged and an equitable solution will be offered to the truly deserving without overly straining the resources of local boards of education. While the *Hunter* decision is correct with respect to intentional torts, and the majority and minority opinion agree on this issue, the Maryland courts should permit a cause of action for educational malpractice based on negligence, with limitations on recovery as suggested.

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