No Child Left Behind? Educational Malpractice Litigation for the 21st Century

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† J.D., School of Law, University of California, Berkeley (Boalt Hall), 2004; B.A., University of Southern California, 1999. I would like to first acknowledge Professor Rachel F. Moran for her remarkable intellectual contributions herein. Assuredly, this Comment would never have become a published piece I can be proud of without such an incredible mentor. I would also like to thank my fellow editors on the *California Law Review* for making this Comment worthy of the journal we have worked so hard on these past two years. Most importantly, I acknowledge my family: my parents, Emmins and Melbourne, and my sister and best friend, Lisa. There are no words to sufficiently express my love and thanks for all that you have blessed me with, particularly the gift of education. And to my nephew Dov Bear, may your generation not be left behind.

No Child Left Behind? Educational Malpractice Litigation for the 21st Century

Melanie Natasha Henry

Educational malpractice litigation has been a hotbed of legal controversy since the 1970s. No matter which legal theory it encapsulates—constitutional, property, contract, or tort—plaintiff actions have consistently been foreclosed by a judiciary unwilling to go against public policy concerns.

The American elementary and secondary education system, however, is in crisis. When President George W. Bush signed into law the No Child Left Behind Act of 2001, parents and students across the nation were hopeful that public schools would fulfill their statutory mandate and become truly accountable. This accountability was to be accomplished by providing for supplemental educational services, school transfer options, and highly qualified teachers in classrooms. Unfortunately, school districts are not fulfilling their statutory obligations, and our children continue to be left behind.

This Comment argues that non-performing educational agencies and school districts should be held accountable via private rights of action. Although the No Child Left Behind Act itself provides no express right of action, student and parent beneficiaries of the No Child Left Behind Act should be able to litigate their statutory rights under 42 U.S.C. § 1983. Further, Congress should consider amending the statutory language of the No Child Left Behind Act to explicitly include private actions.

INTRODUCTION

On January 8, 2002, at Hamilton High School in Hamilton, Ohio, President George W. Bush signed into law a significant reauthorization of the Elementary and Secondary Education Act of 1965 (ESEA).[1] The newly revised ESEA was dubbed the No Child Left Behind Act of 2001

1. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965).

(NCLBA).[2] According to Rod Paige, U.S. Secretary of Education, "with the stroke of his pen, President Bush changed the culture of education in America and kept his promise to leave no child behind."[3] Despite criticism from some education groups about lack of funding and overambitious timetables, it nonetheless appears that most have praised the NCLBA's objectives: "increasing academic standards and enhancing the educational experience for all students, regardless of their status or race."[4]

With such an important mandate applicable to all Title I elementary and secondary schools,[5] how exactly does the government expect this ambitious piece of legislation to effect marked and drastic change within the American education system? President Bush claims that the NCLBA will accomplish lasting change via accountability:

> [N]obody should allow an excuse . . . to undermine accountability. . . . [O]therwise you just shuffle kids through. And that's unacceptable in America. . . . [A]ccountability is a crucial part of educational excellence and educational reform. And it's very important that all states take seriously what we insist upon; and that is, in return for money, we expect you to do what's right, by each single child that lives in your state.[6]

In response to the President's remarks, it is not difficult to posit a persuasive argument that the states have not been "doing right" by our children with regard to education. For example, there is an alarming state-by-state disparity in educational attainment in the United States at the secondary level.[7] This disparity not only highlights the necessity of

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2. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2001) (codified as amended in scattered sections of 20 U.S.C.A.). The Public Law deelares that it is "[a]n [a]ct [t]o close the achievement gap with accountability, flexibility, and choice, so that no child is left behind." *Id.*

3. Press Release, U.S. Department of Education, Paige Joins President Bush for Signing of Historic No Child Left Behind Act of 2001 (Jan. 8, 2002), http://www.ed.gov/news/pressreleases/2002/01/01082002.html.

4. Lisa A. Brown, *No Child Left Behind Act*, 66 TEX. B.J. 68, 68 (2003).

5. Title I schools are institutions that receive federal funding for particular educational programming under Title I of the Elementary and Secondary Education Act of 1965. 20 U.S.C. § 6301 (2000). Congress has discussed the possible passage of the Title I Integrity Act of 2003, which amends Title I to "specify the purposes for which [Title I] funds . . . may be used." S. 1372, 108th Cong. pmbl. (2003). For a complete listing of Title I schools in California, see the California Department of Education website at http://www.cde.ca.gov/ta/ac/ti/ap/results.asp?allschools=yes (last modified May 11, 2004).

6. President George W. Bush, Remarks on Education at Read-Patillo Elementary School, New Smyrna Beach, Florida (Oct. 17, 2002), *at* http://www.whitehouse.gov/news/releases/2002/10/20021017-5.html.

7. As of March 2000, 15.9% of Americans over the age of twenty-five had neither graduated from high school nor received an equivalent certification. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 141 tbl.212 (2002) (describing the educational attainment by state from 1990 to 2000). This percentage, however, was the average for the country. At the state level, 22.5% of residents in Alabama twenty-five years and older did not have their high school diploma, while the percentage in Washington and South Dakota was only 8.2%, well under the national average. *Id.*

well-enforced national education programs such as the NCLBA, but also strongly suggests that some individual school districts may not be providing children with an adequate education.

Legislators intend to achieve accountability in federally funded schools through a key feature of the NCLBA—the requirement for submission of a state-developed plan.[8] These plans detail exactly how the state intends to comply with particular requirements of the NCLBA, as well as how states in general will help low-achieving children meet "challenging academic achievement standards,"[9] so that presumably, no child will be left behind.[10] As of January 31, 2003, every state in the union, along with the District of Columbia and Puerto Rico, had submitted its plan to the Secretary of Education.[11] All state plans have subsequently been approved.[12]

The primary tool for achieving accountability under the state plans is the statutory requirement that states must "establish[] a definition of 'adequate yearly progress' (AYP) to use each year to determine the achievement of each school district and school."[13] Once the state has defined the AYP for Title I schools, the statute mandates the identification of individual problem schools that have failed to meet the AYP for two years in a row.[14] After problem schools have been identified, the NCLBA

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8. 20 U.S.C.A. § 6311(a)(1) (2003).

9. *See id.* § 6311(b)(1)(A) ("Each State plan shall demonstrate that the State has adopted challenging academic content standards and challenging student academic achievement standards that will be used by the State."); *id.* § 6311(b)(1)(B) ("The academic standards required by subparagraph (A) shall be the same academic standards that the State applies to all schools and children in the State.").

10. The statute not only creates an affirmative duty for states to submit a plan, but to also see that it is actualized. *See generally* 20 U.S.C.A. § 6311(c) (requiring states and state educational agencies to provide assurances that they will fulfill their statutory obligations); *id.* § 6311(g) (listing penalties for failure to comply with the statute).

11. Press Release, U.S. Department of Education, Paige Announces That All States Are on Track by Submitting No Child Left Behind Accountability Plans on Time: Another Important Milestone Reached in the Implementation of Historic Law (Feb. 3, 2003), http://www.ed.gov/news/pressreleases/2003/02/02032003b.html. Secretary Paige stated,

> Every state has met this key deadline to outline their plans to educate every child, and I am now confident that state education leaders and governor [sic] will not rest until no child is left behind. Accountability is the cornerstone of our new education law and our state leaders understand that. They aren't standing around wringing their hands.

Id.

12. Approved state plans are available in Microsoft Word and Adobe PDF format on the following U.S. Department of Education webpage: http://www.ed.gov/admins/lead/account/stateplans03/index.html (last visited July 1, 2004).

13. Letter from Rod Paige, United States Secretary of Education, to Education Colleagues 2 (July 24, 2002), http://www.ed.gov/policy/elsec/guid/secletter/020724.html.

14. *See id.* Currently, however, there are a number of problem schools, highlighting the wide disparity among those that are maintaining or failing to maintain state defined AYP. For example, in Kansas, 87% of schools made the requisite progress. Erik W. Robelen, *State Reports on Progress Vary Widely*, EDUC. WK., Sept. 3, 2003, at 1, 37 tbl. In Florida, however, only 13% of schools maintained AYP, thus leaving 87% of the schools in the state inadequate. *Id.*

"provides a list of consequences . . . that allow States to take a range of actions."[15] These actions include "more limited consequences such as hiring an outside expert . . . , to more significant measures such as replacing school staff."[16] In 2003, The Education Trust authored a report that compiled the results of state schools' AYPs.[17] The report revealed that the AYP system "is doing what it was meant to do," that is, "identifying schools that need improvement, and . . . closing achievement gaps."[18]

As stated, the fundamental purpose of the NCLBA is "to ensure that all children have a fair, equal and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments."[19] In light of the statute's broad mandate, it quickly becomes clear that, as some commentators have suggested, "the success or failure of the [NCLBA] rests in its [effective] implementation."[20] But what happens when state plans are not well implemented, and as a result, school districts are not capable of providing the level of educational services required by the new legislation? This concern is especially relevant as the NCLBA endows states with a high level of discretion regarding the execution and achievement of its myriad objectives.[21] Moreover, if these state-developed plans are not seen through, there may be a detrimental effect upon students and parents, possibly resulting in the resurgence of educational malpractice claims.

Concerned California citizens were the first to challenge a state's inadequate implementation of its state plan by filing a complaint in the San

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15. Letter from Rod Paige to Education Colleagues, *supra* note 13.

16. *Id.*

17. The Education Trust is a nonprofit organization that lobbies postsecondary institutions and policy makers to support reforms in K-12 schools in an effort to close the achievement gap between disadvantaged children and other students. *See* http://www2.edtrust.org/edtrust/about+the+ed+trust (last visited July 1, 2004).

18. DARIA HALL ET AL., THE EDUCATION TRUST, WHAT NEW "AYP" INFORMATION TELLS US ABOUT SCHOOLS, STATES, AND PUBLIC EDUCATION 1 (2003), http://www2.edtrust.org/NR/rdonlyres/4B9BF8DE-987A-4063-B750-6D67607E7205/0/NewAYP.pdf (last visited July 1, 2004).

19. 20 U.S.C.A. § 6301 (2003).

20. Erin Kucerik, *The No Child Left Behind Act of 2001: Will It Live Up to Its Promise?*, 9 GEO. J. ON POVERTY L. & POL'Y 479, 487 (2002).

21. For some, this discretion is a benefit. "That's the beauty of the law. . . . It allows all the different states to implement a plan that works best for [them]." Robelen, *supra* note 14, at 37 (quoting Ronald J. Tomalis, U.S. Department of Education Acting Assistant Secretary for Elementary and Secondary Education) (alteration in original). I, however, view state discretion as a potential for maintaining disparities in education from state to state. The Supreme Court in *Brown v. Board of Education* ended its commentary on the necessity and importance of education with a disturbing conclusion. The Court stated that "[s]uch an opportunity [as education], *where the state has undertaken to provide it*, is a right which must be made available to all on equal terms." Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (emphasis added). The fallacy in this statement is clear. How is it possible to establish, maintain, and enforce an educational system made available to all students on "equal terms," when such a system is necessarily unequal because each state fundamentally has the ultimate control over the educational opportunities provided to its residents?

Francisco County Superior Court.[22] Californians for Justice Education Fund, along with the California Association for Community Organizations for Reform Now (ACORN),[23] sued both the California State Board of Education and the California Department of Education. According to the complaint, "[i]n order to receive federal funds and implement the federal law, Respondents must establish an appropriate definition of a 'highly qualified' teacher . . . within the parameters of [the NCLBA]."[24] The plaintiffs allege, however, that during a meeting on May 30, 2002, the Board of Education knowingly adopted a regulation that instituted a lower standard for "highly qualified" teachers,[25] thereby violating the NCLBA.[26]

As a remedy, the plaintiffs did not request monetary damages, but instead sought, in addition to other relief, that the "Court command[]

22. Compl., Californians for Justice Educ. Fund v. California State Bd. of Educ. (S.F. County Super. Ct. filed Jan. 23, 2003) [hereinafter Compl.]. On January 27, 2003, four days after the complaint was filed in California, the Association for Community Organizations for Reform Now (ACORN) joined parents in filing suit in the Manhattan Supreme Court against the superintendents and school districts of New York City and Albany. Ass'n of Cmty. Orgs. for Reform Now v. N.Y. City Dept. of Educ., 269 F. Supp. 2d 338 (S.D.N.Y. 2003). The New York suit sought "status as a class action on behalf of all children allegedly denied their 'rights' to transfer to other schools and to receive supplemental education services." Mark Walsh & Joetta L. Sack, *Suits Contend Officials Fail to Obey ESEA*, EDUC. WK., Feb. 5, 2003, at 1, 13. This suit, and its ultimate outcome in the United States District Court for the Southern District of New York, is discussed in detail *infra* in Parts II.A.2.c & II.A.3.

23. ACORN, the country's largest community-based organization for low- to moderate-income families, is active in more than fifty cities. *See* http://www.acorn.org (last visited July 1, 2004). It pursues advocacy for many of its members' diverse interests, including housing issues, living wages, and public education. *Id.*

24. Compl., *supra* note 22, at 1. A "highly qualified" teacher within the meaning of the NCLBA, "(i) has obtained full State certification as a teacher . . . or passed the State teacher licensing examination, and holds a license to teach in such State . . . ; and (ii) . . . has not had certification or licensure requirements waived on an emergency, temporary, or provisional basis." 20 U.S.C.A. § 7801(23)(A)(i-ii) (2003). The plans submitted on January 31, 2003, were also to include how each state intends to place "highly qualified" teachers in all classrooms. *See* 20 U.S.C.A. §§ 6311(b)(8)(C), 6314(b)(1)(C), 6315(c)(1)(E) (2003).

25. Compl., *supra* note 22, at 5. In California, "highly qualified" teachers have met the following requirements: "1) possession of a bachelor's degree, 2) successful passage of a state exam for reading, writing, and mathematics (the CBEST), and 3) passage of state exams in subjects to be taught *or* completion of 18 units of university coursework (or equivalent) in subjects to be taught." *Id.* at 4 (referencing STATE BD. OF EDUC., CALIFORNIA CONSOLIDATED STATE APPLICATION FOR NCLB Addenda 1 (2002)).

26. The meeting has since been highly criticized. *See, e.g.*, Letter from George Miller, Congressman, D-Cal., to Reed Hastings, President, California Board of Education (Aug. 5, 2002), *available at* http://edworkforce.house.gov/democrats/rel8502.html (admonishing the Board members for acting in an "audacious and reckless" manner, in their effort to "deliberately misrepresent the alarmingly high number of under-qualified teachers in the State of California"); *see also* Kara Shire, *Education Board Ridiculed for Skirting Teacher Quality*, CONTRA COSTA TIMES, Aug. 6, 2002, at a03 ("California Board of Edueation members . . . attempt[ed] to wriggle around new federal rules requiring all teachers be highly qualified by the start of school in 2005."); *Scandalous Education Inequity: Board Used Deception to "Comply" with Highly Qualified Teacher Requirement*, SAN JOSE MERCURY NEWS, Aug. 8, 2002, at 8B (stating that "[i]f members of the state Board of Education aren't embarrassed, they should be," and characterizing the approval of the regulation as "[d]esperate and dumb").

Respondents to: (1) withdraw the May 2002 definition of a 'highly qualified' teacher for NCLB purposes and to inform districts and any other implementing party of its invalidity; [and] (2) immediately promulgate a revised definition of 'highly qualified.'"[27] In response to the allegations in the complaint, the Board claimed that it would submit a new proposal to the federal officials by May 1, 2003.[28] On June 10, 2003, the Board unanimously adopted a proposal that defined "highly qualified" in a way that met NCLBA standards.[29]

Was invidious intent the impetus behind the Board's initial failure to codify a higher standard for quality teachers in California schools? In May 2003, ACORN reported that "[t]he [Bush] Administration has deliberately pushed states and school districts to comply with other provisions of the [NCLBA] while ignoring the importance" of ensuring that highly qualified teachers are present in public school classrooms.[30] The report stated that "42 percent of the states surveyed have not even defined what highly qualified means in their state, putting local districts in a bind as to how to comply with this requirement."[31] Furthermore, "[t]he Department of Education is not requiring states to turn in their definitions of highly qualified."[32] Thus, the California Board's error might simply be a reflection of the approach many states are taking, as well as the Administration's apparent lack of concern for the NCLBA's teacher quality requirements.

Or, perhaps the Board's decision was a result of necessity, reflecting the fact that, currently, there is a desperate need for teachers in California classrooms. This need reinforces California's practice of hiring teachers with emergency credentials that are less comprehensive than the federal government's prescribed criteria.[33] In fact, during the 2001-2002 school year, nearly 42,000 California school teachers had emergency or similar provisional credentials.[34] Yet, regardless of motive, the fact remains that

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27. Compl., *supra* note 22, at 14.

28. Statement of Phil Garcia, spokesman for the California State Board of Education, *in* Walsh & Sack, *supra* note 22, at 13.

29. For details on the Board's revised definition, see Memorandum from Karen Steentofte, Chief Counsel, California State Board of Education, to California State Board of Education Members (June 10, 2003), http://www.cde.ca.gov/board/agenda/yr2003/june/bluejun03item6.pdf (outlining highly-qualified teacher requirements in California under the NCLBA according to grade-level and "newness" to the profession).

