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## Damages Actions for Denial of Equal Educational Opportunities

Milton B. Garber

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## COMMENT

# DAMAGES ACTIONS FOR DENIAL OF EQUAL EDUCATIONAL OPPORTUNITIES

**ABSTRACT:** This comment examines two actions for monetary recovery by educationally injured students. A central thesis is that one of the key concepts in the analysis of such actions is the "right to an education," which can be interpreted in two different ways. It can mean the right to attain a certain educational *result*, e.g., learning to read at grade level, or it can mean the right to have an equal educational *opportunity*. The significance of this distinction is examined with respect to: (1) actions for professional negligence, i.e., "educational malpractice," and (2) actions under 42 U.S.C. § 1983.

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### I. INTRODUCTION

Imagine a student who attends elementary and secondary schools for twelve years. He is regularly promoted, despite some failing marks and a serious reading deficiency, until finally he is graduated from high school. Subsequently he is rejected for several full time jobs because he is unable to read well enough to fill out a job application form. Tests show he has at best a fifth grade reading ability.<sup>1</sup> Has this student suffered a compensable wrong at the hands of his teachers or school officials?

To date only two cases have been decided at the appellate level on

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1. The facts are substantially those of *Peter W. v. San Francisco School Dist.*, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976), and *Donohue v. Copiague Union Free School Dist.*, 64 A.D.2d 29, 407 N.Y.S.2d 874 (1978) [hereinafter cited as *Donohue I*], *aff'd*, 47 N.Y.2d 440, 391 N.E.2d 1352 (1979) [hereinafter cited as *Donohue II*].

these facts—*Peter W. v. San Francisco School District*<sup>2</sup> and *Donohue v. Copiague Union Free School District, I & II*.<sup>3</sup> In each case the student/plaintiff sued on a negligence theory claiming as his injury the inability to read or write. The appellate decisions in both cases affirmed the trial court's dismissal of the actions.

In light of the above decisions, where do pupil/plaintiffs who cannot read and write stand today? If they sue on a negligence theory and plead as injury their failure to learn to read, they stand to lose. As will be seen, simply recharacterizing the injury might change this result, at least in jurisdictions where sovereign immunity is no problem. In states such as Missouri, sovereign immunity is a problem;<sup>4</sup> consequently, in these jurisdictions an action under 42 U.S.C. § 1983 would be more promising.

The question of a viable legal theory of recovery for educationally injured pupils may become more insistent in the future. Results of Scholastic Aptitude Tests given to high school seniors have declined steadily for the last twenty years<sup>5</sup> and an estimated thirteen percent of all high school graduates are functional illiterates—unable to read and write well enough to get along in modern society.<sup>6</sup> Despite declining college board scores, the high school grades of entering college freshmen are higher than ever before.<sup>7</sup> Such data suggest an erosion of academic standards in secondary schools.

Also indicative of the problem is a substantial decrease over the last fifty years in the number of nonpromotions in elementary schools.<sup>8</sup> During this period the majority of the American educational community adopted the view that holding a child back and requiring him to repeat the same material resulted in boredom and did nothing to enhance the child's educational development.<sup>9</sup> A policy of automatic or "social" promotions became solidly entrenched in American schools.<sup>10</sup> A more prag-

2. 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).

3. *Donohue I*, 64 A.D.2d 29, 407 N.Y.S.2d 874 (1978), *aff'd*, *Donohue II*, 47 N.Y.2d 440, 391 N.E.2d 1352 (1979).

4. RSMo § 537.600 (1978).

5. U.S. NEWS & WORLD REP., Sept. 24, 1979, at 13.

6. U.S. NEWS & WORLD REP., Sept. 10, 1979, at 32. In Missouri 10% of the 67,538 eighth graders taking the Basic Essential Skills Test (BEST) in March 1979 failed the Reading/Language Arts component of the test. See *Summary: 1978-79 School Year BEST Results for Eighth Grade Students*, Missouri Dept. of Elementary and Secondary Education (July 20, 1979). The BEST is designed to measure "minimum adult competencies," essentially functional literacy. A sample question is: "You see this sign: 'Authorized Personnel Only.' This means that (A) children can play in the area, (B) anyone can rest in the area, (C) only special workers belong in the area, or (D) this is a place for writers only."

7. COOPERATIVE INSTITUTIONAL RESEARCH PROGRAM, *THE AMERICAN FRESHMAN: NATIONAL NORMS FOR FALL 1978*, cited in Walsh, *Does High School Grade Inflation Mask a More Alarming Trend?*, 203 SCIENCE 982, 982 (1979).

8. Safer, Heaton & Allen, *Socioeconomic Factors Influencing the Rate of Non-Promotion in Elementary Schools*, 54 PEABODY J. EDUC. 275, 275 (July 1977).

9. Cunningham & Owens, *Social Promotion: Problem or Solution?*, 60 NAASP BULL. 25, 27 (Oct. 1976).

10. *Id.* at 27.

matic explanation for the prevalence of this policy may be found in the increased strain on school facilities due to the combined effects of population growth and compulsory school attendance laws. Financial exigencies favor promoting school children up and out as rapidly as possible.<sup>11</sup>

Whatever the reason for its adoption, the practice of social promotions is the engine that turns out functionally illiterate high school graduates like Peter W. and Donohue. These students may plausibly claim to have been injured by the educational system, and where an injury is claimed the quest for a legal remedy is likely to continue.

## II. PROFESSIONAL NEGLIGENCE AS A THEORY OF RECOVERY

The *Peter W.* and *Donohue* cases centered around claims of professional negligence or "educational malpractice." The essential allegations in each case were: (1) the defendant school teachers and administrators had a duty to the plaintiff either to exercise reasonable care or to exercise the professional skill of an ordinarily prudent educator; (2) the defendants had a duty under the state constitution or statutes to educate the plaintiff;<sup>12</sup> (3) the defendants breached these duties in that they failed to evaluate the plaintiff's performance adequately, failed to provide proper instruction, promoted the plaintiff although he had not mastered the basic skills necessary to benefit from subsequent courses, and ultimately graduated the plaintiff from high school, although he lacked rudimentary skills of reading and writing;<sup>13</sup> and (4) as a proximate result of these negligent acts the plaintiff was injured in that upon graduation from high school he lacked basic skills to the detriment of his employability and earning capacity.<sup>14</sup>

The appellate courts in both cases affirmed the trial courts' dismissal of the complaints. In *Peter W.* the California Court of Appeals refused to find a duty of care in teaching students to read and write, stating that no new area of tort liability should be opened unless "the wrongs and injuries involved were both comprehensible and assessable within the existing judicial framework."<sup>15</sup> The court found that the science of pedagogy is too uncertain to permit the formulation of workable

11. In Missouri, social promotion is regarded as a fact of life originating initially in the 1919 requirement (RSMo § 11523 (1919) (current version at RSMo § 167.031 (1978)) that school attendance be compulsory through age 14. Conversation with Charles G. Foster, Director of Pupil Personnel Services, Dept. of Elementary and Secondary Education (July 30, 1979).

12. *Donohue II*, 47 N.Y.2d at \_\_\_, 391 N.E.2d at 1353; *Peter W.*, 60 Cal. App. 3d at 818, 826, 131 Cal. Rptr. at 856, 862.

13. *Donohue II*, 47 N.Y.2d at \_\_\_, 391 N.E.2d at 1353; *Peter W.*, 60 Cal. App. 3d at 818, 131 Cal. Rptr. at 856.

14. *Donohue II*, 47 N.Y.2d at \_\_\_, 391 N.E.2d at 1353; *Peter W.*, 60 Cal. App. 3d at 818, 131 Cal. Rptr. at 856.

