Nonliability for Negligence in the Public Schools--Educational Malpractice from Peter W. to Hoffman

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“Educational Malpractice” from Peter W. to Hoffman

I. Introduction

On December 17, 1979, the New York Court of Appeals rendered a decision that could mark a major development in the field of education law. The court, in Hoffman v. Board of Education of the City of New York, held that a cause of action sounding in "educational malpractice," although possibly cognizable under traditional notions of tort law, would not be recognized as a matter of public policy. The significance of the decision lies in the New York court’s expansive reading of the term "educational malpractice."

In this Note, it will be argued that in Hoffman, the New York Court of Appeals erred in its classification of the facts before it as an "educational malpractice" action because Hoffman did not present a claim of educational malpractice in the traditional sense. The labeling of the facts in Hoffman as educational malpractice rewrites the term by significantly expanding its scope. The court may have set a precedent that will effectively shield educational administration from judicial inquiry, even when such inquiry would be warranted.

II. The Facts

Daniel Hoffman was born April 6, 1951. His mother was a German immigrant with the equivalent of a junior high school education. Daniel was 13 months old and just beginning to talk when his father died. After his father’s death, Daniel developed a severe speech impediment. His doctor believed that this was probably due to the shock of his father’s death and that he would get over it.

Daniel, however, did not overcome his impediment. In February of 1956, when Daniel was almost five years old and still unable to speak properly, his mother took him to the National Hospital for Speech Disorders. The hospital’s records noted that Daniel was a "friendly child with little or no intelligible speech." The records also stated that the child had "Mongoloid eyes" and that the "impression" was "borderline Mongolism." One month later,
Daniel was administered a non-verbal intelligence test by a psychologist employed by the hospital. On this test, Daniel scored an IQ of ninety—a score within the range of normal intelligence.\(^7\)

Six months later, in September of 1956, Daniel entered kindergarten. Four months later, Monroe Gottsegen, a clinical scientist who had been employed by the defendant school board for one week and who had not yet received his Ph.D. in psychology, administered the primarily verbal Stanford-Binet Intelligence Test to Daniel. On this test, Daniel scored an IQ of seventy-four, one point below the statutory cutoff point of seventy-five required for placement in classes for children with retarded mental development (CRMD).

Despite the borderline determination of IQ and the fact that the Stanford-Binet Intelligence Test has a standard deviation of fifteen to sixteen\(^8\), Gottsegen recommended placement in the CRMD class. He was not, however, convinced of his determination. The Stanford-Binet Test is primarily verbal, and Daniel was afflicted with a severe speech impediment. Gottsegen had experienced a great deal of difficulty understanding Daniel’s verbal responses. The IQ determination of seventy-four was essentially an approximation based upon Gottsegen’s guesses as to what Daniel was trying to say. In his report, dated January 23, 1957, Gottsegen states, “... [Daniel] needs help with his speech problem in order that he be able to learn to make himself understood. Also his intelligence should be reevaluated within a two-year period so that a more accurate estimate of his abilities may be made.”\(^9\)

Despite Gottsegen’s doubts of the accuracy of his results, no attempt was made to obtain Daniel’s social history. If a social history had been obtained, it would have revealed that Daniel had been an otherwise normal child until he developed his speech impediment upon the death of his father. More importantly, it would have also revealed that Daniel had received a score of ninety on a nonverbal IQ test only ten months before.

Daniel entered his first CRMD class in October of 1957. When his mother took him to the class, she was told that it was a class for retarded children and that her son would not have been placed in the class unless he were, in fact, mentally retarded.\(^10\) His mother was never informed that the recommendation for placement of her child in CRMD classes was based upon her son’s falling only one point short of the statutory cutoff of seventy-five. Moreover, she was never informed that the internal rules of the school administration would have required a retesting of Daniel upon her request.\(^11\) At the time of Daniel’s first class, Mrs. Hoffman inquired whether her son would receive speech therapy in the special class and was informed that “he [would] get everything that is

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\(^7\) 410 N.Y.S.2d at 101.

\(^8\) L. CRONBACH, ESSENTIALS OF PSYCHOLOGICAL TESTING 216 (3d ed. 1970). This fact was not discussed in the court decisions. This means that because of the inherent inaccuracies of the Stanford-Binet Test, an IQ determination of seventy-four could reflect a genuine IQ from sixty-six to eighty-two. This fact should have been more significant since Daniel’s placement in CRMD classes was substantially motivated by his performance on the Stanford-Binet Test. A proper interpretation of the test result would have been that Daniel may not even have been eligible for CRMD placement.

\(^9\) 410 N.Y.S.2d at 102.

\(^10\) Id. at 104.

\(^11\) Id. at 103.
needed . . . .”12 She later stated that she was “happy about that, and that’s how it all started. He was in a retarded class and he stayed there.”13

Daniel remained in CRMD classes for eleven years.14 At no time during those eleven years was he given an additional intelligence test as Gottsegen had originally recommended. In September of 1968, Daniel was transferred from CRMD classes to a manual and shop training center for retarded youths. At the start of his second year at the center, he was informed that he was no longer eligible to remain since it had been determined that he was not retarded.15 Four months earlier, Dr. William F. Garber had administered the Wechsler Intelligence Scale for Adults test to Daniel, and he had scored a verbal IQ of eighty-five and a performance IQ of 107, for a full-scale IQ of ninety-four. This IQ determination placed Daniel in the normal range of intelligence, despite his having been “closeted with mentally retarded children for more than twelve years.”16 This result was also consistent with the IQ determination made thirteen years before by the National Hospital for Speech Disorders.17

After being dismissed from the training center, Daniel, a boy who did not know how to do anything except go to school, went into a state of prolonged depression.18 In December of 1969, he was examined by Dr. Lawrence I. Kaplan, a neurologist and psychiatrist. Dr. Kaplan’s opinion was that Daniel was not mentally retarded, but that he had a “defective self-image and feelings of inadequacy” caused by being placed in a class of mentally retarded children and resulting in “an alteration in his concept of himself, particularly because he is intelligent enough to appreciate the position in which he is placed.”19