30. Ass'n of Cmty. Orgs. for Reform Now, Leaving Teachers Behind: How a Key Requirement of the No Child Left Behind Act (Putting a Highly Qualified Teacher in Every Class) Has Been Abandoned (May 22, 2003), http://www.acorn.org/index.php?id=341.

31. Press Release, Association of Community Organizations for Reform Now, Leaving Teachers Behind: How a Key Requirement of the No Child Left Behind Act (Putting a Highly Qualified Teacher in Every Class) Has Been Abandoned (May 21, 2003), http://www.acorn.org/index.php?id=1135.

32. *Id.*

33. *See* NCLBA criteria for highly qualified teachers, *supra* note 24.

34. THE CTR. FOR THE FUTURE OF TEACHING AND LEARNING, CALIFORNIA'S TEACHING FORCE: KEY ISSUES AND TRENDS 2 (2002), *available at* http://www.cftl.org/documents/KeyIssues2002.pdf.

California public schools are not adhering to federal requirements as to the quality of teachers in the classrooms.

Gross disparities in the quality of educational instruction are not unique to California schools. Data suggests that school districts around the nation have a significant lack of "highly qualified" teachers. During the 1999-2000 school year, 15.6% of teachers in the United States had three or fewer years of teaching experience.[35] And regardless of teaching experience, on average, 13.8% of secondary school teachers were teaching out-of-field, meaning they did not have an academic background or certification in the core subjects[36] they were teaching.[37]

These statistics are especially pernicious given that "[m]any studies show that students learn more from teachers with strong academic skills."[38] In addition, the students who receive instruction from less-qualified teachers are perhaps the ones who need quality instruction the most.[39] In fact, teachers who score in the bottom quarter on college entrance examinations are more likely "to have taught only in elementary schools, only in public schools, and in schools where 50 percent or more of children were eligible for free or reduced-price lunch."[40] Perhaps in response to the difficult balance between the need for educated and competent instructors and the demand for more teachers in the classrooms, the government has endorsed new ways to certify teachers in a minimal amount of time, while still meeting the "highly qualified" standard.[41]

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35. NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2002 197 tbl.32-3 [hereinafter CONDITION OF EDUCATION 2002] (describing the number and percentage distribution of full-time secondary public and private school teachers according to undergraduate and graduate majors in various fields of study by teacher characteristics from 1999 to 2000) (June 2002), *available at* http://nces.ed.gov/pubs2002/2002025.pdf.

36. The core subjects are English, foreign language, mathematics, science, and social science.

37. NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2003 146 tbl.28-1 (2003) [hereinafter CONDITION OF EDUCATION 2003] (describing the percentage distribution of public school students according to their teachers' qualifications, by school level and course subject area from 1999 to 2000), *available at* http://nces.ed.gov/programs/coe/2003/pdf/28_2003.pdf.

38. CONDITION OF EDUCATION 2002, *supra* note 35, at 91.

39. *E.g.*, Compl., *supra* note 22, at 11.

40. CONDITION OF EDUCATION 2002, *supra* note 35, at 91. For the 1999-2000 school year,

> [p]ublic schools with low minority enrollments (less than 10 percent) and schools with low percentages of students eligible for free or reduced-price lunch (less than 15 percent) both have higher percentages of teachers with master's degrees than those with high minority enrollments (50 percent or more) and those with high percentages of students eligible for free or reduced-price lunch (30 percent or more).

Id. at 92.

41. The Department of Education recently endorsed the "Teachers College," an entirely online institution dedicated to teacher certification that is supported by Western Governors University. The "College" is physically located in a building in Salt Lake City, Utah, and prospective teachers "earn degrees not through credit hours, or by completing a set number of courses, but by passing a set of assessments." Sean Cavanagh, *Online School Could Address ESEA Decrees*, EDUC. WK., Mar. 19, 2003, at 1, 11. The Internet-based curriculum "offer[s] the possibility of easier access to improved credentials for thousands of instructors who will soon need them to meet new federal requirements." *Id.*

Yet, as California's situation demonstrates, despite states' best efforts, it appears unlikely that all states will fulfill the NCLBA's mandate in time.[42] As many of the nation's public schools remain below statutory standards, the federal government will have to step in and hold those schools accountable through sanctions. As approved state plans become subject to peer review and critical analysis by educators, policy makers, and the public, the federal government must act quickly and decisively in response to our failing schools. Otherwise, litigating presumptively rights-conferring provisions under the NCLBA may be an action more and more students and their parents take to effectively contend with educational malpractice.[43]

The motivation for this Comment is twofold. First, the state of America's public schools is in critical condition, and, as a result, our children's future is in jeopardy. Students and parents are in desperate need of systemic redress that will force schools to truly become accountable. Accountability can potentially be achieved through litigation, which will provide redress for students who have not been afforded a "minimally adequate"[44] education. Second, the judiciary's stunning lack of recognition for educational malpractice claims over the last three decades, despite the continuing inadequate standards of instruction, supports an interest in reviving educational liability litigation under a theory courts will recognize. I argue that current federal sanctions for noncompliance with, or violations of, the NCLBA, such as withdrawing funding, are not enough. Despite large legal obstacles, parents and students should have a private right of action against schools that are not in compliance with the standards the federal government has prescribed in the NCLBA and, as a direct result, are depriving student beneficiaries of the rights conferred therein.

In Part I, this Comment explores the courts' traditional reluctance to recognize educational malpractice claims under tort, contract, constitutional, and property law. This reluctance is due in part to difficulties in

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42. For example, the NCLBA mandates that schools have highly qualified teachers in their classrooms "not later than the end of the 2005-2006 school year." 20 U.S.C.A. § 6319(a)(2).

43. Indeed, in referring to NCLBA specific educational malpractice claims, Scott R. Palmer, an attorney who advises states on ESEA compliance, predicted that "[i]t is likely we'll see more litigation like this." Walsh & Sack, *supra* note 22, at 13. Julie Underwood, the National School Boards Association General Counsel, concurred: "[w]e live in a litigious society, and this is something you expect." *Id.*

44. In New York, for example, a "minimally adequate" education is defined as follows:

> Specifically, children are entitled to "minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn," as well as "access to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks," and "minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas."

Campaign for Fiscal Equity, Inc. v. State, 744 N.Y.S.2d 130, 135 (N.Y. App. Div. 2002) (quoting Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 666 (N.Y. 1995)), *aff'd in part, rev'd in part*, 801 N.E.2d 326 (N.Y. 2003).

defining appropriate standards for teaching. This background lays the foundation for the argument in Part II that the specific educational services provided in the NCLBA should help alleviate the historical concerns of the courts in educational malpractice actions. Part II also explores whether those provisions in the NCLBA can be the basis for a private right of action, which arises under one of three sources: (1) impliedly under the NCLBA itself; (2) 42 U.S.C. § 1983, which provides private individuals with a civil action for deprivation of rights by a state actor[45]; or (3) expressly with statutory amendments to the NCLBA that provide an individual cause of action. While this Comment will argue that 42 U.S.C. § 1983 provides the most effective and doctrinally satisfying method for pursuing an educational malpractice claim, recent case law suggests that express statutory amendments may be the only viable avenue for pursuing such claims. Thus, this Comment concludes by proposing such a statutory amendment.

I
EDUCATIONAL MALPRACTICE JURISPRUDENCE

Educational malpractice[46] claims have been brought under various legal theories, drawing on tort, constitutional, contract, and property law. Despite the wide range of approaches, as a viable cause of action against public elementary and secondary schools, educational malpractice has been ineffectual at best. Indeed, "[e]ducational malpractice is a tort theory beloved of commentators, but not of courts. While often proposed as a remedy for those who think themselves wronged by educators, educational malpractice has been repeatedly rejected by the American courts."[47] Nonetheless, legal commentators and scholars have been actively advocating educational liability litigation since the early 1970s.[48] The following is a summary of the major theories behind educational liability claims and their fundamental flaws.

A. Tort Law

Educational malpractice claims under tort law take the form of a negligence action where plaintiffs must show that: (1) the defendant owed a

45. 42 U.S.C. § 1983 (2000).

46. Although by common definition the term "educational malpractice" may fall narrowly within the parameters of tort law, I intend for the term to include all forms of educational liability, incorporating aspects of tort, contract, property, and constitutional law. Thus, for purposes of this Comment, educational malpractice and educational liability are used interchangeably.

47. Ross v. Creighton Univ., 740 F. Supp. 1319, 1327 (N.D. Ill. 1990), *aff'd in part, rev'd in part*, 957 F.2d 410 (7th Cir. 1992) (citation omitted).

48. *See, e.g.*, Stephen D. Sugarman, *Accountability Through the Courts*, 82 SCH. REV. 233, 235 (1974) (opining that the utilization of educational liability claims is a way to reinvigorate the credibility of America's public schools).

duty of care to the plaintiff, (2) the defendant breached the duty as a result of negligence, and (3) the plaintiff was proximately injured as a result.[49] The popularity of tort-based claims peaked during the 1970s and 1980s. Primarily used in suits against secondary schools, litigants claimed that the school negligently performed its duty to educate the student. The main theory of these cases was that liability fell squarely upon the educator to ensure that a student graduates with basic competency in literacy, mathematics, and the sciences. If the school failed to do so, it could be considered negligent for "not exercis[ing] reasonable care under all the circumstances."[50] This was particularly true if as a proximate cause of that neglected duty, the student suffered an injury—most likely a failure to obtain employment due to inadequate skills. Plaintiffs typically sought monetary damages as compensation for lost wages. Yet, the courts in these cases never reached the issue of damages, instead dismissing the claims for at least one of three reasons: (1) no appropriate standard of care,[51] (2) lack of causation, or (3) public policy concerns.[52]

The seminal case in tort educational malpractice litigation, *Peter W. v. San Francisco Unified School District*,[53] illustrated courts' reluctance to require educators to conform to a duty of care. Peter was functionally illiterate and could not read above an eighth grade level, but nonetheless received a diploma and graduated from high school through the process of social promotion. Peter sued the school district on a tort theory of negligence, claiming that respondents "negligently and carelessly failed to provide [him] with adequate instruction, guidance, counseling and/or supervision in basic academic skills."[54]

To a large extent, the appellate court ignored the issues of injury, proximate cause, and negligence and instead focused on whether the school district had a duty of care to the plaintiff.[55] After considering the legal, financial, and public policy implications a ruling in Peter's favor would have, the court ultimately held that there was no duty, and as a result, Peter's complaint failed to show a tenable cause of action.[56] This holding was, in significant part, a result of the court's conclusion that "classroom methodology affords no readily acceptable standards of care, or cause, or

49. 3 B.E. WITKIN, CALIFORNIA PROCEDURE: PLEADING § 537 (4th ed. 1996).

50. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 3 (Tentative Draft No. 1, 2001).

51. Todd A. DeMitchell & Terri A. DeMitchell, *Statutes and Standards: Has the Door to Educational Malpractice Been Opened?*, 2003 BYU EDUC. & L.J. 485, 487-88 (2003) (noting that "educators are not required to perform their duties in accordance with the standard of care observed by their profession").

52. *See infra* notes 64-66 and accompanying text.

53. 131 Cal. Rptr. 854 (Cal. Ct. App. 1976).

54. *Id.* at 856.

55. *Id.* at 857.

56. *Id.* at 861.

injury."[57] The *Peter W.* decision has set a precedent that, thus far, courts have followed in denying educational malpractice claims on a tort theory of negligence.[58] Unfortunately, this precedent potentially prevents courts from considering valid and important educational malpractice claims.

From the inception of tort-based educational malpractice litigation, courts have been wary of imposing upon an educational institution a legally enforceable duty to either the student or the parent, outside of constitutional or statutory reasoning.[59] For example, although the *Peter W.* court found that educators in public schools have a duty of care in how they educate,[60] this duty was a "term of common parlance [and not the] legalistic concept of 'duty' which will sustain liability for negligence in its breach."[61] The court further stated that the determination of whether that duty exists is solely within its purview[62] and is to be decided in accordance with public policy.[63]

Yet, perhaps the largest obstacles plaintiffs have to overcome in educational malpractice litigation are the various public policy arguments surrounding the issue. The *Peter W.* opinion provides one of the most succinct and sympathetic descriptions of the prodefendant/proschool public policy argument in all of educational malpractice case law:

> Few of our institutions, if any, have aroused the controversies, or incurred the public dissatisfaction, which have attended the operation of the public schools during the last few decades. Rightly or wrongly, but widely, they are charged with outright failure in the achievement of their education objectives; . . . they bear responsibility for many of the social and moral problems of our society at large. Their public plight in these respects is attested in the daily media, in bitter governing board elections, . . . and in survey upon survey. To hold them to an actionable "duty of care," in the discharge of their academic functions, would expose them to the tort claims—real or imagined—of disaffected students and parents in countless numbers. They are already beset by social and financial problems which have gone to major litigation. . . . The

57. *Id.* at 860.

58. *See, e.g.*, Gupta v. New Britain Gen. Hosp., 687 A.2d 111 (Conn. 1996); Chevlin v. L.A. Cmty. Coll. Dist., 260 Cal. Rptr. 628 (Cal. Ct. App. 1989); Hunter v. Bd. of Educ., 439 A.2d 582 (Md. 1982); D.S.W. v. Fairbanks N. Star Borough Sch. Dist., 628 P.2d 554 (Alaska 1981); Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352 (N.Y. 1979).

59. *See, e.g.*, *Peter W.*, 131 Cal. Rptr. at 854; *Hunter*, 439 A.2d 582; *D.S.W.*, 628 P.2d 554.

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

61. *Id.* at 858. *But cf.* B.M. v. State, 649 P.2d 425, 427 (Mont. 1982) (holding that public "school authorities owed the [plaintiff] a duty of reasonable care in testing her and placing her in an appropriate special education program").

62. *Id.* at 859 ("[W]hether a defendant owes the requisite 'duty of care,' in a given factual situation, presents a question of law which is to be determined by the courts alone.").

63. *Id.* ("[J]udicial recognition of such duty in the defendant . . . is initially to be dictated or precluded by considerations of public policy.").

> ultimate consequences, in terms of public time and money, would burden them—and society—beyond calculation.[64]

In wanting to separate themselves from the educational arena and provide schools discretion, courts are rejecting potentially valid claims in a misguided effort to avoid the label of "super school boards."[65] This policy, though appropriate in certain contexts, generally allows schools to fall short in delivering appropriate educational services. Furthermore, although some of the public policy concerns retain merit, as an overall bar to educational malpractice claims, they remain unconvincing.[66]

Another problematic issue in educational tort malpractice cases is determining causation. With a plethora of factors potentially influencing a student's education, courts often will reject a claim rather than attempt to wade through the quagmire of reasons why, for example, a student graduated functionally illiterate.[67] In *Peter W.*, the court provided a laundry list of reasons why determining causation in educational malpractice cases was impossible. These reasons "may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified."[68] Such subjective and amorphous determinants apparently do not lend themselves to judicial scrutiny.

An additional motivating concern is that courts fear frivolous lawsuits and plaintiffs who seek to abuse the system. For a minority of litigated claims, this may well be a valid concern. For example, in *Bishop v. Indiana Technical Vocational College*,[69] a student alleged that, as a result of "general incompetence" on the part of her educators, "she received an inferior educational experience."[70] Bishop sued her vocational school and

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64. *Id.*

65. Denise C. Morgan, *What is Left to Argue in Desegregation Law?: The Right to Minimally Adequate Education*, 8 HARV. BLACKLETTER L.J. 99, 127 (1991) ("Agreeing on a national standard of minimally adequate education would also save courts from overriding local control of schools and becoming super school boards."). *But cf.* John G. Culhane, *Reinvigorating Educational Malpractice Claims: A Representational Focus*, 67 WASH. L. REV. 349, 374 (1992) ("[O]nly a small percentage of cases cast as 'educational malpractice' would even theoretically involve second-guessing pedagogical decisions.").

66. As two commentators put it, "[c]urrently, public policy dictates that educational malpractice not be recognized as a tort. But public policy does change." DeMitchell & DeMitchell, *supra* note 51, at 506.

67. *See, e.g.*, *Peter W.*, 131 Cal. Rptr. at 861 ("[T]he 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."); Torres v. Little Flower Children's Servs., 474 N.E.2d 223, 226 (N.Y. 1984) (suggesting that educational liability cases "require the courts to assess . . . such elusive factors as his own attitude, motivation, temperament, past experience and home environment"); Loughran v. Flanders, 470 F. Supp. 110, 115 (D. Conn. 1979) ("The claim for damages necessarily hinges upon questions of methodology and educational priorities, issues not appropriate for resolution by this Court.").

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

69. 742 F. Supp. 524 (N.D. Ind. 1990).