15. *Peter W.*, 60 Cal. App. 3d at 824, 131 Cal. Rptr. at 860. Although not so styled, the argument is basically one of nonjusticiability. See text accompanying notes 115-133 *infra*.

standards for assessing alleged academic wrongs. Doubt was also expressed as to whether an inability to read and write is an "injury" within the law of negligence; *i.e.*, was plaintiff's mastery of verbal skills a legally protected interest?<sup>16</sup> The court further noted the absence of any "perceptible" causal connection between the defendant's conduct and the injury alleged by the plaintiff; after all, there could be many reasons for the plaintiff's inability to read.<sup>17</sup> Finally, the court stressed the burdens of time and money that might be placed on the educational system if an actionable duty of care were recognized in this situation.<sup>18</sup>

Regarding the allegation that a statutory duty was breached, the California court's characterization of the injury as "failure of educational achievement," an "injury" not "within the meaning of tort law,"<sup>19</sup> was again critical, for if there was no cognizable injury no action would lie. Furthermore, the California education statutes were held to be directed to the provision of educational benefits, not to the protection against injury of any kind.<sup>20</sup>

In *Donohue I*, the New York Supreme Court quoted extensively from *Peter W.* and reached the same result for similar reasons. The dissent contended, however, that courts are no less competent to try educational malpractice cases than they are to try medical malpractice cases, and furthermore, that if a flood of litigation were feared, the state would not have abolished sovereign immunity years ago.<sup>21</sup>

In *Donohue II* the New York Court of Appeals unanimously affirmed *Donohue I*, but on different reasoning. The court in *Donohue II* held that "a complaint alleging 'educational malpractice' might on the pleadings state a cause of action within traditional notions of tort law."<sup>22</sup> Citing a leading law review article published after *Donohue I* was decided,<sup>23</sup> the court accepted the notion of "a legal duty of care flowing from educators, if viewed as professionals, to their students."<sup>24</sup> The court also conceded that a judicially manageable standard of care might be evolved, that proximate cause might be established, and that there might be a

16. 60 Cal. App. 3d at 824-26, 131 Cal. Rptr. at 860-62. The plaintiffs' characterization of their injury in results-oriented terms, *i.e.*, in terms of their disability to read or write, was probably fatal in both *Peter W.* and *Donohue*. A central proposition of this comment is that characterization of a plaintiff's injury in terms of a deprivation of an equal educational opportunity may be more successful. For example, does a student with a second grade reading ability who has been socially promoted to the eighth grade have an equal or fair opportunity to benefit from eighth grade course materials?

17. *Id.*

18. *Id.* at 825, 131 Cal. Rptr at 861.

19. *Id.* at 826, 131 Cal. Rptr. at 862.

20. *Id.*

21. *Donohue I*, 64 A.D.2d at 41-42, 407 N.Y.S.2d at 883.

22. *Donohue II*, 47 N.Y.2d at \_\_\_, 391 N.E.2d at 1354.

23. Elson, *A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching*, 73 Nw. L. REV. 641 (1978).

24. *Donohue II*, 47 N.Y.2d at \_\_\_, 391 N.E.2d at 1353.

judicially cognizable injury in such a case.<sup>25</sup> Nonetheless, the court held that as a matter of public policy such claims should not be entertained by the courts because of the administrative law doctrine of primary jurisdiction.<sup>26</sup> The court found that the New York Constitution and statutes vested control and management of educational affairs in the Board of Regents and the Commissioner of Education and that judicial recognition of the plaintiff's cause of action would constitute "blatant interference" with responsibilities lawfully committed to these administrative agencies.<sup>27</sup>

On the question of a breach of statutory duty, the court cited *Moch Co. v. Rensselaer Water Co.*<sup>28</sup> in holding that the education laws were not intended to impose a duty on a school district "to ensure that each pupil receives a minimum level of education, the breach of which duty would entitle a pupil to compensatory damages."<sup>29</sup> According to the court, any power of review over educational operations was given by the constitution to the legislature and not to the courts acting at the behest of pupil/plaintiffs.

*Donohue II* is the most recent decision on educational malpractice. The holding that such a cause of action may exist is binding only in New York; however, the court was obviously influenced by John Elson's painstaking 130 page treatment of the topic in *A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching*.<sup>30</sup> There is no reason to believe the influence of this work will be limited to New York, and it is unnecessary to rehearse here the arguments concerning the nature of the duty of care, if any, owed to students and whether or not a submissible case may be made on the question of proximate cause. These matters, according to *Donohue II*, can be taken as tentatively settled in favor of the plaintiffs. The issue as to the nature of the injury, however, requires comment.

In *Donohue II* the court refused to intervene in academic functions on the ground that primary jurisdiction over the academic operations of schools is properly committed to administrative agencies. A student's claim of injury based on his failure to learn to read or write calls directly into question the competency of educational personnel in their area of expertise, teaching. A claim of this kind of injury naturally evokes the doctrine of primary jurisdiction; when the issue is the competency of experts the agency in charge of such experts should handle the matter first.

25. *Id.* at \_\_\_\_, 391 N.E.2d at 1353-54.

26. See generally *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); B. SCHWARTZ, *ADMINISTRATIVE LAW* §§ 165-171 (1976). The public policy rationale was recently cited in upholding the dismissal of an educational malpractice suit against a private school in New York. *Pietro v. St. Joseph's School*, 48 U.S.L.W. 2229 (U.S. Sept. 21, 1979).

27. *Donohue II*, 47 N.Y.2d at \_\_\_\_, 391 N.E.2d at 1354.

28. 247 N.Y. 160, 159 N.E. 896 (1928).

29. *Donohue II*, 47 N.Y.2d at \_\_\_\_, 391 N.E.2d at 1353.

30. Elson, *supra* note 23.

What, though, if the injury asserted is not the failure to learn, but is the deprivation of an opportunity to learn? This claim raises not only a question of educational expertise but also a question of a constitutional right, thereby undercutting the applicability of the doctrine of primary jurisdiction. The United States Supreme Court stated in *Brown v. Board of Education*:<sup>31</sup>

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a *right* which must be made available to all on equal terms.<sup>32</sup>

With respect to this constitutional right, the argument goes back to the ubiquitous practice of social promotion. When a student is promoted to a class level substantially above his competency, he is, in effect, deprived of an opportunity to benefit from the course material in the upper level classes. This is what must have happened at some point to students Peter W. and Donohue. A student in eighth grade classes, who, for example, has only a second grade reading level is obviously at a serious disadvantage—a disadvantage caused by his wrongful placement in the eighth grade classes. In *Brown*, of course, the Court was talking about racial minorities being disadvantaged by their wrongful placement in segregated schools; however, there is no reason why the principle should not apply to other groups of students who are wrongfully placed in a disadvantageous educational setting.

Support for this argument comes from the same court that decided *Donohue I*. In *Hoffman v. Board of Education*,<sup>33</sup> the court held that plaintiff was entitled to \$500,000 in damages because he had been wrongly placed in a class for children with retarded mental development. Shortly after entering kindergarten, plaintiff's IQ was tested by the school board's psychologist and determined to be 74, one point below the cutoff level for regular classes. The psychologist, however, expressed some uncertainty as to the test's accuracy and recommended that the child's intelligence be re-evaluated within two years. The re-evaluation did not take place until eleven years later when the plaintiff was seventeen years old. At this time plaintiff's IQ was rated at 94 by one test and 100 by another. There was compelling evidence that plaintiff's IQ had never been as low as 74.<sup>34</sup>

Expert testimony established that plaintiff had suffered diminished intellectual development and psychological depression as a result of his

31. 347 U.S. 483 (1954).

32. *Id.* at 493 (emphasis added). In a companion case the Court reached the same conclusion on the basis of the fifth amendment due process clause. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

33. 64 A.D.2d 369, 410 N.Y.S.2d 99 (1978).