In January of 1970, Daniel was administered several IQ tests. On the verbal tests, he scored an IQ of eighty-nine. On the performance tests, he scored an IQ of 114, for a full-scale IQ of 100.20 He scored below average on the test areas affected by schooling, but above average in areas which required no previous learning in a school situation.21 The psychologist who had administered the tests concluded that Daniel’s learning potential had always been above average.22 His intellectual development, however, had been impaired by the assumption that the IQ determination of Gottsegen had been correct. This assumption led his family and others to fail to provide him with the stimulation that they otherwise would have given the child. Having been labeled as retarded, Daniel was subsequently treated as retarded for twelve years. As a result, Daniel felt that he was “substantially without an education; that he did not

12 Id. at 104.
13 Id.
14 Id. During those eleven years, although he continued to reside at the same address, Daniel was transferred among five different schools.
15 Id. at 103.
16 Id. at 104.
17 Id. at 101.
18 The account of his subsequent actions is related at 410 N.Y.S.2d at 105.
19 Id. at 105. Dr. Kaplan added: “* * * [one] is treated as a mentally retarded patient, a person who cannot learn or cannot do something that normal children are doing, he assumes in the long run that that’s the role that he should be playing in life, and so this diminishes his incentive and diminishes the capacity to learn.” Id.
20 Id. at 106.
21 Brief for respondent, supra note 4, at 13.
22 410 N.Y.S.2d at 106.
know what he could do to earn a living; and that he did not know where he fitted into the world, and even where he fitted into his family.\textsuperscript{23}

The next few years showed little improvement in Daniel's condition.\textsuperscript{24} At the time of trial, Daniel, age twenty-three, worked as a part-time messenger, earning fifty dollars per week.\textsuperscript{25}

At trial, Daniel Hoffman was awarded a judgment of $750,000.\textsuperscript{26} The intermediate appellate court affirmed, although the judgment was reduced to $500,000.\textsuperscript{27} The New York Court of Appeals, however, reversed and dismissed the complaint as failing to state a cause of action.\textsuperscript{28} In dismissing the complaint, the New York Court of Appeals labeled the facts in Hoffman as presenting a claim sounding in "educational malpractice," thus presenting no recognized claim for relief. Because the significance of this decision lies in the court's use of the term "educational malpractice" to describe the facts, it is necessary to review the traditional type of educational malpractice action before the impact of Hoffman may be effectively evaluated.

III. History

Other than Hoffman, there are only two significant cases in the educational malpractice area.\textsuperscript{29} The first and most often cited case is Peter W. v. San Francisco Unified School District.\textsuperscript{30} The second case is the very recent Donohue v. Copiague Union Free School District.\textsuperscript{31} Both of these cases involve substantially the same facts and issue,\textsuperscript{32} and share an identical result.\textsuperscript{33} Upon close examination of these cases, however, it is apparent that the holdings are very specific, and that the term educational malpractice is a term of art intended to cover a very specific type of factual situation.

\begin{notes}
23 Id. \\
24 Id. \\
25 Id. \\
26 Id. at 100. \\
27 Id. at 111. \\
28 424 N.Y.S.2d at 380. \\

The Garrett case was dismissed without opinion December 5, 1977. The Beaman case was dismissed January 31, 1978, also without opinion. The Fisher case was settled, the case being dismissed by agreement July 10, 1979.


32 In the initial Donohue decision, Justice Baisley called the complaint in Donohue "parallel if not identical" to the complaint in Peter W. 408 N.Y.S.2d at 385.

33 That is, a person who claims to have been inadequately educated while a student in a public school system may not state a cause of action in tort against the public authorities who operate and administer the system. 131 Cal. Rptr. at 855; 418 N.Y.S.2d at 378.
\end{notes}
A. Peter W. v. San Francisco Unified School District

In *Peter W.*, the plaintiff challenged the effectiveness of the San Francisco public school system.\(^{34}\) Eighteen-year-old Peter W. had graduated from high school after twelve years of schooling. Intelligence tests had shown that he had an average to slightly above average IQ and was completely able to be educated. Peter W., however, was functionally illiterate. After twelve years of schooling and the receipt of a high school diploma, he had the reading, writing, and mathematical skill levels of a fifth-grader.

In his complaint, Peter W. claimed that he had been inadequately educated, alleging that this was caused by negligence\(^{35}\) of the defendant school district. He further alleged that as a result of this failure to educate, he had suffered a loss of earning capacity because he was unqualified for any employment other than labor which required little or no ability to read and write.\(^{36}\) Peter W. sought $500,000 in damages for lost wages due to his restricted occupational opportunities and additional damages in compensation for the cost of a private tutor.

The defendant school district demurred to the complaint. The trial court sustained the demurrer, but granted Peter W. leave to amend. When he failed to amend his complaint, the trial court entered judgment and dismissed the action. From the dismissal, Peter W. appealed.

The appellate court, after noting that the doctrine of governmental immunity from tort liability had been abolished in California, set out the allegations required by California law to plead sufficiently a cause of action for negligence: "1) facts showing a duty of care in the defendant, 2) negligence constituting a breach of the duty, and 3) injury to the plaintiff as a proximate result."\(^{37}\) Because the litigants were not contesting the elements of negligence, proximate cause, or injury, the court focused its analysis entirely upon the requirement of a duty of care in the defendant. The issue, characterized by the court as "novel and troublesome,"\(^{38}\) was whether there was a duty to educate, the failure of which could render school authorities liable for damages.

The court began its analysis by observing that although the defendant school district did have a duty to educate with care within the common meaning of the terms, its conduct must be viewed in light of duty of care construed in

\(^{34}\) This factual narrative is based upon the appellate court decision, 131 Cal. Rptr. at 856. It is supplemented by Comment, *supra* note 30.


\(^{36}\) 131 Cal. Rptr. at 856.

\(^{37}\) *Id.* at 857.