70. *Id.* at 524.

instructors under 42 U.S.C. § 1983,[71] asserting "that the defendants interfered with her 'Right to the Pursuit of Happiness.'"[72] According to the court, Bishop cited no law and provided no support for her claims of deficient instruction.[73] As a result, the court found her action "entirely frivolous."[74]

The court held that "[e]ducational malpractice, without more, is simply not a constitutional deprivation under § 1983."[75] The *Bishop* court further determined that educational malpractice, litigated as a tort, is a "matter of state law that does not, by itself, deprive its victims of their constitutional rights."[76] In so holding, the court highlighted the federalism concerns relevant to educational malpractice, that state law may provide a remedy where federal law, and more specifically 42 U.S.C. § 1983 claims, cannot.

B. Constitutional Law

Regrettably, there is no guarantee or right to education under the federal Constitution.[77] Therefore, constitutional claims in this area arise primarily under state law. As with the previously discussed tort actions, constitutional claims have failed to take root as a means of enforcing accountability. Although the reasons for this failure varied, courts reviewing this type of educational malpractice claim consistently highlight the public policy ramifications therein. Here, I briefly discuss the two main categories of constitutional claims in educational liability litigation: due process and school finance, which includes equal protection arguments.

1. Due Process

Plaintiffs typically assert due process claims when, as a result of an expulsion or dismissal, the student loses a portion of her education, or an entire degree. In *Board of Curators v. Horowitz*, a medical student sued the University of Missouri-Kansas City Medical School for her dismissal based on poor performance in her final year of clinical rotations.[78] Her

71. *See infra* discussion Part II.

72. *Bishop*, 742 F. Supp. at 524.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* (footnote omitted); *see also* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 202 (1989) (stating that the "Due Process Clause of the Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation").

77. *See* text accompanying *infra* note 93.

78. 435 U.S. 78, 79 (1978). This case could have also reflected property law concerns, as plaintiff had the opportunity to assert a claim that she was deprived of her "property" interest in her medical degree as a result of her dismissal. However, Horowitz did not assert a property claim, instead maintaining that she was deprived of a "liberty" interest. *See id.* at 82-83; *cf.* Ezekwo v. New York City Health & Hosps. Corp., 940 F.2d 775 (2d Cir. 1991) (finding plaintiff medical student had a valid property interest in becoming Chief Resident).

skills were evaluated by a team of seven doctors,[79] of whom all but two either recommended that she should not graduate or that she be removed from the program entirely.[80] Horowitz claimed that she was deprived of her due process rights because, following the dismissal, she was not granted a hearing. The Eighth Circuit agreed with Horowitz, holding that the failure to provide her with information and a hearing regarding her dismissal violated her Fourteenth Amendment rights.[81]

The school appealed, and the Supreme Court applied the lenient abuse of discretion standard to review student dismissals from public schools, stating that "academic dismissals from state institutions can be enjoined if 'shown to be clearly arbitrary or capricious.'"[82] Since the Court found that Horowitz's dismissal was neither arbitrary nor capricious, the school was not held liable. Here, the Court avoided what it construed as a potential public policy pitfall by expressly "declin[ing] to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship."[83] The similarity to the California court's reasoning in *Peter W.* is clear. Rather than become involved in micro-managing, the Supreme Court chose to steer clear of the dispute, deferring to the decision and academic policies of the school administration.

2. *School Finance and Equal Protection*

Another type of constitutional educational malpractice claim is school finance litigation in which claimants primarily assert that educational inequality is a violation of a student's right to equal protection under the Fourteenth Amendment. These plaintiffs generally claim that disproportionate funding based on property taxes leads to unequal levels of education between school districts. There are three primary types of school finance litigation claims. These include those asserted under either the federal or state equal protection clauses, and "adequacy" arguments which address some students' state constitutional right to a minimally adequate education.

San Antonio Independent School District v. Rodriguez[84] is representative of the first type of school finance litigation. In Texas, state funding for public schools is supplemented by individual school districts that employ

79. This evaluation process was new, as "the school had to create a procedure to be followed in Horowitz's case." Horowitz v. Bd. of Curators, 538 F.2d 1317, 1320 (8th Cir. 1976), *rev'd*, 435 U.S. 78 (1978).

80. *Horowitz*, 435 U.S. at 81.

81. *Horowitz*, 538 F.2d at 1320-21.

82. *Horowitz*, 435 U.S. at 91 (quoting Mahavongsanan v. Hall, 529 F.2d 448, 449 (5th Cir. 1976)).

83. *Id.* at 90.

84. 411 U.S. 1 (1973).

an ad valorem taxation system wherein schools receive a portion of the property taxes of the residences in their district.[85] As a result, the plaintiffs, who resided in the low-income Edgewood school district of San Antonio, received a per-pupil allowance of $356,[86] whereas students from the higher-income Alamo Heights district received $594[87] per student, a $238 difference.[88] The plaintiffs brought federal equal protection claims, asserting that legislative financing schemes regarding education should be examined under a standard of strict scrutiny, where education is a fundamental interest and wealth is a suspect classification.[89]

The Supreme Court, however, refused to recognize this claim in *Rodriguez*. The Court acknowledged that the state "virtually concede[d] that its . . . dual system of financing education could not withstand the strict judicial scrutiny that [is] . . . appropriate in reviewing legislative judgments that interfere with fundamental constitutional rights."[90] Texas instead had argued unsuccessfully in the lower courts that its school financing scheme should be reviewed under a rational basis standard, which defers to legislative judgments as long as the manner in which the schools were funded was reasonable.[91] On appeal, Texas's argument prevailed as the Court failed to find justification for using a standard of strict scrutiny. Instead, the Court determined that (1) "the Texas system does not operate to the peculiar disadvantage of any suspect class"[92] (that is, wealth is not suspect), and (2) "[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected"[93] (that is, education is not a fundamental right).

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85. *Id.* at 9-10.

86. This amount represents a combination of the ad valorem tax ($26 per student), funds from the Minimum Foundation Program ($222 per student), and Federal grant funds ($108 per student). *Id.* at 12.

87. This figure is a combination of the ad valorem tax ($333 per student), funds from the Minimum Foundation Program ($225 per student), and Federal grant funds ($36 per student). *Id.* at 13. The Court also suggested that the difference in per student expenditures was due to the fact that "Edgewood's student population [was] more than four times that of Alamo Heights. . . . If Alamo Heights had as many students to educate as Edgewood does (22,000) . . . its per-pupil expenditures would therefore have been considerably lower." *Id.* at n.33.

88. In addition to socioeconomic status, the system on its face appears to also have a racially discriminatory effect. At the time, approximately 90% of the residents in the Edgewood school district were Mexican-American and over 6% were black. However, in the Alamo Heights school district, only 18% of the residents were Mexican-American, and less than 1% were black. *Id.* at 12-13.

89. San Antonio Indep. Sch. Dist. v. Rodriguez, 337 F. Supp. 280, 282 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1 (1973).

90. *Rodriguez*, 411 U.S. at 16.

91. *Id.* at 16-17.

92. *Id.* at 28.

93. *Id.* at 35. Yet, the Court explicitly states that "[n]othing [we] hold[] today in any way detracts from our historic dedication to public education." *Id.* at 30.

The implications of the Court's two-pronged holding in *Rodriguez* are troubling. In effect, *Rodriguez* shuts down many potential educational malpractice claims within a constitutional framework. This is a direct result of the Court's clear assertion that education is not a fundamental right, and as such, claims must be reviewed under a rational basis standard.

The second type of school finance litigation is similar to the first, with plaintiffs alleging that children in less wealthy districts received an education inferior to that of students in more affluent neighborhoods. In these cases, the funding for public schools was supplemented by a levy on property taxes within a particular district. Thus, students residing in poor neighborhoods received lower per pupil expenditures than those in wealthy ones. Here, however, claimants asserted an equal protection challenge at the state level, meeting with relative success in the early 1970s.[94] For example, the California Supreme Court in *Serrano v. Priest*, held that an educational system that is inherently unequal due to disproportionate financing is unconstitutional, finding:

> the California public school financing system, with its substantial dependence on local property taxes and resultant wide disparities in school revenue . . . invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors. Recognizing as we must that the right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth, we can discern no compelling state purpose necessitating the present method of financing. . . . [T]herefore, . . . such a system cannot withstand constitutional challenge and must fall before the equal protection clause.[95]

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94. *See, e.g.*, Van Dusartz v. Hatfield, 334 F. Supp. 870, 877 (D.C. Minn. 1971) ("[A] system of public school financing which makes spending per pupil a function of the school district's wealth violates the equal protection guarantee of the 14th Amendment."); Serrano v. Priest, 96 Cal. Rptr. 601 (1971); Robinson v. Cahill, 287 A.2d 187, 217 (N.J. Super. Ct. Law Div. 1972) ("The present system of financing public . . . schools in New Jersey violates the requirements for equality contained in the State and Federal Constitutions. The system discriminates against pupils in districts with low real property wealth, and it discriminates against taxpayers by imposing unequal burdens for a common state purpose."). *But see, e.g.*, Milliken v. Green, 212 N.W.2d 711, 721 (Mich. 1973) ("[I]t has not been shown that the Michigan financing system substantially denies students in school districts having relatively low state equalized value per pupil 'equal educational opportunity.' Thus, we find no discrimination violative of Michigan's Equal Protection Clause."); Shofstall v. Hollins, 515 P.2d 590, 592-93 (Ariz. 1973) (holding that the Arizona constitution "establish[es] education as a fundamental right," although the court determined that the "school financing system which has a rational and reasonable basis and which meets the educational mandate of our constitution should, unless otherwise discriminatory or capricious, be upheld."). Interestingly, the decisions in both *Shofstall* (decided November 2, 1973) and *Milliken* (decided December 4, 1973), which found their school financing systems constitutional, came after the Supreme Court's decision in *Rodriguez*, 411 U.S. 1 (Mar. 21, 1973).

95. 96 Cal. Rptr. 601, 604 (1971).

The U.S. Supreme Court's subsequent finding in *Rodriguez* directly contrasted with this determination.[96]

Not all state courts were willing to go as far as California in enforcing a principle of equality, however, so other plaintiffs sought relief on the basis of a third type of school finance litigation—"adequacy" claims. This phase is exemplified by a recently settled case in New York, *Campaign for Fiscal Equity, Inc. v. State* ("CFE II").[97] Parents brought suit on behalf of their children, alleging that the way in which New York financed its public schools led to certain classes of students not receiving their constitutionally guaranteed right to a minimally adequate and sound basic education under the state constitution.[98] The New York Supreme Court determined that the plaintiffs' allegations were "cognizable" and therefore, "[t]he trial court will have to evaluate whether the children in plaintiffs' districts are in fact being provided the opportunity to acquire the basic literacy, calculating and verbal skills necessary to enable them to function as civic participants capable of voting and serving as jurors."[99]

However, the State appealed and the Appellate Division of the New York Supreme Court reversed, holding that "[e]ven if we were to assume that the schools in the City do not provide a sound basic education, plaintiffs failed to prove that deficiencies in the City's school system are caused by the State's funding system."[100] The primary justification the appellate court gave for its ruling was its determination that New York was constitutionally mandated to provide students with the "opportunity" for a sound basic education, not the actual achievement of it.[101] The court also expressed the policy concerns typical to educational malpractice claims.[102]

Following plaintiffs' appeal on constitutional grounds, the New York Court of Appeals affirmed the Appellate Division's decision in part and reversed it in part in *CFE III*.[103] The court began by stating its "unanimous recognition of the importance of education in our democracy"[104] before it held that the New York school systems were functioning in direct contradiction to the state constitutional mandate of providing students with a sound basic education that is minimally adequate, from teacher quality to

96. 411 U.S. 1 (1973).

97. 744 N.Y.S.2d 130 (N.Y. App. Div. 2002) (CFE II), *aff'd in part, rev'd in part*, 801 N.E.2d 326 (N.Y. 2003).

98. *See supra* note 44.

99. Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 667 (N.Y. 1995) (CFE I).

100. *CFE II*, 744 N.Y.S.2d at 144.

101. "The proper standard is that the State must offer all children the *opportunity* of a sound basic education, not *ensure* that they actually receive it." *Id.* at 143.

102. *Id.* at 138 ("[A] statement that the current system is inadequate and that more money is better is nothing more than an invitation for limitless litigation.").

103. Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326 (N.Y. 2003) (CFE III).

104. *Id.* at 327.

school facilities.[105] Cognizant of the public policy issues embedded within educational liability claims, the court attempted to "fashion an outcome that will address the constitutional violation instead of inviting decades of litigation."[106]

The *CFE III* ruling called for a new school funding system, where it is the State's responsibility to determine the actual costs of a "sound basic education."[107] Once that is accomplished, it must also "ensur[e] . . . that every school . . . ha[s] the resources necessary for providing the opportunity for a sound basic education."[108] Despite the outcome of *CFE III*, as with other types of school finance litigation, adequacy claims have generally proved an uncertain remedy in addressing educational neglect.

C. *Contract Law*

As with tort and constitutional educational malpractice actions, potential claimants have little in the way of positive precedent to support their litigation under a theory of contract law. While educational liability claims brought under contract law have primarily focused on upper-level institutions and private secondary schools, rather than public elementary and secondary schools,[109] one of the first cases in this area, *Torres v. Little Flower Children's Services*,[110] dealt with a child care agency. The New York court system, which is typically unsympathetic to educational liability claims,[111] determined in *Torres* that, despite the contractual basis for the educational liability claim, "as a matter of public policy the courts would not second-guess the professional judgments of public school educators and administrators in selecting programs for particular students."[112]

Abandoned as a young child, Frank Torres was placed under the care of Little Flower Children's Services, an agency authorized for child care.[113] Once placed, the agency was under contract to provide Torres with "the arrangement, as needed, of religious training, education and vocational

105. *Id.* at 334 (determining that, for example, "New York City schools provide deficient teaching because of their inability to attract and retain qualified teachers.").

106. *Id.* at 349.

107. *Id.* at 348.

108. *Id.* (footnote omitted).

109. *See, e.g.*, Russell v. Salve Regina College, 890 F.2d 484 (1st Cir. 1989), *rev'd*, 499 U.S. 225 (1991); Denver Parents Ass'n v. Denver Bd. of Educ., 10 P.3d 662 (Colo. 2000); Miller v. Loyola Univ. of New Orleans, 2002-0158 (La. App. 4 Cir. 9/30/02), *writ denied*, 839 So. 2d 38 (La. 2003).

110. 474 N.E.2d 223 (N.Y. 1984). *Torres* is actually a hybrid educational malpractice action, encompassing aspects of tort, constitutional, and contract law.

111. *See, e.g.*, Hoffman v. Bd. of Educ., 400 N.E.2d 317 (N.Y. 1979); Donohue v. Union Free Sch. Dist., 391 N.E.2d 1352 (N.Y. 1979); *CFE II*, 744 N.Y.S.2d 130 (App. Div. 2002), *aff'd in part, rev'd in part*, 801 N.E.2d 326 (N.Y. 2003); Paladino v. Adelphi Univ., 454 N.Y.S.2d 868 (App. Div. 1982); Helm v. Prof'l Children's Sch., 431 N.Y.S.2d 246 (Sup. Ct. 1980). Currently, the most notable exception, of course, is *CFE III*.

112. *Torres*, 474 N.E.2d at 224.

113. *Id.*

training."[114] Torres, a fluent Spanish speaker with limited knowledge of English, was initially diagnosed with borderline retardation, and was later rediagnosed as having an "extremely complex reading disability."[115] Torres alleged that as a result of the negligent diagnosis of his disability and Little Flower's inadequate provision of educational services,[116] he was functionally illiterate when he left Little Flower's care. Torres claimed his illiteracy resulted from Little Flower's breach of its contractual duty to educate him. The court dismissed the contract claim in one paragraph, relying on a weak and circular public policy argument that Torres's "claim must fail because of the public policy against educational malpractice claims."[117]

However, the *Torres* court did suggest the basis for a successful contractual educational liability claim: "[a] different question would be posed if the contract required specified services, for instance, a designated number of hours of instruction."[118] Thus, it appears that if specific requirements were delineated within the contract and the educational institution breached that contract by failing to provided the specified services, Torres would have had a valid contractual educational liability claim.

Such specified services were apparent in *Ross v. Creighton University*,[119] where a basketball player sued his university, claiming that it breached its oral contract to provide him with an adequate education.[120] The University allegedly

> failed to perform five commitments made to Ross: (1) "to provide adequate and competent tutoring services," (2) "to require [Ross] to attend tutoring sessions," (3) to afford Mr. Ross "a reasonable opportunity to take full advantage of tutoring services," (4) to allow Mr. Ross to red-shirt, and (5) to provide funds to allow Mr. Ross to complete his college education.[121]

The Seventh Circuit determined that the pertinent issue was not "whether Creighton had breached its contract with Mr. Ross by providing *deficient*

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114. *Id.*

115. *Id.*

116. For example, Little Flower did not initially implement the suggestions from the reading specialist who diagnosed Torres's reading disability. Later, however, the ageney arranged for tutoring, but because Torres was not provided with transportation, he stopped attending. *Id.*

117. *Id.* at 227.

118. *Id.*

119. 957 F.2d 410 (7th Cir. 1992).

120. In addition to his breach of contract claim, Ross asserted three tort negligence claims, including the novel one of "negligent admission," alleging that the University knowingly accepted him despite the fact that he was not "reasonably qualified" to perform at the level required of the students there. *Id.* at 415. Indeed, once Ross left the University, he had the language skills of a fourth grader and read at a seventh grade level. *Id.* at 412.