34. *Id.* at 382 n.8, 410 N.Y.S.2d at 108 n.8.

lengthy misplacement in classes for the mentally retarded.<sup>35</sup> The rule seems clear that a diminished capacity to learn resulting from wrongful placement in a disadvantageous educational setting is a compensable injury. The injury is not so much the absence of any specific substantive learning, but rather the diminution of one's opportunity to learn.<sup>36</sup>

It should be noted that the majority in *Hoffman* sought to distinguish *Donohue I* on the ground that *Hoffman* involved *misfeasance* by school officials in placing plaintiff in the wrong class and then failing to follow their psychologist's recommendation of re-evaluation. *Donohue*, on the other hand, involved an allegation of *nonfeasance* in failing to teach the plaintiff to read.<sup>37</sup> Justice Damiani, the author of the court's opinion in *Donohue I*, dissented in *Hoffman* and in so doing made short work of the majority's attempt to distinguish *Donohue*. In the first place, the conduct complained of in *Hoffman*—failure to re-test plaintiff within two years—was an act of omission, *i.e.*, nonfeasance; whereas, the conduct complained of in *Donohue*—failure to teach properly—was an act of misfeasance.<sup>38</sup> But, the dissent continued, even if the majority had gotten the labels straight, it would make no difference. "Negligence exists when injury results from the violation of a legal duty . . . , whether the act in violation be active or passive, of commission or omission, of misfeasance or nonfeasance."<sup>39</sup> According to Justice Damiani the *Hoffman* court should have followed *Donohue I* and found for the defendant school board on the ground that no legal duty of care runs from school officials to school children with respect to the performance of academic functions.<sup>40</sup> Although Justice Damiani was probably correct in believing that *Hoffman* implicitly rejected this holding of *Donohue I*, the matter is now settled in New York with the acceptance in *Donohue II* of a duty of care flowing from professional educators to their students.

Returning to *Donohue II*, the question remains: How solid is the primary jurisdiction argument on which that decision rested? In *Donohue II* the injury alleged was plaintiff's reading disability and the conduct complained of was negligent evaluation, teaching, and promotion of the plaintiff. In this posture the case called into question an array of pedagogical

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35. *Id.* at 379, 410 N.Y.S.2d at 106. This description of the damage is reminiscent of the Supreme Court's finding in *Brown* that racial segregation of school children "generates a feeling of inferiority . . . that may affect their hearts and minds in a way unlikely ever to be undone. . . . A sense of inferiority affects the motivation to learn." *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954).

36. The most important shortcoming in Elson's analysis of the educational malpractice cause of action is his characterization of the injury in terms of "failure to learn." He speaks also of "affective or emotional" harm, but his analysis stops short of characterizing the injury as a deprivation of an opportunity to learn. Elson, *supra* note 23, at 755.

37. *Hoffman v. Board of Educ.*, 64 A.D.2d 369, 386, 410 N.Y.S.2d 99, 110 (1978).

38. *Id.* at 399, 410 N.Y.S.2d at 118.

39. *Id.*

40. *Id.*



practices without alleging any established legal interest infringed by such practices. Absent a clear legal interest on which to focus the analysis, the court felt a general review of the defendant's pedagogical practices would intrude too deeply into areas over which educational agencies had primary responsibility. If, however, plaintiff had pleaded as his injury a deprivation of his opportunity to learn, a constitutional deprivation, resulting from a specific negligent educational practice (social promotion), the primary jurisdiction defense might have been less persuasive.

It appears then that a cause of action for educational malpractice might be viable, at least in a jurisdiction such as New York that has abolished the doctrine of sovereign immunity. In Missouri, however, sovereign immunity remains basically intact. Consequently, an educationally injured student in Missouri would require a different legal theory to recover from a public school or school district. The most promising theory would appear to be an action under 42 U.S.C. § 1983 which would not be barred by state sovereign immunity.<sup>41</sup>

### III. SECTION 1983 AS A THEORY OF RECOVERY

Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.<sup>42</sup>

The principal considerations with respect to a potential section 1983 action by an educationally injured student are: (1) the sources and nature of federal rights allegedly infringed; (2) whether or not the claim presents questions that are justiciable; (3) whether the eleventh amendment bars actions against a public school or school district; (4) the nature of the mental state required for liability and the availability of qualified immunities to school officials; and (5) the nature and proof of damages.

#### A. Sources and Nature of Federal Rights

Federally protected rights can arise directly from the Federal Constitution or statutes, or indirectly from state constitutions or statutes. The fourteenth amendment prohibits states from depriving any persons of

41. The supremacy clause in U.S. CONST. art. VI, cl. 2, bars applicability of state sovereign immunity statutes to § 1983 actions.

42. 42 U.S.C. § 1983 (1976). 28 U.S.C. § 1343 (3) (1976) gives federal district courts jurisdiction to entertain § 1983 actions. In Missouri, federal jurisdiction has been held not to be exclusive and § 1983 actions are thus cognizable in state circuit courts. *Shapiro v. Columbia Union Nat'l Bank & Trust Co.*, 576 S.W.2d 310 (Mo. En Banc 1978), cert. denied, 48 U.S.L.W. 3210 (U.S. Oct. 1979). State remedies need not be exhausted before invoking § 1983. *McNeese v. Board of Educ.*, 373 U.S. 668, 671-72 (1963); *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

"life, liberty, or property, without due process of law."<sup>43</sup> The United States Supreme Court has held that the *liberty* interests protected by this amendment may derive from state as well as federal law. "We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the state."<sup>44</sup> The Court has held also that *property* interests protected by the fourteenth amendment may be derived from state as well as federal statutes.<sup>45</sup> In fact, constitutionally protectible property interests may be derived from contractual relationships and even from informal policies and practices amounting to an institutional common law.<sup>46</sup> Thus, both federal and state sources must be examined in considering whether an educationally injured student has a federally protected right upon which to base a section 1983 claim.

### 1. Federal Constitutional Rights

There is no explicit right to an education in the United States Constitution. If such a right exists, it probably arises from the due process or equal protection clauses.<sup>47</sup> At the heart of these clauses are such elusive concepts as "liberty," "fairness," and "equality." Political philosophers have often noted an inherent duality in these concepts. For instance, do equality and freedom exist when everyone has an equal right to publish a newspaper or only when everyone has a printing press? Is it the negative absence of restraint or the affirmative capacity to act that makes for liberty or equality?<sup>48</sup> Steeped in a Lockean tradition of limited government, members of the United States Supreme Court have tended strongly toward the negative concepts of freedom and equality. In *Bolling v. Sharpe*<sup>49</sup> the Court said:

Although the Court has not assumed to define "liberty" with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective.<sup>50</sup>

The emphasis upon freedom from restraint is obvious.

Although still dominant in American judicial philosophy, the negative concept of liberty has recently yielded slightly to a more positive or

43. U.S. CONST. amend. XIV, § 1.

44. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1977). See also Schopler, *Annotation: Supreme Court's Views as To Concept of "Liberty" Under Due Process Clauses of Fifth and Fourteenth Amendments*, 47 L. Ed. 2d 975, 981 (1976).

45. *Board of Regents v. Roth*, 408 U.S. 564 (1972).

46. *Perry v. Sindermann*, 408 U.S. 593 (1972).

47. U.S. CONST. amends. V, XIV, § 1. See generally Hogan, "Obtaining an Education" as a Right of the People, 3 NOLPE SCH. L.J. 15 (1973); Note, *The Right to Education: A Constitutional Analysis*, 44 U. CIN. L. REV. 796 (1975).

48. For treatments of the twin concepts of liberty in social theory, see C. BAY, *THE STRUCTURE OF FREEDOM* 27-64 (1965); I. BERLIN, *FOUR ESSAYS ON LIBERTY* 118-72 (1969); G. TINDER, *POLITICAL THINKING* 81-83 (1970).

49. 347 U.S. 497 (1954).