\(^{38}\) *Id.* at 855.
the legal sense. In this sense, the finding of a duty of care "amount[ed] to a statement that two parties [stood] in such relationship that the law will impose on one a responsibility for the exercise of care toward the other." 39

The appellate court noted that the legal abstraction, duty of care, embodied three concepts. First, the existence of a duty of care was an essential factor in any assessment of liability for negligence. Second, whether such a duty existed in a given factual situation was a question of law to be determined solely by the court. Third, and the concept most important to the present case, was that judicial recognition of a duty of care in the defendant, with the consequences of his liability in negligence for its breach, was initially to be dictated or precluded by considerations of public policy. 40

For assistance in analyzing these amorphous "considerations of public policy," the appellate court looked to the California Supreme Court. In Rowland v. Christian, 41 that court had declared that the basis for all negligence liability in California rested in section 1714 of the California Civil Code which (paraphrased in terms of duty of care) states that "[a]ll persons are required to use ordinary care to prevent others being injured as a result of their conduct." 42 Liability was to flow from this general principle in all cases except when a departure from it was "clearly supported by public policy." 43 As a result of this departure, although a person may have injured someone as a result of his conduct, he will not be held liable if consideration of factors of public policy dictate nonliability.

The court deemed the pertinent factors of public policy to be the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with the resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. 44

The appellate court recognized the existence of additional factors as well. Often classified as administrative or socio-economic considerations, these factors included the probability of feigned claims, the difficulty of proof of a particular injury, and the prospect of limitless liability for the same injury. 45 The court stated that these policy considerations were "controlling" 46 in the determination of whether a defendant owed a legal duty of care.

After analysis of these policy considerations, the appellate court held that

39 Id. at 859 (quoting Raymond v. Paradise Unified School District, 218 Cal. App. 2d (1963)). Stated another way "[Duty] ... is an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to relief." W. PROSSER, HANDBOOK OF THE LAW OF TORTS, §33, at 295-296 (4th ed. 1971) [hereinafter referred to as PROSSER].
40 131 Cal. Rptr. at 859.
41 69 Cal. 2d 108, 70 Cal. Rptr. 97 (1968).
42 131 Cal. Rptr. at 859. CAL. CIVIL CODE §1714 (West), in pertinent part, reads: "Everyone is responsible, not only for the result of his wilful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person. ..." 131 Cal. Rptr. at 859 n.2.
43 131 Cal. Rptr. at 859. See also PROSSER §4.
44 131 Cal. Rptr. at 859-60.
45 Id. at 860. See also PROSSER §4, at 21-23.
46 131 Cal. Rptr. at 860.
the defendant school district did not owe Peter W. the requisite legal duty of care, and, thus, plaintiff was not entitled to relief.

The court found the injury alleged by Peter W. to be simply not "comprehensible and assessable within the existing judicial framework."47 In the words of the court:

Unlike the activity of the highway or market place, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught. . . . The "injury" claimed here is plaintiff's inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, is 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.48

The court also found no conceivable "workability of a rule of care" against which the school district's alleged conduct could be measured, no reasonable "degree of certainly" that plaintiff suffered injury within the meaning of the law of negligence, and no "perceptible connection" between the defendant's conduct and the injury suffered which would establish a causal link between them.49

The court believed that these policy determinations alone would be dispositive of the question of whether a duty of care was owed by the people who administered the academic phases of the public educational system. The court, however, discussed another factor, a practical consideration which weighed heavily in its ultimate determination. Recognizing that the public school systems of this country are under almost constant criticism and are "beset by social and financial problems which have gone to major litigation,"50 the court was not willing to expose a school system to the "tort claims—real or imagined—of disaffected students in countless numbers"51 by holding them to an actionable duty of care in the discharge of their academic functions. Realizing the constraints placed upon public schools by their publicly supported budgets, the court stated that "the ultimate consequences [of recognizing an actionable duty of care], in terms of public time and money, would burden [the schools]—and society—beyond calculation."52

The final result: public policy required that the school district not be held liable for the injury allegedly suffered by Peter W. The appellate court affirmed the dismissal of his complaint.

The scope of the holding in Peter W. is limited. In fact, the exact holding is

47 Id.
48 Id. at 860-61 (citing R. Flesch, Why Johnny Can't Read (1965) R. Gagne, The Conditions of Learning (1965); Schubert and Torgerson, Improving the Reading Program (1968)). See also Stull, Why Johnny Can't Read—His Own Diploma, 10 Pac. L. J. 647 (1979); Shanker, Dangers in the "Educational Malpractice" Concept, American Teacher 4 (June 1975).
49 131 Cal. Rptr. at 861.
50 Id.
51 Id. But see Prosser §12, at 51. "It is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation,' and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds." (Emphasis added.)
52 131 Cal. Rptr. at 861.
expressed clearly in the opening lines of the majority opinion, "The ... question on this appeal is whether a person who claims to have been inadequately educated, while a student in a public school system, may state a cause of action in tort against the public authorities who operate and administer the system. We hold that he may not."53

The issue presented was narrow, and the holding was precise. A reasonable construction of the opinion would limit the holding to the situation where a student, under a general allegation of negligence, sought to recover damages from the people who administered the academic phases of public education for failing to provide him with adequate training in basic academic skills.54

B. Donohue v. Copiague Union Free School District

In Donohue,55 the New York courts were confronted with the same factual situation as Peter W.56 Donohue had been a student at a high school in the defendant school district. In spite of the fact that he had received failing grades in several subjects and lacked basic reading and writing skills, he was allowed to graduate. After graduation, he found it necessary to employ a private tutor in order to obtain the basic skills he had not acquired in high school.

