THE NEW EDUCATION MALPRACTICE LITIGATION

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ABSTRACT

In recent years, a growing body of evidence has confirmed what personal experience and intuition have long suggested: the quality of a child's teacher has a profound and lasting impact on the child's academic achievement. According to one expert, replacing just the least effective five percent of America's teaching force with average teachers could catapult our nation's K-12 education system from its current place among the worst performing in the developed world to among the top. Yet for complex reasons related to school culture, administrative inertia, and the time and cost associated with dismissing a teacher for poor performance, schools across the country continue to subject students to chronically ineffective teachers in considerable numbers.

In this Article we revive the argument, first raised in courts in the 1970s and 80s, that children assigned to ineffective teachers should be able to sue school districts under elementary principles of tort law, seeking relief in the form of reassignment to an adequate teacher and remedial education services. Courts initially rejected this "educational malpractice" theory of litigation due to the plaintiffs' inability to establish basic elements of the negligence tort, pointing in particular to the lack of a workable standard of reasonable care (since little consensus existed regarding appropriate pedagogical methods) and problems showing proximate cause (since the effects of teacher quality on student learning were so difficult to prove).

The common law of torts, however, is designed to be judicially responsive to changing times and public policy considerations. And times have certainly changed: School officials today operate with access to unprecedented amounts of data concerning teacher effectiveness and teacher impacts on student learning that was wholly absent decades ago. These modern advances demand re-examination of the old reasons that courts provided for rejecting educational malpractice claims. To date, however, the academy has failed to undertake any such analysis.

This Article seeks to fill that gap. We argue that the recent advances in educational data substantially undermine the basic rationales offered by courts for dismissing the original educational malpractice lawsuits. In particular, unlike the initial era of educational negligence claims that proceeded principally under the theory that a school district should be liable for the negligent teaching practices of its teachers, we argue that a plaintiff student may state a claim against a school district

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for its negligence one step earlier: in its decision to assign the student to a classroom taught by a teacher whom school officials know to be chronically ineffective based on extensive statistical data concerning the teacher's performance. For instance, schools now know with some degree of certainty, over a period of years, whether a particular teacher typically improves her students' academic ability by more or less than a full grade level's worth of gains. The worst teachers, it turns out, tend to produce paltry gains year-after-year. This data offers both an eminently workable standard of care for determining whether a school has been negligent in subjecting students to an incompetent teacher (indeed, some states such as New York require schools to classify teachers as "ineffective" on the basis of the student learning data), and also an evidentiary link establishing that the teacher is a proximate cause of the child's lack of attainment.

In addition to setting the groundwork for this new educational malpractice claim, the Article also explores potential policy responses on the part of school districts who may seek to head off costly litigation brought by plaintiff students who have been assigned to inadequate teachers. We suggest that some schools may respond proactively in precisely the fashion that the plaintiffs and school reformers have long desired, by voluntarily dismissing and replacing their least effective teachers. Others may attempt to evade liability without acting to remove ineffective teachers, for example by foreclosing public access to teacher effectiveness data or reducing their own reliance on such data in the first moment. In all events, however, we think this much is for certain: a new era of educational malpractice litigation may well be on the horizon.

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"From the moment students enter a school, the most important factor in their success is not the color of their skin or the income of their parents, it's the person standing at the front of the classroom."

- President Barack Obama[1]

INTRODUCTION

In the contentious world of education reform, this much is clear: when it comes to improving academic achievement, there is no measured component of schooling more important than teacher quality.[2] One often-cited study of the impact of teacher effectiveness in Tennessee found that the average elementary student assigned to high-performing teachers for three straight years will display academic achievement levels *fifty percentile points higher* than a similar student who is assigned to low-performing teachers during the same three year period—the difference between qualifying for accelerated or remedial courses in the fourth year.[3] Researchers at the Brookings Institution frame the matter slightly differently, concluding that the difference between assigning a child to top-quartile and bottom-quartile teachers for four straight years is greater than the size of the black-white academic achievement gap.[4]

The growing body of evidence regarding the critical importance of teacher effectiveness has generated a variety of policy proposals aimed at increasing the quality of teachers in American classrooms. A number of these proposals—such as efforts to improve the quality of teacher training programs, to provide professional development for current teachers, and to ensure that schools are able to retain and reward effective teachers—wisely aim to make the most out of the existing workforce.[5] Recognizing, however, that some small section of the existing teaching workforce may lack the talent, commitment, or ability needed to teach at an effective level, another set of proposals focuses on the learning gains that could occur if our schools were able to permanently replace these lowest-performing teachers. On this front, conservative education researcher Eric Hanushek has estimated that if the United States were able to remove somewhere between 5% and 12% of its worst teachers and replace them

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[1] President Barack Obama, Remarks to the Hispanic Chamber of Commerce (Mar. 10, 2009).

[2] JENNIFER KING RICE, UNDERSTANDING THE EFFECTIVENESS OF TEACHER ATTRIBUTES, at v (2003), *available at* http://www.epi.org/publication/books_teacher_quality_execsum_intro/.

[3] WILLIAM L. SANDERS ET AL., CUMULATIVE AND RESIDUAL EFFECTS OF TEACHERS ON FUTURE STUDENT ACHIEVEMENT 6 (1996).

[4] ROBERT GORDON ET AL., THE BROOKINGS INSTITUTION, IDENTIFYING EFFECTIVE TEACHERS USING PERFORMANCE ON THE JOB 8 (2006).

[5] *See generally* Linda Darling-Hammond & Barnett Berry, *Highly Qualified Teachers for All*, EDUCATIONAL LEADERSHIP, November 2006, at 14-20.

just with average teachers, the net effect after one educational cohort (thirteen years) would be to catapult the U.S. from its current position as one of the lowest-performing developed countries in the world[6] to the top of the international rankings.[7] That improvement, in turn, would result in what Hanushek projects as an aggregate increase in U.S. gross domestic product of some $112 *trillion* over the lifetime of a child born today.[8] The dramatic positive effects of replacing low-performing school teachers are not trumpeted only by conservatives; the progressive Center for American Progress recently issued a report calling for the removal of chronically ineffective teachers, and in doing so it relied partly on Hanushek's aforementioned conclusions.[9]

The notion that America's students would be substantially better off if schools would remove their least effective teachers carries persuasive force not only because of the research and bipartisan support behind it, but also because of intuition and personal experience. A great many students (and, we suspect, some adults) can readily recall the worst teacher that they have ever had, and can list the ways in which that teacher failed to create an environment conducive to learning. A 2009 article in *The New Yorker* described some of New York City public schools' worst offenders, teachers who were deemed incompetent and who were consigned to the city's "Rubber Room" day-after-day, often for years, while collecting their pay checks as the endless process to terminate their employment lumbered on.[10] One teacher was removed from teaching duty after passing out drunk in front of a classroom full of high school students, only to be reinstated two years later, still only to be removed again after she was caught drunk at school with a water bottle containing alcohol, so debilitated that she was unable to blow into a breathalyzer.[11] Less egregious examples of poor teaching are also abundant—the article describes a teacher who was placed in the rubber room after failing to organize her classroom, correct student work, complete report cards,

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[6] NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., PURSUING EXCELLENCE: A STUDY OF U.S. TWELFTH GRADE MATHEMATICS AND SCIENCE ACHIEVEMENT IN INTERNATIONAL CONTEXT 30, 36 (1998), http://nces.ed.gov/pubs98/twelfth/ (observing that U.S. twelfth-grade students outscored their counterparts in only two of twenty-one developed countries in math and science).

[7] Eric A. Hanushek, *Valuing Teachers*, EDUCATIONNEXT, Summer 2011, at 43.

[8] *Id.*

[9] ROBIN CHAIT, CENTER FOR AMERICAN PROGRESS, REMOVING CHRONICALLY INEFFECTIVE TEACHERS, 2-3 (2010). The Center's report also noted a Brookings Institution report that analyzed data from Los Angeles public schools and concluded that "dismissing the bottom quartile of novice teachers in the district after their first year based on value-added estimates would result in a net increase in student test scores gains of 1.2 percentage points annually across the district," which in the Center's view would be "significant over time." *See* GORDON, *supra* note 4 at 14.

[10] Stephen Brill, *The Rubber Room*, THE NEW YORKER, Aug. 31, 2009, http://www.newyorker.com/reporting/2009/08/31/090831fa_fact_brill.

[11] *Id.*

follow the state's curriculum, or manage her students' behavior in class.[12] Surveys of school administrators paint a profound picture of the widespread need to remove teachers of this sort: 81% of administrators say that there is at least one tenured teacher in their school who is performing so poorly as to potentially warrant dismissal.[13]

In response to the research and anecdotal evidence of teacher incompetence and its substantial negative impact on children, one might think that policy makers and school officials would be in the midst of bold policy action aimed at removing ineffective teachers. Yet the data refute that proposition roundly. In Chicago Public Schools, for example, a district that employs more than 21,000 teachers, a grand total of *nine* tenured teachers were dismissed for performance reasons in the four-year period from 2005 and 2008, a rate of roughly 0.01% per year.[14] In Denver Public Schools, not a *single* tenured teacher was fired for poor performance between 2006 and 2008.[15] All the while, school officials report that they believe a far higher percentage of teachers *should* be dismissed for poor performance; in Chicago, administrators suggested that 7.5% of teachers should be dismissed, or seven hundred and fifty times the rate of the percentage actually dismissed.[16]

Why, then, are so few low-performing teachers actually removed? The answer entails a complex interplay involving matters of administrative inertia, the time and cost required to complete teacher dismissal processes, school culture, and difficulties hiring new teachers to replace the ones just removed. Numerous authorities have discussed the exorbitant time and cost involved in dismissing tenured teachers due to the stringent due process protections that must be satisfied in most districts (under state law and union-negotiated collective bargaining agreements) before a teacher can be removed.[17] In New York City, for instance, the process for removing a teacher costs roughly $250,000 and often involves several years of hearings, which in turn require principals to spend time in court testifying rather than in school, before a decision is rendered on whether an incompetent tenured teacher may be fired—and sometimes even then the teacher prevails.[18] In light of this, many administrators may view the dismissal process as not worth the considerable tradeoff in time and energy, and focus instead on how to make do despite the ongoing

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[12] *Id*.

[13] DANIEL WEISBERG ET AL., THE NEW TEACHER PROJECT, THE WIDGET EFFECT 6.

[14] *Id.* at 17.

[15] *Id*. Neither is it the case that schools are declining to renew teachers *before* they reach tenure; in Chicago, for example, only 29 teachers were non-renewed during their pre-tenure probationary period, or 0.1% each year. *Id*. at 15, fig. 6. Denver was notably more aggressive in its use of non-renewal, yet even that district declined to offer full-tenure to a mere 3% of its probationary teachers.

[16] *Id*. at 18.

[17] *See* CHAIT, *supra* note 9 at 10-12, 14-15.

[18] Frank Eltman, ASSOCIATED PRESS, *Firing Tenured Teachers Isn't Just Difficult, It Costs You*, USA TODAY, June 30, 2008, available at http://www.usatoday.com/news/education/2008-06-30-teacher-tenure-costs_N.htm; *see also* BRILL, supra note 10.

presence of the incompetent teacher. Some researchers also suggest that even if dismissing a teacher were not so difficult, administrators might still avoid it for reasons related to school culture, such as a desire to avoid unpleasant encounters or a fear of harming school morale.[19] Under this view, administrators may be partly to blame for lacking the courage to make the tough, but correct decisions for children. Yet another explanation relates to the possible perception among administrators that firing an ineffective teacher may yield little benefit because of the difficulties associated with identifying bad teachers to begin with,[20] and with finding qualified replacement teachers.[21]

In view of these many barriers, a host of education reformers from both sides of the political spectrum have lamented the collective inability and the lack of will on the part of school officials to remove bad teachers.[22] But given the emerging consensus on this front,[23] we think the more pressing issue moving forward is not the *policy* question of *whether* America's schools should be replacing more of their worst teachers, but rather the *political* question of *how* that day will ever come. After all, our collective inability to replace low-performing teachers is not a new dilemma: A 1936 New York Times editorial noted that "[t]here are at least 'several hundred' incompetents now in the school system" who were either "unfit to teach at any time, or have been rendered unfit by the passing years."[24] That fact led the Times to ask the same question then—nearly eighty years ago—that many reformers are still asking now: "why are [unfit teachers] allowed to remain?"[25] This, in turn, leads us to ask: if

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[19] *See generally* EDWIN M. BRIDGES, THE INCOMPETENT TEACHER, MANAGERIAL RESPONSES 25 (1992); Suzanne R. Painter, *Principals' Perceptions of Barriers to Teacher Dismissal*, 14 JOURNAL OF PERSONNEL EVALUATION IN EDUCATION, no. 3, 2000, at 253-264.

[20] *See* CHAIT, *supra* note 9 at 9.

[21] There was, for some time, a notion that the United States faced a great "teacher shortage," but that view is now largely discredited. Although certain fields and schools are indeed difficult to staff (e.g., math and science teachers and schools serving low-income populations), finding a teaching job in the United States is currently more difficult than it has been in some time, owing largely to the recent economic downturn. *See* Heather Hollingsworth, ASSOCIATED PRESS, Teacher Shortage Gives Way to Teacher Glut, USA TODAY, Nov. 13, 2009, available at http://www.usatoday.com/news/education/2009-11-13-teacher-glut_N.htm; *see also* RICHARD INGERSOLL, CENTER FOR THE STUDY OF TEACHING AND POLICY, IS THERE REALLY A TEACHER SHORTAGE? (2003).

[22] *See, e.g.*, Natalie Hopkinson, *Why Michelle Rhee's Education 'Brand' Failed in D.C.*, THE ATLANTIC, Sept. 15 2010, *available at* http://www.theatlantic.com/politics/archive/2010/09/why-michelle-rhees-education-brand-failed-in-dc/63014/ (describing Democrat Michelle Rhee's support for increasing school administrator ability to fire low-performing teachers); HANUSHEK, *supra* note 7 (conservative author supports dismissing low-performing teachers); CHAIT, *supra* note 9 (progressive); *cf. also* TIM SASS, THE URBAN INSTITUTE, *Value Added of Teachers in High-Poverty and Lower-Poverty Schools* (November 2010) (noting disproportionate adverse impact of low-performing teachers in schools serving low-income students).

[23] *See supra* note 22 and accompanying text.

[24] WEISBERG, *supra* note 13 at 2 (quoting New York Times op-ed).

[25] *Id*.

history demonstrates that school officials are not on their own accord going to replace low-performing teachers whom the officials fully know to be ineffective, is there nothing that parents can do to prevent (or seek redress for) the injuries that inevitably befall when the ineffective teachers leave their children grade levels behind and unprepared to compete in the 21st century economy?

We argue in this Article that there may well be recourse in court for children assigned to chronically ineffective teachers under basic principles of tort law familiar to most first-year law students. Such children should be able to state a claim for negligence against school officials who, with full knowledge that certain teachers are chronically ineffective as revealed by advanced analyses of student learning data, nevertheless assign students to a year's worth of academic injuries in those teachers' classrooms. By analogy, a daycare center could surely be held liable in tort if it were to entrust a child to an employee whom it knew to be unfit, and were the child to subsequently be injured.[26] We believe the public education case bears strong similarities to this daycare example, as in both situations the relevant fault lies in the administrator's negligent decision to subject a child to an employee whom experience (and in the case of the teacher, data) has revealed to be ineffective.

The claim we propose shares its theoretical roots with a number of "education malpractice" lawsuits that were filed unsuccessfully in the 1970s and 80s. In those cases, students sought redress in tort law against schools that had allegedly subjected them to incompetent teachers and educational processes, yet in all but one decision the courts refused to hold the schools liable.[27] The courts provided two basic explanations for this outcome[28]: the schools could not be said to owe a *duty* of care to provide children with a particular quality of academic instruction because a teacher's choice of classroom methodology is subject to no readily acceptable or workable standard of care;[29] and the allegations against the

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[26] *See, e.g.*, *Amica Mut. Ins. Co. v. Wetmore*, 48 Conn. L. Rptr. 213 (2009) (cause of action for negligence against daycare provider who left children with unfit caretaker).

[27] The lone exception is *B.M. v. Montana*, 200 Mont. 58 (1982), which held that a cause of action could lie for a school district's negligence in improperly placing a child in an appropriate special education class.

[28] Some courts also suggested that the child's academic harms did not constitute an "injury" within the meaning of tort law, though other courts did not find that rationale persuasive. *Compare Peter W*, 60 Cal.App.3d at 825 ("We find . . . no reasonable degree of certainty that plaintiff suffered injury within the meaning of the law of negligence.") (internal quotation marks and alterations omitted), *with Donohue*, 47 N.Y.2d at 443 (noting that "the element of injury" might be satisfied in the plaintiff's educational negligence action because "who can in good faith deny that a student who upon graduation from high school cannot comprehend simple English a deficiency allegedly attributable to the negligence of his educators has not in some fashion been 'injured'"?).

[29] *See, e.g.*, *Peter W. v. San Francisco Unified School District*, 60 Cal.App.3d 814, 824 (1976) ("We find in this situation no conceivable 'workability of a rule of care' against which defendants' alleged conduct may be measured.")

school and teachers could not be deemed the *proximate cause* of a child's failure to learn since other factors were also to blame.[30]

The basic premise of this Article, however, is that times have changed, and that with these changing times old common law rules must be revisited. Just as medical malpractice, emotional distress, and mass toxic tort suits did not always enjoy wide acceptance, so too have dramatic reforms in the education policy arena and resulting advances in the world of educational data rendered the courts' prior duty and proximate cause rationales no longer controlling. To be specific, we now live in the era of standards-based school reform, wherein schools collect mountains of data that can be culled (albeit to arguable degrees of certainty) to discern how much learning individual teachers contribute to their students over time—so called "value-added" data.[31] It is this data that has allowed educational experts to distinguish high-performing teachers from low-performing ones; it turns out that teachers who produce strong learning gains (*e.g.*, greater than one year's worth each year) in prior years typically continue to do so in future years, and that the same is true of teachers who struggle to increase their students' learning.[32] Many states and districts now use this value-added data in the process of evaluating and paying teachers.[33]

As a result, while courts in the prior era of education malpractice litigation were loath to fashion a standard of care for what constituted a "reasonably prudent educator" because there was little consensus regarding reasonable classroom methodology and thus little way for school districts to know whether most teachers were exercising reasonable care or not, school officials today utilize substantial value-added evidence regarding the effectiveness of their teaching staff. In New York state, for example, schools are required to rate their teachers as "highly effective," "effective," "developing," or "ineffective" based on a performance review that incorporates value-added data.[34] To the extent that such data is clear and reliable enough to be used in teacher evaluations, it would be difficult for schools to argue that it does not also offer courts a "workable" duty of care. Put another way, a child who is assigned to a teacher that school officials have themselves rated as "ineffective" for multiple years can make a compelling, common-sense argument that the district has failed to

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[30] *Donohue v. Copiague Union Free Sch. Dist..*, 64 A.D.2d 29, 39 (1978) ("[T]he plaintiff's complaint must be dismissed because of the practical impossibility of demonstrating that a breach of the alleged common law and statutory duties was the proximate cause of his failure to learn."), *aff'd sub nom*, *Donohue v. Copiague Union Free Sch. Dist.*, 47 N.Y.2d 440, 391 N.E.2d 1352 (1979).