50. *Id.* at 499-500. A similar definition of "liberty" may be found in *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923).

affirmative concept. According to one scholar the crucial break came in 1937 with the end of the judicial attempt to establish a laissez faire government.<sup>51</sup> In *West Coast Hotel v. Parrish*<sup>52</sup> the Court said: "[T]he liberty safeguarded is liberty in a social organization which *requires* the protection of law against the evils which menace the health, safety, morals and welfare of the people."<sup>53</sup> Arthur S. Miller wrote that with this case "the nature of liberty under the Constitution was changed; the Positive State received its constitutional underpinnings. The Court expressly recognized that liberty could be infringed by forces other than government and that to counteract them government intervention may be required."<sup>54</sup>

The notion of affirmative government action to enhance individual equality and liberty received another boost in the segregation cases. "Though purportedly acting negatively in cutting away specific acts of racial discrimination . . . the operational impact of the decisions since *Brown* is to require affirmative action by state officials."<sup>55</sup> Even Chief Justice Burger has tested the waters by stating in dicta: "No one can question the State's duty to protect children from ignorance."<sup>56</sup> This statement suggests a right to education, an implication possibly at odds with the Court's official position that there is no fundamental constitutional right to education: "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."<sup>57</sup>

Thus, when the question is cast in terms of whether there is a positive, constitutional right to have an education, the Court says the answer is "no." However, when the question is cast in negative terms, *i.e.*, in terms of whether there is a right not to be deprived of an opportunity to get an education, the answer is "yes," there is such a right.<sup>58</sup> It is obvious that when the facts permit alternative phrasings, it is crucial for a plaintiff seeking to establish this constitutional right to pose the question in negative terms; that is, in terms appealing to the traditional tendencies of the Court and, for that matter, of American political philosophy.<sup>59</sup>

It may be useful at this point to review some of the cases in which a deprivation of a constitutionally protected right to an educational opportunity has been found. In *Meyer v. Nebraska*<sup>60</sup> the Court held un-

51. Miller, *Constitutional Revolution Consolidated: The Rise of the Positive State*, 35 GEO. WASH. L. REV. 172 (1966).

52. 300 U.S. 379 (1937).

53. *Id.* at 391 (emphasis added).

54. Miller, *supra* note 51, at 176.

55. Miller, *An Affirmative Thrust to Due Process of Law?*, 30 GEO. WASH. L. REV. 399, 414 (1962).

56. *Wisconsin v. Yoder*, 406 U.S. 205, 222 (1972).

57. *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

58. "Such an opportunity [to get an education], where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

59. See generally L. HARTZ, *THE LIBERAL TRADITION IN AMERICA* 50-66 (1955).

60. 262 U.S. 390 (1923).

constitutional a Nebraska statute prohibiting the teaching of foreign languages to children who had not yet passed the eighth grade. The Court said the statute unreasonably infringed the liberties of pupils to acquire useful knowledge, of teachers to teach, and of parents to control the education of their children.<sup>61</sup> Thus, the opportunity to learn a foreign language was protected from an unreasonable restraint.

A series of cases applied the separate-but-equal doctrine of *Plessy v. Ferguson*<sup>62</sup> in the field of education. The cases held that when a state made a certain type of education, e.g., a legal education, available to white students, a truly equal educational opportunity must be made available to Negro students. Failure to do so amounted to a deprivation of the Negro students' constitutional right to an equal educational opportunity.<sup>63</sup> This series of cases culminated in *Brown* where it was held that racially segregated schools were inherently unequal in terms of educational opportunities offered.<sup>64</sup> These cases posed the question of educational deprivation in two forms: total exclusion from the white schools,<sup>65</sup> and admission with subsequent exclusion from effective participation in the schooling.<sup>66</sup> The latter form of the question is the one most relevant to students who find themselves in classes substantially above their competencies in reading and writing.

Both total and partial exclusion cases can be found in areas not involving racial segregation. Cases have held that "exceptional" children, i.e., "mentally retarded, emotionally disturbed, physically handicapped, hyperactive and other children with behavioral problems," cannot be denied access to all publicly supported education.<sup>67</sup> *Hosier v. Evans*<sup>68</sup> held that children who were not permanent residents of the Virgin Islands could not be denied admission to the public schools there. The courts in both *Hosier* and *Mills v. Board of Education* recognized that considerations of public expense and increased administrative burdens were not sufficient to justify exclusion of these children from a public education when such an education was available to other children.<sup>69</sup>

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61. *Id.* at 401.

62. 163 U.S. 537 (1896).

63. *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

64. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

65. *Id.*; *Sweatt v. Painter*, 339 U.S. 629 (1950); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

66. *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

67. *Mills v. Board of Educ.*, 348 F. Supp. 866, 868, 875 (D.D.C. 1972). *Accord*, *Pennsylvania Ass'n for Retarded Children v. Commonwealth*, 343 F. Supp. 279 (E.D. Pa. 1972).

68. 314 F. Supp. 316 (D.V.I. 1970).

69. *Id.* at 320; *Mills v. Board of Educ.*, 348 F. Supp. 866, 876 (D.D.C. 1972). *Cf. Goldberg v. Kelly*, 397 U.S. 254 (1969) (greater expense and administrative burdens insufficient reasons for depriving welfare recipients of their constitutional right to a hearing before termination of their benefits).

*Hobson v. Hansen*,<sup>70</sup> a case involving exclusion from effective participation in educational processes, arose from a District of Columbia practice of using aptitude tests to place school children in educational tracks. The court found that the aptitude tests were standardized to white middle class standards and that this frequently caused Negro and disadvantaged children to be relegated to the lower tracks with little chance of escape. The court held this to be a denial of an "equal opportunity to obtain the white collar education available to the white and more affluent children."<sup>71</sup> The court further stated:

Inevitably children from lower socioeconomic levels will tend to have had a very limited background conducive to developing communicative skills of the kind required for success in the normal academic curriculum. They will tend above all to be handicapped in the use of standard English. . . . Consequently, unless these children are given intensive remedial instruction in basic skills, primarily in reading . . . , they will be condemned to a substandard education.<sup>72</sup>

The court also held that the right to an equal educational opportunity is embodied in the due process clause as well as in the equal protection clause. "[T]he doctrine of equal educational opportunity—the equal protection clause in its application to public school education—is in its full sweep a component of due process."<sup>73</sup>

The *Hobson* opinion is notable in that it invokes both negative and positive concepts of liberty. There is the negative notion that Negro and disadvantaged students should be freed from the restraints of an unfair testing and placement system. There is also the positive notion that if an education is available at the level of white middle class students, then other students must affirmatively be given the opportunity (through intensive remedial instruction in basic skills) to participate effectively in that education.

In *Lau v. Nichols*<sup>74</sup> the question presented was whether approximately 1,800 students in San Francisco whose native language was Chinese had a right to supplemental instruction in English in the public schools. The Court held that the students had such a right but reached its decision on a statutory, not constitutional, ground. Although fourteenth amendment grounds were argued, the Court found it sufficient to hold that denial of "a meaningful opportunity to participate in the educational program"<sup>75</sup> violated section 601 of the 1964 Civil Rights Act which bans discrimination

70. 269 F. Supp. 401 (D.D.C. 1967).

71. *Id.* at 407.

72. *Id.* at 471. See also *Larry P. v. Riles*, 48 U.S.L.W. 2298 (U.S. Oct. 16, 1979) (denial of equal protection where utilization of IQ tests standardized to white middle class children resulted in placement of disproportionate numbers of black children in classes for the mentally retarded).

73. 269 F. Supp. at 493.

74. 414 U.S. 563 (1974).

75. *Id.* at 568.

"on the grounds of race, color, or national origin" in federally funded programs.<sup>76</sup> Even though the constitutional issues were not reached, the Court's reasoning in finding an educational deprivation is important:

[S]tudents who do not understand English are effectively foreclosed from any meaningful education. Basic English skills are at the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education.<sup>77</sup>

Justice Blackmun, with Chief Justice Burger joining him, concurred only because large numbers of students were involved.<sup>78</sup>

The facts in *Serna v. Portales Municipal Schools*<sup>79</sup> were essentially the same as in *Lau* except Spanish-surnamed children were involved. The district court held that the children's English language deficiencies and a paucity of bilingual instructors constituted a deprivation of the children's constitutional right to an equal educational opportunity.<sup>80</sup> The Tenth Circuit, however, affirmed on the basis of the 1964 Civil Rights Act, as in *Lau*, without reaching the constitutional issues. The appellate court emphasized that "numbers are at the heart of this case and only when a substantial group is being deprived of a meaningful education will a Title VI violation exist."<sup>81</sup> Here, too, arguments concerning financial considerations were not permitted to bar the vindication of students' educational rights.

The main argument favoring a policy of social promotion is the financial one, *i.e.*, cost effectiveness. If large numbers of students were held back, there might not be enough teachers or school rooms to accommodate them. The courts, however, have not been very receptive to this argument where federally guaranteed rights were involved. In *Stanley v. Illinois*,<sup>82</sup> Justice White's majority opinion held that a state could not terminate the parental rights of unwed fathers, for reasons of administrative efficacy, without meeting due process requirements of notice and hearing. What Justice White said there could well be applied to the practice of social promotion:

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76. 42 U.S.C. § 2000 (d) (1976).