Because of these alleged deficiencies in his knowledge, Donohue sued his school district for $5,000,000. Like the plaintiff in Peter W., he sought recovery on a negligence theory.57 Donohue alleged that the school district had a duty to teach him and to "test him ... in order to evaluate his ability to comprehend the subject matters of the various courses" so that he would have a "sufficient understanding and comprehension of subject matters in said courses as to ... qualify for a Certificate of Graduation."58 He claimed that since he was, in fact, functionally illiterate upon graduation, the school district had breached this duty in that they:

failed to evaluate the plaintiff’s mental ability and capacity to comprehend the subjects being taught to him at said school; * * * failed to provide adequate school facilities, teachers, administrators, psychologists, and other personnel trained to take the necessary steps in testing and evaluation processes insofar as the plaintiff is concerned in order to ascertain the learning capacity, intelligence and intellectual absorption on the part of the plaintiff; * * * failed to teach plaintiff in such a manner so that he could reasonably understand what was necessary under the circumstances so that he could cope with the various subjects which they tried to make the plaintiff understand; * * * failed to adopt the accepted professional standards and methods to evaluate and cope with plaintiff’s problems which constituted educational malpractice.59

53 Id. at 855.
54 Id. at 836.
55 The case is reported at three levels; 408 N.Y.S.2d 584 (Sup. Ct. 1977); 407 N.Y.S.2d 874 (App. Div. 1978); 418 N.Y.S.2d 375 (N.Y. 1979).
56 This factual narrative is based upon the majority opinion of the intermediate appellate court, 407 N.Y.S.2d at 876-77.
57 Donohue also sought recovery for an alleged breach of a statutory duty imposed by Art. II § 1 of the New York State Constitution. 407 N.Y.S.2d at 877. This theory also failed.
58 407 N.Y.S.2d at 876.
59 Id. at 876-77.
The defendant school district moved to dismiss the complaint for failing to state a cause of action. Relying on the “persuasive reasoning” of the California court in *Peter W.*, the New York State Supreme Court dismissed the complaint.⁶⁰

In light of the almost identical fact pattern presented in *Donohue*, it is not surprising that the intermediate New York appellate court opinion mirrors the California ruling in *Peter W.* The court began by reviewing the elements of a negligence action in New York, stating that it was “axiomatic” that there can be no recovery in negligence unless “1) the defendant owed the plaintiff a cognizable duty of care, 2) the defendant failed to discharge that duty and 3) the plaintiff suffered damage as a result of such failure.”⁶¹

Noting that the question of duty was a question of law entirely for the courts,⁶² the court stated that the existence of a duty of care ultimately rested upon principles of sound public policy.⁶³ This determination, of necessity, required consideration of many factors, which included,

*moral* considerations arising from the view of society toward the relationship of the parties, the degree to which the courts should be involved in the regulation of that relationship and the social utility of the activity out of which the alleged injury arises; *preventative* considerations, which involve the ability of the defendant to adopt practical means of preventing injury, the possibility that reasonable men can agree as to the proper course to be followed to prevent injury, the degree of certainty that the alleged injuries were proximately caused by the defendant and the foreseeability of the harm to the plaintiff; *economic* considerations, which include the ability of the defendant to respond in damages; and *administrative* considerations, which concern the ability of the courts to cope with a flood of new litigation, the probability of feigned claims and the difficulties inherent in proving the plaintiff’s case.⁶⁴

Recognizing that the question whether there was a duty to educate was one of first impression in its jurisdiction, the court relied heavily on the analysis of *Peter W.* The court quoted at length from the *Peter W.* opinion, and adopted its rationale and conclusion.⁶⁵ After examining the relevant factors of public policy involved in the determination of a duty of care,⁶⁶ the court ruled that there was no duty to educate flowing from educators to their students, the breach of which would render them liable in damages.⁶⁷

Although it seemed to base its holding upon the policy determinations of *Peter W.*, the intermediate appellate court mentioned an additional reason for its reluctance to allow this cause of action to succeed. The majority believed that the courts were simply not the appropriate place to “evaluate conflicting theories of how best to educate.”⁶⁸ Allowing plaintiffs like Donohue to succeed would necessarily require judges and juries to determine which subjects should

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⁶⁰ 408 N.Y.S.2d 584, 585 (Sup. Ct. 1977)
⁶¹ 407 N.Y.S.2d at 877 (citing 41 N.Y. JUR., NEGLIGENCE §7).
⁶² 407 N.Y.S.2d at 877 (citing to PROSSER §37, at 206).
⁶³ 407 N.Y.S.2d at 877.
⁶⁴ Id.
⁶⁵ Id. at 878. This page is primarily a quote from *Peter W.*
⁶⁶ The court never actually examines the factors listed at note 64 and accompanying text *supra*, in its opinion. The court appears to simply adopt the policy determinations made in *Peter W.*
⁶⁷ 407 N.Y.S.2d at 878.
⁶⁸ Id. at 879.
be taught, which teaching methods should be utilized, which tests should be administered, etc. Essentially, "recognition of a cause of action in negligence to recover for 'educational malpractice' would impermissibly require the courts to oversee the administration of the State's public school system."  

For these reasons, Donohue's complaint was dismissed for failure to state a cause of action.

The majority, however, made it clear that their determination should not be viewed as sanctioning shoddy professionalism in teachers. In the words of the court, "This determination does not mean that educators are not ethically and legally responsible for providing a meaningful public education for the youth of our State. Quite the contrary, all teachers and other officials of our schools bear an important public trust and may be held to answer for the failure to faithfully perform their duties. It does mean, however, that they may not be sued for damages by an individual student for an alleged failure to reach certain educational objectives."  

Justice Suozzi dissented. Drawing an analogy that the negligence alleged was "not unlike that of a doctor who, although confronted with a patient with a cancerous condition, fails to pursue medically accepted procedures to 1) diagnose the specific condition and 2) treat the condition, and instead allows the patient to suffer the inevitable consequences of the disease," he believed the complaint was at least sufficient to withstand a motion to dismiss.

He also stated that the policy determinations of Peter W. relied upon by the majority did not mandate a dismissal. The question of whether the functional illiteracy of the plaintiff was caused by the negligence of the school district or "was the product of forces outside the teaching process [was] really a question of proof to be resolved at trial."  

He referred to the fear of a new flood of litigation and the possible difficulty in framing a measure of damages as "unpersuasive grounds for dismiss[al]" because "[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."  

He also believed that the plaintiff had shown the existence of a statutory duty of care flowing from defendant to him under former section 4404 of the New York State Education Law.

Justice Suozzi simply found no difference between educational malpractice and the other forms of malpractice and negligence actions recognized by the courts. He warned that dismissal of the plaintiff's complaint without allowing him his day in court was tantamount to sanctioning misfeasance in the educational system.