[31] *See generally* Damian W. Betebenner, THE CENTER FOR ASSESSMENT, GROWTH, STANDARDS AND ACCOUNTABILITY (2009), available at http://www.nciea.org/publications/growthandStandard_DB09.pdf.

[32] GORDON, *supra* note 4 at 7-8.

[33] *See* Erica Phillips & Stephanie Banchero, *L.A. Teachers Face New Evaluations*, THE WALL STREET JOURNAl, June 14, 2012, available at http://online.wsj.com/article/SB10001424052702303410404577464883636440156.html? (noting that at least 30 states now use student achievement to evaluate teachers).

[34] N.Y. Educ. Law § 3012-c(2)(a).

act with reasonable care in continuing to place students in the teacher's classroom. Additionally, the very foundation of value-added data, which ties student learning gains to the quality of a teacher, is that teacher quality has a direct effect on differences in student learning—a premise that may serve to refute the courts' notion that teachers are not the proximate cause of deficiencies in student learning. It is our view, in sum, that recent developments in school reform may give the old "education malpractice" theory new legs.

Part I of this Article briefly recounts the history of education malpractice litigation and the reasons (largely rooted in the elements of duty of care and proximate causation) why courts in the earlier era declined to impose liability on school officials. In Part II we describe the substantial changes that have taken place in the field of K-12 education since the initial era of lawsuits, giving close attention to the dramatic increase in the amount of data collected on student learning and teacher effectiveness. Part III then explains why this brave new world of data on teacher effectiveness requires courts to revisit the initial rationales used to reject education malpractice claims, and why as a result a properly framed complaint may succeed today. In doing so, Part III sets forth the strongest arguments for reformers who envision education malpractice litigation as playing a central role in efforts to improve the quality of teaching in our nation's schools. Part IV then examines the flip-side of the debate; that is, the perspective of school officials who do not wish to face the proposed litigation. In accordance with the desires of education malpractice plaintiffs and school reformers, some officials may decide that the best way to avoid costly litigation is to simply remove low-performing teachers once they are identified. Others, however, may wish to avoid litigation without dismissing teachers, perhaps under the belief that the new value-added data is not sufficiently accurate to justify a conclusion that certain teachers are chronically ineffective. For these officials, the relevant question is not how to frame a successful cause of action, but rather how to implement state-imposed value-added data requirements in a way that avoids opening schools up to education malpractice litigation in the first instance. Part IV considers various approaches that might assist in that end. Finally, we conclude with some thoughts on potentially far-reaching impacts that this newly-viable cause of action may have on the school reform arena as a whole.

I. THE HISTORY OF EDUCATION MALPRACTICE LITIGATION

For a brief moment during the 1970s, a serious possibility existed that the legal principle of negligence might be applied in the context of public education much like it had already been applied in other professional contexts. Doctors, for example, had practiced under the

specter of tort liability for medical malpractice since the mid-1800s,[35] but the same negligence principle had never been extended to educators.[36] In 1972, however, Gary Saretsky and James Mecklenburger published their controversial article, *See You In Court*, hypothesizing that public school students might well be able to state a claim against their school for failing to teach them basic skills.[37] The first such "education malpractice" lawsuit, *Peter Doe v. San Francisco Unified School District*, was filed in California Superior Court just two years later,[38] and a similar case was brought in New York shortly thereafter.[39] Responding to these filings, interested school reformers and education lawyers buzzed with excitement about the prospect that schools might be held accountable to individual students and their parents for negligent instructional practices that resulted in deficient educational attainment.[40] The attorney representing Peter Doe captured this sentiment when she declared that "[t]he *Peter Doe* case is simply a forerunner of an effort on the part of parents to bring focus, through the judicial system, upon the fact that the schools, the educational systems of this society, have failed to provide the Peter Does of this country the kind of education to which they're entitled."[41]

The buzz did not last long. California's courts quickly rejected the contention that public schools should be held liable in tort for educational malpractice, and New York courts soon followed suit.[42] Additional lawsuits were filed in other state courts in the ensuing years, but uniformly—with the solitary exception of a unique Montana special education case[43]—those suits would meet the same end.

This section aims to provide an account of the major lawsuits that comprised this initial wave of unsuccessful educational malpractice litigation, discussing their basic facts, legal theories, and holdings. As

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[35] Physicians' liability for negligence, or medical malpractice, was subject to certain privileges specific to their field, such as the locality and customary practice rules that allowed doctors to define their own standards of care. *See generally* JAMES C. MOHR, *American Medical Malpractice Litigation in Historical Perspective*, 283 JAMA 1731, 1732 (2000); THEODORE SILVER, *One Hundred Years of Harmful Error: The Historical Jurisprudence of Medical Malpractice*, 1992 WIS. L. REV. 1193, 1194 (1992)

[36] John Elson, A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching, 73 N.W. U. L. REV. 641, 642-43 (1978).

[37] Gary Saretsky & James Mecklenburger, *See You In Court*, SATURDAY REVIEW, Oct. 14, 1972, at 50.

[38] *See* First Amended Complaint, *Peter Doe v. San Francisco Unified School District*, No. 653-312 (Filed in Cal. Super. Ct. Sept. 6, 1974). Note that the case caption was later changed to *Peter W. v. San Francisco Unified School District*.

[39] *See Donohue v. Copiague Union Free Sch. Dist.*, 408 N.Y.S.2d 584 (N.Y. Sup. Ct. 1977), *aff'd sub nom., Donohue v. Copiague Union Free Sch. Dist.*., 407 N.Y.S.2d 874 (N.Y. App. Div. 1978), *aff'd sub nom., Donohue v. Copiague Union Free Sch. Dist.*, 47 N.Y.2d 440 (1979).

[40] Gary Saretsky, *The Strangely Significant Case of Peter Doe*, PHI DELTA KAPPAN, May 1973, at 589.

[41] *Id*.

[42] *Peter W.*, 60 Cal.App.3d at 817; *Donohue*, 47 N.Y.2d. at 444.

[43] *B.M. v. Montana*, 200 Mont. 58 (1982)

commentators have noted, the initial era of education malpractice litigation actually comprised two distinct kinds of cases.[44] The first category sought judicial intervention based on a school's negligent failure to provide ordinary children with basic academic skills.[45] A second category of cases involved claims stemming from a more discrete kind of injury: a school's misdiagnosis and improper placement of a child into a special education or regular education program.[46] Our focus is on the first category of cases in light of its closer nexus to the type of claim we are proposing.[47] We accordingly do not discuss the history of special education malpractice claims or other educational tort litigation of a materially different kind (for example, cases regarding higher education[48] and improper use of school discipline[49]).

Our primary object here is to identify the various rationales that courts in the initial era offered for why liability should not be imposed upon school officials accused of negligent academic instruction. For if we are correct that recent developments in the realm of educational data truly render plausible the malpractice action in the present day, it must be the case that these developments offer a compelling rebuttal to the initial logic provided by the courts who ruled against similarly situated plaintiffs some four decades ago. As we shall see, the courts that rejected the original wave of educational malpractice litigation are best understood as having done so for three reasons: the inability of plaintiffs to establish three

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[44] *See* Sharan E. Brown & Kim Cannon, *Educational Malpractice Actions: A Remedy for What Ails Our Schools?*, 78 ED. LAW REP. 643, 644 (1993) (noting that "[t]he cases seem to be of two types"); Frank D. Aquila, *Educational Malpractice: A Tort En Ventre*, 39 CLEV. ST. L. REV. 323, 327 (1991)

[45] *See, e.g.*, *Peter W.*, 60 Cal.App.3d 814; *Donohue*, 47 N.Y.2d 440; *Poe v. Hamilton*, 56 Ohio App.3d 137 (1990); *Bell v. Board of Education of the City of West Haven*, 55 Conn. App. 400 (1999).

[46] *See, e.g.*, *Hoffman v. Board of Education of the City of New York*, 49 N.Y.2d 121 (1979); *D.S.W. v. Fairbanks North Star Borough School District*, 628 P.2d 554 (Ala. 1981); *B.M. v. Montana*, 200 Mont. 58.

[47] We do not mean to suggest that the other kinds of educational negligence actions are unimportant; our choice instead simply recognizes the different implications of a successful claim within each category. For example, a lawsuit challenging a school's failure to diagnose a student's special education needs would seek a remedy of proper classification and placement, and perhaps some monetary damages. That, in turn, might create structural incentives for a school district to play closer heed to its special education assignment procedures for fear that future suits arising out of those procedures might impose additional litigation and remedial costs. But neither the suit nor the remedy would incent the school to proactively dismiss ineffective teachers who harm the general student population. By contrast, a lawsuit charging a school district with negligently assigning students of ordinary academic capacity to ineffective teachers might seek as a remedy an injunction ordering the court to reassign plaintiff students to adequate teachers. Thus, unlike in the special education case, a successful malpractice claim in the regular instruction context would create strong incentives for schools to proactively replace its lowest-performing teachers in order to avoid litigation—a policy that could have substantial positive impacts on K-12 education in America.

[48] *E.g.*, *Wilson v. Continental Insurance Companies*, 274 N.W.2d 679 (Wis. 1979).

[49] *E.g.*, *Tirpak v. Los Angeles Unified School District*, 187 Cal.App.3d 639 (1986).

critical elements of the prima facie negligence case—duty, causation, and, to a lesser extent, injury. We examine these rationales using a case-by-case approach, beginning with the seminal educational malpractice lawsuit, *Peter W.*

A. *Peter W. v. San Francisco Unified School District*

Peter W. v. San Francisco Unified School District, involved an eighteen-year-old graduate of San Francisco's public school system, one Peter W.[50] Peter was a typical student in many respects: "an 18-year-old male who ha[d] recently graduated from a high school operated by the district" and who had previously "been enrolled in its schools, and had attended them, for a period of twelve years."[51]

Peter's complaint brought seven causes of action, separable into three discrete legal theories: a single claim sounding in fraud for intentional misrepresentation, another claim alleging common law negligence, and a third set of claims alleging various theories of statutory negligence. The Court of Appeal quickly rejected the fraud claim (that the school had lied to Peter's parents about his performance at school, thereby causing injury) because the complaint failed to plead the necessary element of reliance.[52] As commentators such as Stephen Sugarman have previously noted, fraud theories are not likely to succeed in education litigation due to difficulties not just with establishing reliance, but also with establishing the necessary guilty mental state on the part of the school defendant.[53] The court found Peter's common law and statutory negligence claims to be far more challenging, however, although ultimately worthy of the same outcome. But before discussing the court's analysis of these claims it makes sense to pause briefly to distinguish between the two theories of negligence, common law and statutory.

Common law negligence is the typical theory under which tort lawsuits are brought. The theory begins with the idea that all persons have a duty to exercise "due care in [their] actions so as not to create an unreasonable risk of injury to others."[54] One who acts with "due care" and yet injures another is not liable for those injuries because he was not negligent, while a person who fails to act with due care and injures another is deemed negligent and thus liable. The critical question in any common law negligence suit, then, is whether a defendant has acted with "due care." Under the common law approach, that question is answered by

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[50] As is common with most litigation involving individuals under the age of eighteen, the California courts shortened the plaintiff's last name to just his initial (after the suit was originally filed under the name "Peter Doe") for the sake of maintaining the plaintiff's privacy.

[51] *Peter W.*, 60 Cal.App.3d at 818.

[52] *Peter W.*, 60 Cal.App.3d at 826-27.

[53] Stephen D. Sugarman, *Accountability through the Courts*, 83 The School Review, no. 2, 1974, at 233 n.5.

[54] Laura Hunter Dietz et al., 57A Am. Jur. 2d Negligence § 75.

reference to the "reasonable person" standard: where a tort defendants acts consistent with "the standard of conduct . . . of a reasonable man under like circumstances," he will not be found negligent.[55]

To call the reasonable man approach a "standard" is, of course, to gloss over the reality that it is a complicated and amorphous construct indeed (and one that has caused inestimable confusion to many first year law students). Recognizing this fact, courts over time have adopted various doctrines designed to add greater certainty and clarity to tort litigation. The concept of statutory negligence, or "negligence per se," as it is also known, is one such doctrine. That doctrine holds that a court may borrow "the requirements of a legislative enactment or an administrative regulation" as the relevant standard of care for the supposed "reasonable man."[56] Thus, for instance, courts frequently hold automobile drivers to be guilty of negligence per se where they cause injury due to their driving in excess of a statutory speed limit.[57] The idea is, rather than to engage in a freestanding inquiry in each case over whether a defendant drove faster than a "reasonable man" would have driven, the mere existence of the statute affords a far simpler test: anything in excess of the speed prescribed by law is negligence, anything not is not.

But not all statutes can be "borrowed" for purposes of establishing a relevant standard of care. Consider a statute requiring ranchers to fence in their land to prevent cattle from encroaching upon, and thus damaging, land belonging to another. If Rancher fails to put up the required fence and his cattle subsequently encroach upon and damage Farmer A's land, Rancher would appropriately be found negligent per se (and thus liable in tort) for violating the fencing statute. But now consider the same statute and the same rancher, but a new tort plaintiff, Farmer B. Farmer B sues Rancher not for injuries to his land from Rancher's cattle (because Rancher's cattle never entered Farmer B's land), but rather for a different injury that occurred when Farmer B trespassed on Rancher's land and came into contact with some poisonous weeds. In this case, Rancher should *not* be liable for statutory negligence—even though his violation of the fencing law was a cause of Farmer B's injury—because the purpose of the relevant statute is to protect against damage to land by cattle and not to protect persons like Farmer B from the kind of injury he sustained.[58]

Applying these concepts to educational malpractice claims in *Peter W.*, the court properly considered Peter's common law negligence claim (that school district officials failed to act as a reasonable person in providing his education) separately from his statutory negligence claims. Tackling the common law claim first, the complaint alleged that the defendant school district and its "agents and employees negligently failed to use reasonable care in the discharge of its duties to provide plaintiff

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[55] Restatement (Second) of Torts, § 283.
[56] *Id*. § 286.
[57] *See, e.g.*, *Dill v. Colley*, 3 La. App. 305, 1925 WL 4783 (Ct. App. La. 1925).
[58] *See generally* Restatement (Second) of Torts, § 286.

with adequate instruction . . . in basic academic skills and failed to exercise that degree of professional skill required of an ordinary prudent educator."[59] In particular, Peter charged the district with negligently placing him in classes where he could not read the assigned materials and where teachers were unable to satisfactorily teach the particular subject; allowing him to advance to grade levels where he was unprepared for the coursework; and ultimately giving him a diploma despite his being unable to read at the eighth grade level.[60] Due to these "negligent acts and omissions" by the school district, the complaint alleged that Peter "graduated from high school with a reading ability of only the fifth grade," and that he accordingly "suffered a loss of earning capacity [because he graduated] unqualified for any employment other than . . . labor which requires little or no ability to read or write."[61]

The trial court dismissed this claim, and the California Court of Appeal affirmed. The Court of Appeal began by noting the "familiar" elements of an action in negligence: a (1) "duty of care in the defendant," and a (2) "breach of th[at] duty," that is the (3) "proximate" cause of (4) an "injury to the plaintiff."[62] In the court's view, however, Peter's claim failed because of an inability to satisfy the first element. Indeed, the court noted that the parties did not even "debate the adequacy of plaintiff's [claim] with respect to the elements of negligence [or breach], proximate cause, and injury;" they instead focused "exclusively" upon the issue of "whether [the complaint] alleges facts sufficient to show that defendants owed [Peter] a 'duty of care.'"[63]

The court concluded that the school district owed Peter W. no duty of care based on its weighing of various public policy considerations. Resort to a balancing of public policy factors was appropriate in the first instance because under elementary principles of tort law, "judicial recognition of [a] duty in the defendant, with the consequence of [its] liability in negligence for its breach, is initially to be dictated or precluded by [a court's] considerations of public policy."[64] In the context of educational malpractice, the court explained, four public policy considerations in particular required the conclusion of no duty. First, and most important, the court declared that it could discern no "workab[le] rule of care against which defendants' alleged conduct may be measured."[65] "Unlike the activity of the highway or the marketplace," the court reasoned, "classroom methodology affords no readily acceptable standards of care . . . [t]he science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught,

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[59] *Peter W.*, 60 Cal. App. at 826.
[60] *Id*.
[61] *Id*.
[62] *Id*. at 820.
[63] *Id*.
[64] *Id*. at 822 (citing 4 Witkin, Summary of California Law (8th ed. 1974) Torts § 493, at 2749).
[65] *Id*. at 825.

and any layman might—and commonly does—have his own emphatic views on the subject."[66] In other words, given the lack of consensus over a single proper way to educate a child, how could a court know whether a teacher had been negligent in his approach to educating a child in any particular instance?

Second, the court held that no duty should exist because of the difficulties associated with establishing proximate causation. In the court's view, "[s]ubstantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from *outside the formal teaching process, and beyond the control of its ministers*. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified."[67] Thus, in light of these many other causal factors for a child's academic attainment, the court deemed it unwise to impose a duty of care on the schools. Interestingly, the court used this rationale to support its finding of no duty of care, though it could have held alternatively that even were a duty of care to exist, Peter still could not succeed in his educational malpractice action due to his inability to prove proximate cause as a free-standing element independently necessary for a finding of liability.

Third, the court found it unwise to recognize a duty of care under the vague assertion that there is no "reasonable 'degree of certainty that . . . plaintiff suffered injury' within the meaning of the law of negligence."[68] The court recognized that the asserted "injury" in the case before it was Peter W.'s "inability to read or write," an injury that seems concrete and certain enough. But the court nonetheless appeared to suggest that this injury was not cognizable under the circular logic that a student's interest in acquiring basic academic skills is not an interest "protected" by law.[69]

Finally, the court added one further public policy consideration to its list of reasons for refusing to impose a duty of care: the risk of crushing liability should the doors be opened to a cause of action for educational negligence. Given the ambiguity that would necessarily accompany any court-fashioned standard for what constitutes "reasonably prudent" teaching, the court legitimately feared that "[t]o hold [defendants] to an actionable 'duty of care,' in the discharge of their academic functions,

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[66] *Id*. at 824.

[67] *Peter W.*, 60 Cal.App.3d at 824 (emphasis added).

[68] *Id*. at 825.