77. 414 U.S. at 566.

78. *Id.* at 572.

79. 351 F. Supp. 1279 (D.N.M. 1972), *aff'd*, 499 F.2d 1147 (10th Cir. 1974). *Accord*, *Arvizu v. Waco Indep. School Dist.*, 373 F. Supp. 1264 (W.D. Tex. 1973), *rev'd in part*, 495 F.2d 499 (5th Cir.), *rehearing denied*, 496 F.2d 1309 (5th Cir. 1974) (absence of appropriate curriculum for Mexican-American pupils created an "inherently unequal" situation which placed an affirmative duty on school officials to provide for the special needs of these pupils). *See generally* McCarthy & Thomas, *The Right to an Education: New Trends Emerging from Special Education Litigation*, 7 NOLPE Sch. L.J. 76 (1977).

80. 351 F. Supp. at 1282.

81. 499 F.2d at 1154.

82. 405 U.S. 645 (1972).

The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. . . . Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important rights of both parent and child. It therefore cannot stand.<sup>83</sup>

In sum, courts have acted consistently to vindicate equal educational opportunity rights. The right of elementary school children not to be unreasonably denied an opportunity to learn a foreign language was upheld in *Meyer v. Nebraska*.<sup>84</sup> The rights of racial minorities,<sup>85</sup> handicapped children,<sup>86</sup> culturally deprived children,<sup>87</sup> non-resident students,<sup>88</sup> and linguistic minorities<sup>89</sup> have all been vindicated in the face of discriminatory school practices. In none of these instances have considerations of financial cost or administrative efficacy been sufficient to save the discriminatory practice.

The *Meyer* case is unique in dealing with elementary school children in general. Other cases have dealt with a deprivation suffered only by some identifiable sub-group of school children; consequently, these cases fit more comfortably within the favored notion of negative liberty as opposed to positive liberty. The courts are more ready to remove restraints on the liberty of a few children than they are to require the affirmative enhancement of the liberty of all. In this context it could easily be argued that students who are advanced *via* social promotion constitute a sub-group whose liberty to learn is inequitably restrained. Their opportunity to benefit from the courses offered is restrained by their inadequate verbal skills just as the opportunities of the children in *Lau* and *Serna* were restrained.

The principal judicial obstacle to finding a constitutional right on which to base a section 1983 action is *San Antonio School District v. Rodriguez*,<sup>90</sup> where the Supreme Court held that "education" is not a fundamental right protected by the Federal Constitution.<sup>91</sup> This holding arose in the context of a school financing case. Appellees' argument was that wealthy school districts raised more money from property taxes and therefore had more money per pupil to spend, resulting in a denial of equal protection to students in poorer districts. A preliminary question,

83. *Id.* at 656-57.

84. 262 U.S. 390 (1923).

85. See notes 63-64 and accompanying text *supra*.

86. See note 67 and accompanying text *supra*.

87. *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967).

88. *Hosier v. Evans*, 314 F. Supp. 316 (D.V.I. 1970).

89. *Lau v. Nichols*, 414 U.S. 563 (1974); *Serna v. Portales Mun. Schools*, 351 F. Supp. 1279 (D.N.M. 1972), *aff'd*, 499 F.2d 1147 (10th Cir. 1974).

90. 411 U.S. 1 (1973).

91. *Id.* at 35.

however, was whether appellees had asserted a fundamental right which would trigger the compelling state interest standard of review.<sup>92</sup> On this issue, a majority of five held that education was not a fundamental right.

The *Rodriguez* decision was based on the following reasoning: (1) A right is "fundamental" only if it is explicitly or implicitly guaranteed by the Constitution.<sup>93</sup> (2) A right to education is not explicitly guaranteed by the Constitution.<sup>94</sup> (3) A right to education, meaning by "education" the acquisition of substantive knowledge or skills, is not implicitly guaranteed by virtue of any relationship to the rights of speech or vote because the Constitution does not guarantee rights of "the most *effective* speech or the most *informed* electoral choice."<sup>95</sup> (4) Therefore, the right to education, which is neither explicitly nor implicitly guaranteed by the Constitution, is not fundamental, *and* even if it is fundamental by virtue of a linkage to the rights of speech and vote, "no charge fairly could be made that the system fails to provide each child with an *opportunity* to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and full participation in the political process."<sup>96</sup>

For present purposes the important point to note about this reasoning is that the concept of a "right to education" is used in a positive, substantive, results-oriented sense in step (3) where it is denied "fundamental" status, while it is used in a negative, procedural, opportunity-oriented sense in step (4) where, for purposes of argument, fundamental status is admitted. The Court's analysis overlooks this important conceptual distinction. The holding is clear that a right to education in a substantive, results-oriented sense is not a fundamental constitutional right; however, the constitutional status of a right to an equal educational opportunity is still an open question.

In sum, there is a constitutional right to an equal educational opportunity. Such a right was arguably recognized first in 1923 in *Meyer v. Nebraska*; it was more clearly developed in the segregation cases culminating in an unequivocal statement in *Brown v. Board of Education* in 1954; and since then the right has been recognized and reaffirmed on numerous occasions including an approving quotation from *Brown* in *Rodriguez*.<sup>97</sup> The right is more likely to be vindicated when it is asserted in negative, procedural, opportunity-oriented terms than when it is asserted in positive, substantive, results-oriented terms. Arguments as to financial cost and administrative efficacy have not proven effective to

92. *Id.* at 17.

93. *Id.* at 33-34. This proposition was vigorously disputed by Justice Marshall in a lengthy dissenting opinion. Justice Marshall detailed several rights regarded by the Court as "fundamental" but which cannot meet the "explicit-implicit" test adopted by the majority in the present case. *Id.* at 100 (Marshall, J., dissenting).

94. *Id.* at 35.

95. *Id.* at 36.

96. *Id.* at 36-37 (emphasis added).

97. *Id.* at 29-30.



sustain school practices in derogation of this right. Whether the right is a "fundamental" one capable of invoking the compelling state interest standard of review is not clear at this time.<sup>98</sup>

## 2. Federally Protected Rights from Non-Constitutional Sources

Pertinent educational rights may arise from two federal acts, section 504 of the Rehabilitation Act of 1973<sup>99</sup> and the Education for All Handicapped Children Act of 1975.<sup>100</sup> The acts are identical in defining "handicapped children" and in requiring a "free appropriate public education" for all such children between the ages of three and eighteen at present and between the ages of three and twenty-one after September 1, 1980. The main difference between the acts is that the Education for All Handicapped Children Act is simply a granting formula—states complying with its standards are eligible for federal funds—whereas section 504 is a mandatory civil rights law applicable to any program receiving funds in excess of \$2,500, regardless of the purposes for which the funds are received.<sup>101</sup>

Section 504 has been held to create affirmative rights capable of supporting a private right of action.<sup>102</sup> Previous section 504 actions in the education area have not been successful because of application by the courts of primary jurisdiction and exhaustion of remedies doctrines.<sup>103</sup> These cases involved students with pre-existing handicaps (deafness and emotional disturbance), not handicaps created by school practices such as social promotion. When the question is not how best to deal with a pre-

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98. It is possible to formulate an argument for the existence of a positive, substantive right to education. The argument rests on the fact that each state now makes education compulsory for a certain number of years. When a state subjects an individual to "confinement" to a school classroom for six hours a day, nine months a year, for ten years, the state, in abridging the individual's physical liberty, thereby assumes a duty to educate the individual. The Fifth Circuit Court of Appeals has held in two cases that involuntary confinement in a state mental institution creates a constitutional right to medical treatment. The state must either treat or release the patient. *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Donaldson v. O'Connor*, 493 F. 2d 507 (5th Cir. 1974), *vacated on other grounds*, 422 U.S. 563 (1975). Since the degree of "confinement" in public schools is substantially less than that in mental institutions, the argument for a right to education is weaker than that for a right to medical treatment.

99. 29 U.S.C. § 794 (1976). Section 504 bars discrimination against handicapped persons in three major areas: employment, architectural barriers, and education.