In a terse opinion, the New York Court of Appeals affirmed. The court noted that no one in good faith could deny that a functionally illiterate high

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69 Id.
70 407 N.Y.S.2d at 879.
71 Id. at 884.
72 Id. at 883.
73 Id.
74 Id. at 884.
75 Id.
school graduate had not, in some fashion, been "injured." They also found that the establishment of a standard by which to judge an educator’s performance was not necessarily an "insurmountable obstacle." Moreover, the court stated that nothing in the law prevented charging professional educators with the same duty to the public as that owed by doctors, lawyers, architects, engineers, and other professionals. The fact that a complaint may state a valid cause of action under traditional tort law, however, does not require that it be sustained. The court held that as a matter of public policy, claims of educational malpractice should not be entertained by the courts.

The New York Court of Appeals did not analyze the public policy considerations in its opinion. It did, however, voice a concern expressed by the lower appellate court (adopting an attitude that would ultimately control in Hoffman) in even stronger language: "Recognition of this cause of 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." The court used the phrase "this cause of action." Ostensibly, the court was being specific and was limiting its holding to the situation when a cause of action for educational malpractice is alleged. In light of the virtual identity of the factual situations presented in Peter W. and Donohue, and in the face of the heavy reliance on Peter W. by the Donohue courts, it would seem that the term educational malpractice as used in Donohue mirrors the definition embraced in Peter W. Specifically, the term educational malpractice is a term of art confined to the question of whether a student, who claims to have been inadequately educated in a public school system, may state a cause of action in tort against the public authorities who operated and administered the system. Peter W. and Donohue have answered this question in the specific context of a student whose only claim is for alleged inadequate training in basic academic skills—public policy dictates that such a cause of action not be recognized by the courts.

IV. Distinguishing Hoffman

Even a cursory look at the cases of Peter W. and Donohue shows the basic similarities between the two. The gist of Peter W.’s complaint was that his school district had a duty to educate him, and that they had "failed to provide plaintiff with adequate instruction, guidance, counseling, and/or supervision in basic academic skills such as reading and writing" because of which he "suffered a loss of earning capacity by his limited ability to read and write."
Donohue’s complaint was essentially the same. He claimed that the school had failed “to evaluate his ability to comprehend the subject matters of the various courses” so that he did not have a “sufficient understanding of subject matters . . . to qualify for a Certificate of Graduation.” Since he had graduated, however, he concluded that he was entitled to damages for the deficiencies in his knowledge.

These complaints have two common characteristics. First, the allegations of negligence were very general. Neither Peter W. nor Donohue alleged a specific act on the part of their respective school officials that could have caused their injury. A specific cause simply did not exist.

The other common feature is that the injury complained of in both cases was functional illiteracy. Both Peter W. and Donohue had received years of education in normal classes in a public school system, and both had graduated without being able to read and write and without a basic understanding in other courses. As a result of this functional illiteracy, they both sued their respective school districts claiming a general failure of an alleged duty to educate.

In the end, the courts gave each case identical treatment. Out of this identical treatment evolved a label for the cause of action both Peter W. and Donohue had presented—“educational malpractice.” Both the California and the New York courts were specific in their holdings. There was no indication in the opinions that the term educational malpractice was meant to define anything but the facts and allegations presented in Peter W. and Donohue. As a result of these decisions, therefore, a claim alleging educational malpractice can be said to have the following characteristics: (1) a graduate who had enjoyed an otherwise normal education, but despite that had (2) graduated as a functional illiterate, and who now (3) seeks to recover damages in tort from his school district for an alleged failure of its general duty to educate.

At the outset, the case presented by Daniel Hoffman seems distinct from the cases presented by Peter W. and Donohue. Daniel Hoffman was not a disgruntled student claiming that because he had graduated from high school without being able to read and write he should be entitled to damages in tort. Rather, he claimed that he was the victim of professional negligence which caused him to be erroneously classified and treated as mentally retarded for twelve years of his life.

In his complaint, Daniel alleged an element that neither Peter W. nor Donohue was able to allege. He was able to point to specific acts on the part of the school authorities which ultimately resulted in his injury. Daniel Hoffman’s complaint alleged two acts of negligence “1) the defendant was negligent in its original testing procedures and placement of the plaintiff in an educational environment for mental defectives . . . and 2) the defendant was negligent in failing or refusing to follow adequate procedures for the recommended retesting of plaintiff’s IQ.” These specific acts, the original testing by Gottsegen, the placement of Daniel in CRMD classes upon a borderline

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85 407 N.Y.S.2d at 876.
86 Daniel had never graduated from any school, and there is some record that he could read and write. 410 N.Y.S.2d at 118.
87 410 N.Y.S.2d at 113.
The determination of IQ, and the subsequent failure of the school authorities to retest as Gottsegen had recommended, are readily seen as the cause of Daniel's injury. Because of these specific acts, a boy of normal intelligence was classified and treated as mentally handicapped for twelve years.

The nature of Daniel's injury also differed substantially from the injuries alleged by Peter W. and Donohue. Daniel did not seek recovery because of functional illiteracy. His injury was the emotional trauma suffered from having spent twelve years of his life unjustly "imprisoned in a world of disturbed, disrupted [and] abnormal beings." The normal world had shunned him, and although he could not understand it, he was intelligent enough to perceive what was happening to him. He eventually resigned himself to the role society had dictated to him—the role of the retarded child. He developed "feelings of inadequacy" and a "defective self-image" as a result. Then, suddenly, he was told that he is normal, and that society now expected him to exist and survive in the world of the normal. The shock of this revelation sent Daniel into a state of prolonged depression. As one psychiatrist testified at trial, "when one is told he is not retarded after 13 years of being considered otherwise, one cannot then simply go out and say, 'Now I am not retarded. I am going to conquer the world or do something.'" Arguably, Daniel suffered extended mental anguish.

Thus, unlike Peter W. or Donohue, Daniel had never had a normal education in any sense, he did not claim functional illiteracy as his injury, and he could point to specific acts on the part of school authorities that resulted in his harm. But even beyond the factual distinctions, the issue presented in Hoffman also varied from that in Peter W. and Donohue. As one author noted: "In Hoffman... the thrust of the plaintiff's case is not so much a failure to take steps to detect and correct a weakness in a student, that is, a failure to provide a positive program for a student, but rather, affirmative acts of negligence which imposed additional and crippling burdens upon a student.... [I]t does not seem unreasonable to hold a school board liable for the type of behavior exhibited in Hoffman." Despite all these discrepancies, however, the New York Court of Appeals summarily classified Daniel Hoffman with Peter W. and Donohue, and dismissed his complaint for stating an unrecognized claim of "educational malpractice."