[69] *See id*. at 825, 824 n.3. The logic is circular because the ultimate question to which the court sought an answer was whether the child's interest in basic academic instruction should be considered an interest protected by tort law. To say that it is not such an interest because it is not an interested protected by law is merely to restate the question. The court could have been saying that there was no injury because there was no specific state law protecting Peter's interest in academic instruction, but the existence of a statute protecting against the claimed injury has never been considered necessary to a satisfactory *common law* tort suit; that is instead a question reserved for claims sounding in statutory negligence.

would expose them to the tort claims—real or imagined—of disaffected students and parents in countless numbers," which would in turn "burden [schools]—and society—beyond calculation."[70]

After dismissing the common law negligence claim, the Court of Appeal turned to Peter W.'s statutory negligence claims. The question before the court was whether, even if the district could not be said to owe a duty of "reasonable care" to Peter, the district could still be guilty of negligence for violating a standard of care borrowed from an existing statutory enactment. Peter's attorneys argued that five California statutes should be interpreted as establishing precisely such a standard.[71] But the court disagreed, explaining that like Farmer B in the cattle fencing example above, the statutes to which Peter pointed were not "designed to protect against the risk" of the particular injury sustained by Peter.[72] In the court's eyes, the statutes were not even designed as "safeguards against 'injury' of any kind," and were instead merely "provisions directed to the attainment of optimum educational results."[73]

B. *Donohue v. Copiague Union Free School District*

As in *Peter W.*, the plaintiff in the first New York education malpractice case, *Donohue v. Copiague Union Free School District*, was a high school graduate who sued his school district charging both common law negligence and statutory negligence based on the district's failure to provide him with what he alleged to be an adequate level of academic instruction.[74] Like in *Peter W.*, however, *Donohue* was decided in favor of the district defendant. Indeed, with respect to the common law negligence claim, the trial level court in *Donohue* reached its result by expressly relying upon the California Court of Appeal's reasoning in *Peter W.*, holding that "based upon the cogent reasoning in [*Peter W.*], the Court finds no common law duty in New York upon which [Donohue's negligence claim] can be bottomed.

On appeal, the New York appellate division and New York Court of Appeals reached the same conclusion, echoing *Peter W.*'s public policy rationale to find no judicially cognizable duty of care. Like the decision in

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[70] *Id*. at 825.
[71] *Id*. at 826.
[72] *Id*.
[73] *Id*. It may be that the court conflated its discussion of "injury" in the foregoing common law negligence context with the discussion in this statutory negligence context. The court's assertion that Peter's alleged injury (his inability to read) is not cognizable under tort law makes sense in the sense that the alleged injury was not to an interest protected by the statutes referenced in the complaint. But that holding only militates in favor of the court's ruling concerning statutory negligence; it says nothing about whether his injury is cognizable as a matter of common law negligence.
[74] *See Donohue*, 408 N.Y.S.2d at 585 ("As stated, the first cause of action sounds in negligence."); *Donohue*, 407 N.Y.S.2d at 880 ("The plaintiff's second cause of action sounds in negligence and alleges the breach of a duty found in the State Constitution (art. XI, § 1) and enabling legislation.")

Peter W., the New York courts focused especially on the difficulty associated with defining a workable standard of reasonable care, since any such standard would "call upon jurors to decide whether [students] should have been taught one subject instead of another, or whether one teaching method was more appropriate than another, or whether certain tests should have been administered or test results interpreted in one way rather than another, and so on, ad infinitum."[75] To this rationale the New York Court of Appeals added a related additional separation of powers concern, explaining that because any judicially announced standard of care would require a court to "sit in review of the day-to-day implementation of [school] policies," recognition of an educational malpractice action "would constitute blatant interference with the responsibility for the administration of the public school system lodged by Constitution and statute in school administrative agencies."[76] Summarizing these concerns, the appellate division stated succinctly that "[i]t simply is not within the judicial function to evaluate conflicting theories of how best to educate."[77]

The New York courts also disposed of Donohue's statutory negligence claims, following the same logic employed in *Peter W.* The Appellate Division noted the basic rule for deciding statutory negligence claims, pointing out that "[i]t is a well-established principle of torts that statutes which are not intended to protect against injury, but rather are designed to confer a benefit upon the general public, do not give rise to a cause of action by an individual to recover damages for their breach."[78] The state statutes that Donohue argued should be read as imposing a duty on the school district were, however, "not intended to protect against the 'injury' of ignorance" as their purpose was instead merely to "confer the benefits of a free education upon what would otherwise be an uneducated public."[79] Thus, the school district defendant could not be found negligent under a statutorily imposed duty of care.

Two aspects of the New York courts' resolution of *Donohue*, however, differed from the California Court of Appeal's decision in *Peter W.* First, unlike *Peter W.*, which had pointed to difficulties with establishing proximate causation as a reason not to impose a duty of care, the New York courts appeared to suggest that even if they had been willing to recognize a duty of care for public policy reasons, an educational malpractice claim might still fail *directly* for want of the element of proximate cause. In the words of the appellate division:

> [T]he plaintiff's complaint must be dismissed because of the practical impossibility of demonstrating that a breach of the alleged common law . . . duties was the proximate cause of his failure to learn. The failure to learn does not bespeak

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[75] *Donohue*, 407 N.Y.S.2d 874, 879 (App. Div. 1978).
[76] *Donohue*, 47 N.Y.2d 440, 445 (1979).
[77] *Donohue*, 407 N.Y.S.2d at 879.
[78] *Id*. at 880.
[79] *Id*.

> a failure to teach. . . . A school system cannot compel a particular student to study or to be interested in education. . . . In addition to innate intelligence, the extent to which a child learns is influenced by a host of social, emotional, economic and other factors which are not subject to control by a system of public education. In this context, it is virtually impossible to calculate to what extent, if any, the defendant's acts or omissions proximately caused the plaintiff's inability to read at his appropriate grade level.[80]

Second, the New York Court of Appeals appeared to disagree with the *Peter W.* court's flimsy argument that a claim for educational malpractice does not state an injury recognized in the law of torts. As the high court put it, "who can in good faith deny that a student who upon graduation from high school cannot comprehend simple English a deficiency allegedly attributable to the negligence of his educators has not in some fashion been 'injured'"?[81] That conclusion was of no moment to the ultimate disposition of the case, however, as neither the duty of care nor the proximate causation elements had been established.

C. *Other Educational Malpractice Cases Involving Basic Academic Skills*

Peter W. and *Donohue* were the first major cases to charge a school with negligence for its ordinary academic instructional practices, but they were not the last. Although "the popularity of tort-based claims peaked during the 1970s and 80s,"[82] there have been a number of more recent attempts to revisit the same theory, though these suits have inevitably met the same fate largely for reasons related to duty and proximate cause.[83] In the 1990 case of *Poe v. Hamilton*,[84] for example, an Ohio student sued her psychology teacher for negligence after she failed the teacher's course and was consequently unable to graduate on time. The student argued that the teacher was negligent for recording only three grades during the entire semester, until the last day of classes when the teacher gave a final exam and three quizzes in a twenty-five minute period. The student also argued that the teacher had been negligent for failing to notify her that she was in danger of failing the course.

The Ohio Court of Appeals dismissed the student's lawsuit for three reasons. First, it noted that under state law the teacher was entitled

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[80] *Id*. at 881.
[81] *Donohue*, 47 N.Y.2d 440, 443 (1979).
[82] Comment, Melanie Natasha Henry, *No Child Left Behind? Educational Malpractice Litigation for the 21st Century*, 92 CAL. L. REV. 1117, 1128 (2004)
[83] In addition to the two cases discussed in this section, *see also Hunter v. Bd. of Educ. of Montgomery County*, 292 Md. 481 (Ct. App. Md. 1982); *Denson v. Steubenville Bd. of Educ*., 85-J-31, 1986 WL 8239 (Ohio Ct. App. July 29, 1986).
[84] *Poe v. Hamilton*, 56 Ohio App.3d 137 (1990).

to qualified immunity unless he acted "with malicious purpose, in bad faith, or in a wanton or reckless manner,"[85] which the student could not show. Second, the court observed that "[e]ven if [the student] had sufficiently alleged recklessness, it is doubtful whether proximate cause could have been established," since "[f]actors such as the student's attitude, motivation, temperament, past experience and home environment may all play an essential and immeasurable role in learning."[86] Finally, the court reasoned that it would not recognize a cause of action for educational malpractice "as a matter of public policy," citing *Donohue* and the New York courts' concern for trusting the professional judgment of educators in light of the lack of a workable standard of care.[87]

Another recent case is *Bell v. Board of Education of the City of West Haven*,[88] where plaintiff school children and their parents sued a Connecticut school district for negligence in "impos[ing] on the children a teaching method (responsive classroom method) that . . . emphasize[d] social skills at the expense of discipline and academics." The court of appeals rejected the claim, however, under reasoning by now familiar. In the court's view, no duty of care could be recognized because the tort principles of "duty, standard[] of care, and reasonable conduct . . . are difficult, if not impossible, to apply in the academic environment. . . . Among other problems for adjudication, these claims involve the judiciary in the awkward tasks of defining what constitutes a reasonable educational program and of deciding whether that standard has been breached."[89]

D. *A Special Education Case: B.M. v. Montana*

Although each of the cases discussed thus far have concerned claims involving a school's failure to provide regular academic instruction, one special education case warrants brief mention. The Montana Supreme Court's decision in *B.M. v. Montana* represents the only case in the entirety of educational malpractice litigation in which a claim was allowed to proceed beyond the motion to dismiss stage.[90] The court's decision was motivated by the unique place that special education had within the state's education code and is best read as a statutory negligence case where a relevant state law was indeed designed to protect the plaintiff child from the alleged injury.[91] Accordingly, the ruling

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[85] *Id*. at 138 (quoting Ohio Rev. Code § 2744.03(A)(6)(b).
[86] *Id*. (quoting *Donohue*, 47 N.Y.S.2d at 446 (Wachtler, J., concurring)).
[87] *Id*. at 139.
[88] 55 Conn. App. 400 (1999).
[89] *Id*. at 406.
[90] *See* AQUILA, *supra* note 43 at 351 ("Only one jurisdiction, Montana, has allowed relief for educational malpractice."). Ultimately, however, the plaintiff in *B.M.* was not awarded relief because of an admission that she did not suffer any real injury. *B.M. by Berger v. State*, 215 Mont. 175, 698 P.2d 399 (1985)
[91] *See B.M.*, 200 Mont. at 427 ("[S]ection 20-7-401, MCA, sets up a special class of students for which special education programs are provided. The child clearly falls within

cannot be read as recognizing the viability of general educational malpractice claim in the regular instruction context.

But we think a closer reading of *B.M.* suggests an additional ground for distinction that should provide reason for optimism for an educational malpractice plaintiff in the modern era. The specific source of negligence alleged in *B.M.* was the "negligent misplacement [of the child] in a segregated classroom,"[92] and not the negligent *teaching* of the child per se.[93] This distinction makes a difference because the typical source of negligence in the previously discussed cases has had to do with the school's choice of instructional methods or particular pedagogical decisions (e.g., the decision to pass Peter W. on to advanced grade levels without him knowing how to read;[94] the psychology teacher's grading practices in *Poe*; and the use of the "responsive classroom method" in *Bell*). Faced with such allegations, courts were quite reasonably concerned with their (in)ability to distinguish between reasonable and unreasonable educational decisions. But the negligence in *B.M.* was of a different kind; it took place one step earlier in the school's decision to place the child in a classroom where it knew she would not be able to learn effectively. In the same way, we will suggest below that a student should be able to sue a present day school district with negligence for assigning her to a classroom teacher who has demonstrated a chronic inability to teach effectively.

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As the foregoing accounts should make clear, the story of education malpractice litigation is a story driven by the elements of duty of care and proximate causation, which have dictated adverse outcomes for plaintiff children and their parents. The existing scholarship on educational malpractice has done a reasonable job describing this narrative arc (even if it has missed the critical next chapter).[95] Put simply, the

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this class. The complaint here is that the school district failed to follow the statutory and regulatory policies governing the placement of students in the special education program.").

[92] *Id*. at 428.

[93] *See* BROWN & CANNON, *supra* note 43 at 643 n.1.

[94] The plaintiff in *Peter W.* also charged the district with negligence for placing him in an inappropriate classroom taught by teachers who were not qualified to instruct him, which is similar to the negligent placement decision alleged in the *B.M.* case. But the California Court of Appeal treated *Peter W.* as a case about negligent instruction and the difficulties associated with deciding whether a particular pedagogical approach was reasonable. *See Peter W.*, 60 Cal.App.3d at 824 ("The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught.").

[95] *See* SUGARMAN, *supra* note 53; ELSON, *supra* note 35; BROWN & CANNON, *supra* note 43; AQUILA, *supra* note 43; Johnny C. Parker, *Educational Malpractice: A Tort Is Born*, 39 CLEV. ST. L. REV. 301 (1991); Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 Tex. L. Rev. 777, 851 (1985); Comment, *Educational Malpractice*, 124 U. PA. L. REV. 755 (1976); Note, Catherine D. McBride, *Educational Malpractice: Judicial Recognition of A Limited Duty of Educators Toward Individual Students; A State Law Cause of Action for Educational Negligence*,

courts have refused for public policy reasons to recognize a duty of care running from school officials to their students, and they've argued that even if such a duty were to exist, other causes (such as environmental and family-related factors, the students' own motivation, and so on) interrupt the chain of proximate causation such that the schools should not be held liable for the resulting academic injuries. In particular, the courts have worried that imposing a duty of care on schools would necessarily require them to make a vast number of intricate decisions concerning whether a particular educational decision (*e.g.*, to allow a child to move on the next grade level, to give a certain grade, or to use a specific kind of teaching method) is "reasonable" where no workable standard exists.

These rationales strike us for the most part as well-reasoned in light of the era in which they were provided. But the question moving forward is whether they ought to remain controlling in modern times. In order to answer that question, however, it makes sense to first identify what exactly it is that has changed in the world of education policy over the past several decades. We turn to that question now.

II. THE BRAVE NEW WORLD OF DATA-DRIVEN SCHOOL REFORM

In the past four decades, substantial advances have been made in the areas of educational standards, educational data, and the state of educational research. Whereas in the 1970s educational standards, if they existed at all, were vague and underspecified, states now routinely develop standards by grade and subject matter.[96] Data on student achievement that was available for select populations of students or only in highly aggregated form—e.g., at only the national or state level—is now available as part of highly integrated, longitudinal data-sets that track individual students by their demographic and achievement information along with the districts, schools, and teachers they interact with. Finally, the techniques that researchers use to analyze the available data have also changed dramatically. Statistical correlation techniques which used to be the state-of-the-art have been replaced by statistical models that allow for causal inference, even as the cost of computing power necessary to run

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1990 U. ILL. L. REV. 475 (1990); Note, Deborah D. Dye, *Education Malpractice: A Cause of Action That Failed to Pass the Test,* 90 W. VA. L. REV. 499 (1988). The only writing we are aware of discussing a re-visitation of the educational malpractice theory in recent years is a 2007 short essay in which the authors suggested doing so in light of new academic standards and particular aspects of the No Child Left Behind Act. *See* Terri A. DeMitchell & Todd A. DeMitchell, *A Crack in the Educational Malpractice Wall*, 64 THE SCHOOL ADMINISTRATOR, no. 9 (Oct. 2007). But that brief piece does not identify or discuss the critical role that new educational data plays in undermining the early courts' decisions concerning duty and proximate cause.

[96] For example, 45 states and the District of Columbia have recently adopted the Common Core Standards, which provide standards in English Language Arts and Literacy in History/Social Studies, Science and Technical subjects for grades K-12. *See The Common Core State Standards Initiative*, http://www.ccsso.org/Resources/Programs/The_Common_Core_State_Standards_Initiative.html (last visited Aug. 8, 2012).

these highly complex models has dropped dramatically. Researchers no longer need to embark on massive data collection efforts in order to get information about what is going on in schools nor do they need access to large university mainframes in order to analyze their data.

It is only a slight exaggeration to say that what once took an Act of Congress or state legislation can now be accomplished by an independent researcher and a FOIA request—a fact made clear by the recent and well-publicized decision by the *Los Angeles Times* to hire an independent researcher to calculate value-added scores for Los Angeles Unified teachers.[97] In other words, times have changed. They have changed sufficiently that it is possible to imagine plaintiffs able to overcome the obstacles identified by courts in the earlier era of education malpractice cases.

This section proceeds by briefly recounting the uneven development of education standards, data collection methods, and research techniques to illustrate how previous conditions forestalled the possibility of prevailing on this kind of claim. This is followed by a consideration of the present policy environment that includes state standards, extensive data collection practices, and district-endorsed value-added models, which can isolate the 'causal effects' of teachers on student achievement. The estimates provided by value-added models provide judges with evidence of both a teacher's unique contribution to a student's learning and, as a score expressed relative to an average teacher, a workable standard for determining a duty of care.

A. The Old World of Education Standards

Most scholars mark the beginning of the modern concern for linking educational inputs with outputs to several developments in the 1960's.[98] Among the most significant of these developments were the passage of the 1965 Elementary and Secondary Education Act (ESEA),[99] and the creation of the National Assessment of Educational Progress (NAEP). Under Title I of the ESEA, districts were given money to deliver compensatory educational services to students in low income areas, provided that districts evaluate the quality of the programs provided.[100] While Title I evaluation occurred at the local level, NAEP was designed to provide policymakers with a longitudinal measure of academic achievement at the national level. Using a matrix-sampling procedure,

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[97] Richard Buddin, *How Effective Are Los Angeles Elementary Teachers and Schools?* (2010), *available at* http://documents.latimes.com/buddin-white-paper-20100908/; *see also* Jason Song & Jason Felch, *Times Updates and Expands Value-added Ratings for Los Angeles Elementary School Teachers*, LOS ANGELES TIMES, May 7, 2011.

[98] *See, e.g.*, DANIEL KORETZ, MEASURING UP: WHAT EDUCATIONAL TESTING REALLY TELLS US 46-73 (2008); Robert L. Linn, *Assessments and Accountability*, 29 EDUCATIONAL RESEARCHER 4 (2000).

[99] The Elementary and Secondary Education Act, Pub L. 89-10, 79 Stat. 27 (1965).

[100] 20 U.S.C. §§ 6301 *et seq*.

NAEP allowed for a wide sampling of curriculum while providing a broad measure of achievement for the nation's students as a whole and for major subgroups as well.[101] Taken together, these policies marked the start of an era in which evaluation would become a central component of education policy.[102]

These federal efforts to measure educational attainment were followed by similar efforts at the state level. The state level policies followed the federal policies in their concern with measuring school outcomes, but while federal measurement efforts were created for informational purposes, states added accountability provisions to educational assessment efforts. Between 1963 and 1974, states passed 73 laws concerning accountability, including 54 between 1972 and 1974.[103] The most notable feature of many of these laws was the introduction of "minimum competency tests" (MCTs)—tests that students were required to pass in order to receive their diploma.[104]

These tests represented a fundament shift in the nature and use of tests in American education.[105] Prior to MCTs nearly all tests were "norm referenced" tests, meaning they reported a student's achievement level relative to other students. MCTs were "criterion referenced" tests, meaning they provided a measure of student achievement relative to an *absolute* standard of performance.[106] Though states had long required students to take a certain number of courses and subjects to graduate, state laws rarely articulated either learning outcomes or the levels of "competency" with the specificity required to develop valid test based accountability systems.[107] In addition to articulating outcome levels and

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[101] For a history of the development of NAEP and its design as a national assessment, *see* RICHARD ROTHSTEIN ET AL., GRADING EDUCATION: GETTING ACCOUNTABILITY RIGHT 99-118 (2008).