100. 20 U.S.C. §§ 1401-1419 (1976). See Comment, *Legal Remedies for the Misclassification or Wrongful Placement of Educationally Handicapped Children*, 14 COLUM. J.L. & Soc. PROB. 389 (1979).

101. For a useful comparison of the two acts, see Erb & Mercer, *Legislation for the Handicapped: in Brief*, 7 NOLPE SCH. L.J. 194 (1977).

102. *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977). *Accord*, *United Handicapped Fed'n v. Andre*, 558 F.2d 413 (8th Cir. 1977). See generally Salomone, *Enforcing Educational Rights Through Private Actions: One Step Beyond Bakke*, 8 NOLPE SCH. L.J. 76 (1978).

103. *Doe v. New York Univ.*, 442 F. Supp. 522 (S.D.N.Y. 1978); *Crawford v. University of N.C.*, 440 F. Supp. 1047 (M.D.N.C. 1977).

existing handicap, but rather how to redress a wrong caused by the educational system itself, the defenses of primary jurisdiction and exhaustion of remedies lose much of their force. The reason for this is that while statutes give educational agencies primary responsibility for treating the educational problems of the handicapped, the courts traditionally have had primary responsibility for remedying the wrongs caused by tortious conduct.

Whether money damages are available on a direct action under section 504 is not clear. Since money damages are clearly allowable under section 1983, it might be best for an educationally injured student to bring his action under section 1983 alleging the deprivation of a right protected by section 504.

The Education for All Handicapped Children Act does not itself create any federally protected rights on which a section 1983 action could be based. The Act, however, operates as an inducement for states to create rights which, in turn, are protected by the due process clause of the Federal Constitution. Such rights could then support a section 1983 action. The pertinent Missouri statutes read as follows:

In order to fully implement section 1 (a) of article IX, constitution of Missouri, 1945, providing for the establishment and maintenance of free public schools for gratuitous instruction of all persons in this State within ages not in excess of twenty-one years as prescribed by law, it is hereby declared the policy of the state of Missouri to provide or to require public schools to provide to all handicapped and severely handicapped children within the ages prescribed herein, as an integral part of Missouri's system of gratuitous education, special educational services sufficient to meet the needs and maximize the capabilities of handicapped and severely handicapped children . . .<sup>104</sup>

*Handicapped children*, children under the age of twenty-one years who have not completed an approved high school program and who, because of mental, physical, emotional or learning problems, require special educational services in order to develop to their maximum capacity.<sup>105</sup>

The Missouri definition of "handicapped children" is broader than the federal definition which provides:

The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special educational and related services.<sup>106</sup>

In Missouri, children with "learning problems" qualify on the face of the statute as handicapped children, assuming they are under twenty-one years

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104. RSMo § 162.670 (1978).

105. RSMo § 162.675 (2) (1978) (emphasis added).

106. Education for All Handicapped Children Act, 20 U.S.C. § 1401 (1) (1976).

of age and have not yet completed high school. The federal statute, reaching no further than "specific learning disabilities," appears narrower. Furthermore, handicapped children in Missouri are entitled to "special educational services in order to develop to their maximum capacity." The federal requirement does not specify an entitlement to "maximal" development of capacities.

The scope of the Missouri entitlement was discussed in *Pitts v. Board of Education*<sup>107</sup> where the Kansas City Court of Appeals said in dictum that a handicapped student was entitled to special education services in order to reach "optimal personal development" even if such development exceeded the average level for all students.<sup>108</sup> The case involved a student who suffered from "organicity—a minimum brain dysfunction—manifested by hyperactivity."<sup>109</sup> The student's IQ scores were above average and his school performance was superior in reading but inferior in math and spelling. His parents sought to have him designated a "handicapped child," and given special education services. The school board refused, and after exhausting administrative review, the parents sought judicial review. Two years after the case was filed the circuit court dismissed the petition as moot on the ground that by the time any new evaluation could be had the student would have graduated from high school. The appellate court affirmed on the basis of mootness but said it was "disconcerted" with the "laggardly" process of determination and added:

The decision of the Board to deny student Pitts evaluation as a handicapped child rests on an error of law. . . . The Act does not consign a student to an hypothetical median level of achievement but allows optimal personal development where the actual capacity exceeds the average . . . . The determinations of the Board that, in effect, the achievement of average scholastic performance disqualifies for the remedial services of the Act are contrary to law.<sup>110</sup>

Under this view, once a handicap is established, the extent of the educational entitlement in Missouri is very broad. If such an entitlement qualifies as a protectible property interest under the due process clause, deprivation of the entitlement could support a section 1983 claim. In *Goss v. Lopez*<sup>111</sup> the United States Supreme Court held that a student's statutory entitlement to a public education is a property interest protected by the due process clause.<sup>112</sup> Missouri's special education statute expressly makes the provision of special education services to handicapped persons "an integral part of Missouri's system of gratuitous education";<sup>113</sup> hence, the

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107. 568 S.W.2d 595 (Mo. App., D.K.C. 1978).

108. *Id.* at 597.

109. *Id.*

110. *Id.*

111. 419 U.S. 565 (1975).

112. *Id.* at 574.

113. RSMo § 162.670 (1978).

extension of the *Goss* ruling to special education entitlements would not be a very great leap.

More difficult than finding a protectible property interest once handicapped status has been established may be the initial establishment of such status with respect to a victim of social promotion. The question is whether, for example, an eighth grader with a second grade reading level is a "handicapped child" within the meaning of the statute. The statute defines a "handicapped child" as a child under age twenty-one who has not completed high school and who "because of mental, physical, emotional or learning problems" requires special educational services.<sup>114</sup> It is arguable that an eighth grade student with a second grade reading level would experience "learning problems" and possibly "emotional problems" as well, and that, absent special educational services, he could not participate effectively in the class. Such a student would not be far removed from those in *Lau v. Nichols*<sup>115</sup> whose lack of basic English skills rendered their "classroom experiences wholly incomprehensible and in no way meaningful."<sup>116</sup> It would be difficult, logically, to deny handicapped status to a student whose lack of basic skills substantially diminished his capacity to benefit from his classroom experiences.

Finally, it may not be necessary to assert a handicapped status in order to establish a federal claim. The Missouri Constitution states:

A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law.<sup>117</sup>

State statutes and regulations implement this command. The State of Missouri has undertaken to provide an opportunity of an education, an opportunity which, once provided, becomes a constitutional right that, according to *Brown*, "must be made available to all on equal terms."<sup>118</sup>

### B. *Justiciability*

In *Baker v. Carr*<sup>119</sup> the United States Supreme Court said the test for justiciability is: "[W]hether the duty asserted can be judicially identified and its breach judicially determined and whether protection for the right asserted can be judicially molded."<sup>120</sup> If the duty, breach, and remedy in a given case are not amenable to judicially manageable

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114. RSMo § 162.675 (2) (1978).

115. 414 U.S. 563 (1974).

116. *Id.* at 566.

117. Mo. CONST. art. 9, § 1 (a).

118. *Brown v. Board of Educ.*, 347 U.S. at 493.

119. 369 U.S. 186 (1962).

120. *Id.* at 198.

standards of review, courts are reluctant to act. This reluctance was illustrated recently in *Board of Curators v. Horowitz*.<sup>121</sup>

In *Horowitz* the Supreme Court held that the academic dismissal of a medical student was "careful and deliberate"<sup>122</sup> and comported with the requirements of procedural due process. For purposes of the present analysis, the question is whether automatic or social promotion is a "careful and deliberate" procedure or practice. If it is not, then presumably it would not meet the requirements of procedural due process. In a social promotion case, however, the question would remain as to whether the wrongful placement of the student in a grade above his competency is comparable to the outright dismissal or exclusion of a student as in *Horowitz*. This raises a substantive due process question with respect to the fairness of the result reached in the proceedings in question.