V. The Treatment of Hoffman by the New York Courts

A. The Intermediate Appellate Court

In a three-to-two decision, the intermediate appellate court affirmed the judgment of the trial court on the condition that the respondent accept a reduced verdict of $500,000. Avoiding the allegation that Gottsegen had been
negligent in the initial testing and recommendation for CRMD placement, the
majority focused upon the school officials' failure to follow the recommenda-
tion that Daniel's "intelligence be re-evaluated within a two-year period so
that a more accurate estimation of his abilities can be made."93

The school board had argued that a reevaluation of intelligence was not
the same as a retesting of intelligence. Both terms were words of art. To
"retest" meant to administer an additional intelligence test, while to "re-
evaluate" meant observation of the child, using his classroom progress and
subsequent performance on semiannual achievement tests to determine
whether another intelligence test was warranted. The school board pointed out
that Daniel had been constantly observed in his CRMD classes, his progress
being noted and measured by semiannual achievement tests. In the opinion of
his teachers, they saw nothing that contradicted Gottsegen's initial determi-
nation of retardation. Consequently, administration of another intelligence test
did not appear necessary.94

The majority was not impressed by the defendant's semantic distinction.
In the words of Justice Shapiro, the majority admonished the defendants, "So
little had to be done to avoid the awesome and devastating effect . . . on plain-
tiff's life, and that little was not done."95 The majority found that the defen-
dant's contention contradicted the testimony of its own expert witnesses that
the intelligence of children is determined solely by intelligence tests, not by
achievement tests and classroom evaluations.96 They argued that if Gottsegen
had meant what defendant contended, and not that another intelligence test be
administered, then he had meant less than nothing. If what the defendant
claimed were true, it would mean that instead of observing Daniel daily, his
teachers would only have to note his progress once in the following two years, a
result the majority concluded was absurd.97

The majority also pointed out that even if Gottsegen's initial recommen-
dation was puzzling or equivocal, it was up to the school administration to find
out what its own employee was talking about. In light of the borderline deter-
mination of IQ, the majority held that defendant's affirmative act of CRMD
placement created a relationship out of which a duty arose to take reasonable
steps to ascertain whether that placement was proper.98 Because the direction
for retesting was placed in the same document which directed the CRMD
placement, the majority called the failure to follow Gottsegen's recommen-
dation "an egregious error committed on a wholesale basis."99 The court con-
cluded that the jury could properly have found that if Gottsegen's report was
ambiguous, each teacher was negligent in failing to inquire as to its true mean-

93 From Gottsegen's report after the administration of the January 9, 1957 intelligence test. Id. at 107.
94 Id.
95 Id. at 109.
96 Id. at 107. The court notes in a footnote that Dr. Donald Wiedis, a witness for the defendant,
testified that intelligence tests have nothing to do with what one has learned in the past and are not designed
"to tap academic achievement." Another witness for the defendant, Dr. Henry Lipton, testified that the
word "intelligence" would require an IQ evaluation which could not be done without an IQ test. Id. at n.4.
97 Id. at 108.
98 Id. at 109.
99 Id. at 108.
ing, and thus, the school district was equally responsible as their employer under the doctrine of respondeat superior.100

After noting that in New York damages for psychological and emotional injury are recoverable even absent physical injury, the court addressed itself to the argument that the case presented an unrecognized claim of educational malpractice. The court began with an analogy; if Daniel had been improperly diagnosed or treated by medical or psychological personnel in a municipal hospital, the municipality would have been liable for the resulting damage.101 "Negligence is negligence,"102 and the majority found no reason to afford special treatment simply because the governmental entity involved was a school system. The court pointedly distinguished Peter W. and Donohue and the policy reasons that previously had led to the denial of a cause of action for "educational malpractice." In the words of the court:

[Defendant's] rhetoric constructs a chamber of horrors by asserting that affirmance in this case would create a new theory of liability known as "educational malpractice" and that before doing so we must consider public policy and the effects of opening a vast new field which will further impoverish financially hard pressed municipalities. Defendant, in effect, suggests that to avoid such horrors, educational entities must be insulated from the legal responsibilities and obligations common to all other governmental entities no matter how seriously a particular student may have been injured and, ironically, even though such injuries were caused by their own affirmative acts in failing to follow their own rules.

I see no reason for such a trade-off, on alleged policy grounds, which would warrant a denial of fair dealing to one who is injured by exempting a governmental agency from its responsibility for its affirmative torts. * * * If the door to "educational torts" for nonfeasance is to be opened, it will not be by this case which involves misfeasance in failing to follow the individualized and specific prescription of defendant's own certified psychologist, whose very decision it was in the first place, to place plaintiff in a class for retarded children . . . .104

The majority concluded that a dismissal of the complaint would constitute "an intrusion on the jury's role as trier of fact," and would be "an unwarranted finding of fact in a jury case."105 The majority affirmed, stating that "any other result would be a reproach to justice,"106 and ending its opinion by quoting the Latin maxim, "Fiat justitia, ruat coelum."107

Two dissenting justices wrote separate opinions. Justice Martuscello felt that the plaintiff had not established the negligence of the defendant by its

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100 Id.
101 Id. at 110.
102 Id.
103 This refers to the failure of the school authorities to follow the recommendation of Gottsegen that Daniel's intelligence be re-evaluated within two years.
104 410 N.Y.S.2d at 110 (citations deleted). By using this misfeasance/nonfeasance distinction, the majority really plays its own semantic game, as the dissent of Justice Damiani points out. The emotional and colorful language of the majority opinion suggests that the majority had determined that Daniel should recover, but had to grope for a theory to justify the affirmance.
105 Id. at 111.
106 Id.
107 Let justice be done, though the heavens fall.
breach of a duty owed to him under either of his proposed theories of liability.\textsuperscript{108}