[102] *See* KORETZ, *supra* note 98 at 55 (observing that Title I "marked the onset of a sea change in educational testing, from diagnosis and local evaluation to large-scale monitoring of performance and, ultimately, to test-based accountability").

[103] PHYLLIS HAWTHORNE, LEGISLATION BY THE STATES: ACCOUNTABILITY AND ASSESSMENT IN EDUCATION. REPORT NO. 2. REVISED 3, 19 (1974).

[104] By 1978, thirty-three states had legislation mandating some form of minimum competency test. For statistics and a basic description of these laws see: Chris Pipho, *Minimum Competency Testing in 1978: A Look at State Standards*, 59 PHI DELTA KAPPAN 585, 585 (1978).

[105] *See* KORETZ, *supra* note 98 at 57. (describing minimum competence tests as "beyond a doubt the single most important change in testing in the past half century").

[106] For a classic discussion of the differences between norm and criterion referenced tests, *see* HAROLD GULLIKSEN, THEORY OF MENTAL TESTS 267 (1950) (discussing the use norm referenced testing while noting that the score on such tests cannot establish an absolute level of attainment).

[107] *See* Merle S. McClung, *Competency Testing Programs: Legal and Educational Issues*, 47 FORDHAM L. REV. 651, 678-79, 684-86 (1979) (noting for example that some states defined competency in terms of adult-life competencies, beliefs, and future attitudes, thus requiring that any assessment have predictive capabilities that would be impossible to substantiate and impossible to measure.); Gene V. Glass, *Minimum Competence and Incompetence in Florida*, 59 PHI DELTA KAPPAN 602, 603 (1978) ("[N]o one knows how well a person must read to succeed in life or what percent of the graduating class ought to

performance standards, the introduction of these 'high stakes' tests required that states, for the first time, take steps to align learning objectives, curriculum, exit examinations, and classroom instruction—or risk lawsuits when they sought to enforce test sanctions.[108] The top down alignment of educational standards required by MCTs and criterion referenced tests more generally have since become the cornerstone of American education policy.[109]

The fundamental building blocks of our current accountability system—evaluation of education outputs, articulation of standards, criterion referenced testing—were thus in place by the time the first education malpractice lawsuits were filed in the late 1970s. However, for all of these developments, there were several limitations to these accountability systems. First, the vast majority of the data on student achievement was, like NAEP, collected at the national level. The sampling techniques allowed for broad coverage, but by design they could not provide disaggregated information on either the state or district level. Second, though MCTs provided student-level information on standards based academic attainment, they did so as a one-time event. If a student was found to lack basic competency, it was impossible to know at what point a student had stopped meeting grade level expectations and therefore which teachers or administrators might have had a duty to act. Though the stated purpose of these state reforms was to create educational accountability for teachers and districts, many scholars noted that this was totally out of the question given the lack of data and the limitations of existing research design.[110]

Not only did scholars doubt that they had the data necessary to hold teachers accountable for student achievement, but scholars were equally unsure about what methods of teaching could reliably produce the levels of achievement required by the tests. As a leading review of

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be able to calculate compound interest payments.").

[108] The alignment of these elements involves establishing what scholars refer to as content, curricular, and instructional validity. In order to be valid, an exit examination must reflect the state standards (content validity); the materials used for instruction (curricular validity); and the content actually taught in schools (instructional validity). George Madaus, *Minimum Competency Testing for Certification: The Evolution and Evaluation of Test Validity*, *in* THE COURTS, VALIDITY, AND MINIMUM COMPETENCY TESTING 39 (George Madaus ed., 1983). For an example of litigation brought on by a State's failure to properly align its exit exam to the materials used for instruction, *see Debra P. v. Turlington*, 644 F.2d 397, 404 (5th Cir. 1981) ("We believe that the state administered a test that was, at least on record before us, fundamentally unfair in that it may have covered matters not taught in the schools of the state.").

[109] *See* KORETZ, *supra* note 98 at 57 ("[N]orm-referenced reporting has since ebbed and flowed, but criterion-referenced testing with cut scores has persisted and . . . is now required by federal law.").

[110] Gene Glass, *The Many Faces of 'Educational Accountability'*, 53 PHI DELTA KAPPAN 636, 637 (1972) ("[T]he empiricist promises more than he can deliver when he attempts to credit or punish individual teachers, administrators, or school districts on the basis of nonexperimental, correlational evidence concerning their contributions to the welfare of their pupils.").

literature on the effects of teacher performance on student achievement concluded at the time,

> [T]he research literature on the relation between teacher behavior and student achievement does not offer an empirical basis for the prescription of teacher-training objectives . . . [and] given the well-documented, strong association between student achievement and variables such as socioeconomic status and ethnic status, the effects of techniques of teaching on achievement . . . are likely to be inherently trivial.[111]

That is to say, there was considerable doubt about the ability of teachers to impact student learning beyond family background and native ability.[112] In this view, even if teachers did have information on low student performance, it was questionable whether they could do anything to change this reality. Given both this belief that student characteristics were at least as important as teacher behavior in determining student achievement, and the general paucity of data on student achievement, it is little wonder that judges in the early period could find no clear standard of care or causal evidence linking teacher behavior with student achievement to support a claim of educational malpractice.

B. Expanding Educational Standards and Student Achievement Data

Despite the limitations of early accountability systems, the adoption of standards based testing and reform efforts would only accelerate over the next three decades. Heeding calls in both the mainstream press[113] and professional education journals[114] for more and better data on student achievement, Congress passed several pieces of legislation in the mid-1990s that placed the financial resources of the federal government behind efforts to develop standards and more robust accountability systems throughout the country.[115] Unlike previous efforts, the new accountability legislation required states to track the achievement

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[111] Robert W. Heath & Mark A. Nelson, *The Research Basis for Performance-Based Teacher Education* 44 REV. OF EDUC. RESEARCH 463, 481 (1974).

[112] This view stemmed in part from many scholars' interpretation of the famous Coleman Report, which some read as concluding that schools could do relatively little to influence student achievement. *See* JAMES S. COLEMAN, ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY 325 (1966) ("Schools can bring little to bear on a child's achievement that is independent of his background and general social context.").

[113] *See, e.g.*, Barbara Vobejda, *U.S. to Fill Statistics Gap in Education: States Had Sought More Student Data*, WASHINGTON POST, May 3, 1988, at A25.

[114] *See, e.g.*, Michael W. Kirst & Allan Odden, *National Initiatives and State Education Policy*, 4 STAN. L. & POL'Y REV. 100 (1992).

[115] *See* MARIS A. VINOVSKIS, FROM A NATION AT RISK TO NO CHILD LEFT BEHIND 56-84 (2009); PATRICK J. MCGUINN, NO CHILD LEFT BEHIND AND THE TRANSFORMATION OF FEDERAL EDUCATION POLICY, 1965-2005, at 75-104 (2006).

of *all* students toward state achievement standards.[116] Though the speed, quality, and degree of implementation varied considerably,[117] states began passing legislation and setting standards so as to refashion their entire education systems to create alignment and support for their educational objectives. In California, for example, this process included the selection of textbooks, the development of assessments, articulation of graduation requirements, and creation of teacher credentialing system all of which reflected the state's new standards.[118]

In addition to calling for the development of state educational standards, federal legislation also required that states implement assessments aligned to their standards. States were required to tests students at least once between 3rd and 5th grade, 6th and 9th grade, and 10th and 12th grade.[119] As part of these assessments states were required to develop three criterion-based levels of achievement("partially proficient," "proficient," and "advanced"); to report disaggregated performance by a variety of subgroups;[120] and to determine what constituted "adequate yearly progress" (AYP) toward achievement standards for districts and schools.[121] When the No Child Left Behind Act (NCLB) was passed in 2001, it would retain nearly all of these innovations while adding the requirement that students be tested *every* year between 3rd and 8th grade in math and English Language Arts. NCLB would also require that schools be responsible for student achievement for particular subgroups of students, not just average test scores across the school as a whole.[122]

The introduction of this yearly testing requirement was critical because it meant that states and parents had a more complete longitudinal picture of student achievement. Though few states would actually develop data-systems with the capability of tracking individual students longitudinally in the early days of NCLB, the testing environment was now in place to make longitudinal data collection possible.[123] Similarly,

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[116] *See* MCGUINN *supra* note 115 at 100.

[117] *See* Richard F. Elmore, et al., *The New Accountability in State Education Reform: From Process to Performance*, *in* HOLDING SCHOOLS ACCOUNTABLE: PERFORMANCE-BASED REFORM IN EDUCATION 67 (Helen F. Ladd ed., 1996) ("Over 80 percent of states claim they are engaged in developing, piloting, or implementing such new approaches to accountability, but [as of 1996] few performance-based systems are actually up and running.").

[118] *See* CAL. EDUC. CODE § 60422 (textbooks); *id.* § 60602 (accountability standards); *id.* § 60605 (testing and standards); *id.* § 60805 (exit exam); *id*. § 44259 (teacher certification).

[119] *See* MCGUINN, *supra* note 115 at 96.

[120] These subgroups include: state, local educational agency (LEA), gender, race, limited-English proficiency, migrant status, disability, and economic status. MCGUINN, *supra* note 115 at 96.

[121] *Id*.

[122] *See* Marnie S. Shaul & Harriet C. Ganson, *The No Child Left Behind Act of 2001: The Federal Government's Role in Strengthening Accountability for Student Performance*, 29 REV. OF RESEARCH IN EDUC. 151, 153-56 (2005).

[123] EDUCATION COMMISSION OF THE STATES, ECS REPORT TO THE NATION: STATE

the subgroup reporting requirements of NCLB also had the effect of pushing states to develop more robust data systems because each individual test score had to be linked to a particular student with a particular set of variables in order to produce AYP calculations.[124]

Though these developments were each seen as important steps to prevent districts from hiding behind aggregated scores and to ensure that every student had the chance to receive a high quality education, scholars noted that the definition of adequate yearly progress under NCLB created a series of perverse incentives for schools and teachers. Because schools were rewarded for the percentage of students from each sub-group who reached the proficient level, the law incentivized teachers to focus their attention on so called "bubble kids," students whose scores placed them just below the proficiency cutoff.[125] A gain large enough to move the student past the cutoff would have a positive influence on the school's AYP calculation, while a similarly sized gain for a student lower down the assessment scale would not.[126] This reality struck many as fundamentally unfair. That unfairness, combined with a growing body of literature that indicated the differential impact of teachers on student learning and the desire to improve the quality of America's teaching force, spurred calls to move away from "status" measures and toward "value-added" based accountability systems.[127]

C. Value-Added Models and the New Era of Accountability

Though value-added models (VAMs) have been an issue of interest for several decades,[128] it is only recently with the implementation of yearly testing and the precipitous decline in the cost of computing power necessary to calculate value-added scores that they have become the subject of widespread policy interest.[129] Indeed, the development and implementation of VAMs have become a key feature of federal education policy. The American Recovery and Reinvestment Act of 2009 (ARRA)

IMPLEMENTATION OF THE NO CHILD LEFT BEHIND ACT 15-16 (2004). .

[124] *Id*. At 16.

[125] DOUGLAS N. HARRIS, VALUE-ADDED MEASURES IN EDUCATION 57 (2011) (noting that proficiency standards incentivize schools to focus on students near the cut-off).

[126] Robert L Linn, et al., *Accountability Systems: Implications of Requirements of the No Child Left Behind Act of 2001*, 31 EDUC. RESEARCHER 3, 15 (2002) ("Dividing the score scale on a test into regions that are then assigned labels . . . ignores differences in performance within each region. Gains in scale scores within a region go undetected and receive no credit.").

[127] *See* HARRIS, *supra* note 125 at 43-47.

[128] *See, e.g.*, Eric A. Hanushek, *Teacher Characteristics and Gains in Student Achievement: Estimation Using Mic*ro-*Data*, 61 AM. ECON. REV. 280 (1971).

[129] *See, e.g.*, William S. Sanders and Sandra P. Horn, *Educational Assessment Reassessed*, EDUC. POL'Y ANALYSIS, Mar. 1995 at 3 ("[P]erforming the operations necessary to analyze test data beyond the [basic] provided measures required an inordinate amount of time and expertise prior to the recent advent of powerful and inexpensive computers.")

included more than $4 billion to be given to states as part of the Race to the Top Program.[130] Key criteria for assessing state applications for Race to the Top funds included the implementation of a teacher evaluation system that can "differentiate [teacher] effectiveness" using "data on student growth . . . as a significant factor,"[131] that these teacher evaluations happen on a yearly basis, and that the evaluations be used in compensation, promotion, tenure, and retention decisions.[132] These growth models are also incorporated into the Race to the Top definitions of an "effective" and "highly effective" teacher,[133] along with the Department of Education's proposal for the latest reauthorization of the ESEA.[134]

The upshot of these federal policies has been the rapid implementation of systems supporting value-added calculations and the adoption of growth models by states. Thirty-five states currently have a statewide data system that includes unique identifiers for teachers and students.[135] These identifiers allow teacher and student records to be linked and subsequently matched with longitudinal test data.[136] The remaining states and the District of Columbia, with the exception of California, currently have the capacity in their data systems to match these records but do not have a policy for doing so.[137] The creation of value-added capable data systems has not been a mere formalism; as of 2011, twenty-four states have adopted policies requiring the use of the value-added information produced by their data systems in the assessment of teacher effectiveness—a development that has been described by the National Council on Teacher Quality (NCTQ) as nothing short of a "sea [] change in teacher evaluations."[138]

In half of these states, according to the NCTQ, "student achievement/growth [data] is required to be the preponderant criterion in teacher evaluations."[139] For example, in the District of Columbia, teachers who teach reading or math in grades 4 through 8 each receive an "Individual Value-Added" score, which comprises 50% of the teacher's

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[130] *See* U.S. DEPARTMENT OF EDUCATION, *Race to the Top Program Executive Summary* 2 (2009); American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

[131] Race to the Top Fund, 74 Fed. Reg. 59,688, 59,803 (Nov. 18, 2009).

[132] *Id*.

[133] *See id.* at 59,804 (defining an "effective teacher" as a teacher whose students achieve at least one grade level of gains in a year and a "highly effective teacher" as one whose students achieve at least one and a half grade levels worth of gains in a year).

[134] *See* U.S. DEPARTMENT OF EDUCATION, A BLUEPRINT FOR REFORM: THE REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT 14 (2011) (discussing role of student growth in measuring teacher effectiveness).

[135] NATIONAL COUNCIL ON TEACHER QUALITY, 2011 STATE TEACHER POLICY YEARBOOK: NATIONAL SUMMARY 66 (2012).

[136] *Id*.

[137] *Id*.

[138] *Id*. at 3.

[139] *Id*.

overall district evaluation score.[140] In New York, the State Education Department is putting in place a teacher evaluation system as part of its implementation of the state's Race to the Top award that would require teachers who receive an "ineffective" rating based on their value-added scores to receive an overall "ineffective" rating from the state.[141]

VAMs can vary in their statistical approach and can be quite complex, but at their most basic level, they attempt to isolate the unique contribution and provide a causal estimate of the effect of a teacher on a student's academic achievement.[142] They provide this estimate by comparing the statistically adjusted test scores of a teacher's individual students at the beginning of the year and at the end of the year. By using a student's prior level of achievement in the growth calculation, the models are able to control for variation in students' academic starting points. Additional adjustments are often made depending on the specific model but typically include student background characteristics and school-based factors that may affect a student's achievement level but are beyond a teacher's control. The individual student gains are aggregated for each teacher to create a teacher's value-added score. Depending on the model this score can be compared to other teachers in the school, district, or state.[143] Thus, a key feature of VAMs is that the models provide estimates of teacher effects independent of the various qualities of the class of students they were assigned. Consequently, this allows us to say what the learning gains of the average student would be if he or she were assigned to teachers with different value-added scores.

To help illustrate how VAMs function and how the information provided by these models might be interpreted by interested parties, we will briefly consider the characteristics of the VAM currently employed to evaluate teachers in New York City.[144] The data used to calculate teacher

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[140] *Value-Added Overview*, DISTRICT OF COLUMBIA PUBLIC SCHOOLS, http://www.dc.gov/DCPS/In+the+Classroom/Ensuring+Teacher+Success/IMPACT+(Performance+Assessment)/Value-Added (last visited Aug. 9, 2012).

[141] Press Release, NEW YORK STATE EDUCATION DEPARTMENT, Chancellor Tisch and Commissioner King Praise Evaluation Agreement (Feb. 16, 2012), http://www.oms.nysed.gov/press/ChancellorTischandCommissionerKingPraiseEvaluationAgreement.html.

[142] *See* Pete Goldschmidt, NATIONAL CENTER FOR RESEARCH ON EVALUATION, STANDARDS, & STUDENT TESTING, *Using Value Added Models to Monitor Teacher Effects* 3, http://www.tqsource.org/webcasts/201012Workshop/Pete_Goldschmidt_PPT.pdf. Note that this is a crucial distinction between value-added models and traditional statistical analyses involving correlation and regression models. Correlation and regression analysis provide information only about the *association* between independent and dependent variables and do not provide a basis for causal interpretation. As the old adage goes "correlation is not causation".

[143] For a non-technical description of value-added models and how they work, *see* HARRIS, *supra* note 125; HENRY I. BRAUN, EDUCATIONAL TESTING SERVICE, USING STUDENT PROGRESS TO EVALUATE TEACHERS: A PRIMER ON VALUE-ADDED MODELS (2005), *available at* http://www.ets.org/Media/Research/pdf/PICVAM.pdf.

[144] Although we use the New York City model for illustrative purposes here, it must be stressed that the specific variables and specification of the VAM will determine the

value-added scores in New York is taken from state student test score data in grades four through eight in math and English Language Arts. The New York City model includes a number of student and classroom level characteristics in order to provide a causal estimate of an individual teacher's contribution to a student's test score achievement. In addition to a student's pre- and post-test scores, the model includes a number of statistical control variables on student characteristics including race, gender, English language learner, free and reduced lunch, and disabilities as well as variables relating to a student's school performance including number of absences and suspensions, summer school enrollment, grade retention.[145] Classroom-level variables are also used in the model including measures of class size, average student test score achievement, average student classroom characteristics, and the proportion of students new to the district.[146]

As one can imagine, the collection of information on each of these variables for all teachers and students in grades four through eight represents a massive data collection effort. The availability of this data is, however, absolutely crucial to the success of the value-added project. The information for each of these variables allows the model to control for other factors that might influence student achievement and therefore allow for a more accurate estimation of teachers' effects.

All of this data is used to produce, after several statistical adjustments, a teacher's single year value-added score.[147] These value-added scores can then be used to determine a teacher's percentile for value-added—that is, how an individual teacher's value-added score compares to other teachers in the district.[148] The city has assigned teachers

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acceptable conclusions that one can draw from the model's output as different models require different assumptions which must be met in order to produce unbiased estimates of a teacher's value-added effects. For a discussion of how the New York model varies from other models in use, *see* Sarah Butrymowicz & Sarah Garland, *How New York City's Value-Added Model Compares to What Other Districts, States Are Doing*, THE HECHINGER REPORT (Mar. 1 2012), http://hechingerreport.org/content/how-new-york-citys-value-added-model-compares-to-what-other-districts-states-are-doing_7757/.