Expressing the view that "[c]ourts are particularly ill-equipped to evaluate academic performance,"<sup>123</sup> Justice Rehnquist, writing for the Court in *Horowitz*, was reluctant to review the substantive due process claim. While agreeing with the district court that no showing of arbitrariness or capriciousness had been made,<sup>124</sup> he refused to embrace an "arbitrary or capricious" standard of review with respect to academic dismissals from public schools. The reasons given for declining to "enlarge the judicial presence in the academic community" included the fear that such an enlargement would harm the "many beneficial aspects of the faculty-student relationship," and the reluctance of the Court to encroach upon the expertise of professional educators in evaluating their students.<sup>125</sup>

The Missouri Supreme Court has also been reluctant to review the substantive performance of academic functions. *Smith v. Consolidated School District No. 2*<sup>126</sup> involved the propriety of including wrestling in a high school curriculum. In declining to resolve this question, the court said: "The courts will not interfere with the exercise of a school district's discretion except in a case of clear abuse, fraud, or some similar conduct."<sup>127</sup>

These cases manifest a strong judicial doubt as to the availability of manageable standards for reviewing the substantive content of academic functions. In other cases, however, the courts have set such doubts aside and plunged into the thicket.

The segregation cases following *Plessy v. Ferguson*<sup>128</sup> and culminating in *Brown* required in several instances judicial examination of academic offerings to determine whether the separate educational opportunities

121. 435 U.S. 78 (1978).

122. *Id.* at 85.

123. *Id.* at 92.

124. *Id.*

125. *Id.* at 89-90.

126. 408 S.W.2d 50 (Mo. En Banc 1966).

127. *Id.* at 53.

128. 163 U.S. 537 (1896).

were really equal.<sup>129</sup> In *McLaurin v. Oklahoma State Regents*,<sup>130</sup> a Negro admitted to a doctoral program at the University of Oklahoma was required to sit apart from other students in the classrooms, in the library, and in the cafeteria. The Court said: "The result is that appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."<sup>131</sup>

The Court again evaluated relative academic opportunities in *Sweatt v. Painter*<sup>132</sup> where a Negro had been refused admission to the University of Texas Law School but was offered admission to a newly established law school for Negroes. In concluding that the new school did not represent an equal educational opportunity, the Court examined both objective factors such as number of faculty members, course variety, and library size, and qualities incapable of objective measurement such as the reputation of the faculty and experience of the administration.

In *Hobson v. Hansen*<sup>133</sup> the educational opportunities open to Negro and disadvantaged students who were unfairly placed in a lower educational track were examined in great detail and found wanting. In *Lau v. Nichols*<sup>134</sup> and *Serna v. Portales Municipal Schools*<sup>135</sup> the courts felt they were competent to declare the educational opportunities afforded students lacking basic English skills to be legally inadequate.

In *Wisconsin v. Yoder*<sup>136</sup> the question was whether the alternative education provided by Amish citizens for their children was adequate to satisfy the state's interests in universal education. After considering expert testimony presented at the trial level, the Supreme Court concluded that "[the Amish] have carried the even more difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests the State advances in support of its program of compulsory high school education."<sup>137</sup>

The preceding cases indicate that when a serious question as to the equality of an educational opportunity is presented, the courts will examine the merits of the issues. Such issues are in fact justiciable. A section 1983 claim that an educational practice such as social promotion has deprived a student of his constitutional right to an equal educational opportunity would probably not fail for want of justiciability; although, this

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129. See note 63 and accompanying text *supra*.

130. 339 U.S. 637 (1950).

131. *Id.* at 641.

132. 339 U.S. 629 (1950).

133. 269 F. Supp. 401 (D.D.C. 1967).

134. 414 U.S. 563 (1974).

135. 351 F. Supp. 1279 (D.N.M. 1972), *aff'd*, 499 F.2d 1147 (10th Cir. 1974).

136. 406 U.S. 205 (1972).

137. *Id.* at 235.

conclusion must be tempered by the repeated expressions in *Horowitz* of judicial reluctance to review substantive academic issues.<sup>138</sup>

### C. *The Eleventh Amendment*

On its face the eleventh amendment bars suits in federal courts against a state by citizens of another state. The Supreme Court has held that this prohibition extends to suits by a state's own citizens as well.<sup>139</sup> This, then, raises the question whether a public school district can be sued at all under section 1983.<sup>140</sup>

*Mt. Healthy City School District Board of Education v. Doyle*<sup>141</sup> involved a section 1983 action by a school teacher who had been fired. The Supreme Court held that the school board had no eleventh amendment immunity. "The bar of the Eleventh Amendment to suit in federal courts extends to States and state officials in appropriate circumstances . . . , but does not extend to counties and similar municipal corporations."<sup>142</sup> The Court reasoned that a "state" does not, within the meaning of the eleventh amendment, include political subdivisions; that school districts were political subdivisions; and therefore, that school districts were not immunized against suit. In Missouri, school districts are declared by statute to be political subdivisions,<sup>143</sup> and hence should not be entitled to an eleventh amendment immunity.

A different question is whether school districts are amenable to suit as "persons" within the meaning of section 1983. The answer was given in *Monell v. Department of Social Services*<sup>144</sup> where the Supreme Court held: "Local governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief."<sup>145</sup> Dicta in the opinion make it clear that "local governing bodies" includes school boards.<sup>146</sup> The Court added, however, that local governing bodies could not, under section 1983, be held vicariously liable on a theory of *respondeat superior*.<sup>147</sup> Nonetheless, "local governments, like every other 1983 'person,' by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received

138. See Pavela, *Judicial Review of Academic Decisionmaking After "Horowitz,"* 8 NOLPE SCH. L.J. 55 (1978).

139. *Hans v. Louisiana*, 134 U.S. 1 (1890).

140. In *Alabama v. Pugh*, 438 U.S. 781 (1978), a § 1983 suit by prison inmates against the Alabama Board of Corrections was held barred by the eleventh amendment.

141. 429 U.S. 274 (1977).

142. *Id.* at 280.

143. RSMo § 70.210 (2) (1978).

144. 436 U.S. 658 (1978).

145. *Id.* at 690.

146. *Id.* at 696-99.

147. *Id.* at 691. For a thorough analysis of this aspect of the *Monell* decision, see Comment, *Respondeat Superior Liability of Municipalities for Constitutional Torts After "Monell": New Remedies to Pursue?*, 44 MO. L. REV. 514 (1979).

formal approval through the body's official decisionmaking channels."<sup>148</sup> In this context it is not difficult to argue that social promotion is an acknowledged custom of public schools today.<sup>149</sup>

The above discussion indicates that neither the eleventh amendment nor the limitations inherent in the language of section 1983 should preclude the kind of social promotion case being analyzed here.

#### D. *Mental States and Qualified Immunities*

While simple negligence alone will not support a section 1983 action,<sup>150</sup> a finding of "deliberate indifference" has been held to be sufficient.<sup>151</sup> Furthermore, a pattern of related negligent acts may lead to a finding of deliberate indifference:<sup>152</sup>

Where plaintiffs have been able to demonstrate a pattern or practice of improper behavior, knowledge of it has been imputed to the responsible supervisory official so that the injury to the individual no longer appears to be the result of purely negligent conduct—for which the supervisor would not normally be liable—but of the "deliberate indifference" of the supervisor who might have, but did not, take action to prevent continued injuries.<sup>153</sup>

A question might be raised as to whether the imputation of a culpable mental state to the supervisory official or agency runs afoul of *Monell's* strictures against recovery on a *respondeat superior* theory. The focus in *Monell* was on the "causation" requirement of section 1983: "[A]ny person who . . . shall subject or cause to be subjected, any person . . . to the deprivation of any rights . . ." The conclusion was that "Congress did not intend § 1983 liability to attach where such causation was absent."<sup>154</sup> A finding that but for "deliberate indifference" on the part of the supervisory official or agency the injury would not have occurred would

148. *Monell v. Department of Social Serv.*, 436 U.S. 658, 690-91 (1978).