121. *Id.* at 416.

academic services[, but r]ather, . . . whether the University had provided any real access to its academic curriculum at all."[122]

Similar to the way in which the *CFE II* court framed the relevant issue years later,[123] the *Ross* court emphasized educational access and opportunity as opposed to the quality of the education that was actually provided. However, unlike the decision in *CFE II*, the Seventh Circuit "disagree[d] . . . with . . . the district court as to whether the contract counts of the complaint [could] be dismissed at the pleadings stage," and as a result, held that "the allegations of the complaint [were] sufficient to warrant further proceedings."[124] Yet, the Seventh Circuit was careful to ensure that its opinion was limited in scope. It added a public policy justification for its decision to "bar any attempt to repackage an educational malpractice claim as a contract claim," stating that "the policy concerns that preclude a cause of action for education malpractice apply with equal force to bar a breach of contract claim attacking the general quality of an education."[125]

In addition to public policy, the primary concern courts have with contract-based claims is defining the nature and scope of the contractual terms at issue. This leaves room for ambiguity and potential abuse of discretion as the courts, for example, choose to define contractual rights to education as an issue of access or opportunity, rather than quality or adequacy.

D. Property Law

The relationship between education and property law is complex, involving careful analysis of a student's state and federal property interests. The Supreme Court has held that an individual's property interest is determined by state constitutional and statutory law.[126] As a result, a person's property is bound by the terms and conditions the state places on that property.[127] However, whether the property interest is protected from

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122. *Id.* at 417. By framing the relevant issue in this manner, the *Ross* court was able to effectively sidestep the educational malpractice public policy quagmire, and instead focus on specific promises which the University failed to fulfill. *Id.* ("Ruling on this issue would not require an inquiry into the nuances of educational processes and theories, but rather an objective assessment of whether the institution made a good faith effort to perform on its promise.").

123. *See supra* note 101.

124. *Ross*, 957 F.2d at 417.

125. *Id.* at 416.

126. *See, e.g.*, Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id.

127. *See, e.g.*, Texaco, Inc. v. Short, 454 U.S. 516, 526 (1982) ("[J]ust as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest.").

deprivation under the Constitution of the United States is solely a federal determination.[128] Thus, when analyzing educational malpractice claims within a property law context, the first question is whether a student's interest in an education generally or in a particular credential (for example, a diploma) has been defined constitutionally or statutorily by that state as property, and the second question is whether that "educational property" represents a federally protected interest.[129]

To determine what property rights students have in their education, one must therefore look to state property law as well as federal and state constitutional law. The U.S. Constitution protects individuals from state deprivation of, among other things, "property without due process of law."[130] A number of state constitutions also include due process clauses that are typically interpreted much like the federal provision.[131]

The Supreme Court has held that "the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause."[132] Thus, it appears that, for example, if a student is dismissed for academic failure or violation of school rules he could claim a deprivation of his right to a diploma.[133] However, acknowledging prior educational malpractice case law, particularly constitutional due process claims, success for these types of property

128. *See, e.g.*, Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978) ("Although the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." (quoting *Roth*, 408 U.S. at 577)).

129. It has also been determined that contractual rights can be enforeed as property interests, particularly in the employment context. *See, e.g.*, Bishop v. Wood, 426 U.S. 341, 344 (1976) ("A property interest in employment can, of course, be created by ordinance, or by an implied contract."); Perry v. Sindermann, 408 U.S. 593, 601 (1972) ("A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."); *see also Roth*, 408 U.S. at 578 ("[T]he respondent's 'property interest' in employment . . . was created and defined by the terms of his appointment.").

Further, in certain situations, the Supreme Court has held that the contractual nature of a property right does not bar recognition of that right if the terms of the contract are not express, but rather, promissory or implied in nature. *See, e.g.*, *Perry*, 408 U.S. at 601. For example,

> [a] written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient "cause" is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a "property" interest in reemployment.

Id.

130. U.S. CONST. amend. XIV, § 1.

131. *See, e.g.*, ALASKA CONST. art. 1, § 7; CAL. CONST. art. 1, § 7; N.Y. CONST. art. 1, § 6.

132. Goss v. Lopez, 419 U.S. 565, 574 (1975).

133. *See, e.g.*, *id.* (finding that a student's educational property interest "may not be taken away for misconduct without adherence to the minimum procedures required by . . . [the Due Process] Clause"); *see also* Brent E. Troyan, Note, *The Silent Treatment: Perpetual In-School Suspension and the Education Rights of Students*, 81 TEX. L. REV. 1637 (2003).

actions is far from guaranteed.[134] A similar claim may be made if a student fails a high school exit examination as a result of inadequate teaching.[135] These "high-stakes" tests have been widely criticized as unfair and discriminatory, similar to the controversy surrounding college placement exams such as the SAT and ACT.[136] Perhaps in part due to such criticisms, California students, parents, and educators recently spoke out against the mandatory testing scheme, and the State Board of Education voted unanimously to delay the denial of diplomas based on unsatisfactory exit examination scores for two years.[137] With approximately twenty states now requiring graduating high school seniors to take and pass a high school exit examination in order to receive their diplomas,[138] property based educational malpractice actions could very well be brought.

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134. *See, e.g.*, Martin v. Shawano-Gresham Sch. Dist., 295 F.3d 701 (7th Cir. 2002); Ratner v. Loudoun County Pub. Sch., 16 Fed. Appx. 140 (4th Cir. 2001) (unpublished decision); Shaboon v. Duncan, 252 F.3d 722 (5th Cir. 2001); Seal v. Morgan, 229 F.3d 567 (6th Cir. 2000); Zellman *ex. rel.* M. Z. v. Indep. Sch. Dist. No. 2758, 594 N.W.2d 216 (Minn. Ct. App. 1999).

135. Typically, if a student fails the exit exam, he or she receives a completion certificate in recognition of completed course work, rather than a high school diploma. In Florida, for example, approximately 9% of the 2003 graduating class "have failed the Florida Comprehensive Assessment Test, . . . the 10th-grade-level math and reading exam that students must pass to graduate." Fredreka Schouten, *School Exit Exams Wreak Havoc: Those Who Fail Cannot Receive Diplomas, Even If They Passed All Classes*, DETROIT NEWS, May 25, 2003, http://www.detnews.com/2003/schools/0305/25/a08-173719.htm. One of the students facing the prospect of receiving a certificate of completion instead of a diploma stated that "[t]he certificate of completion is nothing. . . . What are you going to do with one of those? Work at McDonald's or Burger King." *Id.*

136. *See* Rachel F. Moran, *Sorting and Reforming: High-Stakes Testing in the Public Schools*, 34 AKRON L. REV. 107, 132 (2000) ("High-stakes testing is popular because it offers a way to identify and blame individuals without acknowledging a collective unwillingness to invest in public schools, particularly those in low-income, often minority areas."); *see also* Maurice R. Dyson, *Leave No Child Behind: Normative Proposals to Link Educational Adequacy Claims and High Stakes Assessment Due Process Challenges*, 7 TEX. F. ON C.L. & C.R. 1 (2002); William S. Koski, *Educational Opportunity and Accountability in an Era of Standards Based School Reform*, 12 STAN. L. & POL'Y REV. 301, 301-04 (2001); Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495 (1999); Blakely Latham Fernandez, Comment, *TAAS and* Gl Forum v. Texas Education Agency*: A Critical Analysis and Proposal for Redressing Problems with the Standardized Testing in Texas*, 33 ST. MARY'S L.J. 143 (2001). *But see, e.g.*, Jennifer C. Braceras, *Killing The Messenger: The Misuse of Disparate Impact Theory to Challenge High-Stakes Educational Tests*, 55 VAND. L. REV. 1111 (2002).

137. Press Release, California State Board of Education, State Board of Education Delays Consequences of California High School Exit Exam: Decision Postpones Exit Exam as Graduation Requirement to Class of 2006 (July 9, 2003), http://www.cdc.ca.gov/be/pn/nr/documents/newsrelhsee070903eng.pdf. This means that students in the graduating class of 2006 will be the first in California whose diplomas may be denied if they do not pass a single exam. In support of the decision, State Board President Reed Hastings stated, "we want to give our reforms more time to work for more students before requiring the exit exam as a condition of high school graduation." *Id.* Hastings cautioned, however, that "[t]he exit exam is here to stay. . . . Our mantra must be educate, remediate and educate some more." *Id.* For more information on California's high school exit examination, see the State Board of Education website located at http://www.cde.ca.gov/be/ (last modified May 24, 2004).

138. Twenty states currently require high school students to pass exit examinations in order to graduate, and another five states will have the requirement by 2008. Education Week on the Web, Special Report, Quality Counts 2004: State of the States, State Data Table Standards and

This summary of educational malpractice jurisprudence indicates that even if a plaintiff suffers real injury due to inadequate instruction, courts refuse to sanction recovery primarily because of public policy concerns.[139] The judicial consensus appears to be, "[a]s a matter of public policy, the courts should not entertain a cause of action in educational negligence or, as it is sometimes referred to, educational malpractice, against either public or private schools."[140] Legal theorists have referred to this phenomenon as the "doctrine of academic abstention."[141] In addition to concerns about duty and causation highlighted within the tort context, courts in general remain concerned about the issuance of monetary damages, potentially burdening schools with oppressive judgments, and interfering with functions normally under the purview of the legislature and the administrative agencies. This results in "[t]he educational malpractice victim los[ing] something akin to freedom and property when she is denied access to the courtroom to hold a professional accountable for the negligence that has caused her harm—a right granted to other classes of people."[142] Yet, until plaintiffs overcome these obstacles, educational liability claims necessarily must turn on another theory of law that addresses specific rights in order to succeed in the courts.[143]

II
LITIGATING THE NO CHILD LEFT BEHIND ACT

The lack of judicial recognition of educational malpractice claims within various legal contexts further victimizes parents and students who feel injured by inadequacies in the educational system. Hence, there is still a need for a viable cause of action in this area. Since the Supreme Court

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Accountability, p. 11, http://www.edweek.com/sreports/qc04/reports/standacct-t1k.cfm (last visited July 1, 2004).

139. For a general discussion of educational malpractice public policy concerns, see Frank D. Aquila, *Educational Malpractice: A Tort En Ventre*, 39 CLEV. ST. L. REV. 323 (1991).

140. Helm v. Prof'l Children's Sch., 431 N.Y.S.2d 246, 246 (N.Y. App. Term 1980) (per curiam); *see also* Bd. of Curators v. Horowitz, 435 U.S. 78, 92 (1978) ("Courts are particularly ill-equipped to evaluate academic performance."); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973) ("[T]his case . . . involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels.").

141. *See, e.g.*, Virginia Davis Nordin, *The Contract to Educate: Toward a More Workable Theory of the Student-University Relationship*, 8 J.C. & U.L. 141, 145-49 (1982); Kevin P. McJessy, Comment, *Contract Law: The Proper Framework for Litigating Educational Liability Claims*, 89 NW. U. L. REV. 1768, 1769 (1995).

142. Cheryl L. Wade, *When Judges are Gatekeepers: Democracy, Morality, Status, and Empathy in Duty Decisions (Help from Ordinary Citizens)*, 80 MARQ. L. REV. 1, 48 n.206 (1996).

143. Arguably rights-conferring provisions in the NCLBA, such as supplemental educational services, placing highly qualified teachers in classrooms, and providing students with transfer options, may be sufficiently specific to allow plaintiffs to successfully litigate commonlaw educational malpractice actions. Nonetheless, such specificity does not cure other obstacles courts may envision, including public policy and educational institution deference.

has largely rejected constitutional approaches to enforcing education entitlements, plaintiffs have necessarily turned to rights-conferring statutes such as the Individuals with Disabilities in Education Act[144] (IDEA), and its predecessor, the Education of the Handicapped Act (EHA), for greater success.[145]

The rights conferred in those statutes, however, have focused on students with special needs. Conversely, the promulgation of the NCLBA affords an opportunity to consider whether students in general education without special needs have statutorily-created, judicially-enforceable rights to the quality of educational instruction proffered by the Act. The NCLBA requires states to adopt clear and specific standards that, in theory, may be judicially enforceable on behalf of private individual plaintiff parents and students. However, since the statute does not expressly confer a private right of action, alternative methods for successfully litigating these suits must be explored.

The first potential claim would be an implied right of action under the NCLBA.[146] The Supreme Court's ruling in *Gonzaga University v. Doe*,[147] however, effectively subsumed the query of whether an implied right exists within the broader question of whether there is a private right of action under § 1983. Functionally equating § 1983 actions with an implied statutory

144. 20 U.S.C. §§ 1400-1487 (2000). *See, e.g.*, M.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 391-92 (3d Cir. 1996) ("A school district that knows or should know that a child . . . is not receiving more than a *de minimis* educational benefit must . . . correct the situation. . . . [I]f it fails to do so, a disabled child is entitled to compensatory education."); W.B. v. Matula, 67 F.3d 484, 495 (3d Cir. 1995) ("We conclude that the . . . presumption in favor of all appropriate relief is not rebutted as to § 1983 actions to enforce IDEA. Defendants have identified [nothing] . . . in the text or history of IDEA indicating such a limitation, and indeed there is strong suggestion that Congress intended no such restriction.").

145. Pub. L. No. 91-230, Title VI, 84 Stat. 175 (1970). *See, e.g.*, Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 (1985) ("We conclude that the [EHA] authorizes . . . school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the [EHA]."); Mrs. W. v. Tirozzi, 832 F.2d 748, 755 (2d Cir. 1987) ("In light of . . . clear legislative history, we hold that parents are entitled to bring a § 1983 action based on alleged violations of the EHA."); Quackenbush v. Johnson City Sch. Dist., 716 F.2d 141, 148 (2d Cir. 1983) ("[T]he district court did not err in refusing to dismiss, because . . . the complaint . . . sets forth a cause of action against the school district under § 1983 . . . based upon its alleged policy to . . . prevent[ ] handicapped children from gaining access to the procedural safeguards guaranteed by the [EHA].").

146. In 1975, the Court established a relatively clear formula for determining whether a private right of action exists impliedly under a particular statute:

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted,"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort v. Ash, 422 U.S. 66, 78 (1975) (citations omitted) (quoting Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39 (1916)). Now, this is no longer the relevant test.

147. 536 U.S. 273 (2002).

right likely results in courts applying the tests in a similar manner. Thus, the Court's foreclosure of the possibility of an implied right of action leads to a second alternative, an action under 42 U.S.C. § 1983.[148] In Part II.A, I argue that a § 1983 action makes the most sense doctrinally and practically, as it provides plaintiffs across the country with a standardized federal claim based upon a deprivation of specific educational rights. Nonetheless, recent decisions have cast doubt on whether such an action is viable. Therefore, Part II.B explores the final alternative, a statutory amendment creating an express private right of action. However, this scenario is unlikely, as it would require Congress to significantly amend the NCLBA.

A. Litigating the NCLBA Under 42 U.S.C. § 1983

On its own, 42 U.S.C. § 1983, which allows civil actions for deprivation of rights, does not specifically provide protection against anything.[149] The ability to bring a civil suit against a state actor for deprivation of rights under § 1983 stems from "Congress recogniz[ing] the need for original federal court jurisdiction as a means to provide at least indirect federal control over the unconstitutional actions of state officials."[150] The text of § 1983 states in pertinent part "[e]very person who, under color of any statute . . . of any State or Territory . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ."[151]

The inquiry to determine whether a right is enforceable under § 1983 is no different from the initial inquiry of whether a right can be implied from a statute: is the congressional intent to create a right clear and unambiguous?[152] Yet, perhaps the most significant barrier to a § 1983 action is showing that the right described in the statute actually is a right cognizable under § 1983. That is, the statutory right must be equivalent to "any rights, privileges, or immunities secured by the Constitution and laws."[153]

Because the definition of the term "right" has varied from statute-to-statute and court-to-court, the scope of § 1983 actions has had a confusing

148. The Court's movement from a functional and flexible approach towards a more formalistic one requiring specific intent can best be seen through the Court's implied statutory private right of action jurisprudence. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275 (2001); Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982); Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 12 (1981); Cannon v. Univ. of Chi., 441 U.S. 677, 688 (1979).

149. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617 (1979).

150. District of Columbia v. Carter, 409 U.S. 418, 428 (1973).

151. 42 U.S.C. § 1983 (2000).

152. *See, e.g.*, Gonzaga Univ. v. Doe, 536 U.S. 273 (2002); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981).