[145] VALUE-ADDED RESEARCH CENTER, WISCONSIN CENTER FOR EDUCATION RESEARCH, NYC TEACHER DATA INITIATIVE: TECHNICAL REPORT ON THE NYC VALUE-ADDED MODEL 10 (2010) [hereinafter "Technical Report"], *available at* http://schools.nyc.gov/NR/rdonlyres/A62750A4-B5F5-43C7-B9A3-F2B55CDF8949/87046/TDINYCTechnicalReportFinal072010.pdf.

[146] *Id*.

[147] *See id*. at 8-18 (describing model specifications). The model actually produces several value-added scores in addition to the single year score, including a multi-year value-added score (if sufficient data is available) and scores for students with certain characteristics including gender, tertile of achievement (based on prior test scores), disability, and English language learner. *Id*. at 15. There is growing evidence in the literature that multi-year value-added calculations provide more stable and more accurate measures of teacher effectiveness. *See* Daniel F. McCaffrey, et al., *The Intertemporal Variability of Teacher Effect Estimates*, 4 EDUC. FIN. AND POL'Y 572 (2009).

[148] *Id*. at 17. The city also produces percentile scores for teachers based on multiple years of value-added score, level of teaching experience, and student subgroup. *Id*.

to categories based on their value-added percentiles: "low" (0^{th} – 4^{th} percentile); "below average" (5^{th} – 24^{th} percentile); "average" (25^{th} - 74^{th} percentile); "above average" (75^{th} - 94^{th} percentile); "high" (95^{th} – 99th percentile).[149] Based on this information it is possible for a school administrator to compare the average effectiveness of a given teacher to that of other teachers in the district and to calculate an estimate of the difference in student achievement for a student being assigned one teacher instead of another. To take an extreme example, according to information released by the New York City on 2008-9 value-added scores, a fifth grader assigned to a teacher in the 95th percentile of math value-added could be expected on average to achieve roughly 17 scale points higher in math that if assigned to a teacher in the 5^{th} percentile—an amount more than half the difference in cut scores between lacking proficiency and achieving grade level proficiency.[150] Given the evidence that the value of teacher effects is both cumulative and lasting,[151] this difference has potentially large consequences for an individual student's long-term academic achievement.

Though there can be no denying the sudden popularity of VAMs, the adoption and implementation of VAMs in teacher evaluation is not without critics. Many scholars worry that VAMs are not able to adequately control for the many variables that can influence student learning[152] and question whether the assumptions necessary to support causal interpretations in value-added scores are reasonable.[153] Scholars have also noted the instability of individual teacher value-added scores from year to year, a fact which raises questions about whether these models can reliably assess teacher quality.[154]

Other scholars, while not disputing this evidence, argue that VAMs are still valuable tools that can and should be used with care be used by school officials.[155] These scholars note that while value-added measures are not perfect, they still provide the best available measure for assessing

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[149] *Id*. at 18.

[150] *Id*. at 19 (noting that in fifth grade math in 2008-2009, the difference between the cut score for Level II (partially meeting grade level standards) and Level III (proficient) was 31 points).

[151] *See* RAJ CHETTY et al., THE LONG-TERM IMPACT OF TEACHERS: TEACHER VALUE-ADDED AND STUDENT OUTCOMES IN ADULTHOOD 3-4 (Nat'l Bureau of Econ. Research, Working Paper No. 17699, 2011).

[152] *See, e.g.*, EVA L. BAKER, ET AL., PROBLEMS WITH THE USE OF STUDENT TEST SCORES TO EVALUATE TEACHERS 3 (2010), *available at* http://www.epi.org/publication/bp278/ ("The nonrandom assignment of students to classrooms and schools—and the wide variation in students' experiences at home and at school—mean that teachers cannot be accurately judged against one another by their students' test scores, even when efforts are made to control for student characteristics in statistical models.").

[153] *See* Sean Reardon & Stephen Raudenbush, *Assumptions of Value-Added Models for Estimating School Effects* 34-36 (Working paper prepared for the National Conference on Value-Added Modeling 2008).

[154] *See, e.g.*, McCaffrey, *supra* note 147 at 585-598.

[155] *See, e.g.*, HARRIS, *supra* note 125 at 158, 161.

teacher quality—one that is superior to the traditional reliance on routes to teaching, course work, and so on.[156] In particular, they note that value-added measures are important because they judge teachers on the outcome that education policy is most concerned with—student achievement—rather than simply the characteristics of the teacher.[157] Economist and value-added expert Doug Harris highlights this important distinction between attribute variables and outcome measures with a tennis metaphor: "we could try to determine who is a better player by observing each player's performance—for example, players' serve and backhand techniques. But why not just look at who won the match or each player's overall winning percentage?"[158] Rather than trying to image the characteristics of a good teacher, VAMs allow administrators to determine teacher effectiveness *in practice*.

III. THE NEW EDUCATION MALPRACTICE LITIGATION

Armed now with a complete understanding of the initial era of education malpractice litigation and the substantial intervening changes in educational standards and data, we are now prepared to address the critical question: what changes, if any, does the new landscape of educational data compel with respect to education malpractice claims?

We acknowledge at the outset that a number of the courts' initial holdings are *not* changed by new developments. The new world of educational data, for instance, does nothing for a cause of action premised on statutory (as opposed to common law) negligence, it does not assist plaintiffs who might sue school officials for fraud, and it has no consequence for states whose sovereign immunity doctrines would insulate school districts in any event. But the new world of data does change the analysis for the elements of the common law negligence claim. We explore these elements one-by-one, before concluding with a brief discussion of the affirmative defense of comparative negligence.

A. Duty of Care

As discussed above,[159] the courts of the initial era were unwilling to recognize claims for education malpractice due chiefly to problems with

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[156] STEVEN GLAZERMAN ET AL, EVALUATING TEACHERS: THE IMPORTANT ROLE OF VALUE-ADDED 9 (2010), *available at* http://www.brookings.edu/research/reports/2010/11/17-evaluating-teachers/ ("If student test achievement is the outcome, value-added is superior to other existing methods of classifying teachers. Classification that relies on other measurable characteristics of teachers . . . considered singly or in aggregate, is not in the same league in terms of predicting future performance as evaluation based on value-added.").

[157] Douglas N. Harris, *Teacher Value-Added: Don't End the Search Before It Starts*, 28 J. OF POL'Y ANALYSIS & MGMT. 693, 694 (2009).

[158] *Id*.

[159] *See supra* part I.

the first element of the common law tort claim, the duty of care. The courts provided two primary explanations for their reluctance: the absence of a workable standard of care, and the fear of crushing liability.[160]

1) A Workable Standard of Care

The courts of the prior era took the view that it was impossible to fashion a "workable" standard for what qualifies as reasonable and unreasonable teaching because of the subjective nature of pedagogical practice. Professor John Elson summarized it well in 1978 when he wrote that the problem with the theory was that "the plaintiff in the educational negligence suit inevitably asks the court to decide what the legally acceptable and unacceptable teaching practices are within the court's jurisdictional boundaries."[161] Yet as the California Court of Appeal recognized in *Peter W.*, the line between the legally "acceptable" and "unacceptable" teaching practices is anything but clear. After all, "[t]he science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might—and commonly does—have his own emphatic views on the subject."[162]

The evolution of standards, testing, and value-added assessment measures, however, makes it possible for a duty of care to be fashioned *without requiring courts to pass judgment on the legal acceptability of particular teaching practices*. The crux of the new education malpractice claim is that the charged negligence is not a particular teacher's decision about "how or what a child should be taught," but rather the decision by school officials to continue assigning students to teachers whom the district's own data reveal to be continually ineffective. Put another way, what constitutes "malpractice" in the theory we present is not *the kind of teaching* that happens *within* the classroom, but the fact that chronically low-performing teachers are allowed to remain in the classroom at all.

Although this argument is certainly novel in the context of academic injuries, it should be recognized that the broader theory from whence it derives is of established pedigree in the law of torts. Section 317 of the Restatement (Second) of Torts provides that an employer "is under a duty to exercise reasonable care to control his" employee so as to prevent the employee from "intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them."[163] Moreover, the Restatement notes that,

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[160] Some courts, such as the California Court of Appeal in *Peter W.*, also explained that no duty of care would be imposed due to problems with proximate causation and injury. Rather than tackle those concerns under the heading of duty of care, however, we discuss them separately below as independent elements of the common law tort suit. *See infra* part III.B.3-4.

[161] *See* ELSON, *supra* note 36 at 646.

[162] *Peter W.*, 60 Cal.App.3d at 824 (1976).

[163] Although the restatement refers specifically to risk of bodily harm, it is still relevant for our purposes because at least some courts have interpreted Section 317 to give rise to

> [t]here may be circumstances in which the only effective control which the master can exercise over the conduct of his servant is to discharge the servant. Therefore the master may subject himself to liability . . . by retaining in his employment servants who, to his knowledge, are in the habit of misconducting themselves in a manner dangerous to others.[164]

The tort theory set forth in Restatement of Torts § 317 is buttressed by a parallel section in the Restatement of Agency. Section 213 of that Restatement provides that "[a] person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless . . . in the employment of improper persons . . . in work involving risk of harm to others."[165] The Restatement's comment goes on to explain that liability will be imposed on an employer under Section 213 where, "the employer has not taken the care which a prudent man would take in selecting the person for the business in hand."[166]

Restatement of Torts § 317 and Restatement of Agency § 213 thus provide the groundwork for plaintiffs to sue for what is commonly referred to as the tort of "negligent retention" of an unfit employee. And unlike the unworkable task of adjudicating whether a particular pedagogical practice is legally unsound, the courts have had little difficulty concluding across a host of contexts that the negligent retention tort embodies a judicially enforceable standard of care. For example, Courts have recognized tort liability for: a school district that negligently retains a teacher who poses a risk of sexual abuse;[167] an employer who retains an employee who has previously stolen private property;[168] a hospital who retains a doctor who steals drugs from patients to satisfy his own addiction;[169] a bar that retains a bartender who has a history of criminal assault,[170] and numerous other factual situations.[171]

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tort liability where the employee does not cause bodily injury. *See, e.g.*, *Frye v. Am. Painting Co.*, 642 N.E.2d 995, 998 (Ind. Ct. App. 1994) (negligent retention of employee tort claim recognized where employer knew of employee's prior act of burglary, theft and arson, but where plaintiff was uninjured); *see also Am. Exp. Travel Related Services, Co., Inc. v. Symbiont Software Group, Inc*., 837 So. 2d 434, 435 (Fla. Dist. Ct. App. 2002) (recognizing negligent retention tort where defendant company's employee stole from the plaintiff, but where there was no bodily injury). *But see Jaindl v. Mohr*, 637 A.2d 1353, 1356 (Pa. Super. Ct. 1994), *aff'd*, 661 A.2d 1362 (1995) (no tort liability under Section 317 where plaintiff did not allege bodily harm).

[164] Restatement (Second) of Torts § 317 cmt. c (1965).

[165] Restatement (Second) of Agency § 213 (1957).

[166] *Id*. § 213 cmt. d.

[167] *C.A. v. William S. Hart Union High Sch. Dist*., 270 P.3d 699, 708 (2012); *Marquay v. Eno*, 662 A.2d 272, 281 (1995).

[168] *Frye v. Am. Painting Co.*, 642 N.E.2d 995, 998 (Ind. Ct. App. 1994).

[169] *Wagner v. Ohio State Univ. Med. Ctr*., 934 N.E.2d 394, 402 (Ohio Ct. App. 2010).

[170] *Foster v. Loft, Inc.*, 526 N.E.2d 1309, 1313 (1988).

As the courts have conceived it, the key question in the negligent retention tort is whether the defendant "knew or should have known that its employee would subject a third party to an unreasonable risk of harm."[172] Yet resolving this inquiry in the case of a school district that negligently retains a low-performing teacher should, if anything, be *more* workable than certain other negligent retention claims typically adjudicated by courts. That is so because in, for example, the case of a plaintiff who sues a school district alleging that the district negligently retained a teacher who sexually abused her, it is often a hotly contested issue (resolvable only via difficult credibility determinations) whether school officials knew or should have known of a teacher's prior acts of sexual abuse to begin with.[173] Yet in a lawsuit alleging negligent retention of a chronically ineffective teacher, the court can rely on the existence of extensive value-added assessment data, the whole purpose of which is to provide school officials with statistically reliable metrics regarding a teacher's past performance—there is simply no dispute as to whether the district knew or should have known of its teachers' prior performance.

Once it is established that a defendant knew or should have known about its employee's past bad act, the existence of value-added data is also helpful in terms of the court's ability to determine whether an employee's past bad behavior is indicative of an *unreasonable* risk of harm. In the ordinary negligent employee retention context, the courts operate from the presumption that a prior bad act (say, by an employee who fails to complete a repair contract promised to a customer but who accepts payment nonetheless) evinces an unreasonable risk that the employee will act improperly again such that the employer should discharge him.[174] But this presumption may or may not be accurate; surely an employee who has deceptively failed to complete a past assignment poses a greater risk of doing the same on a future assignment, but there is no clear way to know just how high the risk is. Courts impose duties of care in such instances nonetheless.[175] In the education malpractice context, however, there is substantial data that can be brought to bear on the question of whether a past bad act (e.g., improving student learning at a very low rate over three years) is actually indicative of a bad teacher who is likely to continue his bad performance moving forward. A 2006 Brookings Institution study found, for example, that a student assigned to a teacher in the bottom

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[171] *See generally Employment of incompetent, inexperienced, or negligent employee as an independent ground of negligence toward one other than an employee*, 8 A.L.R. 574 (collecting negligent retention cases).

[172] *L.L.N. v. Clauder*, 563 N.W.2d 434, 445 (Wis. 1997); *Moses v. Diocese of Colorado*, 863 P.2d 310, 329 (Colo. 1993) (same).

[173] *See, e.g.*, *Doe v. Centennial Indep. Sch. Dist. No. 12*, A04-413, 2004 WL 2939861 (Minn. Ct. App. Dec. 21, 2004) (noting existence of a "genuine issue of material fact about whether [the school district] knew or should have known that the teacher was sexually abusing" the plaintiff).

[174] *See, e.g.*, *CoTemp, Inc. v. Houston W. Corp.*, 222 S.W.3d 487, 492 (Tex. App. 2007).

[175] *See id*. at 493.

quartile of value-added gains over the preceding two-year period lost on average 10 percentile points of achievement relative to a student who was assigned to a top-quartile teacher during the prior two years."[176] Another study, this one by researchers at Mathematica, found that when three years of student learning data is used, there is a 74% chance that a teacher who is identified as performing at or below the 18th percentile of all teachers in terms of student learning gains is actually at or below the 18th percentile.[177] The degree of certainty rises to 83% when asked to identify teachers below the eighth percentile over three years.[178]

Of course, a school district defendant could respond that there is no "workable" standard of care notwithstanding the general acceptability of the negligent retention tort theory because the court in an educational malpractice claim would still be required to decide just how bad a teacher must be before the district will be found negligent for leaving him in the classroom. In other words, the district will argue that reframing the tort has not eliminated the need for impossible judicial line-drawing but rather shifted its focus from evaluating the propriety of certain classroom teaching practices to evaluating how bad a teacher must be before he or she should no longer be allowed to teach. Is it negligent for a school district to retain a teacher who is in the 8th percentile in terms of student learning gains over three years? Perhaps so. But what if the teacher is in the 15th percentile over three years? Or the 25th percentile for two years? The difficulty answering each successive question might suggest that a workable standard of "reasonable care" eludes the court's grasp.

The response, however, is that the district's argument proves too much. *Every* common law negligence claim requires judicial line drawing; indeed that is a necessary outcome of measuring the defendant's conduct against a hypothetical "reasonable person" standard of care. For example, courts are called upon to draw difficult lines in cases in which a school district is sued for negligently retaining a teacher who allegedly abuses a student, where the district knew or should have known that the teacher had committed a prior act of abuse.[179] If the prior act was the subject of criminal charges proven in court, then the case for negligence would seem simple and the standard of care workable, since the likelihood of a future bad act seems high. But what if the prior act was a criminal charge of sexual abuse of a child five years earlier, where the government later dropped the charges due to the victim's reluctance to testify? Or what if it was a mere *allegation* of sexual abuse, never charged in court,

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[176] GORDON, *supra* note 4 at 7-8. The researchers described this predicted 10-point gap as "massive." *Id*.

[177] PETER Z. SCHOCHET & HANLEY S. CHIANG, MATHEMATICA POLICY RESEARCH, ERROR RATES IN MEASURING TEACHER AND SCHOOL PERFORMANCE BASED ON STUDENT TEST SCORE GAINS 21, 31, 35 (2010).

[178] *Id*.

[179] *See, e.g.*, *Virginia G. v. ABC Unified Sch. Dist.*, 15 Cal. App. 4th 1848, 1855(Cal. Ct. App. 1993); *C.A. v. William S. Hart Union High Sch. Dist.*, 53 Cal. 4th 861, 870 (2012).

ten years earlier? At what point is the line crossed where a school district would be unreasonable in deciding to retain the teacher?

Or to give another example, in *CoTemp, Inc. v. Houston W. Corp.*, the Texas state courts decided a case involving a local mechanical contracting firm that failed to install air conditioning units that it had contracted to provide a customer.[180] The customer sued, charging that the contracting firm was liable for negligently retaining an allegedly unfit employee who was responsible for the failed contract in the case at bar. The customer argued that the defendant's decision to retain the employee was negligent because the company knew that the employee had failed to complete assigned contracts on two prior occasions.[181] The Texas Court of Appeals agreed, finding little difficulty in ruling that the employee was unfit based on his two prior mistakes and therefore holding that the employer was negligent for "retaining in its employ an incompetent servant" that the company knew "was incompetent or unfit, thereby creating an unreasonable risk of harm to others."[182] Yet that decision necessarily entailed abstract line-drawing. What, exactly, was it about the employee's past history that made retaining him negligent? Would the company have been negligent in retaining him if he had only failed to complete a contract on *one* prior occasion and not two? Or what if his two mistakes were ten and twenty years ago? The point is simply to say, courts routinely draw difficult lines as to what conduct is negligent and what is not, and the education malpractice context should be no exception.