149. As one writer put it: "As recently as last year an educator of national prominence suggested that social promotion was a practice so well entrenched in public schools that only a revolution could erase it." Thompson, *Because Schools are Burying Social Promotion, Kids Must Perform to Pass*, 166 AM. SCH. Bd. J. 30, 30 (Jan. 1979). The very next sentence in the above quotation was, "But he was wrong." This burst of optimism referred to the author's study of five specific school systems and to public opinion polls showing people do not like social promotion. The author subsequently hedged by saying, "All of these rumblings may not add up to a full scale revolution in public education, but they do portend significant changes." *Id.* See also Hogan, "Obtaining an Education" as a Right of the People, 3 NOLPE SCH. L.J. 15 (1973). Note, *The Right to Education: A Constitutional Analysis*, 44 U. CIN. L. REV. 796 (1975).

150. *Estelle v. Gamble*, 429 U.S. 97 (1976); *Williams v. Vincent*, 508 F.2d 541, 546 (2d Cir. 1974). See *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1205 (1977).

151. *Estelle v. Gamble*, 429 U.S. 97, 105 (1976); *Bishop v. Stoneman*, 508 F.2d 1224 (2d Cir. 1974); *Williams v. Vincent*, 508 F.2d 541, 543-44 (2d Cir. 1974).

152. *Bishop v. Stoneman*, 508 F.2d 1224, 1226 (2d Cir. 1974).

153. *Developments in the Law: Section 1983 and Federalism*, *supra* note 150, at 1207.

154. *Monell v. Department of Social Serv.*, 436 U.S. 658, 692 (1978).



appear to meet the *Monell* requirement.<sup>155</sup> Thus, deliberate indifference by school officials to the educational injuries caused by a custom of social promotion could be a sufficient mental state for liability under section 1983.

In *Pierson v. Ray*<sup>156</sup> the Supreme Court held that section 1983 was not meant to abolish common law immunities for government officials and that police officers retain, with respect to section 1983 damage actions, a qualified immunity. School officials were provided a similar qualified immunity in *Wood v. Strickland*.<sup>157</sup> There is no monetary liability for a school official acting "in good faith in the course of exercising his discretion within the scope of his official duties."<sup>158</sup> However, an act done in "ignorance or disregard of settled, indisputable law" is not an act done in good faith,<sup>159</sup> and may even rise to the level of malice, at which point punitive damages might be available.<sup>160</sup>

Would the qualified immunity of school officials be a defense to a section 1983 claim that a student's constitutional right to an equal educational opportunity was violated by the practice of social promotion? The answer under *Wood* would depend on whether or not the act of social promotion was done in ignorance or disregard of settled, indisputable law. Clearly the law is settled and well known to professional educators that there is a constitutional right to an equal educational opportunity,<sup>161</sup> but is this all that is required? Probably not. *Procunier v. Navarette*<sup>162</sup> expanded the *Wood* "disregard of settled law" limitation on the immunity defense by saying:

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155. Causation has also been found where supervisory officials breached a statutory duty to control the conduct of subordinates for the plaintiff's benefit. See *Sims v. Adams*, 537 F.2d 829 (5th Cir. 1976) (action against mayor and police chief for breach of duty to control policeman's known propensity for improper use of force). Such a theory of causation may be relevant to a claim that school officials breached a statutory duty to see that teachers provided special educational services for the benefit of handicapped children. See RSMo § 162.670 (1978).

156. 386 U.S. 547 (1967).

157. 420 U.S. 308 (1975).

158. *Id.* at 319.

159. *Id.* at 321.

160. This was the dissent's interpretation of the Court's holding. *Id.* at 327-31. With respect to the general availability of punitive damages in § 1983 actions, see *Batista v. Weir*, 340 F.2d 74 (3d Cir. 1965); *Palmer v. Hall*, 517 F.2d 705 (5th Cir. 1975). Both cases held punitive damages were available when malice was shown.

161. The right was established in 1954 in *Brown* and has been repeatedly affirmed. See cases cited notes 84-89 *supra*. That the right is well known to professional educators is reflected by the discussions of the right in educational journals. See, e.g., Hogan, "Obtaining an Education" as a Right of the People, 3 NOLPE SCH. L.J. 15 (1973).

162. 434 U.S. 555 (1978). In this case a § 1983 damage action against prison officials alleging interference with a prisoner's outgoing mail failed because the prison officials possessed a qualified immunity and, at the time of the conduct complained of, there was no established first amendment right protecting the mailing privileges of state prison inmates.

[T]he immunity defense would be unavailing . . . if the constitutional right allegedly infringed . . . was clearly established at the time of their challenged conduct, if they knew or should have known of that right and if they knew or should have known that their conduct violated the constitutional norm.<sup>163</sup>

Apparently, then, the question of whether professional educators knew or should have known that a practice of social promotion violated the constitutional right of the students to an equal educational opportunity would be a question for the jury. An affirmative answer would defeat the immunity defense.

#### E. Damages

In *Carey v. Piphus*<sup>164</sup> the Court said Congress intended generally to allow only for compensatory damages under section 1983, although punitive damages might properly be awarded in a case where malice was proved and a deterrent purpose could be served by such an award.<sup>165</sup> In *Carey* a denial of procedural due process occurred with respect to a child's suspension from school for misconduct. No actual injury was shown, however, and damages were limited to a nominal award of one dollar. Mental and emotional distress would have been compensable injuries had they been proven.<sup>166</sup>

In *Peter W.* damages of \$500,000 were pleaded; the plaintiff in *Donohue* alleged damages of \$5,000,000.<sup>167</sup> In *Hoffman*<sup>168</sup> a jury awarded \$750,000 in damages, subsequently reduced to \$500,000 on a remittitur. In an educational injury case compensatory damages may comprise both tangible and intangible damages. The cost of tutorial services needed to redress the injury may involve tutoring the student up to grade level not only in basic skills such as reading, but also in the substantive knowledge he has been deprived of by being in upper level classes where course materials were above his competency level. Other damages might include the value of lost earnings while the student attends the necessary remedial classes and damages for any irremediable harm to the student's intellectual development.<sup>169</sup>

Section 1983 damage actions have often been unsuccessful.<sup>170</sup> One reason has been the qualified immunity available to executive officials. Another reason has been that section 1983 plaintiffs often have not been sympathetic characters, e.g., prison inmates and criminal defendants; whereas the typical section 1983 defendant has been a lower level

163. *Id.* at 562 (emphasis added).

164. 435 U.S. 247 (1978).

165. *Id.* at 255-57.

166. *Id.* at 264.

167. Elson, *supra* note 23, at 761 n.464.

168. *Hoffman v. Board of Educ.*, 64 A.D.2d 369, 410 N.Y.S.2d 99 (1978).

169. For an excellent discussion of the question of damages, see Elson, *supra* note 23, at 754-62.

170. See *Developments in the Law: Section 1983 and Federalism*, *supra* note 150, at 1226.

government official who could ill-afford a heavy damage judgment.<sup>171</sup> Finally, a major reason has been the difficulty of measuring the damages.

For example, it is difficult to place a monetary value on a given plaintiff's exercise of first amendment rights or his right to vote or to attend an integrated public school, or on his dignitary and symbolic interest in not being subjected to false imprisonment, invasion of privacy, or stigmatization.<sup>172</sup>

It is now well recognized, however, that "[d]ifficulty of ascertainment is no longer confused with the right of recovery for a proven invasion of the plaintiff's rights."<sup>173</sup> The Supreme Court has also recognized that it simply is not fair to bar recovery because the damages are difficult to measure:

Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.<sup>174</sup>

It is worth observing that difficulties of measurement have not been a bar to awarding damages for intangibles such as past and future pain and suffering and for mental and emotional distress. The fixing of an appropriate damage award for "diminished intellectual development"<sup>175</sup> and other educational injuries should be no more difficult.

#### IV. CONCLUSION

The preceding analysis indicates that an educational injury resulting from the deprivation of a student's constitutional right to an equal educational opportunity may prove to be a compensable wrong. In states where sovereign immunity has been abolished, a recovery for such an injury may be sought on a theory of educational malpractice. In all states, an action for damages under 42 U.S.C. § 1983 appears to be viable.

MILTON B. GARBER

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171. *Id.* at 1225.

172. *Id.* at 1226.

173. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265-66 (1946).

174. *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555, 563 (1931).

175. *Hoffman v. Board of Educ.*, 64 A.D.2d 369, 379, 410 N.Y.S.2d 99, 106 (1978).