Focusing on plaintiff's allegation that Gottsegen had been negligent in his administration of the initial intelligence test, he noted that none of plaintiff's expert witnesses had testified that Gottsegen had departed from good psychological practice in administering a primarily verbal IQ test to a child with a severe speech impediment.\textsuperscript{109} Although one expert had felt that it would have been wise to supplement the verbal test with a nonverbal IQ test, the court could not infer that he was unwise not to do it or that he had deviated from standard psychological practice.\textsuperscript{110} When inferences were equally consistent, one with liability and the other without it, the plaintiff had simply not met his burden of proof and the case should not have been allowed to go to the jury.\textsuperscript{111}

As to plaintiff's second theory, the one relied upon by the majority, Justice Martuscello agreed with defendant's interpretation of the crucial word "re-evaluate." He believed that plaintiff had, in fact, been periodically re-evaluated. This reevaluation consisted of Daniel's entire school record, including his teacher's observations in class and his results on the standardized achievement tests.\textsuperscript{112} Accordingly, Justice Martuscello found no justification for affirmance and suggested that the judgment be reversed and the complaint be dismissed.

Justice Damiani, on the other hand, concluded the complaint should be dismissed since the public policy of the state, as established in \textit{Donohue}, mandated that a cause of action sounding in educational malpractice may not be recognized. He believed that the majority's affirmance necessarily involved the courts in the evaluation of the judgments and actions of educators, an interference that \textit{Donohue} expressly prohibits.\textsuperscript{113}

Justice Damiani also found fault with the majority's classification of Daniel's problem as an injury. Daniel had suffered from a severe speech impediment before he had entered the defendant's schools, and thus the failure to teach him to speak properly left him no worse off than when he had entered the school system. Since he was no worse off than when he started and his subsequent learning difficulties stemmed from his inability to communicate, Daniel had not suffered an injury within the meaning of tort law.\textsuperscript{114}

Justice Damiani further blamed plaintiff and his mother for not protesting his placement in CRMD classes.\textsuperscript{115} He noted that Daniel had received the best speech therapy the school district had to offer and that he had been instructed in social studies, mathematics, English, and science and that he did have the ability to read and write.\textsuperscript{116} He also reasoned that the benefit of retrospection

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\textsuperscript{108} See note 87 and accompanying text supra.
\textsuperscript{109} 410 N.Y.S.2d at 114.
\textsuperscript{110} \textit{Id}.
\textsuperscript{111} \textit{Id}.
\textsuperscript{112} \textit{Id}. at 117.
\textsuperscript{113} \textit{Id}.
\textsuperscript{114} \textit{Id}. at 118.
\textsuperscript{115} \textit{Id}.
\textsuperscript{116} \textit{Id}.
had enabled the plaintiff to convince the jury that he had been severely dam-
aged by his erroneous placement.117

Justice Damiani did, however, make a valid criticism of the majority's misfeasance/nonfeasance distinction that they had claimed separated Hoffman from Donohue. In his words,

Quite apart from the fact that the complaints in both [Donohue and Hoffman] alleged acts of both omission and commission, the main thrust of the plaintiff's case at bar was that the defendant failed to retest plaintiff within two years after his placement in a CRMD class as recommended by its own psychologist. This act of omission is one of nonfeasance, which is defined as the failure to perform an act which a person should perform. . . . In Donohue, the gist of the plaintiff's cause of action was that although the defendant had given him instruction in reading, it had not done so properly or effectively and therefore he could not read upon graduation. This was an act of commission or misfeasance, which is defined as the improper performance of a lawful act.118

The majority had thus mislabeled the case before it as involving misfeasance instead of nonfeasance. But even if the case had been correctly classified, Justice Damiani felt that the distinction was immaterial. The real question was whether defendant owed plaintiff a duty, not whether the breach of the duty was by active or passive conduct.119 Stating that Donohue conclusively established that no such duty existed, he claimed that the failure of the majority to follow an obviously controlling precedent could lead only to uncertainty in the law.120

B. The New York Court of Appeals

Hoffman reached the New York Court of Appeals shortly121 after the court had rendered its decision in Donohue.122 In a surprisingly short opinion, the New York Court of Appeals reversed in a four-to-three decision. The majority ignored the obvious difference of the facts in Hoffman and, without explanation, summarily labeled the case as presenting the identical issue as that presented in Donohue and Peter W.—educational malpractice.

After a brief statement of the facts, the court began with the following: "At the outset, it should be stated that although plaintiff's complaint does not so state, his cause of action sounds in 'educational malpractice.' . . . As we have recently stated in Donohue v. Copiague Union Free School District, such a cause of action although quite possibly cognizable under traditional notions of tort law, should not, as a matter of public policy, be entertained by the courts of this State."123

117 Id.
118 Id. (citations deleted). For a further analysis of the distinction between misfeasance and nonfeasance, see PROSSER §56; 2 HARPER AND JAMES, THE LAW OF TORTS §18.6 (1956).
119 410 N.Y.S.2d at 118.
120 Id. at 119.
121 The final Donohue decision was rendered on June 13, 1979. The Hoffman decision was rendered on December 17, 1979. In this respect, Daniel Hoffman can be viewed as a victim of bad timing.
122 See text accompanying note 55-83 supra.
123 424 N.Y.S.2d at 378-79 (citation deleted).
Stating that "[t]he significant issue presented on this appeal is whether considerations of public policy preclude recovery for an alleged failure to properly evaluate the intellectual capacity of a student,"124 the majority continued, "We had thought it well settled that the courts of this State may not substitute their judgment, or the judgment of a jury, for the professional judgment of educators."125

The court focused on the misfeasance/nonfeasance distinction drawn by the lower appellate court. "[E]ven if we were to accept the distinction drawn by the court below, and argued by plaintiff on appeal, we would not reach a contrary result. The policy considerations which prompted our decision in Donohue apply with equal force to 'educational malpractice' actions based upon allegations of educational misfeasance and nonfeasance."126