In fact, what appears to be driving the district's argument that a court is incapable of determining just how bad a teacher must be before it is unreasonable for the district to retain him is the existence of *additional* data in the first place. *More* statistical information about propensity for harm, in other words, is what separates the negligent instruction case from the negligent air conditioning employee case: In the former, school districts can calculate a teacher's specific percentile of performance and the amount of student learning associated with it (such that it would seem inappropriate to rule that negligence exists at, for example, the tenth percentile of teacher performance but not the eleventh), but in the latter there is no such data—only intuition as to whether an employee will repeat a prior mistake. It cannot be, however, that the presence of greater statistical certainty about the risk of future injury renders a standard of care unworkable in the educational injury context. To the contrary; courts have generally held that "[t]he statistical foreseeability" of injury is a "proper basis on which to affix legal responsibility.[183]

A second argument that a defendant school district might raise is that even if reliance on statistical data is generally appropriate in a court's fashioning of a standard of care, the available data in this context is not

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[180] 222 S.W.3d 487, 492 (Tex. App. 2007).
[181] *Id*.
[182] *Id*.
[183] *United States v. Tex-Tow, Inc.*, 589 F.2d 1310, 1314 (7th Cir. 1978).

statistically reliable enough to serve as the basis for a workable standard of care. Value-added measures, the school district might argue, simply do not tell us enough about teacher quality to be relied upon in litigation. In the context of the data presented above, the district could contend that an 83% certainty that the identified teacher is indeed within the bottom eight percentiles of teacher performance is not certain enough to warrant the inference that the district would be negligent for retaining him.[184]

The response to this charge is to fight the premise: there is an emerging general consensus that value-added data is indeed a good measure of teacher quality.[185] The school districts' and states' own behavior confirms this fact, since schools are increasingly required to use value-added data in evaluating teacher performance.[186] The school defendants, in other words, cannot have it both ways. They cannot at the same time use this data to evaluate and classify their own teachers as "ineffective" (an actual practice in places such as New York) while arguing as a defense in court that the data is meaningless. What is more, looking at educational malpractice litigation in the long-view, to the extent that value-added data may still be rough around the edges in the present day, the models will only improve with time: additional years of data will increase the quality of teacher value-added estimates and additional research will allow for more finely tuned models as hypothetical concerns give way to empirical evidence—something that is already starting to happen.[187] In other words, the time horizon for the reliability-defense is short and shrinking.

2) *Fear of Crushing Liability*

If courts confronted with our new theory of educational malpractice litigation are indeed capable of fashioning a workable standard of care, the next question to ask is whether the new theory also responds to the prior courts' concern over the risk of crushing liability. Again, we think the recourse to statistical value-added measures changes the analysis. In the prior era, the crux of the courts' concern was that a lack of consensus as to what constitutes reasonable pedagogical practices would lead great numbers of parents to file lawsuits believing—whether "real or imagined"—that their children were each being taught using unreasonable methods.[188] Moreover, because there are myriad pedagogical choices that a teacher can make in any of a wide host of contexts, what constitutes a reasonable teaching practice in one set of circumstances might be quite unreasonable in another (and vice versa).

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[184] *See* supra notes 177 & 178 and accompanying text.
[185] *See, e.g.*, CHETTY, *supra* note 151.
[186] *See* NATIONAL COUNCIL ON TEACHER QUALITY, *supra* note 135 at 3 (noting that 24 states now require the use of value-added data in teacher performance evaluation).
[187] *See* CHETTY, *supra* note 151 at 3 & n.6 (concluding that concerns about unobservable characteristics biasing value-added results are not supported by the data).
[188] *Peter W.*, 60 Cal. App. 3d at 825.

The result is that individual tort liability determinations would potentially do little to guide either future teacher behaviors or judicial outcomes, so that opening the door to liability in one case would truly lead to a cascade of suits of possibly enormous breadth.

But now consider the nature of the educational malpractice claim we suggest. Once a court determines that retaining a teacher with a given track record of performance (e.g., three years of value-added scores revealing that a teacher is beneath the eighth percentile) constitutes negligent retention, that determination will provide clear ex ante guidance to school districts on when to dismiss a teacher in order to avoid future lawsuits. And the inverse is true as well: A judicial declaration that retaining a teacher with three years of 20th percentile performance is *not* negligent would provide clear warning to plaintiffs not to file future suits where an allegedly negligently retained teacher is of similar quality. All this to say, the comparative clarity of the new theory regarding what constitutes reasonable and unreasonable conduct itself decreases the risk of the crushing litigation wave that the California Court of Appeal found persuasive in rejecting Peter W's claim.

There are other strategic choices that a new educational malpractice claimant might make to avoid a court's concerns over crushing liability. For one, the plaintiff might consciously choose to demand only injunctive and not monetary relief—perhaps a court order assigning children to new teachers, remedial tutoring services to compensate for past bad teachers, and so on. This would address the courts' general concern that "the remedy of money damages is inappropriate as a remedy for one who has been a victim of errors made during his or her education."[189] Or, in a more aggressive (though perhaps less likely to succeed) tack, the plaintiff might attempt to rebut the premise that the risk of crushing litigation is not a problem after all. As Judge Suozzi explained in dissent in *Donohue*, the New York case, "[f]ear of excessive litigation caused by the creation of a new zone of liability was effectively refuted by the abolition of sovereign immunity many years ago, and numerous environmental actions fill our courts where damages are difficult to assess. Under the circumstances, there is no reason to differentiate between educational malpractice on the one hand, and other forms of negligence and malpractice litigation which currently congest our courts."[190]

Taken in toto, we think that the theory of liability we have proposed here avoids many of the pitfalls that the courts recognized when declining to enforce a duty of care in the initial era. If we are correct in that claim, the next question is whether a defendant in any particular case

[189] *D.S.W. v. Fairbanks North Star Borough School District*, 628 P.2d 554, 556 (Ala. 1981).
[190] *Donohue*, 64 A.D.2d 29, 42 (Suozzi, J., dissenting).

can prove that the defendant school district *breached* its duty—that is, that the defendant was actually negligent.[191]

B) Breach

There is, of course, no precedent from the initial era of educational malpractice claims to rely on for our evaluation of the common law element of breach, since the first wave of cases did not recognize a duty of care and thus never made it to the breach determination to begin with.[192] But the basic considerations are straightforward. The plaintiff will argue that the school district's decision to retain a certain chronically ineffective teacher was unreasonable and thus in violation of the district's duty of care. Or, to borrow the language of the Restatement of Agency, the plaintiff will allege that "under the circumstances, the [school district] has not taken the care which a prudent [person] would take in [retaining] the [teacher] for the business in hand."[193] The defense will respond in turn that even if there is a workable standard of care in general, the challenged decision to assign students to a particular low-performing teacher was not negligent because it did not fall beneath the level of care that a prudent person would take given the circumstances.

Whether a court will find the defendant school district negligent will be largely based on the facts of each case. To illustrate, consider a hypothetical claim against New York City school officials over their decision to continue placing children in the classroom of a certain Mr. Jones, a fifth grade Math teacher.[194] Imagine that a parent of a student in Mr. Jones's classroom logs on to the New York Times' website, www.newyorktimes/schoolbook, which provides a wealth of data about the actual amount of student learning produced by individual teachers in the district. The parent learns based on data from the city's accountability system that Mr. Jones has taught a total of 70 students for whom student achievement data exists, and that he places in just the 0th percentile of all teachers in terms of those students' value added learning gains.[195] The parent also learns that the district has calculated that (after controlling for non-teacher variables per the city's value added model) Mr. Jones's 70 students performed .51 standard deviations lower than they would have if they had a teacher of average quality rather than Mr. Jones. For frame of reference, one standard deviation on the state's fifth grade math test

[191] *See generally* Restatement (Second) of Torts § 281(b).

[192] That is, with the exception of the Montana special education case decided on statutory negligence grounds, *see supra* notes 90-91 and accompanying text.

[193] Restatement (Second) of Agency § 213 cmt. d.

[194] The data used in this example describe the actual value added scores of a real teacher in New York City, but we have elected to use a pseudonym.

[195] Although the data does not reveal how many years' worth of data is encompassed in this evaluation, context suggests that it is multiple years, as Mr. Jones taught 24 students (and was in the 3rd percentile) in 2010, and has a total of 70 students in his sample.

represents 35 scale score points.[196] The difference between the lowest possible Level 2 scale score (encompassing students who are partially proficient but still not meeting state standards) and the lowest possible Level 3 score (meeting state standards) is just 31 points.[197] Thus, to say that Mr. Jones is responsible for producing student learning gains .51 standard deviations below what an average teacher would be expected to produce (roughly 18 scale score points) is to say that a student beginning the year as proficient (Level 3) will likely no longer meet the state standards for proficiency at the end of that year (Level 2).[198] Furthermore, if these single year deficits are compounded by a below-average teacher the following year, the likelihood the student would ever regain grade level proficiency shrinks dramatically. Given that an 8th grade math student who scores at the proficient (Level 3) cut score still has only a 1 in 3 chance of being on track to reach the *minimum* level of college readiness in math,[199] having a teacher like Mr. Jones has dramatic consequences for a student's educational career.

Based on this information, the parent sues the school district, alleging that its decision to retain Mr. Jones and to place children in his classroom constitutes educational malpractice. Has the school breached its duty of care? We think the answer is a straightforward "yes." To continue assigning students to a teacher whom the district's own data systems reveal to have produced a deficiency in student learning that would more likely than not move a proficient student to below grade level seems well beneath the level of care that a reasonably prudent person would take in the position of the relevant school official. This is clear under any intuitive appraisal of what a "reasonable person" would do in such circumstances, and that conclusion is only bolstered by the New York Department of Education's own definition of teachers who fall in the zero-to-fourth percentiles as "low" performing and thus in danger of being rated "ineffective."[200]

Of course, whether a school district's decision to retain any particular teacher constitutes negligence will vary with the particular circumstances of each case. Our hypothetical would be a closer question if the data revealed Mr. Jones to be in the tenth percentile, as opposed to the first percentile of teachers. But as already discussed, the existence of close cases does not mean that the courts should decline to hold school

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[196] *See* Technical Report, *supra* note 145 at 19.

[197] *Id*.; *see also* New York State Education Department, *The Guide to Your Parent Report for Mathematics*, http://www.nysparents.com/pdfs/nys_NYSTP_2011_M_english.pdf (describing Level 2 as demonstrating "a partial understanding of the mathematics content expected at this grade level" and Level 3 as demonstrating a proficient "understanding of the mathematics content expected at this grade level").

[198] *See The Guide to Your Parent Report for Mathematics*, *supra* note 145.

[199] New York State Department of Education, *A New Standard for Proficiency: College Readiness* 7 (2010), http://www.oms.nysed.gov/press/PressConferencePresentation UPDATEDAM07_28.pdf.

[200] *See* Technical Report s*upra* note 145 at 18; N.Y. Educ. Law § 3012-c(2)(a).

defendants liable for negligence altogether.[201] It also bears noting that the case for negligence may be easier in New York, where the state has required its lowest performing teachers to be rated as "ineffective."[202] Yet even in the absence of such frank evaluatory language, the courts could use value-added data to enact a rule under which, for example, any decision to retain a teacher who over a three-year period of data contributed an average loss of learning of a certain number of scale score points is negligent. Although line-drawing will invariably require tough judgments, the point is that there are workable rules that courts could follow to adjudicate these cases.

The school district does have a different counter-argument that must be considered. The school may argue that its decision to retain a chronically low-performing teacher such as Mr. Jones is not negligent because any reasonable school administrator faced with the same circumstances would make the same decision. After all, school administrators across the country fire almost undetectable numbers of teachers for poor performance,[203] often because of the high cost and difficulty of finding better replacements.[204] Thus, the school district defendant could argue, its decision to retain a given teacher is simply consistent with the standard industry practice and ought not to be considered "unreasonable."

Digging a bit deeper into the argument reveals that it is actually comprised of two components. First, the argument is in the nature of an appeal to *custom* as a defense; that is, the idea that what is "reasonable" in any individual case may be determined by comparison to the standard industry practice (in this case, retaining the teacher was reasonable because so few teachers are fired in general). The Restatement of Torts reflects an openness to this defense, stating that "[i]n determining whether conduct is negligent, the customs of the community, or of others under like circumstances, are factors to be taken into account, but are not controlling."[205] The second aspect of the argument is an analogy to the law of products liability, where courts determine whether a product suffered from a design defect by asking whether there was a feasible alternative to the charged product that could have been offered at a *reasonable cost*.[206] Applying that logic in the education context would suggest that retaining a chronically ineffective teacher might be reasonable simply because of the costs of complying with exhaustive union procedures for terminating teachers.

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[201] *See supra* pgs. 34-36.
[202] N.Y. Educ. Law § 3012-c(2)(a).
[203] *See supra* notes 14, 15 and accompanying text.
[204] *See supra* notes 17, 18 and accompanying text.
[205] Restatement (Second) of Torts § 295A.
[206] *See* Restatement (Third) of Torts: Products Liability § 2 cmt. d (describing the Restatement's risk-utility test for determining a design defect as encompassing an inquiry into whether a "reasonable alternative design would, at *reasonable cost*, have reduced the foreseeable risks of harm posed by the product") (emphasis added).

Neither of these strands of the argument, however, should persuade a court. With respect to the custom-based argument, although the Restatement notes that defenses based on industry custom are *permissible*, it takes great pains to also point out that such defenses are by no means dispositive. The Restatement observes, for instance, that even where the defendant's conduct conforms to industry custom, that is "not necessarily conclusive as to whether the actor . . . has exercised the care of a reasonable man under the circumstances."[207] The Restatement continues:

> [C]ustoms and usages themselves are many and various. Some of them are the result of careful thought and decision, while others arise from the kind of inadvertence, neglect, or deliberate disregard of a known risk which is associated with negligence. No group of individuals and no industry or trade can be permitted, by adopting careless and slipshod methods to save time, effort, or money, to set its own uncontrolled standard at the expense of the rest of the community. If the only test is to be what has always been done, no one will ever have any great incentive to make any progress in the direction of safety.[208]

We could not have stated it better ourselves. The education malpractice plaintiff could thus persuasively argue that conformity with the customary school district practice of refusing to dismiss even the lowest performing teachers is no defense.

The second argument—that the decision to retain an ineffective teacher is reasonable by virtue of the high costs of any alternative—is also unavailing. The reasonable cost defense is a particular development in the product liability context, where courts apply a strict liability theory and not a traditional negligence theory.[209] Thus, it is uniquely in the product liability context that courts engage in "risk-utility balancing," and where liability is predicated on whether a particular product could have been designed in a safer way without adding exorbitant costs to the manufacturing process.[210] Courts accordingly do not consider the costs of comporting with the reasonable man standard in deciding ordinary common law negligence suits. It is no defense, for example, that a school district was reasonable for retaining a sexual predator because the cost of firing the teacher and hiring a new one would have been extremely high—and the same should be true for an educational injury.

Finally, even if the high cost of replacing an ineffective teacher were properly considered in the negligence determination, those costs are

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[207] Restatement (Second) of Torts § 295A cmt. c.
[208] *Id*.
[209] *See* Restatement (Third) of Torts: Products Liability § 1 cmt. a (noting that "'strict products liability' is a term of art that reflects the judgment that products liability is a discrete area of tort law which borrows from both negligence and warranty. It is not fully congruent with classical tort or contract law.")
[210] *See id*. § 2 cmt. a; *id*. § 2 cmt. d.

largely attributable to the school district's conduct in the first place. The onerous due process and evidentiary requirements that must often be satisfied before a teacher may be fired are often the product of the school districts' own negotiated collective bargaining agreements with its teachers.[211] It is inconceivable that a court would be persuaded by the argument that it was reasonable for an ordinary employer to retain an employee who had previously stolen from customers because the employer had guaranteed that particular employee lifetime employment. Neither should a similar argument work in the present context.[212]

C) Causation

Value-added data also alters a court's analysis with respect to the third tort element of causation. As the New York Appellate Division explained in the *Donohue* case discussed at length above,[213] the element of causation requires a tort plaintiff to demonstrate that he "suffered damage as a proximate result of" the defendant's failure to discharge the applicable duty of care.[214] That court rejected an education malpractice claim predicated on the school defendant's failure to properly teach the plaintiff largely on proximate causation grounds. As the court explained,

> [T]he plaintiff's complaint must be dismissed because of the practical impossibility of demonstrating that a breach of the alleged common law [duty] was the proximate cause of his failure to learn. The failure to learn does not bespeak a failure to teach. . . . In addition to innate intelligence, the extent to which a child learns is influenced by a host of social, emotional, economic and other factors which are not subject to control by a system of public education. In this context, it is virtually impossible to calculate to what extent, if any, the defendant's acts or omissions proximately caused the plaintiff's inability to read at his appropriate grade level.[215]

This declaration surely rang true in the era in which it was issued. In the 1970s—long before the existence of state standards, much less complex statistical models of value-added assessment—it was not controversial at

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[211] *See* CHAIT, *supra* note 9 at 14-15.

[212] There is some space for a plausible distinction, which is that some aspect of the high costs for terminating ineffective teachers is out of the school district defendant's hands, since state law also independently imposes certain collective bargaining restraints. *See* CHAIT, *supra* note 9 at 14-15. Even still, we think the reasonable cost defense is unlikely to work for the school district defendant because the notion of cost-balancing is applicable in the product liability suit, and not the typical common law negligence suit.

[213] *See supra* Part I.A.2.

[214] *Donohue v. Copiague Union Free School Dist.*, 64 A.D.2d 29, 30 (N.Y. App. Div. 1978).

[215] *Id*. at 44.

all to declare that it is "impossible to calculate to what extent" a defendant school district's acts proximately caused a plaintiff's inability to achieve at grade level."[216] One expert in 1970 famously opined that "[a]lthough many investigators believe that teachers may be the most important factor in educational achievement for most children, that belief rests largely on judgment and does not give any clue as to how it operates."[217]

The same cannot be said today. The very revolution brought about by value-added data is that advanced data systems can now "provide unbiased estimates of teachers' *causal* impacts on test scores."[218] Value-added models are, in other words, *by definition* able to provide a causal estimate of a teacher's unique contribution to a student's learning and it is clear that districts are interpreting the output of their models in this way.[219] For instance, researchers studying Tennessee's seminal value-added measurement system concluded that the average elementary school student who is assigned to high-performing (top quintile) teachers for three straight years will demonstrate academic achievement levels *fifty percentile points higher* than a similar student who is assigned to low-performing (bottom quintile) teachers during the same three year period—a difference in teacher-caused impacts equal to the gap between a student qualifying for accelerated or remedial courses.[220]

Moreover, the *Donohue* court's concern with "social, emotional, economic and other factors" that may impact a child's rates of learning are also accounted for in the value-added models. New York's model includes independent variables on student characteristics such as race, gender, native language, socioeconomic status (via the proxy of eligibility for free and reduced lunch), and disabilities as well as variables relating to a student's school performance including number of absences and suspensions, summer school enrollment, grade retention and others.[221] This allows researchers to control for other variables that might influence a child's learning in order to isolate an individual teacher's causal effects. Put simply, advanced statistical analysis now permits us to do precisely what the courts believed impossible in *Donohue*: to "calculate to what

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[216] *Id*.

[217] Alexander M. Mood, *Do Teachers Make A Difference* (Bureau of Educational Professions Development, Working Paper, 1970).

[218] CHETTY, *supra* note 151 at 3 (emphasis added).