153. 42 U.S.C. § 1983.

and contradictory jurisprudential history.[154] The hope here is that even if courts hold that "[e]ducational malpractice, without more, is simply not a constitutional deprivation under § 1983,"[155] the statutory rights provided under the NCLBA will fit the judicial definition of "more." Unfortunately, however, if recent litigation is any indication, that hope will not be realized.[156]

1. Overview of § 1983 Jurisprudential History

Between 1980 and 1997, the Supreme Court made six important decisions that dealt specifically with the issue of whether § 1983 is a valid basis for individual redress against state actors who are not fulfilling their federal statutory obligations. Three of those cases resulted in the affirmation of private claims under § 1983,[157] while the other three resulted in denial of the claims.[158] This Section briefly discusses how each of these decisions in turn helped evolve the Court's construction of the scope of § 1983 actions, which helps us understand how the Court applies § 1983 in the educational malpractice context.

a. Establishing the Scope of § 1983 Actions

In *Maine v. Thiboutot*,[159] the Supreme Court considered whether the phrase "and laws" as used in § 1983 includes all laws, as its plain meaning suggests, or whether Congress intended it to be "limited to some subset of laws."[160] The *Thiboutot* Court rejected the state's argument that "and laws" should be narrowly read "as limited to civil rights or equal protection laws," recognizing the slippery slope involved in determining how narrow the construction of the phrase should be.[161] Indeed, the Court stated that the

154. In what is currently the final word on § 1983 cases, particularly within the context of education law, the Supreme Court in *Gonzaga University v. Doe* stated that it granted certiorari in order "to resolve the conflict among the lower courts and in the process resolve any ambiguity in our own opinions." 536 U.S. at 278. *See infra* notes 157-58 and accompanying text.

155. Bishop v. Ind. Tech. Vocational Coll., 742 F. Supp. 524, 524 (N.D. Ind. 1990) (concluding that "petitioner has no cognizable claim under § 1983").

156. *See* Ass'n of Cmty. Orgs. for Reform Now v. N.Y. City Dep't of Educ., 269 F. Supp. 2d 338 (S.D.N.Y. 2003) (ACORN).

157. Wilder v. Va. Hosp. Ass'n, 496 U.S. 498 (1990); Wright v. Roanoke Redev. and Hous. Auth., 479 U.S. 418 (1987); Maine v. Thiboutot, 448 U.S. 1 (1980).

158. Blessing v. Freestone, 520 U.S. 329, 344 (1997); Suter v. Artist M., 503 U.S. 347 (1992); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981).

159. 448 U.S. 1 (1980).

160. *Id.* at 4. Respondent husband and wife alleged that they were denied welfare benefits by the State Commissioner of Human Services, in violation of 42 U.S.C. § 602, which authorizes states to provide temporary assistance to families in need. *Id.* at 2-3. After pursuing their claim through the state administrative scheme provided within the statute, respondents brought the action under § 1983. *Id.* at 3.

161. *Id.* at 7-9.

legislative history did not provide any "express explanation offered for the insertion of the phrase 'and laws.'"[162]

Nonetheless, the Court determined that "[e]ven were the language ambiguous . . . any doubt as to its meaning has been resolved by our several cases suggesting, explicitly or implicitly, that the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law."[163] Ultimately, the Court held that the plain language meaning was applicable[164] and any arguments otherwise "can best be addressed to Congress," which, the Court found it important to note, "has remained quiet in the face of our many pronouncements on the scope of § 1983."[165] Thus, for the first time, the Court recognized that state actors could be held accountable for violations of statutory provisions under a § 1983 action.[166]

The year following its groundbreaking decision in *Thiboutot*, the Court placed a significant limitation on § 1983 rights. In *Pennhurst State School and Hospital v. Halderman*,[167] the Court required "unambiguous" congressional intent to authorize a § 1983 action. The Justices wanted to ensure that, through its legislation, Congress was explicitly "speak[ing] with a clear voice."[168] The plaintiffs contended that the Developmentally Disabled Assistance and Bill of Rights Act (DDABRA)[169] conferred upon the mentally retarded residents of Pennhurst State Hospital enforceable "substantive rights to 'appropriate treatment' in the 'least restrictive' environment [possible]."[170] The title of the DDABRA alone suggests that Congress intended to confer specific rights upon developmentally disabled individuals. However, the Court was not convinced by congressional language that Justice Rehnquist described as "intend[ing] to encourage, rather than mandate, the provision of better services to the developmentally

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162. *Id.* at 7 (citation omitted).

163. *Id.* at 4.

164. "In short, Congress was aware of what it was doing, and the legislative history does not demonstrate that the plain language was not intended." *Id.* at 8.

165. *Id.*

166. Justice Powell, joined by then Chief Justice Burger and Justice Rehnquist, dissented by stating in part,

> [t]he Court holds today, almost casually, that 42 U.S.C. § 1983 creates a cause of action for deprivations under color of state law of any federal statutory right. . . . [T]he reading adopted today is anything but "plain" when the statutory language is placed in historical context. Moreover, until today this Court never had held that § 1983 encompasses all purely statutory claims. . . . To read "and laws" more broadly is to ignore the lessons of history, logic, and policy.

Id. at 11-12 (Powell, J., dissenting).

167. 451 U.S. 1 (1981).

168. *Id.* at 17.

169. Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6000 (1976 & Supp. III 1980) (repealed 2000).

170. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 10 (1981).

disabled."[171] The Court thus found in favor of state officials, concluding that "the court below failed to recognize the well-settled distinction between congressional 'encouragement' of state programs and the imposition of binding obligations on the States."[172]

But was the distinction in actuality well-settled? If the term "Bill of Rights" in the very title of the DDABRA did not pass judicial muster,[173] what language would the Court find adequate? Thus, while the Court initially construed § 1983 broadly in *Thiboutot*, it placed a potentially important limitation on § 1983 by requiring clear congressional intent. Subsequent cases attempted to set out what rights-conferring language would be adequate.

b. Expanding the Scope of § 1983 Actions

The Court directly addressed the question of whether the existence of alternative remedies within a statute could preclude a § 1983 action in *Wright v. Roanoke Redevelopment and Housing Authority*.[174] The Supreme Court, in a 5-4 decision, reversed the lower courts and held "that nothing in the Housing Act or the Brooke Amendment evidences that Congress intended to preclude petitioners' § 1983 claim."[175] According to the Court, "the remedial mechanisms provided [in the statute were not] sufficiently comprehensive and effective to raise a clear inference that Congress intended to foreclose a § 1983 cause of action for the enforcement of tenants' rights secured by federal law."[176]

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171. *Id.* at 20.

172. *Id.* at 27. The Court also stated, "Congress was aware of the need of developmentally disabled persons and plainly understood the difference, financial and otherwise, between encouraging a specified type of treatment and mandating it." *Id.*

173. *Cf.* Gonzaga Univ. v. Doe, 536 U.S. 273, 293 (2002) (Stevens, J., dissenting) (questioning "the Court's studious avoidance of the rights-creating language in the title and text of the [Family Educational Rights and Privacy Act of 1974]").

174. 479 U.S. 418 (1987). Petitioners filed suit under § 1983 because of a violation of the rent ceiling set by the Brooke Amendment, 42 U.S.C. § 1437a (1987), to the Housing Act, Housing and Community Development Act of 1974, 42 U.S.C. § 1401 (1974). According to the original Brooke Amendment, tenants' rent "shall not exceed 25 per centum of family income in the case of a very low income family." Pub. L. No. 96-153 § 202(a), 93 Stat. 1101 (1979).

The district court ruled that the tenants had no valid § 1983 cause of action because there was a remedial scheme within the statute that foreclosed a private remedy. Wright v. City of Roanoke Redev. and Hous. Auth., 605 F. Supp. 532, 537 (W.D. Va. 1984), *aff'd*, 771 F.2d 833 (4th Cir. 1985), *rev'd*, 479 U.S. 418, 429 (1987). The Fourth Circuit subsequently affirmed the lower court's ruling. Wright v. City of Roanoke Redev. and Hous. Auth., 771 F.2d 833, 837 (4th Cir. 1985) ("To conclude, the plaintiffs under 42 U.S.C. § 1437a have certain rights but the remedy to enforce them is not conferred on them. . . . The § 1437 right is simply incompatible with the § 1983 remedy, for . . . the plaintiffs are not to have the authority themselves to sue."), *rev'd*, 479 U.S. 418 (1987). *But cf.* Beckham v. N.Y. City Hous. Auth., 755 F.2d 1074, 1077 (2d Cir. 1985) ("Because the Brooke Amendment falls under neither the *Pennhurst* nor the *Middlesex County* exceptions to section 1983, we agree with the district court that it properly exercised jurisdiction in this case under section 1983.").

175. *Wright*, 479 U.S. at 429.

176. *Id.* at 425.

The dissent argued that plaintiffs should turn to their lease agreements rather than § 1983 for remedy,[177] in order to enforce the Public Housing Authority's promise to provide water and heat.[178] The dissent found no convincing evidence that either the statutory language in the Brooke Amendment or the relevant legislative history, "supports the conclusion that Congress intended to create a [statutory] entitlement."[179] As such, the dissent determined that the Brooke Amendment contained no congressional intent to broaden the scope of the statutory terms.[180] The Court's majority decision illustrates a type of § 1983 inquiry that construes rights broadly.

The Court continued that approach, following *Wright* with another proplaintiff § 1983 decision. The Medicaid Act scrutinized under *Wilder v. Virginia Hospital Association*[181] required states that wanted funding to submit a comprehensive plan "describing the nature and scope of the State's Medicaid program."[182] The central issue in *Wilder* was whether Virginia's plan, and its method for health care provider reimbursement, could be challenged via a § 1983 action.[183] The Supreme Court held that "[i]n light of *Pennhurst* and *Wright*, . . . the Boren Amendment imposes a binding obligation on States participating in the Medicaid program to adopt reasonable and adequate rates and that this obligation is enforceable under § 1983 by health care providers."[184] This finding was due in pertinent part to the Court's determination that "[t]he Boren Amendment is cast in mandatory rather than precatory terms."[185] However, two years later, the Supreme Court reversed course from the *Wilder* decision in *Suter v. Artist M.*[186]

c. *Restricting the Scope of § 1983 Actions*

In *Suter*, the Court considered whether the Adoption Assistance and Child Welfare Act[187] provided a private right of action via either § 1983 or implicitly under the Act itself.[188] Respondents in the class action alleged that the Illinois Department of Children and Family Services did not "make

177. *See id.* at 440 (O'Connor, J., dissenting) ("In my view, petitioners do have a remedy in seeking to secure utilities from respondent: they may sue on their leases.").

178. Housing and Urban Development, 24 C.F.R. § 966.4(e)(7) (1986).

179. *Id.* at 441 (O'Connor, J., dissenting).

180. *Id.* at 434 (O'Connor, J., dissenting) ("The legislative history of the Brooke Amendment, far from indicating an intent to create a statutory right to utilities, shows that Congress was presented with, and ultimately rejected, a proposal to create an enforceable right to 'reasonable utilities.'").

181. 496 U.S. 498 (1990).

182. *Id.* at 502.

183. *Id.* at 501.

184. *Id.* at 512.

185. *Id.*

186. 503 U.S. 347 (1992).

187. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980).

188. *Suter*, 503 U.S. at 350.

reasonable efforts to prevent removal of children from their homes and to facilitate reunification of families where removal had occurred," as required by the state plan submitted under the requirements of 42 U.S.C. § 671(a)(15).[189]

The Court distinguished both *Wright* and *Wilder* by insisting that, in those cases, an examination of the language of the statutes as a whole showed that Congress intended to create an enforceable right.[190] However, in *Suter*, the Court determined that the statutory language created only an affirmative duty upon the states to submit a state plan, not to guarantee that the details of the plan would be actualized in any manner, be it "reasonable" or otherwise.[191] As a result, the Court concluded that "in the context of the entire Act, . . . the 'reasonable efforts' language does not unambiguously confer an enforceable right upon the Act's beneficiaries."[192] The ambiguity, the Court opined, resided with its determination that "reasonable efforts" could be "at least as plausibly read to impose only a rather generalized duty on the State, to be enforced not by private individuals."[193]

Following *Suter*, Congress responded by amending the Social Security Act to confer a private right of action.[194] Congress allowed the holding in *Suter* to remain intact, but made it clear that any forthcoming litigation addressing the enforceability of rights under the Adoption Assistance and Child Welfare Act would be valid under § 1983.

Finally, in *Blessing v. Freestone*,[195] the Supreme Court considered whether the mothers of children who were eligible for child support under Title IV-D of the Social Security Act had a viable § 1983 cause of action to sue a state agency that failed to take adequate steps to secure such support. The Court held that the statute did "not give individuals a federal right to force a state agency to substantially comply."[196] The Court further stated

189. *Id.* at 352.

190. *Id.* at 357.

191. *Id.* at 358 ("Therefore the Act does place a requirement on the States, but that requirement only goes so far as to ensure that the State have a plan approved by the Secretary which contains the 16 listed features.").

192. *Id.* at 363.

193. *Id.*

194. The Social Security Act provides:

> In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in Suter v. Artist M., but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in Suter v. Artist M. that section 671(a)(15) of this title is not enforceable in a private right of action.

42 U.S.C. § 1320a-2 (2000) (citation omitted).

195. 520 U.S. 329 (1997).

196. *Id.*

that "[a] plaintiff seeking § 1983 redress must assert the violation of a federal *right*, not merely of federal *law*."[197]

In reaching this decision, the Court clearly delincated the three-pronged test for § 1983 claims brought under a federal statute that the Court had been developing under *Wright*[198] and *Wilder*.[199] First, the plaintiffs must be the intended beneficiaries of the legislation.[200] Second, the implied right must not be "so 'vague and amorphous' that its enforcement would strain judicial competence."[201] Third, the statutory language must clearly bind the states with an obligation to comply.[202] "In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms."[203] The Court also emphasized that § 1983 inquiries are not focused solely on whether there is a right created under a federal statute.[204] Instead, since the "inquiry focuses on congressional intent, dismissal is proper if Congress 'specifically foreclosed a remedy under § 1983.'"[205] Therefore, construing congressional intent becomes the primary focus in § 1983 claims.

In *Blessing*, the plaintiffs' case failed because it did not pass the first prong. In the Court's opinion, the plaintiffs were unable to state a specific right, but rather relied on a general claim that "Title IV-D creates enforceable rights in families in need of Title IV-D services."[206] The Court reasoned that *Blessing* was distinguishable from *Wright* and *Wilder* because the *Blessing* plaintiffs did not provide "well-defined claims."[207] Furthermore, Title IV-D was held to "measure the *systemwide* performance of a State's Title IV-D program," as opposed to "creating an *individual* entitlement to services."[208] *Blessing* continued the movement, started in *Suter*, toward limiting § 1983 claims to those situations where Congress clearly provided individual entitlements. The Court's practice of interpreting statutes broadly to allow § 1983 claims began to change. This change increasingly caused problems for plaintiffs who suffered from reasonably clear infringements of federal rights under statutes that were not clear enough to satisfy the Court.

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197. *Id.*
198. Wright v. City of Roanoke Redev. and Hous. Auth., 479 U.S. 418, 430-32 (1987).
199. Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 510-11 (1990).
200. *Blessing*, 520 U.S. at 340.
201. *Id.* at 340-41.
202. *Id.* at 341.
203. *Id.*; *see also Wilder*, 496 U.S. at 512.
204. *Id.*
205. *Id.* (quoting Smith v. Robinson, 468 U.S. 992, 1005 n.9 (1984)).
206. Freestone v. Cowan, 68 F.3d 1141, 1150 (9th Cir. 1995), *vacated sub nom.* Blessing v. Freestone, 520 U.S. 329 (1997).
207. *Blessing*, 520 U.S. at 342.
208. *Id.* at 343.

Thus, after a somewhat schizophrenic start, it is now evident that the current state of § 1983 jurisprudence does not lend itself to the promulgation of private rights of action. Rather, the Supreme Court has unilaterally decided to interpret congressional intent on a variety of significant legislation as not conferring individual rights. Despite the existence of a federal law that provides citizens with judicial redress, the Court continues to deny plaintiff claims under § 1983, particularly when state actors infringe upon student rights.[209] The following section examines how § 1983 jurisprudence post-*Blessing* has impacted educational liability litigation at both the state and federal levels.

2. *Educational Jurisprudence Under § 1983*

Initially, plaintiffs in § 1983 educational actions were successful in the lower courts, as was the case in *Lampkin v. District of Columbia.*[210] But, in 2002, the Supreme Court decided *Gonzaga University v. Doe,*[211] which had a chilling effect on educational plaintiff claims in particular and § 1983 actions in general. Indeed, the onerous *Gonzaga* standard of requiring statutory rights to be set forth unambiguously appears to have effectively shut down the possibility of successful plaintiff § 1983 actions under the NCLBA. Though the statute litigated in *Gonzaga* was the Family Educational Rights and Privacy Act[212] and not the NCLBA, a landmark decision in the Southern District of New York recently applied the Supreme Court's line of reasoning in *Gonzaga* to the NCLBA,[213] potentially foreshadowing the negative fate of nationwide NCLBA litigation under 42 U.S.C. § 1983. This section discusses how courts have applied § 1983 in the educational malpractice setting.

a. *Early Success: Lampkin v. District of Columbia*

Lampkin v. District of Columbia was an early example of success for educational malpractice plaintiffs using § 1983. The *Lampkin* plaintiffs were homeless mothers who had brought suit on behalf of their school-age children seeking certain educational services from the school district, as provided for in the 1987 McKinney-Vento Homeless Assistance Act (McKinney Act).[214] Participating states and school districts received federal

209. *See* Gonzaga Univ. v. Doe, 536 U.S. 273 (2002).