The court concluded its opinion by warning of a potential Pandora's box of judicial interference in the administration of the public school system: "In order to affirm a finding of liability in these circumstances, this court would be required to allow the finder of fact to substitute its judgment for the professional judgment of the board of education. . . . Such a decision would also allow a court or a jury to second-guess the determinations of each of plaintiff's teachers. To do so would open the door to examination of the propriety of each of the procedures used in the education of every student in our school system."127

The dissent in the decision is similarly succinct, and goes to the point of this Note. Justice Meyer, in dissent, wrote,

I agree with Mr. Justice Irwin Shapiro, on the analysis spelled out in his well-reasoned decision at the Appellate Division, that this case involves not "educational malpractice" as the majority in this court suggests, but discernible affirmative negligence on the part of the board of education in failing to carry out the recommendation within a period of two years which was an integral part of the procedure by which plaintiff was placed in a CRMD class, and thus readily identifiable as the proximate cause of plaintiff's damages. I, therefore, dissent.128

VI. Implications of the Decision

In Hoffman, the New York Court of Appeals held that courts ought not interfere with the professional judgment of those charged with the responsibility of administration of the public school system. Public policy dictated that causes of action for educational malpractice not be recognized by the courts. It was the summary classification of Hoffman as presenting a claim of educational malpractice that marks the potentially significant development in the area of education law.

Prior to the Hoffman decision, educational malpractice had enjoyed a specific meaning. It was a term of art used to describe the negligence claim alleged by a student when he sued his school district for alleged inadequate instruction in basic academic skills. This was the fact situation presented in both

124 Id. at 377.
125 Id. at 379.
126 Id.
127 Id.
128 Id. at 380 (citations deleted).
Peter W. and Donohue, the cases that gave rise to the term. By labeling the facts presented in Hoffman as presenting the identical case and issue as Peter W. and Donohue, the court effectively redefined the term educational malpractice by significantly expanding its scope. Educational malpractice appears to have become a generic term, describing any plaintiff’s questioning of public school administrative decisions.

In light of the scant authority in the area of educational tort, what may develop out of this decision is a judicially created immunity for school officials in the discharge of their administrative and academic functions. If Daniel Hoffman was not able to recover, school authorities may be able to shield even the most egregious examples of professional incompetence with its accompanying emotional harm from judicial inquiry simply by raising the educational malpractice banner.

Daniel Hoffman did not recover for his injury, and yet, there seems to be no reason why he could not have recovered under basic negligence theory. It has been said that a person is negligent if "he does such an act or omits to take such a precaution that under the circumstances present he, as an ordinarily prudent person, ought reasonably to foresee that he will thereby expose the interests of another to an unreasonable risk of harm." 130

Negligence thus involves conduct which exposes another to an unreasonable risk of harm. 131 What is an "unreasonable risk" was defined by Judge Learned Hand as a consideration of the likelihood that the conduct will injure others taken with the seriousness of the injury should it occur and balanced against the interest that must be sacrificed to avoid the risk. 132

Application of this balancing test to the Hoffman situation shows that an affirmation was entirely justifiable. At the very least, it was arguably foreseeable that the erroneous placement of a child of normal intelligence into a class for the mentally handicapped for twelve years would result in some type of emotional damage. It was equally foreseeable that if care was not taken to insure that the placement was proper, the extended period of time that the child would spend classified as mentally retarded would serve only to substantially aggravate the injury.

These determinations are then balanced against a practically insignificant weight on the other side of the scale. The administration of a subsequent intelligence test as originally recommended, or the taking of a social history would have been so simple that it could not be seriously argued as resulting in the sacrifice of some great value or interest. Justice Shapiro’s words again ring true. "So little had to be done to avoid the awesome and devastating effect ... on plaintiff’s life, and that little was not done." 133

The balancing test thus weighs heavily upon a finding of negligence, and it is likely that had Daniel’s injury arisen in some other setting, he would have

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129 The liability of public school officials for the physical injury of a student is an entirely different area of the law. For a general treatment of this area see Note, supra note 29, at 299-303.
131 PROSSER §31, at 145.
132 Conway v. O’Brien, 111 F.2d 611, 612 (2d Cir. 1940); See also RESTATEMENT (SECOND) TORTS § 291-95 (1965).
133 410 N.Y.S.2d at 109.
recovered.\textsuperscript{134} The New York Court of Appeals afforded education special treatment by noting that \textit{Donohue} had established that the educational setting involved public policy considerations that mandated a reversal in \textit{Hoffman}.\textsuperscript{135} The policy considerations of \textit{Donohue},\textsuperscript{136} however, were not furthered by the dismissal of the complaint in \textit{Hoffman}. The school district has, and indeed has, adopted preventative measures that more or less guarantee that a \textit{Hoffman}-like situation will not occur again.\textsuperscript{137} The proximate cause of Daniel's injury can also be traced to his erroneous placement and the subsequent failure to retest. It is also difficult to perceive the same probability of the flood of litigation and the great number of feigned claims arising from an affirmanse of \textit{Hoffman} that led the court to deny recovery in \textit{Donohue}. The policy determinations behind \textit{Donohue} simply do not yield the identical result when applied to \textit{Hoffman}. The reason for this is apparent. Daniel Hoffman did not present a claim of educational malpractice.

VII. Conclusion

Although Daniel Hoffman did present a unique factual situation to the New York courts, he did not present a claim of educational malpractice. Daniel Hoffman was a victim of professional negligence, but he was denied recovery simply because his injury arose in an educational setting. This decision will undoubtedly shield many otherwise negligent people from liability because it effectively establishes an immunity for school officials in the exercise of their administrative and academic duties. It is an inhumane decision, for liability has been conditioned upon the context in which the injury arose, rather than upon the merit of the individual claim.

\textit{Edward J. Wallison, Jr.}

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\textsuperscript{134} \textit{Id.} at 110.
\textsuperscript{135} 424 N.Y.S.2d at 379.
\textsuperscript{136} See note 64 and accompanying text \textit{supra}.
\textsuperscript{137} The intermediate appellate court in \textit{Hoffman} noted that since 1968, both New York State and the New York City Board of Education have required frequent and periodic retesting of children in CRMD classes. \textit{See generally} N.Y. \textsc{Education Law} \S\S 4402-4407 (McKinney).