[219] *See, e.g.*, *FAQs for Teacher Data Reports*, NEW YORK CITY DEPARTMENT OF EDUCATION, http://schools.nyc.gov/Teachers/TeacherDevelopment/TeacherDataToolkit/FAQ/default.htm (last visited Aug. 11, 2012) (stating that New York City's value-added system is "designed to measure individual teachers' contributions to student learning"); *Value-Added Overview*, *supra* note 140 (D.C. public schools explain that value-added measurement "helps us estimate the teacher's impact on student learning as opposed to the impact of other factors such as students' prior skill level, the resources they have at home, or any learning disabilities they may have. In short, value-added helps us understand what the teacher did, separate and apart from everything else").

[220] William L. Sanders et al., CUMULATIVE AND RESIDUAL EFFECTS OF TEACHERS ON FUTURE STUDENT ACHIEVEMENT 6 (1996).

[221] *See* Technical Report, s*upra* note 145 at 10.

extent" a school's acts "proximately caused the plaintiff's inability to [achieve] at his appropriate grade level."[222]

School district defendants may respond by arguing that the existing value-added models are insufficiently reliable to serve as the predicate for a finding of proximate causation. For support, the defendants will point to scholars who have urged districts to proceed with caution in the selection and implementation of VAMs given the limitations of these statistical techniques.[223] Thus, the schools could assert that value-added data offers, at best, only a very rough estimate of how much learning individual teachers are contributed to their students, such that it is still more or less "impossible to calculate to what extent" the school districts are causing a plaintiff child's inability to read.

The counter-argument is straightforward. As already discussed, value-added models may not be perfect, but they are able to "provide unbiased estimates of teachers' causal impacts on test scores."[224] The reliability of these causal impact estimates also increases substantially as greater sample sizes of student learning data is used and as the models are used to identify the lowest performing teachers. Thus, while there is already a 74% likelihood that a teacher identified as performing at or below the 18th percentile of all teachers over three years of data has been accurately identified as such, the degree of certainty rises to 83% when asked to identify teachers below the eighth percentile over three years of data.[225] Further, proof that the data measures are sufficiently reliable for judges can be gleaned from the states' and districts' own practice of using value-added data in school personnel decisions. It is reasonable for citizens (and judges) to conclude that states and districts, in choosing to use value-added data in personnel decisions, have done their due diligence in selecting a reliable model. For a district or state to suggest otherwise might raise serious questions about whether they have subjected teachers and students to a capricious or irrational system.

That value-added data is sufficiently reliable to sustain a proximate causation ruling is further confirmed by comparison to other cases in which courts have relied upon rough statistical estimates for proximate cause purposes. In *O'Neal v. St. John Hospital & Medical Center*, for example, the Michigan Supreme Court relied on statistical analysis to decide whether a particular act of medical malpractice was a proximate cause of the plaintiff's stroke.[226] The trial court had concluded—based on a single expert's estimate—that the defendant doctor's negligent treatment increased plaintiff's risk of stroke from less than 5 to 10 percent to 10 to

[222] *Donohue*, 64 A.D. at 44.
[223] *See, e.g.*, BRAUN, *supra* note 224 at 4 ("VAM results should *not* serve as the sole or principal basis for making consequential decisions about teachers.").
[224] CHETTY, *supra* note 151 at 3.
[225] SCHOCHET, *supra* note 177 at 21, 31, 35.
[226] 791 N.W.2d 853 (2010).

20 percent.[227] The Michigan Supreme Court held that this increase was sufficient to prove the element of proximate cause.[228] In reaching that holding, however, the court did not so much as mention the reliability of the expert's estimate, much less scrutinize it as the school district defendant would desire. A trial court or jury should thus be free to similarly credit an education malpractice plaintiff's expert testimony stating that the child's teacher was a proximate cause of the child's learning deficiencies.

D) Injury

That brings us to the final element of the common law tort suit, injury. This is an element that some courts of the initial wave were amenable to finding satisfied. The New York Court of Appeals, for example, declared in *Donohue*, "who can in good faith deny that a student who upon graduation from high school cannot comprehend simple English . . . has not in some fashion been 'injured.'"[229]

If there was any doubt in the 1970s regarding the injury produced by bad teaching, however, that doubt is now thoroughly dispelled. The rise of detailed grade-by-grade academic proficiency standards and standardized testing permits courts to identify an average quantum of lost learning caused by a district's negligent retention of a chronically ineffective teacher. For instance, in the hypothetical discussed above where a plaintiff sues over New York City's decision to retain Mr. Jones, the city's data demonstrates that Mr. Jones has produced average student learning gains of .51 standard deviations less than an average teacher, where one standard deviation is the equivalent of 35 scale score points.[230] This means that when comparing Mr. Jones to an average teacher, his students have suffered an average loss of learning of roughly 18 scale score points—more than half the distance between below grade level proficiency (Level 2) and proficiency (Level 3).[231] A school district would be hard pressed to argue that it is not in some way a cognizable "injury" for students who were once proficient to finish the year at below grade level achievement because of the district's teacher assignment decision—especially when an assignment to just an average teacher would have prevented this outcome.

Moreover, in addition to a child's loss in academic achievement (which constitutes injury enough on its own), researchers are also now able to express the losses from poor teaching in terms of long term life outcomes. An analysis of school district data from more than 2.5 million

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[227] *See O'Neal v. St. John Hosp. & Med. Ctr.*, No. 277317, 2008 WL 4791055, at *3 (Mich. Ct. App. Nov. 4, 2008) *rev'd*, 487 Mich. 485, 791 N.W.2d 853 (2010)
[228] 791 N.W.2d at 862.
[229] 47 N.Y.2d 440, 443. The statement was only dicta, however, since the court declined to recognize a duty of care in the first instance.
[230] *Supra* notes 195-96 and accompanying text.
[231] *Supra* notes 197-98 and accompanying text.

children in grades 3-8 concluded that in the long-run, "[s]tudents assigned to high-[value-added] teachers are more likely to attend college, attend higher- ranked colleges, earn higher salaries, live in [wealthier] neighborhoods, and save more for retirement. They are also less likely to have children as teenagers."[232] In concrete terms, the study determined that "[o]n average, a one standard deviation improvement in teacher [value-added] in a single grade raises earnings by about 1% at age 28."[233] And replacing a teacher whose value-added scores are in the bottom 5% with just an average teacher would "increase the present value of students' lifetime income by more than $250,000 for the average classroom."[234]

Although these long-run economic and other injuries are not suffered immediately as a result of the district's negligent teacher assignment, there is a *present* injury in the sense that a student subjected to a chronically low-performing teacher faces an increased risk of long-term losses. Courts have been willing to remedy such increased-risks of future injury in two related ways. First, courts frequently hold that an increased risk of future harm due to an initial injury (in this case, the initial deficiency in learning produced by the ineffective teacher) may be compensable in a present remedy.[235] Second, courts have recognized that injuries in the form of increased risk of a future disease may be remedied through compensation for the expense of medical monitoring to detect and prevent the future condition.[236] A similar remedial approach could be adopted in the educational context and result in a school being ordered to provide ongoing educational evaluation and tutoring services to "detect and prevent" future losses due to the district's academic harms.

The takeaway point of all of this is simply that modern data now confirms what the courts already suspected in the 1970s: a school that fails to reasonably educate its students does indeed inflict real and compensable injuries upon them.

E) Comparative Negligence

Although our analysis of the four elements of the common law negligence suit is complete, one final legal issue warrants brief mention: the defense of contributory or comparative negligence. The courts of the initial wave had no cause to grapple with the issue because the prima facie negligence case was never established. If we are correct about the new theory of litigation, however, courts will have to rule on the matter.

Here, too, it turns out, time has made a difference to the benefit of plaintiff children. In the early 1970s, the majority of states operated under

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[232] CHETTY, *supra* note 151 (abstract).
[233] *Id*.
[234] *Id*.
[235] *See* David Carl Minneman, *Future Disease or Condition, or Anxiety Relating Thereto, as Element of Recovery*, 50 A.LR.4th 13 § 49[a] (collecting cases).
[236] *See generally* Allan L. Schwartz, *Recovery of Damages for Expense of Medical Monitoring to Detect or Prevent Future Disease or Condition*, 17 A.L.R.5th 327.

a contributory negligence system, where a plaintiff was altogether barred from recovery if his own negligence in any way contributed to his injury, no matter how slight it might be by comparison to the defendant's negligence.[237] It is easy to see how such a defense would be of great succor to school district defendants, since a student (or perhaps his parents) might be guilty of some minimal contributory negligence in the student's educational background. The New York Appellate Division alluded to this possibility in *Donohue* when it wrote that "The failure to learn does not bespeak a failure to teach. It is not alleged that the plaintiff's classmates, who were exposed to the identical classroom instruction, also failed to learn. From this it may reasonably be inferred that the plaintiff's illiteracy resulted from other causes."[238]

Between 1969 and 1984, however, *thirty-seven* states shifted course and discarded their contributory negligence rules, replacing them with some form of the modern comparative negligence system.[239] Although the details of the comparative negligence regimes in each state vary, the basic idea is that a plaintiff whose injury owes in part to his own negligence and in part to another's will recover from the other in proportion to that party's share of responsibility.[240] Much more could be written about the evolution and application of the comparative negligence regime, but we do not have space to give it justice presently. The bottom line for purposes of this tort theory is that in a comparative negligence system, plaintiff students will typically be able to recover a substantial part of any award since even if they are themselves partially negligent in failing to learn, that negligence will likely not eliminate the district's liability altogether (as would be true under contributory negligence).

IV) PREEMPTING THE EDUCATION MALPRACTICE LAWSUIT?

If the foregoing section demonstrated that developments in education policy substantially change the analyses that a court would undertake in evaluating a claim of education malpractice, then the critical question becomes: What can school districts do to insulate themselves from future lawsuits? Examining this issue is important not only for the many jurisdictions that are early value-added adopters, but also for the many states and districts that are still considering the best way to implement value-added policies. The considerable financial support from the federal government[241] and private foundations[242] for teacher value-

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[237] *See* Black's Law Dictionary 353 (8th ed. 2004).,

[238] 64 A.D.2d at 44.

[239] Arthur Best, *Impediments to Reasonable Tort Reform: Lessons from the Adoption of Comparative Negligence* 40 IND. L. REV. 1, 6. (2007)

[240] *Id* at 1. Note that this is a "pure" comparative negligence regime. In a "partial" system, there is some threshold of the defendant's proportional responsibility beneath which the defendant will not have to pay any share of the award. *Id*.

[241] *See supra* note 130.

[242] *See, e.g., Intensive Partnership Factsheet: Hillsborough County Public Schools*, BILL

added virtually ensures that these policies will become more numerous in the coming years. Policymakers currently debating adoption would no doubt like to understand the full implications of these policies before they are put in place.

Given that school districts are dynamic systems, once they realize that they may be held liable for teacher assignments made in light of information about a teacher's "value-added" scores, districts will look to adapt their policies. The question is *how* they will do so. In taking up this question we think it is useful to consider possible district responses on a spectrum. On one end of the spectrum are districts that view this type of litigation as meritorious (or that generally support the goal of dismissing low-performing teachers). On the other end are districts that consider the claim specious. For these districts, there may be a number of possible value-added policy choices—some superficial, some substantive—that could be made in the course of implementing their value-added systems that might limit their exposure to potential education malpractice claims.

A. Districts that Support the Education Malpractice Claim

There is no question that one of the major motivations for adopting teacher value-added policies is a desire to improve teacher quality. Though some believe that value-added information is best used in a low- or no-stakes way,[243] at least some of the excitement around these models stems from the possibility that the information they provide could be used to dismiss ineffective teachers. Economist Rick Hanushek, for example, has advocated that districts should use value-added data to fire the lowest performing 5% of teachers.[244] A recent economic analysis suggests that implementing such a policy could have considerable financial and quality of life benefits for students and communities[245]—a finding that received a great deal of attention in the mainstream media.[246] And the arguments for

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& MELINDA GATES FOUNDATION, http://www.gatesfoundation.org/united-states/pages/hillsborough-county-public-schools-fact-sheet.aspx (last visited Aug. 10, 2012) (Describing the Gates foundation's agreement to invest $100 million dollars in Hillsborough County Public Schools in part to assist in the development and implementation of a value-added data system).

[243] *See, e.g.*, DANIEL F. MCCAFFREY ET AL., EVALUATING VALUE-ADDED MODELS FOR TEACHER ACCOUNTABILITY at xx (2003) ("[T]he research base is currently insufficient to support the use of VAMs for high stakes decisions."). *But see id*. at xix-xx (recommending continued development and study of VAM systems in schools to produce better data and to increase understanding about how this information can be used by administrators to improve school quality).

[244] Rick Hanushek, *Teacher Deselection*, in CREATING A NEW TEACHING PROFESSION 165 (Dan Goldhaber & Jane Hannaway eds., 2009).

[245] *See* CHETTY, *supra* note 151 at 3-5.

[246] *See, e.g.*, Annie Lowrey, *Big Study Links Good Teachers to Lasting Gains*, N.Y TIMES, Jan. 26, 2012; Sarah Butrymowicz & Sarah Garland, *New York City Teacher Ratings: How Its Value-Added Model Compares to Other Districts*, THE HUFFINGTON POST, Mar. 2, 2012, http://www.huffingtonpost.com/2012/03/02/new-york-city-teacher-rat_n_1316755.html.

removing teachers with the lowest value-added scores are no longer just theoretical. In 2011, Washington, D.C. fired roughly five percent of its teaching force based on an evaluation system in which, for many teachers, student test score growth comprised half the evaluation.[247]

Given these developments and the general willingness of many states and districts to pursue value-added policies over the strong objections of teachers' unions, it is not hard to imagine that a superintendent of one of these districts might support the plaintiffs in a legal action to remove low-performing teachers. Indeed, Los Angeles Unified Superintendent John Deasy recently expressed his support for a lawsuit challenging the constitutionality of California's tenure rules[248] and another seeking the use of student test scores in teacher evaluations despite being a named defendant in the case.[249]

In a scenario involving the district's ability to act on the information provided by value-added scores, it is conceivable that a like-minded superintendent would similarly applaud the effort by litigants to empower the district to dismiss chronically low-performing teachers. In this case the political pressure provided by the court filing and the superintendent's policy position could produce concessions from teachers' unions regarding the use of value-added data in personnel decisions. Or, failing a negotiated agreement with the teachers union, the district might settle with the education malpractice plaintiff and ask for the court to enter a consent decree ordering it to remove chronically ineffective teachers. In either case the effect of the litigation would be to provide political and legal cover for the school district's desired policy outcome.

B. Districts that Disagree With the Education Malpractice Claim

There are a number of reasons that districts might believe in and support the use of value-added measures in the evaluation of their teachers but be reluctant to embrace the theory that they should be held liable for failing to remove ineffective teachers. The district may consider the cost of replacing teachers and the cost of providing remedial education services to victorious plaintiffs to be too steep a price for any perceived payoff from removing low-performing teachers. Districts may also be reluctant to put themselves on the hook to maintain these types of policies long-term,

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[247] Bill Turque, *More than 200 D.C. Teachers Fired*, WASHINGTON POST, Jul. 15, 2011, http://www.washingtonpost.com/blogs/dc-schools-insider/post/more-than-200-dc-teachers-fired/2011/07/15/gIQADnTLGI_blog.html.

[248] Press Release, LOS ANGELES UNIFIED SCHOOL DISTRICT, Supt. John E. Deasy Addresses Lawsuit Challenging 'Last Hired, First Fired' Layoffs Teachers (May 15, 2012), http://studentsmatter.org/wp-content/uploads/2012/05/SM_Deasy-Statement_5.16.12.pdf ("It is my sincere hope that we can be relieved from this burdensome last hired, first fired rule so that we have the flexibility to provide students with the best and brightest instructors we can give them").

[249] Teresa Watanabe, *Judge Delays Ruling on Suit Targeting LAUSD Teacher Evaluations*, L.A. TIMES, Jun 5, 2012.

since there is no guarantee that any replacement teachers would not themselves have to be replaced in subsequent years. Districts with these concerns may want to consider whether there are ways to implement value-added measures (either voluntarily or due to state mandates) without making themselves vulnerable to litigation. We explore some of those options presently.

1) *Remediation as a Proactive Response*

As a growing number of states move to adopt teacher evaluation policies that require the use of student growth measures, there are likely to be many districts that wish to comply with state requirements in order to remain eligible for state funds but that do not believe value-added models are reliable enough to provide the basis for personnel decisions, much less trigger tort liability. These districts would be in line with a group of scholars who believe that while value-added measures provide useful information and are the best available predictors of a teacher's future performance, they are not yet reliable enough for use in "high stakes" decisions.[250] In this view, the value-added scores represent a noisy signal and therefore should be used as an early warning system—one that requires further investigation and follow up action on the part of administrators.[251]

One reasonable response would be to require all teachers who score below a given score or below a certain percentile to attend remedial training and professional development workshops, with the hope that such voluntary action would convince a court that the district has complied with its requisite duty of care. One potential difficulty with this approach is that value-added measures, even at their best, only provide information about the *outcome* of teacher practice. They provide no information or indication of what specific pedagogical approaches or classroom behaviors (or lack thereof) produced a given value-added score. This fact might undercut a district's ability to claim that professional development constitutes an appropriate response to learning of a teacher's limited contribution to student learning. There is, however, a new and growing body of research that attempts to link value-added scores with specific classroom practice through the use of observation protocols.[252] This research may provide a

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[250] *See, e.g.*, BRAUN, *supra* note 224; MCCAFFREY, *supra* note 243 and accompanying text.

[251] Heather C. Hill, *Evaluating Value-Added Models: A Validity Argument Approach*, 28 J. POL'Y ANALYSIS & MGMT. 700, 706 (2009) ("At best, it seems that value-added scores might be used as a 'leading indicator' of sorts. . . . However, the receipt of these indicators would not itself trigger action, but would trigger further inquiry into teachers' 'quality,' as defined on many more dimensions, before decisions would be made.").

[252] *See, e.g.*, Pam Grossman et al., *Measure for Measure: The Relationship Between Measures of Instructional Practice in Middle School English Language Arts and Teachers' Value-Added Scores* (Nat'l Bureau of Econ. Research Working Paper No. 16015, 2010).

stronger basis and more specific recommendations for districts who consider remedial training to be a more justifiable response to low value-added scores than outright dismissal.

Taking action to improve the skills of existing teachers might be attractive not only to districts that have a hard time attracting high performing teachers (and who therefore have doubts about the quality of any potential replacement teacher) but also more broadly because of the high cost of hiring and training new teachers.[253] If the remediation of teachers is shown to be effective, would-be plaintiffs and courts might consider it a reasonable response when compared against the uncertain effectiveness of a new teacher and the considerable body of research that suggests an additional year of experience is likely to improve a young teacher's effectiveness.[254] Of course, at some point, if a teacher does not improve despite remedial efforts, the district may have a difficult time justifying the assignment of students to the teacher's classroom. In this case the plaintiffs might again seek intervention from the courts to force the district to assign students to another teacher.