210. 879 F. Supp. 116 (D.D.C. 1995) (Lampkin I), *injunction dissolved by* 886 F. Supp. 56 (D.D.C. 1995) (Lampkin II).

211. 536 U.S. 273 (2002).

212. Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (1974).

213. ACORN, 269 F. Supp. 2d 338 (S.D.N.Y. 2003). This case has been identified as "the first reported opinion concerning the federal No Child Left Behind Act of 2001." *N.Y. Federal Court Rejects Private Action Under No Child Left Behind Act*, 9 No. 15 PRIVATE EDUC. L. REP. 3 (Aug. 2003).

214. 42 U.S.C. § 11301 (1988 & Supp. IV 1992). The McKinney Act reflected Congress's determination that "the Federal Government has a clear responsibility and an existing capacity to fulfill

funding in the form of grants, and in return, were obligated to follow the requirements and policies set forth in the McKinney Act,[215] which included the education of homeless children.[216]

The plaintiffs alleged that the District of Columbia had violated the McKinney Act by neither providing homeless students with adequate transportation nor placing those students in appropriate schools in a timely manner.[217] The homeless mothers brought suit under § 1983, claiming the District of Columbia, as a state actor, was depriving their children of the right to education as conferred by the McKinney Act.[218]

The District of Columbia challenged the plaintiffs on the ground that they had no private right of action under 42 U.S.C. § 1983 to enforce the McKinney Act. The district court disagreed and determined that once a school district accepts federal funds specifically earmarked for the McKinney Act, it must follow the Act's requirements. If the school district fails to do so, it has thus deprived the intended recipient of those rights. The court, in an opinion by Judge Lamberth, concluded that the District of Columbia violated the McKinney Act for the reasons asserted by the plaintiffs.[219]

Judge Lamberth described his decision as "one modest step in recognition of sentiments expressed by the Supreme Court [in *Brown v. Board of Education*]."[220] The victory for homeless children in the District of Columbia was brief, however, as less than a month after the ruling, the school district withdrew from the McKinney Act education program.[221] As a result, the district court subsequently held that the school district's obligations to educate homeless students under the McKinney Act were now

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a more effective and responsible role to meet the basic human needs and to engender respect for the human dignity of the homeless." *Id.* § 11301(a)(6).

215. "[B]y accepting federal funds, the District assumed the obligation to comply with the Act's requirements." *Lampkin I*, 879 F. Supp. at 122.

216. "[E]ach State educational agency shall ensure that each child of a homeless individual and each homeless youth has equal access to the same free, appropriate public education . . . as provided to other children and youth." 42 U.S.C. § 11431(1).

217. *See generally id.* § 11432(e)(3).

218. *Lampkin I*, 879 F. Supp. at 120.

219. *Id.* at 122. The Court instructed the District of Columbia to comply with the McKinney Act as follows:

> First, the District must identify homeless children at the time they first arrive at an intake center, and refer these children within 72 hours for requisite educational services, including transportation. Second, the District must offer bus tokens to all homeless children who travel more than 1.5 miles to attend primary or secondary school; offer tokens to a homeless parent or other designated adult escort who accompanies a homeless child to or from school; and eliminate any delays occasioned by once-a-week distribution of tokens at homeless shelters. Alternatively, the District may, if it prefers, provide equivalent transportation services through the medium of a dedicated bus system in lieu of public transit.

Id. at 119.

220. *Id.* at 118.

221. Lampkin II, 886 F. Supp. 56, 58 (D.D.C. 1995).

null and void.[222] When presented with the opportunity, the Supreme Court denied certiorari.[223]

b. The Current Framework: Gonzaga University v. Doe

Less than a decade after *Lampkin*, the Supreme Court's summer 2002 decision in *Gonzaga University v. Doe*[224] struck a significant blow to private right of action claims under § 1983 against educational state actors for alleged violations of federal statutes. *Gonzaga* solidified the current Court's conservative approach to § 1983 claims in an educational context,[225] and may well foreshadow future rulings if NCLBA litigation under § 1983 is granted certiorari.

The plaintiff, John Doe, was an undergraduate student at Gonzaga University's School of Education, a private institution located in Spokane, Washington. Doe planned to become a teacher at a public elementary school in Washington state after graduation. Washington law[226] requires that all new teachers submit an affidavit from a designated official stating that the Dean and relevant faculty members of their graduating institution have "no knowledge that the applicant has been convicted of any crime and [have] no knowledge that the applicant has a history of any serious behavioral problems."[227] The Dean, however, refused to sign the affidavit as a result of a university administrator's investigation of unsubstantiated rumors that Doe had sexually assaulted another student. In addition, the administrator divulged personal information regarding Doe to the agency in charge of certifying state teachers. Doe was not made aware of the in-

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222. *Id.* District Court Judge Lamberth, who had originally ordered the injunction on March 7, 1995, appeared frustrated with having to dissolve that order two weeks later, on March 21, 1995. He stated in his opinion that

> [t]he court must interpret and apply existing law. Given the District's withdrawal from the Program, there is now no law to apply. Defendants have succeeded in circumventing the requirements of the McKinney Act, thereby denying District citizens the federal assistance that would otherwise have been available. If there is to be a remedy, it lies with the District's voters, not with this court.

Id. at 63.

223. District of Columbia v. Lampkin, 513 U.S. 1016 (1994).

224. 536 U.S. 273 (2002).

225. Although the holding in *Gonzaga* was limited to nondisclosure provisions within the Family Educational Rights and Privacy Act, it may be nonetheless applicable to other educational statutes. *See, e.g.*, Ralph D. Mawdsley, *A Section 1983 Cause of Action Under IDEA? Measuring the Effect of* Gonzaga University v. Doe, 170 W. EDUC. L. REP. 425 (2002) (examining the viability of a § 1983 action under IDEA).

226. WASH. ADMIN. CODE § 180-75-082 (1997) (repealed 1999). Effective Mar. 8, 1997, this law was repealed and replaced by WASH. ADMIN. CODE § 180-79A-155 (1999). The outcome of the case was not affected, however, because the new code still contains an affidavit requirement. WASH. ADMIN. CODE § 180-79A-155(3) (1999).

227. Doe v. Gonzaga Univ., 992 P.2d 545, 550 (Wash. Ct. App. 2000) (quoting WASH. ADMIN. CODE § 180-75-082(3) (1997)), *aff'd in part, rev'd in part*, 24 P.3d 390 (Wash. 2000), *rev'd*, 536 U.S. 273 (2002).

vestigation until he received a letter informing him that the Dean had refused to sign the affidavit.[228]

Doe sued both the University and the administrator in state court for, among other claims, violating the Family Educational Rights and Privacy Act (FERPA).[229] Doe claimed that the administrator, in her capacity as a university official, infringed on his right to privacy under the FERPA by disclosing his personal information.[230] According to Doe, individuals could bring an action for monetary damages under § 1983 because the FERPA clearly and unambiguously established a privacy right.

The result of Doe's litigation was a battle of opinions at every level. The jury in the trial court found for Doe, awarding him damages totaling $1,155,000.[231] The Washington Court of Appeals reversed the lower court's decision because it concluded that the "FERPA does not create individual rights privately enforceable under 42 U.S.C. § 1983."[232] In turn, the Washington Supreme Court reversed the appellate court's holding and reinstated the jury verdict. That court concluded that "the FERPA provision at issue here gives rise to a federal right enforceable under section 1983."[233] The U.S. Supreme Court granted certiorari[234] taking the opportunity to create a sorely-needed bright line rule regarding the recognition of § 1983 actions.

The U.S. Supreme Court stated explicitly that it "ha[s] never before held, and decline[s] to do so here, that spending legislation drafted in terms resembling those of FERPA can confer enforceable rights."[235] This reasoning was a result of the Court's determination that the FERPA's "provisions entirely lack[ed] . . . 'rights-creating' language."[236] Instead, the Court found the FERPA's terminology, particularly within the nondisclosure

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228. *Id.* at 551.

229. 20 U.S.C. § 1232g (2000). The FERPA states in relevant part:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information . . .) of students without the written consent of their parents to any individual, agency, or organization.

20 U.S.C. § 1232g(b)(1) (2000).

230. Gonzaga Univ. v. Doe, 534 U.S. 1103 (2002) (mem.).

231. *See id.* The award included $150,000 in damages for the FERPA violation and $300,000 in punitive damages for the FERPA claim. *Id.*

232. *Id.* at 556. The Washington Court of Appeals further held that "even if FERPA did create individual rights enforceable under § 1983, we would nonetheless hold that a teacher candidate waives those rights when he or she applies for teacher certification[, because t]his process necessarily entitles the school to release personally identifiable information to" the state agency. *Id.* at 556-57.

233. Doe v. Gonzaga Univ., 24 P.3d 390, 400 (Wash. 2001), *rev'd*, 536 U.S. 273 (2002).

234. Gonzaga Univ. v. Doe, 534 U.S. 1103 (2002) (mem.).

235. Gonzaga Univ. v. Doe, 536 U.S. 273, 279 (2002).

236. *Id.* at 287. The Court deemed the rights-creating language Respondents asserted as "a far cry from the sort of individualized, concrete monetary entitlement found enforceable in *Maine v. Thiboutot*, . . . *Wright* [*v. Roanoke Redevelopment and Housing Authority*], and *Wilder v. Virginia Hospital Association*." *Id.* at 289 n.6 (citations omitted).

provisions, to be written "in terms of institutional policy and practice," as opposed to focusing on "individual instances of disclosure."[237] The Court then concluded that because the FERPA's provisions are couched in terms of policy and practice, and are far removed from individual interests, "there is no question that [the statute's] nondisclosure provisions fail to confer enforceable rights."[238]

Although Justice Breyer, joined by Justice Souter, concurred with the majority opinion, he nevertheless determined that the majority's bright line rule—that to be enforceable under § 1983 a statutory right must be stated clearly and unambiguously[239]—was premature:

> [T]he statute books are too many, the laws too diverse, and their purposes too complex, for any single legal formula to offer more than general guidance. I would not, in effect, predetermine an outcome through the use of a presumption—such as the majority's presumption that a right is conferred only if set forth "unambiguously" in the statute's "text and structure."[240]

Justice Stevens, joined by Justice Ginsburg, submitted a scathing and insightful dissent in reply to Chief Justice Rehnquist's majority opinion, claiming that it was a "novel [and misguided] attempt to craft a new category of second-class statutory rights."[241] Specifically, Stevens concluded that the majority's new[242] standard for § 1983 actions placed an unnecessary burden on plaintiffs and did "nothing to clarify [the Court's] § 1983 jurisprudence."[243]

The *Gonzaga* decision failed on three important levels. First, in an effort to clarify § 1983 jurisprudence, the Court created a nearly insurmountable bar for plaintiffs in § 1983 educational litigation to overcome, without providing an appropriate definition of "rights-creating language." Indeed, the concurrence expressed discomfort with the inherent ambiguity in the Court's holding.[244] Thus, the *Gonzaga* decision may in fact be

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237. *Id.* at 288. The Court distinguished the language in the FERPA from the "individually focused terminology of Titles VI [of the Civil Rights Act of 1964] and IX [of the Education Amendments of 1972] ('No person . . . shall . . . be subjected to discrimination')," which both have recognized rights under § 1983. *Id.* at 287.

238. *Id.* at 287.

239. According to the majority, this standard is "no less and no more than what is required for Congress to create new rights enforeeable under an implied private right of action." *Id.* at 290.

240. *Id.* at 291 (Breyer, J., concurring).

241. *Id.* at 293 (Stevens, J., dissenting).

242. Justice Stevens questioned that newness by stating, "there should be no difference between the Court's 'new' approach to discerning a federal right in the § 1983 context and the test we have 'traditionally' used, as articulated in *Blessing*." *Id.* at 302 (Stevens, J., dissenting).

243. *Id.* at 303 (Stevens, J., dissenting).

244. *Id.* at 291 (Breyer, J., concurring).

viewed as 5-4, with a significant minority disagreeing as to the basic format for analyzing congressional intent under § 1983 litigation.[245]

Second, the Court assumed a traditional posture reflecting the doctrine of academic abstention, presumably in order to give deference to the legislature while protecting educational institutions. During its dismissal of Justice Stevens's dissent, the Court stated that his argument "fail[ed] to see how relations between the branches are served by having courts apply a multifactor balancing test to pick and choose which federal requirements may be enforced by § 1983 and which may not."[246] Then, subtly placed in a footnote, the Court declared that to have decided *Gonzaga* otherwise, "entails a judicial assumption, with no basis in statutory text, that Congress intended to set itself resolutely against a tradition of deference to state and local school officials . . . by subjecting them to private suits for money damages whenever they fail to comply with a federal funding condition."[247]

Third, and perhaps most important, the *Gonzaga* decision failed the victims of state actor abuse. Section 1983 provides a means towards restitution for deprivation of rights by entities acting under the color of state law. Doe specifically chose to bring his action under § 1983 in a deliberate effort to avoid the pitfall of FERPA—that is, the statute itself contained no provision for a private right of action.[248] Yet, by conservatively analyzing what language invokes a right and what language does not, the Supreme Court has trivialized the spirit and fundamental principle of § 1983 to the point of mooting it with regard to educational plaintiffs' statutory claims.

With an overly narrow construction of the term "rights," the Supreme Court is moving towards a foreclosure of the § 1983 cause of action. The Court now dismisses the fact that a § 1983 action inherently incorporates congressional intent and reviews it in the same manner as an implied right under the statute itself. In *Gonzaga*, the Supreme Court "reject[ed] the notion that [its] implied right of action cases are separate and distinct from [its] § 1983 cases."[249] Initially, it seems that the Court has eliminated confusion by consolidating the requirements under § 1983 and implied right of action claims. Yet, this merger comes at a high price.

First, collapsing the two forms of litigation in this manner weakens both, as it fails to acknowledge them, particularly § 1983, as independent

245. Chief Justice Rehnquist authored the majority opinion, with Justices O'Connor, Scalia, Kennedy, and Thomas joining him. Justices Stevens and Ginsburg dissented. Justices Breyer and Souter concurred with the majority's holding, that in this instance Respondent was not entitled to a private right of action. However, they did not agree with the formulation of the majority's rule necessitating clarity and unambiguity.

246. *Gonzaga*, 536 U.S. at 286.

247. *Id.* at 286 n.5.

248. Doe v. Gonzaga Univ., 24 P.3d 390, 400 (Wash. 2001), *rev'd*, 536 U.S. 273 (2002).

249. *Gonzaga*, 536 U.S. at 283. The Court further stated that "[t]o the contrary, our implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983." *Id.*

and separate avenues to enforce non-express statutory private rights of action. Second, it makes it unnecessarily burdensome for plaintiffs to meet these standards. Indeed, what is the function of a separate § 1983 claim if the judiciary reviews it no differently from an implied right of action?[250] Because the standard for a § 1983 claim and an implied statutory right of action are now the same under judicial construction, no weight is given to the very purpose of 42 U.S.C. § 1983: providing individuals special protection from state actors that encroach upon their rights.[251] The Court's formalistic approach in *Gonzaga* deviates from the appropriate § 1983 standard of review found in prior jurisprudence.

c. *Applying Gonzaga to the NCBLA: ACORN v. New York City Department of Education*

In June 2003, NCLBA litigation felt the first effects of the *Gonzaga* decision. In *Association of Community Organizations for Reform Now v. New York City Department of Education*,[252] the Southern District of New York held that the NCLBA does not grant individuals a private right of action against schools and districts that are not fulfilling their statutory obligations. If the *ACORN* case proves indicative of future litigation, the problems with the Supreme Court's decision in *Gonzaga* will undoubtedly impact the outcome of NCLBA cases.

ACORN, in conjunction with parents of New York public school students and those similarly situated, brought a § 1983 class action suit against local school districts, alleging that the districts had disregarded important provisions of the NCLBA, thereby depriving the students of their rights as conferred under the statute.[253] Specifically, plaintiffs alleged that the New York City and Albany school districts were not fulfilling their statutory obligations to, in part, (1) provide adequate notice to parents that their children's schools were classified as needing "improvement,"

250. It should be noted, however, that the Court in *Gonzaga* identifies one area in which a § 1983 action and an implied right of action differ: "Plaintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes." *Id.* at 284.

251. In addition to *Gonzaga*, potential plaintiffs in public school actions should also be cognizant of the Supreme Court's 6-3 decision in *Raygor v. Regents of the University of Minnesota*, which further strengthens states' immunity under the Eleventh Amendment. 534 U.S. 533 (2002). Instead of filing a claim in federal court and then, upon dismissal, refiling in state court, *Raygor* suggests that claims of federal law violations have to be filed initially in both federal and state courts for prevention of, for example, statute of limitations issues. *Id.* at 548 ("We hold that respondent never consented to suit in federal court on petitioners' state law claims and that [28 U.S.C.] § 1367(d) does not toll the period of limitations for state law claims asserted against nonconsenting state defendants that are dismissed on Eleventh Amendment grounds.").

252. 269 F. Supp. 2d 338 (S.D.N.Y. 2003) (ACORN).

253. *See supra* note 22.