2) *Characterization of Value-Added Results*

Depending on the exact VAM used, value-added scores allow districts to determine an individual teacher's contribution relative to an appropriate comparison group of teachers. The value-added scores of these teachers can be placed in a distribution so that it is possible to determine a given teacher's percentile rank. Except in Lake Woebegone, where everyone is above average, it is the nature of distributions that there will always be a group of people occupying the lower percentiles. It is important to understand, however, that one's percentile rank conveys information only about *relative* performance. It has nothing to say about *absolute* quality. Consider, for example, an Olympic marathoner who finds herself in the 5th percentile of Olympic marathon times. Few would question that despite being at the bottom of this distribution, she is still a very accomplished runner.

This general point about the distinction between relative and absolute performance has potentially important implications for the interpretation of value-added results. Beginning with the passage of the IASA and continuing through Race to the Top, federal education policy has adopted the view that performance should be determined relative to an

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[253] *See* GARY BARNES ET AL., THE COST OF TEACHER TURNOVER IN FIVE SCHOOL DISTRICTS: A PILOT STUDY 5 (2007) (estimating the cost of teacher turnover in a large district like Chicago to be around $86 million per year).

[254] *See, e.g.*, Donald Boyd et al., *How Changes in Entry Requirements Alter the Teacher Workforce and Affect Student Achievement*, 1 EDUC. FIN. & POL'Y. 176, 33-38 (2006); Jonah E. Rockoff, *The Impact of Individual Teachers on Student Achievement: Evidence from Panel Data*, 94 AM. ECON. REV. 247, 250-51 (2004).

absolute standard—that it should be "criterion referenced".[255] The notion that there is an absolute dividing line between proficient and non-proficient—effective and ineffective—appears in all state NCLB standards and has been carried over into many early value-added policies.[256] Districts concerned about liability stemming from the collection of value-added information may want to reconsider affixing normative labels (e.g. “ineffective”) to teachers scoring at the lower end of the distribution. This characterization provides a clear interpretation of the quality of those teachers, but one that is not inherently required by the data. Challenged by parents to explain the continued employment of a low performing teacher, a district might respond that *all* of its teachers are effective and therefore a teacher’s specific location in the value-added distribution is not relevant. A district might also respond that the value-added score alone is not sufficient to make a determination about the effectiveness of a teacher. Rather than create categories with normative labels, a district might opt to report the specific percentile or quartile of value-added performance without commentary.

One difficulty with this approach is that the value-added score can usually be converted, with necessary statistical adjustments, to convey the average expected learning gains for a student. Though a district may refrain from labeling low performing teachers "ineffective," it may be difficult to convince a court that a teacher who consistently produces student learning gains well below those necessary for proficiency is anything but ineffective. Still, making the interpretation of the data a point of contention rather than a fact supplied by the district may be an important part of a district's defense.

3) *Limiting the Release of Value-Added Data*

Rather than consider the way that value-added scores are publicly and officially *characterized*, districts could consider adopting policies that prevent the public release of teachers' value-added scores in the first place. Public disclosure of this information opens the door to litigation because it removes the need for discovery by allowing parents to know the past performance and district assessment of a given teacher. The recent publishing of individual teacher value-added scores by the *New York Times*[257] and *Los Angeles Times*[258] led to rebukes from high profile

[255] *See* KORETZ, *supra* note 98 at 57-67 (noting that criterion referenced tests steadily increased in popularity and are now required under NCLB).

[256] For example, Florida's new teacher evaluation system implemented with the assistance of a Race to the Top grant requires that districts develop ratings systems that include the categories “effective” and “highly effective.” Florida Department of Education, *Race to the Top Evaluation Systems Checklist* 4 (2010), *available at* http://info.fldoe.org/docushare/dsweb/Get/Document-5972/dps-2010-230d.pdf.

[257] Fernanda Santos & Sharon Otterman, *City Teacher Data Reports Are Released*, N.Y. TIMES, Feb. 24 2012, *available at* http://www.nytimes.com/schoolbook/2012/02/24/teacher-data-reports-are-released/.

education reformers like Bill Gates[259] and Teacher for America's Wendy Kopp[260]—criticism that may make it easier for districts to keep value-added scores out of the public eye. In response to the outcry from publicly identifying teacher's scores, New York legislators passed a law that prevents the public release of individual teacher data while still allowing parents access to this information for their student's teachers.[261] Though this approach may keep teacher's names out of the papers, parents would still be able to use this information to bring a case against the district for improperly assigning a student to an ineffective teacher. Districts who wish to avoid this possibility will need to restrict access not only to the media but to individual parents as well.

Attempts to keep this information out of the public view are likely to be met with Freedom of Information Act-type requests as was the case in New York City.[262] In that case, local district officials supported the release of teacher value-added data,[263] and the New York State Department of Education complied.[264] Though teachers unions in New York City sought to enjoin the district and state from releasing the data, the courts ultimately ruled that the state acted properly because the teacher value-added scores were indeed "statistical or factual tabulations or data" subject to disclosure under the New York Freedom of Information Law.[265]

One lesson from this case would seem to be that states and districts should take care to clarify if the results of statistical calculations produced by value-added models are excepted from state public information statutes, whether as statistical tabulations of data or otherwise. A recent investigation concluded that nineteen states already exempt teacher evaluations from disclosure under the state's open records law; nineteen other states allow for disclosure; and the remaining states provide for disclosure pending approval from a teacher or third party.[266] Even with these exemptions, states may want to expressly clarify the status of value-added scores via legislation, as was recently done in Tennessee and

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[258] *See supra* note 97 and accompanying text.

[259] Bill Gates, Editorial, *Shame Is Not the Solution*, N.Y. TIMES, Feb. 22, 2012.

[260] Wendy Kopp, Editorial, *The Trouble With Humiliating Teachers*, WALL ST. J., Mar. 7, 2012.

[261] *See* Thomas Kaplan, *Albany to Limit the Disclosure of Teacher Evaluations*, N.Y. TIMES, June 21, 2012.

[262] *See* Santos & Otterman, *supra* note 256 (discussing the filing of Freedom of Information Act requests seeking teacher data reports in New York City).

[263] *See id.* ("New York City education officials contacted . . . reporters . . . and encouraged them to submit Freedom of Information Act requests for the teachers' rankings.")

[264] *See Mulgrew v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.*, 919 N.Y.S.2d 786, 788 (N.Y. Sup. Ct. 2011) (noting that the New York State Department of Education had agreed to release teacher data reports).

[265] *Mulgrew v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.*, 87 A.D.3d 506, 507 (N.Y. App. Div. 2011).

[266] Stephen Sawchuk, *Access to Teacher Evaluations Divides Advocates*, EDUCATION WEEK, Mar. 27, 2012.

Pennsylvania.[267]

Closing off public access to teacher value-added scores may be especially important when such scores comprise just one component of a teacher's overall evaluation. In these cases a district might argue that value-added scores cannot be properly evaluated in isolation from the rest of a teacher's evaluation. Given that courts in the past have recognized that maintaining confidentiality is an important component of an effective teacher evaluation system,[268] courts may be reluctant to approve the release of one aspect of a teacher's evaluation if it would force the teacher to release the rest of his personnel file to balance otherwise prejudicial information. Moreover, those who seek access to teacher value-added information may have an increasingly difficult time succeeding as more top level education officials (like Secretary of Education Arne Duncan recently)[269] speak out about the harms of releasing teacher evaluation information. In short, districts seeking to limit their exposure to education malpractice litigation may be wise to lobby state law makers for a clearly worded state statute exempting value-added scores from public release.

4) *Limiting the Use of Value-added Data*

Rather than adjust the characterization or release of value-added information, districts may decide to adjust their *use* of value-added information in light of a revived education malpractice claim. Faced with the prospect of on-going threat of liability litigation, it is at least plausible that some districts might consider significantly curtailing or eliminating the use of value-added measures as an aspect of teacher evaluation, even if doing so means foregoing additional federal, state or private funding. Though this would be an extreme response to the threat of litigation, states who have failed to score well in the early rounds of the Race to the Top competition, and who therefore did not receive grants, may abandon or water-down current plans to implement value-added systems.

In its most severe form, such districts might consider the risk of liability stemming from the use of value-added data to be too great to

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[267] Lucas L. Johnson II, *Tennessee Senate Oks Bill to Close Teacher Evaluation Data*, ASSOCIATED PRESS, Mar. 29, 2012, *available at* http://www.timesnews.net/article/9044506; Karen Langley, *Pa. House Approves Teacher Evaluation*, PITTSBURGH POST-GAZETTE, July 3, 2012.

[268] *Bd. of Trs. of Calaveras Unified Sch. Dist. v. Leach*, 258 Cal. App. 2d 281, 288 (Cal. Ct. App. 1968) ("[I]t is common knowledge that [school personnel records] are among the most confidential and sensitive records kept by a private or public employer, and their use remains effective only so long as the confidence of the records, and the confidences of those who contribute to those records, are maintained.").

[269] *See* Sawchuck, *supra* note 265 ("There's not much of an upside [in releasing teacher evaluations], and there's a tremendous downside for teachers."); Rachel Cromidas, *Only Division During Ed Officials' Pitch is Teacher Ratings Release*, GOTHAM SCHOOLS (June 5, 2012), http://gothamschools.org/2012/06/05/only-division-during-ed-officials-pitch-is-teacher-ratings-release/ ("[D]oes every teacher's test score need to end up in the newspaper? . . . I'm not sure if that moves us in the direction we need to go.").

justify its continued use *at all*. Or, rather than abandoning value-added altogether, a less extreme response would be for districts to continue to collect value-added information but to refrain from using it in consequential decisions such as hiring, firing, and granting tenure. Either way, the intended effect of the school district's decision not to rely on value-added data in its personnel decisions would be to persuade a court that value-added models are insufficiently reliable to serve as the basis for a duty of care.[270]

Of course, not all school districts will be able to curtail their use of value-added measures in teacher evaluation under governing state law; at last count twenty-four states expressly require the use of value-added in personnel decisions.[271] Under these state policies, value-added scores are used as one of several indicators (such as subjective principal evaluations), and each indicator is given a specific, partial weight in the calculation of a teacher's overall evaluation. A school district *could* argue that the very fact that a state policy has assigned only a *partial* weight to teacher value-added scores in the overall teacher evaluation suggests that the data systems are inherently too unreliable to serve as the basis for a workable duty of care. But to understand whether this argument may succeed, we need to distinguish between two separate measurement concepts: validity and reliability. Validity is the issue of whether a metric is actually measuring what we say it is measuring. Reliability is the issue of how consistently a measure will produce the same result when the measurement is repeated.

In our view, a school district required to assign a partial weight to value-added scores in its teacher evaluation might be better off framing its defense as a challenge to the *validity* of value-added assessment, and not as a challenge regarding reliability. A defense based on reliability is unlikely to prevail because a state or school district that truly believes that value-added data is unreliable (which is to say that it believes a low-value-added score is likely the product of random noise and not an actual indicator of a bad teacher) would not assign a specific, partial weight to the value-added score; it would refuse to consider value-added *at all*.[272] The very act of assigning a specific weight to value-added indicates that the state believes the measure can be relied upon consistently for all

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[270] *See supra* pgs. 36-37 for a discussion of how this argument might play out in court.

[271] *See* NATIONAL COUNCIL ON TEACHER QUALITY, *supra* note 135 at 3.

[272] To put it in a different way, the proper response to concerns about the use of a potentially faulty compass is not to weigh the reading of the compass by 50%, but rather to consider the compass's reading in light of the other information available—the position of the sun, the direction of shadows, and so on. If all the other available information except for the compass points in the same direction, it may be an indication that the compass is unreliable; if all the information agrees then one can proceed with more confidence. But that kind of a decision making process is one that requires the use of individualized judgment and discretion rather than strictly weighted formulas. *See* BAKER, *supra* note 152 at 21 ("[L]egislatures should avoid imposing mandated solutions to the complex problem of identifying more and less effective teachers.").

teachers and in all cases. And if the state vouches for the underlying reliability of the value-added data, a judge would likely be unmoved by the district's argument that there is no workable standard of care.

By contrast, consider a district's argument that value-added data poses *validity* problems; that is, that a teacher's ability to improve test scores is only one aspect of what makes an effective teacher.[273] Such a district could argue to a judge that a teacher who receives low marks on the value-added portion of her overall teacher evaluation is nonetheless a good teacher—and by extension, that it would not be negligent to retain her—because she contributes important benefits to students in ways that are unmeasurable in the students' achievement on state tests. That argument (which rebuts the tort element of breach), unlike the reliability defense (which speaks to the element of duty), *might* persuade a judge since one could credibly think that there is more to a good teacher than how much one's students learn—perhaps, for instance, one's ability to impart certain important social skills that are not measurable on tests but that would show up on a principal's evaluation.

A plaintiff could respond, however, that a prudent person would not think it reasonable to relegate a classroom of students to below-basic reading and math skills (and all of the future harms that result[274]) simply because of a belief that the teacher was good at showing the students how to be nice or get along with others. This response has some traction, especially in light of the overwhelming trend in educational policy towards recognizing the paramount importance of student learning.[275] Moreover, even if this no-breach defense may be acceptable as a general matter, whether a court will find it convincing in any individual case will turn on the facts of each claim. It will depend on whether, for example, there actually is a record of positive principal evaluations suggesting that a challenged teacher with low value-added scores received high marks for other unmeasurable skills. In some cases involving perhaps well-meaning teachers who are well-respected in the classroom, a credible argument might be made that continuing to assign students to the teacher is not negligent despite the teacher's low value-added scores. In other cases (which we suspect may be the more common situation), the low-value-

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[273] *Cf.* Douglas N. Harris, *Response to Heather C. Hill*, 28 J. POL'Y ANALYSIS & MGMT., 709, 709 (2009) ("[O]ne of the complications in measuring teacher effectiveness is that the goals of education are multifaceted. For this reason, each measure of teacher effectiveness captures teacher performance toward different goals.") (internal citations omitted).

[274] *See* CHETTY, *supra* note 151 at 3-5.

[275] For an example of this trend, one need look no further than to New York state's policy of requiring a teacher who is deemed "ineffective" based on the value-added portion of the evaluation to be labeled 'ineffective' overall, even though the value-added element comprises only 40% of the overall evaluation. *See* Press Release, *supra* note 141 and accompanying text. Under such a policy, a judge might be unwilling to conclude that it is reasonable for a school district to retain an ineffective teacher based on certain of the teacher's unmeasurable skills since the state itself evidently believes that the value-added data alone is enough to dictate its overall teacher evaluation outcomes.

added teacher will also have a track record of mediocre or worse principal evaluations, meaning the argument would not be supported in the record.

In any case, our takeaway point here is simply that a school district may be able to preempt an education malpractice claim by altering its use of value-added data in the first instance. This effort may be most successful if the district can refuse to use value-added in teacher evaluation altogether. But failing that, the district may still be able to succeed in select cases by arguing that there is more to a good teacher than student learning—and that it is accordingly not negligent to retain a teacher whom its value-added data reveals to be ineffective.

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If, at the end of the day, we are correct that a revived claim of education malpractice stands some chance of success, that fact is likely to spur action on the part of both districts with value-added policies and districts who are considering adopting them. We have suggested here a range of possible responses available to these districts. Though we refrain from advocating for any particular policy response, we hope that this examination will prove useful to people on all sides of the issue—advocates, administrators, policymakers—who want to understand how the new educational malpractice litigation might influence school policy.

CONCLUSION

We have attempted in this article to set forth a new theory of education malpractice litigation. The crux of our theory is the dramatic changes in education policy, learning standards, and data quality witnessed over the last four decades.[276] These developments, we have argued, make it possible for courts to impose a duty of care upon school districts that does not require judicial guesswork regarding the propriety of a multitude of pedagogical approaches. Moreover, the very purpose of the value-added models upon which our claim is founded is to provide information about the causal connection between a teacher's work and her students' student learning outcomes—a fact that directly addresses the proximate causation concerns that troubled courts in the initial era of educational malpractice litigation.

If we are correct about the viability of this educational malpractice claim, however, it may well be that the most far-reaching consequence of

[276] Indeed, even though value-added models are quite recent in their development, as of the 2010-11 school year roughly one in four children attend school in a district where some form of value-added model is already in place. Calculation based on data from the following sources: NATIONAL CENTER ON EDUCATION STATISTICS, PARTICIPATION IN EDUCATION Table A-3-2, http://nces.ed.gov/programs/coe/tables/table-enl-2.asp; NATIONAL CENTER ON EDUCATION STATISTICS, COMMON CORE OF DATA, http://nces.ed.gov/ccd/pubagency.asp; Value-Added Assessment and Student Progress, THE CENTER FOR GREATER PHILADELPHIA, http://www.cgp.upenn.edu/ ope_nation.html (last visited Aug. 12, 2012).

our theory is not the role that courts would play in adjudicating such claims moving forward, but rather the salutary incentives that the cause of action would create for primary actors. For example, as we already discussed, the prospect of liability for assigning students to chronically ineffective teachers may incentivize school districts to proactively remove or remediate bad teachers on their own accord.

But perhaps even more importantly, the potential for district liability may create incentives for *teachers* to improve as well. One way to understand this dynamic is to think of chronically ineffective teachers as falling generally into two groups: one group that is essentially incapable of being an effective teacher (perhaps for lack of innate ability); a second that is capable of performing at an effective level but who simply lack the incentives to do so (perhaps since they are tenured and enjoy job security, or because their pay is unaffected by student achievement). The idea that schools might be held liable for assigning students to ineffective teachers—such that districts may begin more actively weeding out the low-performers—could change behavior for both groups: Teachers who are innately incapable of adequate job performance may choose to leave the profession voluntarily rather than risk the shame of being fired,[277] and teachers who are simply underperforming may decide to ratchet up their effort level in order to avoid termination.[278]

In other words, if our theory is correct, its most important outcome might be to change teacher and school district behavior so that successful educational malpractice suits are actually few and far between. That comports with a fundamental purpose of tort law: to incentivize individuals to act with reasonable care by deterring wrongful conduct in the first place through the threat of liability.[279] It would be an intriguing irony, of course, if the end result for advocates pursuing educational malpractice actions is that the specter of tort liability reduces ex ante wrongful behavior by districts and low-performing teachers such that few successful claims are ultimately waged. But it is, we think, an irony that advocates and school children alike would gladly enjoy.

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[277] *See* THE NEW TEACHER PROJECT, THE IRREPLACEABLES: UNDERSTANDING THE REAL RETENTION CRISIS IN AMERICA'S URBAN SCHOOLS 17 (2012) (noting that in one school district, where ineffective teachers were told that they were low-performing, they were three times more likely to leave voluntarily than if they were not told).

[278] *Cf.* MICHAEL HANSEN, UNIVERSITY OF WASHINGTON CENTER ON REINVENTING PUBLIC EDUCATION, CAREER CONCERNS INCENTIVES AND TEACHER EFFORT 41 (2009) (finding that increases in teacher tenure generally correspond to a decrease in teacher effort level as reflected in rates of absenteeism, but that the arrival of a new principal increases teachers' effort levels).

[279] *See* Restatement (Second) of Torts § 901(c) (one purpose of tort law is "to punish wrongdoers and deter wrongful conduct.").