"corrective action," or "restructuring,"[254] (2) allow students to transfer from schools needing "'improvement' 'corrective action' or 'restructuring'" to better-performing schools,[255] and (3) provide students attending schools labeled as such with "supplemental education services" (SES).[256] Plaintiffs sought an injunction forcing the school districts' compliance with those provisions of the NCLBA.[257] In response, defendants relied upon the Supreme Court's ruling in *Gonzaga*, filing a motion to dismiss on the basis that the NCLBA lacks the requisite clear and unambiguous Congressional intent to provide the plaintiffs with a private right of action.[258]

The court articulated the primary issue as whether the NCLBA "evince[s] an unambiguous congressional intent to confer rights upon the parents of schoolchildren."[259] To analyze the issue, the court applied the *Gonzaga* rule that, without clear and unambiguous intent, "there is no basis for a private suit, whether under § 1983 or under an implied right of action."[260] As previously noted, such a high standard makes it next to impossible for plaintiffs to succeed in § 1983 actions, absent an explicit and express congressional intention to provide a private right of action under a particular statute. And, if it were the case that such an explicit and express intention existed, plaintiffs would most likely bring suit directly under the statute itself, not solely under 42 U.S.C. § 1983.

Thus, it came as no surprise when the *ACORN* court granted the defense's motion to dismiss and held, "it is clear that Congress did not intend to create individually enforceable rights with respect to the notice, transfer or SES provisions contained in the NCLBA."[261] In addition, the court found that "any enforcement actions for violation of the [NCLBA] by

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254. *ACORN*, 269 F. Supp. 2d at 341 (citing 20 U.S.C. §§ 6316(b)(1)(E), (5)(A), (7)(C)(1), (8)(A)(i), (6)). This classification scheme identifies three types of schools: (1) school improvement—schools that do not achieve AYP for two years in a row, (2) corrective action—schools that do not achieve AYP for three consecutive years, and (3) restructuring—schools that do not achieve AYP anytime more than three years. *Id.*

255. *Id.*

256. *Id.* at 342 (citing 20 U.S.C. §§ 6316(b)(5)(B), (7)(C)(iii), 8(A)(ii)). These services include tutoring and additional classes.

257. In addition, the plaintiffs brought a constitutional claim under the New York State constitution, which the court later refused to review as a result of the failure of the § 1983 claim. *Id.* at 347 ("Because there is no longer any federal claim, the Court declines to exercise supplemental jurisdiction and dismisses the remaining claim under the New York State constitution.") (citing 28 U.S.C. § 1367(c)(3)).

258. *Id.* at 343.

259. *Id.*

260. *Id.* at 344 (quoting Gonzaga Univ. v. Doe, 536 U.S. 273, 286 (2002)).

261. *Id.* Perhaps more troubling is the *ACORN* court's decision to expand its holding to other potentially rights-conferring provisions of the NCLBA. For example, the court noted that, "[c]onsequently, because the notice, transfer and SES provisions do not provide for individual rights, the 'transition' provision . . . could also not create such individual rights." *Id.* at 344 n.4.

states be taken by the Secretary of Education," and the statute "vests such authority solely in the Secretary."[262]

Lampkin, *Gonzaga*, and *ACORN* are exemplary of § 1983 jurisprudence in an educational context. *ACORN*, however, is the first published case to deal directly with a § 1983 claim under the NCLBA. There, as expected, the Southern District of New York followed the Supreme Court's lead in *Gonzaga* and found no congressional intent to confer individual rights to parents and students under the NCLBA.

Yet, was this path of review the most appropriate? Or is there another standard courts should utilize for future § 1983 educational litigation? I do not intend to suggest that the *Gonzaga* standard as applied to any § 1983 action is inappropriate. Rather, I contend that it is not the right instrument with which to measure educational malpractice and liability claims, particularly under FERPA and IDEA, and specifically under the NCLBA. Education, and students' opportunity to access an adequate one, are far too important to consistently be reviewed under such an oppressive standard.

3. *Applying § 1983 to the NCLBA*

Whether a § 1983 claim under the NCLBA should survive is a complex analysis, given the holdings in *Gonzaga*, and now *ACORN*. Indeed, similar statutes arguably containing educational "rights" provisions, such as FERPA and IDEA, have not lent themselves to consistent and positive judicial review via § 1983.[263] The goal of this section is to analyze the viability of § 1983 claims under the NCLBA by reviewing how the *Gonzaga* test was applied in *ACORN*, and by specifically analyzing whether there is requisite congressional intent and rights-conferring language in the NCLBA to support a valid § 1983 claim.

The test to determine whether an individual has a § 1983 private right of action under a federal statute, first clearly articulated in the *Blessing* three-pronged test, and now condensed into a two-part inquiry following *Gonzaga*, is deceptively unsophisticated. The overarching issue is whether there is congressional intent for the creation of a private right of action to enforce statutorily created rights. That is, the court must determine "whether or not Congress intended to confer individual rights upon a class of beneficiaries."[264] To reach this issue, the first inquiry is whether there are rights to enforce. It is the plaintiff's burden to show Congress articulated the alleged statutory rights "in clear and unambiguous terms."[265]

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262. *Id.* at 345.

263. For a general discussion of the interaction between § 1983 and IDEA, see, for example, Rebecca L. Bouchard, Note, *Education Law—The Relationship Between the Individuals with Disabilities Education Act and Section 1983: Are Compensatory Damages an Available and Appropriate Remedy?*, 25 W. NEW ENG. L. REV. 301 (2003).

264. Gonzaga Univ. v. Doe, 536 U.S. 273, 285 (2002).

265. *Id.* at 290.

This initial inquiry is, of course, the same as a court's determination of whether an implied right of action exists under a statute.[266]

Furthermore, the fact that the provisions plaintiffs allege confer a right actually contain the term "rights" is not determinative.[267] Rather, the statutory language must confer some "sort of '*individual* entitlement' that is enforceable under § 1983."[268] Part and parcel with this individual entitlement is the Court's unnecessary preoccupation with whether the object of the right is an individual, or a group or institutional policy and/or practice. If the object is group based or institutional in nature, the Court classifies it as having an "'aggregate' focus . . . not concerned with 'whether the needs of any particular person have been satisfied,' and [it] cannot 'give rise to individual rights.'"[269]

If the initial showing is not made, however, the analysis is over, and plaintiffs fail to state a cognizable claim under § 1983. On the other hand, if the statutory language is sufficiently rights conferring, the burden then shifts to the state to demonstrate that either Congress explicitly did not intend those rights to be privately enforced, or, through the establishment of an administrative scheme, impliedly foreclosed private actions.[270]

An analysis of the *ACORN* court's reasoning and application of the *Gonzaga* standard is instructive as to why that rule is not an appropriate tool to evaluate § 1983 claims under the NCLBA. The court's analysis followed *Gonzaga* closely and covered two main issues: one discussing whether the NCLBA's language clearly and unambiguously created a private right of action, and the other determining whether congressional intent behind the statute evinced a private right of action. Although the *ACORN* court failed to conclude that the litigated sections of the NCLBA conferred actionable rights, it neglected to expressly state what statutory language would have been sufficient. The court further determined that the cited provisions of the NCLBA were articulated too generally to show adequate congressional intent therein.

a. Rights Conferred Through the NCLBA's Language

Rights-creating language "explicitly confer[s] a right directly on a class of persons that include the plaintiff."[271] The NCLBA confers numerous implied and express rights on parents and students. The express rights

266. Whether a private right of action is implied from a statute or arises via a § 1983 action, "the [two] inquiries overlap in one meaningful respect—in either case [the Court] must first determine whether Congress *intended to create a federal right*." *Id.* at 283.

267. Indeed, in *Pennhurst*, the Court determined that there is "no presumption of enforceability merely because a statute 'speaks in terms of "rights."'" *Id.* at 289 n.7 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981)).

268. *Id.* at 287.

269. *Id.* at 288 (quoting Blessing v. Freestone, 520 U.S. 329, 343-44 (1997)) (citations omitted).

270. *Id.* at 285.

271. Cannon v. Univ. of Chi., 441 U.S. 677, 690 n.13 (1979).

are the most significant to this discussion. Recall that to successfully litigate a post-*Gonzaga* § 1983 claim, plaintiffs must show that the specific provision litigated contains rights-conferring language.[272] Remarks during the *Gonzaga* oral arguments, that the Court may "be somewhat reluctant to parse through [the] statute" to determine whether there are rights created or conferred in every particular section,[273] suggest that the statute as a whole may be taken into consideration to infer intent. However, "a 'blanket approach' to determining whether a statute creates rights enforceable under [§ 1983]" has also been considered inappropriate.[274] While this more expansive review of the NCLBA would be more likely to find rights-conferring language, it is unclear which approach the Court would take.

Parents' and students' express[275] rights under the NCLBA vary by topic area, and include civil rights,[276] notification,[277] assessment,[278] health,[279] and parental involvement and participation in general.[280] However, perhaps the most important section of the NCLBA with respect to express rights of parents and students, is the public school choice provision.[281] In addition to giving the option to transfer, the NCLBA further provides that, "[s]tudents who use the option to transfer . . . shall be enrolled in classes and other activities in the public school to which the students transfer in the same manner as all other children at the public school."[282]

In the *ACORN* case, District Court Judge Koeltl first determined that "the notice, transfer and SES provisions do not contain the kind of 'rights-creating' language that the Supreme Court has deemed 'critical to showing the requisite congressional intent to create new rights.'"[283] This

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272. *See* text accompanying *supra* notes 235-38.

273. Oral Argument of John G. Roberts, Jr. On Behalf of the Petitioners at 6, Gonzaga Univ. v. Doe, 536 U.S. 273 (2002) (No. 01-679).

274. Gonzaga Univ. v. Doe, 536 U.S. 273, 294 (2002) (Stevens, J., dissenting); *see also* Blessing v. Freestone, 520 U.S. 329, 344 (1997) ("The Court of Appeals erred not only in finding that individuals have an enforceable right . . . , but also in taking a blanket approach to determining whether Title IV-D [of the Social Security Act] creates rights."). *Contra* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 18-19 (1981) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.") (quoting Philbrook v. Glodgett, 421 U.S. 707, 713 (1975) (citation omitted), *superceded by statute as noted in* Batterton v. Francis, 432 U.S. 416 (1977)).

275. Here, I use the term "express" to include benefits provided to parents and students under the NCLBA.

276. 20 U.S.C.A. § 7914 (2003).

277. *See, e.g., id.* §§ 1232h, 7012.

278. *Id.* § 1232h(a).

279. *Id.*

280. *Id.* § 7273.

281. *Id.* § 6316(b)(1)(E).

282. *Id.* § 6316(b)(1)(F).

283. ACORN, 269 F. Supp. 2d 338, 344 (S.D.N.Y. 2003) (citing Gonzaga Univ. v. Doe, 536 U.S. 273, 287 (2002)).

determination came as a result of the court's finding that there can be no rights-creating language where the NCLBA is not "focus[ed] on conferring a benefit or entitlement on . . . a class of individuals," but rather is focused "on the entity or person that the statute intends to regulate."[284] Specifically, the court reasoned that solely because the object of the statutory language in those provisions appeared to be local educational agencies, this stripped parents and students of the right to the benefits included in it.

For example, the NCLBA public school choice provision states that

> [i]n the case of a school identified for school improvement under this paragraph, the local educational agency shall, not later than the first day of the school year following such identification, provide all students enrolled in the school with the option to transfer to another public school served by the local educational agency, . . . that has not been identified for school improvement under this paragraph, unless such an option is prohibited by State law.[285]

If this language does not clearly and unambiguously provide students the right to transfer schools, what language would have triggered such an entitlement? Indeed, the court remarked that "Congress, well aware of how to confer entitlements on individuals, could have drafted the NCLBA to provide that parents have the right to transfer their children."[286] In order to change the object from the educational agency to the parents and students, perhaps, the subdivision should instead read:

> In the case of a school identified for school improvement under this paragraph, *parents and all students enrolled in the school* shall, not later than the first day of the school year following such identification, *have* the option to transfer to another public school served by the local educational agency, which may include a public charter school, that has not been identified for school improvement under this paragraph, unless such an option is prohibited by State law.

This altered language, however, does not allocate responsibility for the transfer to the local educational agency. Instead, it provides parents and students with a seemingly unenforceable benefit. Yet, all this is mere conjecture, as the *ACORN* court failed to provide exemplary statutory language that would have sufficiently risen to the standard set in *Gonzaga*. Such an example would be useful for potential plaintiffs, the judiciary, and

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284. *Id.*

285. 20 U.S.C.A. § 6316(b)(1)(E)(i).

286. *ACORN*, 269 F. Supp. 2d at 344. With all due respect, in this statement the court may afford Congress too much credit regarding how courts construe statutory rights. In addition, the NCLBA was drafted and codified before *Gonzaga*, the definitive § 1983 case, where, in its own words, the Supreme Court finally "resolve[d] the conflict among the lower courts and in the process resolve[d] any ambiguity in [its] own opinions." Gonzaga Univ. v. Doe, 536 U.S. 273, 278 (2002).

policy makers alike, to strategically move forward in § 1983 NCLBA litigation.

b. Congressional Intent to Evince a Private Right of Action

Students and their parents must also show that Congress drafted the NCLBA with the intent to confer individual rights. Judge Lamberth eloquently foreshadowed this significant barrier to NCLBA litigation nine years ago in his discussion of the McKinney Act in *Lampkin*: "Lamentably, Congressional goodwill was dissipated by murky statutory draftsmanship. As a result, the [McKinney] Act may not have the encompassing effect . . . its proponents had hoped. Courts respectful of separation of powers will only apply those provisions of the [McKinney] Act where legislative intent is reliably discernible."[287] Therefore, as later noted by Justice Breyer in *Gonzaga*, "[t]he ultimate question, in respect to whether private individuals may bring a lawsuit to enforce a federal statute . . . is a question of congressional intent."[288]

i. Past Treatment by the Judiciary

Applying a congressional intent analysis to the NCLBA, the *ACORN* court determined that the notice, school choice, and SES provisions do not evince the requisite congressional intent, primarily because the sections are drafted somewhat generally, with "an 'aggregate focus,' and [are] not concerned 'with whether the needs of any [single] person have been satisfied."[289] The NCLBA sections the court referred to state in pertinent part, (1) "[i]n providing students the option to transfer to another public school, the local educational agency shall give priority to the lowest achieving children from low-income families,"[290] and (2) "the local educational agency serving such school shall, subject to this subsection, arrange for the provision of [SES] to eligible children in the school,"[291] where "the term 'eligible child' means a child from a low-income family."[292]

In reaching its conclusion, the court took an unfortunate approach, reasoning that because the transfer and SES provisions focus on low-income students, "Congress was concerned with improving . . . the condition of the subset of children from lower income families, rather than ensuring that each individual child was provided with a right to

287. Lampkin I, 879 F. Supp. 116, 126 (D.D.C. 1995), *injunction dissolved by* 886 F. Supp. 56 (D.D.C. 1995).

288. Gonzaga Univ. v. Doe, 536 U.S. 273, 291 (Breyer, J., concurring).

289. *ACORN*, 269 F. Supp. 2d at 345.

290. 20 U.S.C.A. § 6316(b)(1)(E)(ii).

291. *Id.* § 6316(e)(1).

292. *Id.* § 6316(e)(12)(A).

transfer . . . or a right to receive SES."[293] This line of reasoning raises three primary challenges.

First, simply because Congress gives priority to low-income students regarding their transfer rights does not imply that all other children are excluded from this option.[294] Indeed, in a section of the U.S. Department of Education website for the NCLBA, entitled "Choices for Parents," it specifically states: "Parents with children in schools that do not meet state standards for at least two consecutive years may transfer their children to a better-performing public school, including a public charter school, within their district. If they do so, the district must provide transportation, using Title I funds if necessary."[295] In contrast, the subsequent paragraph regarding SES mentions options for low-income children specifically. Because the transfer language does not make any mention of children's family incomes, this lends support to the contention that *all* children are entitled to transfer.[296]

Second, giving a particular group of students priority for benefits should not determine whether individual students in general are entitled to those benefits. In *Zelman v. Simmons-Harris*, Ohio's "Pilot Project Scholarship Program," which provides parents with funds enabling them to enroll their children in a private school or let them remain at their current school and receive tutoring, allegedly violated the Establishment Clause of the federal Constitution.[297] The Court found the scholarship program neutral, and therefore constitutional, noting that "[t]he only prefcrence in the program is for low-income families, who receive greater assistance and have priority for admission."[298] The preferential treatment provided to a subset of students did not affect the Court's view of whether Ohio intended the funds to be used by all eligible students. Indeed, the Court found that the program "confers educational assistance directly to a broad class of individuals."[299]

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293. *ACORN*, 269 F. Supp. 2d at 345.

294. Supplemental Educational Services, however, are only available to students from low-income families. *See id.*

295. Choices for Parents, U.S. Dep't of Educ., *at* http://www.ed.gov/nclb/choice/index.html?src=ov (last visited July 1, 2004).

296. *See id.* Assuming, of course, that a student's particular state provides a transfer option. *See* 20 U.S.C.A. § 6316(b)(1)(E)(i) (Students shall be provided with the option to transfer, "unless such an option is prohibited by State law").

297. 536 U.S. 639 (2002).

> In the 1999-2000 school year, fifty-six private schools participated in the program, forty-six (or 82%) of which had a religious affiliation. None of the public schools in districts adjacent to Cleveland have elected to participate. More than 3,700 students participated in the scholarship program, most of whom (96%) enrolled in religiously affiliated schools. Sixty percent of these students were from families at or below the poverty line. *Id.* at 647.

298. *Id.* at 640.

299. *Id.*

Third, assuming, arguendo, that Congress intended only to entitle low-income students to transfer, it is not clear from the *ACORN* court's analysis whether plaintiffs would indeed be entitled to those rights if they and those similarly situated were all low-income. If that were the case, would the holding then change? Most likely not, as the court further compounded its aggregate focus argument by relying on "[t]he fact that this statutory scheme contains no procedures for individuals to enforce violations of the statute."[300] As a result, the court found requisite congressional intent lacking. Here, again, the inherent contradictions of the *Gonzaga* standard are clear. If the NCLBA contained a mechanism whereby individual parents and students could "enforce violations of the statute," plaintiffs would not have to bring a § 1983 action, and would instead likely sue expressly under the statute itself.

ii. Neglected Evidence of Legislative Intent

The NCLBA was first introduced to Congress as a bill that would "refocus federal efforts to close the achievement gap by giving States and local schools greater flexibility in the use of Federal education dollars in exchange for greater accountability for results."[301] During the drafting stages of the NCLBA, debates on the floor of the House provide insight into the underlying congressional intent. For example, consider the debate regarding the Parental Freedom of Information Amendment[302] in the NCLBA, which provides:

> Parents . . . have the right to access the curriculum to which their children are exposed. Parents . . . also have the right to give informed written consent prior to any student being required to undergo nonemergency medical or mental health examinations, testing or treatment, while at school; and finally, they will be afforded the right to inspect surveys and questionnaires seeking personal information before they are given to students.[303]

Congressman Schaeffer from Colorado stated his support for the amendment, claiming that it was "good . . . because at its core it empowers parents, and that really should be what we are all about here in Congress, is finding ways to empower parents to the greatest extent possible."[304] A clearer example of congressional intent may be found in Kansas Congressman Tiahrt's statement in defense of the amendment he authored:

> The current hodgepodge of State and Federal laws simply does not provide parents of public school children with the clear-cut right to

300. ACORN, 269 F. Supp. 2d 338, 345 (S.D.N.Y. 2003).
301. 147 CONG. REC. E437 (daily ed. Mar. 22, 2001) (statement of Rep. Boehner).
302. This amendment contained the additions to 20 U.S.C.A. § 1232h (2003).
303. 147 CONG. REC. H2587 (daily ed. May 23, 2001) (statement of Rep. Tiahrt).
304. *Id.* at H2588 (statement of Rep. Schaffer).

> access information regarding their child's education. The goal of th[e Parental Freedom of Information A]mendment is to plainly and unambiguously define the rights parents have under the law.[305]

Parental empowerment is an important indicator of congressional intent to confer educational rights to parents. According to the House Committee on Education and the Workforce, parental empowerment is part of the very purpose of the NCLBA.[306]

Perhaps a more useful insight into NCLBA congressional intent is in the legislators' discussion of the school choice provisions. As one Representative described, school choice "provides the means for parents to rescue their children from failing schools and send them to institutions that will successfully equip them for the future. School choice is the heart of this educational reform."[307] In addition, the House Committee report identifies school choice as a means to further empower parents under the NCLBA.[308] Yet, as exemplified by the *ACORN* litigation, school choice is a likely candidate to serve as the foundation for the majority of NCLBA educational liability claims,[309] in addition to access to supplemental educational services and ensuring that there are "high-quality" teachers in every classroom.

My hope is that courts will review legislative history in earnest, and conclude that Congress intended to provide students a "right" to school choice. However, the *ACORN* court, for example, neglected to discuss in its opinion any direct evidence of congressional intent, such as the committee report and statements from the legislators themselves. Instead, the court relied on *Gonzaga*, opining that "the fact that [the NCLBA's] provisions have only an 'aggregate focus' and are not concerned with 'whether the

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305. *Id.* at H2587 (statement of Rep. Tiahrt).

306. "The Purpose of [the NCLBA], is . . . empowering parents. Key components of the legislation include . . . promoting parental empowerment." H.R. REP. NO. 107-63, pt. 1 (2001).

307. 147 CONG. REC. H2593 (daily ed. May 23, 2001) (statement of Rep. Lewis).

308. *See* H.R. REP. NO. 107-63, pt. 1, *supra* note 306. ("It is the Committee's desire that by empowering parents with information on school quality, parents will be in a better position to make decisions about selecting the best possible schools for their children.").

309. For example, in the Chester Upland school district of Delaware County, Pennsylvania, thirty parents sought transfers for their students, applying to fourteen separate districts within the county. Susan Snyder, *'No Child Left Behind' Law Bumps Into Hard Reality*, PHILA. INQUIRER, Oct. 12, 2003, at A01. Despite the NCLBA, of the fourteen districts, not one school would grant the parents' transfer requests. *Id.* Similarly, the New Jersey School Boards Association reported that as of October 2, 2003, "no school district had entered into an agreement to use the interdistrict transfer provision under the [Act]." *Id.* Part of the problem has been a lack of funding. Indeed, "[w]ith federal budget deficits nearing all-time highs and the tab for Iraq expected to grow, Bush and Congress are unlikely to provide the states with the billions of dollars they seek to quickly adapt to the new system." Jim VandeHei, *Education Law May Hurt Bush*, WASH. POST, Oct. 13, 2003, at A01. Additionally, school districts that are denying transfer requests may be doing so becuase: (1) "Many suburban schools are facing rapid enrollment growth and do not have space", (2) "Accepting transfers would conflict with the goal to keep class sizes as small as possible," (3) "The public is in opposition", and (4) "Solicitors advise against taking on transfers because of the cost." Snyder, *supra* at A01.

needs of any particular person have been satisfied' is indicative of Congress' intent not to create individual rights."[310]

Despite the existence of congressional intent, it is not clear how federal courts will resolve this issue with regard to the NCLBA when current § 1983 jurisprudence remains overly discretionary, subjective, and ambiguous. The *ACORN* decision merely serves to highlight the flaws in the structural design of the NCLBA, particularly in light of the heightened scrutiny with which the judiciary reviews § 1983 claims under federal statutes as a result of *Gonzaga*. This obstacle may, however, be overcome by evaluating § 1983 claims based on substantive areas of law, that is, separate standards for separate issues, thus scrutinizing educational liability claims under a different standard altogether. Another option to preclude a possible Supreme Court ruling limiting the enforceability of rights within the NCLBA is a statutory amendment to the NCLBA providing an express private right of action. Exploration of these alternatives is particularly important as these claims concern an especially vulnerable and important class of citizens—our children.

B. Litigating an Express Private Right of Action Under the NCLBA

There is no explicit private right of action for parents and students within the NCLBA. If *ACORN* is any indication, the judiciary will not recognize the NCLBA's fundamental purpose, educational accountability, by allowing private rights of action for students and parents. As a result, Congress must take the initiative and amend the NCLBA to include a workable and meaningful private right of action, as it did in *Suter*.[311] A statutory amendment to the NCLBA providing an express private right of action could preclude a possible Supreme Court ruling limiting the enforceability of rights within the NCLBA.

The NCLBA already addresses private rights of action by protecting teachers against liability. The general rule is that under the NCLBA, "no teacher in a school shall bc liable for harm caused by an act or omission of the teacher on behalf of the school."[312] With regard to damages, the NCLBA expressly provides teachers with several or "fair share" liability protection.[313] In addition, "[p]unitive damages may not be awarded against

310. ACORN, 269 F. Supp. 2d 338, 345 (S.D.N.Y. 2003) (quoting Gonzaga Univ. v. Doe, 536 U.S. 273, 288, 290) (2002)).

311. *See supra* note 194 and accompanying text.

312. 20 U.S.C.A. § 6736(a) (2003).

313. The NCLBA provides:

> In any civil action against a teacher, based on an act or omission of a teacher acting within the seope of the teacher's employment or responsibilities to a school . . ., [the] teaeher shall be liable only for the amount of noneconomic loss allocated to that defendant in direct proportion to the percentage of responsibility of that defendant . . . for the harm to the claimant with respect to which that defendant is liable.

Id. § 6737(a)-(b)(1)(A).

a teacher in an action brought for harm based on the act or omission of a teacher acting within the scope of the teacher's employment."[314] I do not believe that teachers should be liable to suit, as they are not as well equipped to deal with the costs (both financially and professionally) of litigation as state educational agencies and school districts. The NCLBA does not afford similar express protection to state and local educational agencies, suggesting that Congress did not intend to preclude suits against them.

Congress has expressly recognized private rights of action for violations of education law when students with special needs are harmed. For example, the IDEA, formerly the Education for the Handicapped Act (EHA), provides that

> any party aggrieved by the findings and decision under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States.[315]

In *Honig v. Doe*,[316] the Supreme Court affirmed the Ninth Circuit's ruling that a twenty-year-old handicapped student had the right to attend classes during the review of his expulsion, as provided by the EHA. The Court determined that the EHA "confers upon disabled students an enforceable substantive right to public education in participating States."[317] In accordance with that right, disabled students are allowed to "'remain in [their] then current educational placement' pending completion of any review proceedings."[318]

I offer an abbreviated model legislators may use to amend the NCLBA, which would provide the requisite language the judiciary will follow to enforce and support an express civil action within the statute itself.[319] This model provision would be included within § 6143 of the NCLBA, entitled: "Performance Review and Penalties,"[320] adding the following text as:

> (c) BENEFICIARY PRIVATE RIGHT OF ACTION: Any citizen, determined to be a part of the class of beneficiaries, and specifically individual students along with their parents upon whom the rights within the provisions of this education

314. *Id.* § 6736(c)(1).

315. *Id.* § 1415(i)(2)(A).

316. 484 U.S. 305 (1988).

317. *Id.* at 310.

318. *Id.* at 308 (quoting 20 U.S.C. § 1415(e)(3)); *see also* Sch. Comm. of Town of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985) (enforcing § 1415(i)(2)(B)(iii) of the EHA which states that "the court[,] . . . basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate"). Neither of these two cases was brought under § 1983.

319. This statutory amendment draws upon materials contained in 33 U.S.C. §§ 1365, 1415(g) (2000), as well as language from the EHA. *See* text accompanying *supra* note 315.

320. Codified at 20 U.S.C.A. § 7315(b).

> accountability Act are conferred shall have the right to bring a civil action on his or her own behalf, or on behalf of his or her minor child. Such action may be brought in any State court of competent jurisdiction or in a district court of the United States.
> (1) Such an action may be commenced—
> (A) against any person, educational instrumentality or agency acting under color of state law who is alleged to be in violation of (i) a standard, limitation, prohibition, or criterion established or issued by or under this Act or (ii) an order issued by the Secretary or Department of Education with respect to such standard or limitation, or
> (B) against a School Administrator (including School Board, School Districts, and employees of said School Board and District) where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not at the discretion of the Administrator.
> (2) The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such standard, limitation, prohibition, or criterion, or such an order, or to order the School Administrator to perform such act or duty, as the case may be.
> (3) The injunctive relief provided by this subsection shall not restrict any right which any beneficiary (or class of beneficiaries) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the School Administrator, School Board, School District, or a State Education Agency).

The proposed amendment provides a clear private right of action courts should be willing to recognize in NCLBA litigation. The use of the term "beneficiary" and the language of "class" in Section (c) unambiguously states a congressional intent to confer upon students and their parents, as both individuals and a group, the rights set forth within the NCLBA. In addition, the proposed "savings clause" in Section (c)(3), provides a safety net for plaintiffs who may want to bring their action under other statutes or bodies of law.

The inclusion of such express statutory language in the NCLBA would provide students and their parents with a clear right to private actions against non-performing educational agencies and school districts. The courts would be forced to recognize educational malpractice claims under the NCLBA for the specific rights conferred therein. And, perhaps, the fear of private suit would help fulfill the stated mission of the NCLBA—that is, to ensure that the nation's public school system is truly accountable.

CONCLUSION

Since the enactment of the NCLBA, standards of accountability required of participating states and local public educational institutions have risen. Yet, as the actions of state school boards and educational agencies leading to litigation make clear, expecting full compliance with the NCLBA is optimistic at best. Meanwhile, too many of America's children continue to be left behind, victims of gross educational malpractice.

The Court's current trend of restrictive analysis of § 1983 claims is unfortunate. Ultimately, Justice Breyer's concurring opinion in *Gonzaga* was correct: "the statute books are too many, the laws too diverse, and their purposes too complex, for any single legal formula to offer more than general guidance."[321] Indeed, if ever faced with NCLBA litigation under § 1983 or an implied statutory private right of action, the Supreme Court must be willing to consider the possibility that Congress intended for the nation's children and their parents to have an enforceable right to a proper and adequate education. The present high standard for this type of litigation undermines the very intent of many of the statutes that are being violated. The current situation is that the Supreme Court, "by circularly defining a right actionable under § 1983 as . . . 'a right which Congress intended to make enforceable,' . . . has eroded—if not eviscerated—the long-established principle of presumptive enforceability of rights under § 1983."[322]

This restrictively narrow classification scheme within the § 1983 test, presents the primary problem for plaintiffs in § 1983 NCLBA actions, as the Act has been drafted in arguably "aggregate" language, despite the fact that congressional intent strongly points towards a desire to confer individual entitlements. This is why the *Gonzaga* standard is not adequate to scrutinize educational liability claims brought under the NCLBA. If the Court continues to utilize a limited standard that requires "individualized" rights-conferring language, educational liability claims brought under § 1983 will consistently fail.

As it stands, the NCLBA is a weak piece of legislation that has received resounding criticism from the states.[323] Nonetheless, it is currently what we have, and in such a situation, it is imperative to find the means to

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321. Gonzaga Univ. v. Doe, 536 U.S. 273, 291 (2002) (Breyer, J., concurring).

322. *Id.* at 2285 (Stevens, J., dissenting).

323. Bipartisan criticism of the NCLBA in its current manifestation has come from state education administrators to legislators around the country, from Arizona to Michigan to Vermont. They are afraid that as much as 85% of the schools in their states will be considered "failing" under the NCLBA. Michael Winerip, *A Pervasive Dismay on a Bush School Law*, N.Y. TIMES, Mar. 19, 2003 (commenting that "[i]n all the world, the loneliest people must be that handful of men and women . . . dispatched by the Bush administration to . . . defend[] the new No Child Left Behind Act. . . . As I travel the country, I find nearly universal contempt for this noble-sounding law"), *available at* http://www.nytimes.com/2003/03/19/education/19EDUC.html.

enforce its lofty, if naïve, goals, while staying true to the spirit of educational liability claims. The NCLBA attempts to provide systemic educational equality, enforced by provisions espousing accountability. However, when the rights conferred to students and their parents may be trampled upon by inadequate, dysfunctional, and often downright negligent school districts and are then not recognized by courts following an unnecessarily rigid *Gonzaga* standard, the rights-conferring provisions in the NCLBA (for example, transfers and SES) are null and void.

Some commentators have suggested that the courts are an inappropriate forum for achieving meaningful school reform, and where litigation has been successful, it is not clear that the courts' decisions have proved desirable.[324] The very purpose of the judicial system, however, is to ensure that the rights afforded to us by our legislature and constitutions are not infringed. For the American public education system to be held accountable, we must allow for a sanction that creates the appropriate incentive for school districts to create an equitably and efficiently-administered learning environment. What better enforcement mechanism than one promulgated by the persons most affected by violations of the NCLBA, the student and parent beneficiaries of the rights conferred by the statute?

Fifty years ago, the Supreme Court asserted in *Brown v. Board of Education* that:

> [t]oday, education is perhaps the most important function of state and local governments. . . . Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[325]

Then, in 1982, the Court stated that although education "is not a 'right' granted to individuals by the Constitution," it is also not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction."[326] And in 2002, when President Bush signed the NCLBA into law, many hailed the Act as finally achieving the accountability so desperately sought by students and parents to make their public schools worthy of such judicial dicta. Yet, as drafted, the statute lacks the power to truly reinvigorate the atrophied heart of the American public school system. Although parents and their children may attempt through

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324. *See, e.g.*, Kimberly D. Bartman, Comment, *Public Education in the 21st Century: How Do We Ensure That No Child is Left Behind?*, 12 TEMP. POL. & CIV. RTS. L. REV. 95, 109 (2002).

325. 347 U.S. 483, 493 (1954).

326. Plyler v. Doe, 457 U.S. 202, 221 (1982).

various means to litigate the NCLBA for their supposed rights, courts will likely deny these claims until Congress amends the statute to provide for an express private right of action.

This solution, however, is a limited one, as Congress will undoubtedly continue to promulgate legislation that is arguably rights conferring, but which lacks the power of a private right of action for injured claimants. Therefore, it is up to the Supreme Court to reconsider its current construction of the scope of § 1983 actions and recognize educational malpractice claims. The Court should do this and acknowledge the true spirit of the NCLBA—that a quality education provided by truly accountable elementary and secondary educational institutions is a right for every child, especially those we do not wish to leave behind.