

# **Educational Malpractice: More Than an Academic Exercise for Public School Gifted Students?**

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## **Introduction**

Educational malpractice refers to an educator's failure to instruct, test, place or counsel a student properly or adequately when such failure has resulted in emotional or intellectual harm (Riley, 1997, p. 121; Smith, 1992).

Claims alleging educational malpractice by schools have traditionally been prompted by sub-standard student normative outcome through alleged school failure to correctly diagnosis learning disabilities, adequately address learning difficulties and impart basic literacy skills or other specific professional errors, such as omission of curriculum or incorrect calculation of student assessment marks. Courts have almost uniformly disallowed these claims, not always because of a lack of individual merit, but because of public policy considerations and reluctance to prescribe education standards. Undeterred, this paper argues the need for judicial review of schools' liability for injury to gifted students. In so doing, it addresses some of these court concerns and develops a plausible claim through a case study example. Given the lack of institutional commitment to gifted children, it is surprising no case appears to have been brought before an Australian Court questioning a school's duty to a student displaying prior mastery of a school curriculum or expected school standards.

## **The Unmet Needs of Gifted Students**

In a class of 30 mixed ability children, as is the norm in Australian primary schools, the students who stand to benefit most are the 'average' students, to whom the teaching is pitched. Those well below this level may receive school support through certified teachers, teacher aides, pull-out support classes and even private in-class tutoring by a more academically able peer, although the existence of legal claims suggests this support may either be absent or inadequate. Those well above the average receive no benefit (Feldhusen & Moon, 1992; Rogers, 1991), yet, despite forty years of empirical research showing the fallacy of chronological age placement (Gross, 1997, p. 25) in an intellectually and emotionally crippling lock-step progression, they are most often placed in these classes with few or no modifications of any kind (Reis et al., 1998). Where modifications are made, they are most often so minimal as to approximate educational fraud (Gallagher, 2000, p. 10).

Bearing in mind the difference between mildly and profoundly gifted students is as great as that between the mildly gifted and the mentally deficient (Gagne, 2000, p. 11; Gross, 1993), up to 60% of intellectually gifted students work, in school, at a level four to five years below their capacities. Children of I.Q.140 waste half their time in the regular classroom and children of above I.Q.170 waste all their time (Gross, 1994, p. 230). Research indicates that elimination of at least half of the curriculum for highly able students does not alter their achievement test scores (Reis et al., 1998; Reis & Purcell, 1993; Reis et al., 1992). The oversubscription in NSW

to academically selective classes and schools and the widespread patronage of private coaching colleges to redress the intellectual shortfall of mainstream public schools is not surprising. The reduced intellectual rigour of curriculum and class text books in recent years (Gross, Slep & Pretorius, 1999) only exacerbates the problem.

To not provide a differentiated learning environment, both in content and pace and in similar ability grouping, is tantamount to ‘decelerating’ the student, as Elkind (1988) puts it. It is inviting demotivation, frustration, boredom, underachievement, bad study habits, loss of learning skills, perfectionism, and lower self-esteem and confidence caused by an intellectual, social and emotional mismatch with peers. The anxiety suffered by 80% of gifted children, which can progress to clinical anxiety disorder and depression, is due solely to their poor fit in regular classrooms (Gross, M., pers. comm. 26 March 2000; Gross, 1993, 1994; Neihart, 1998, pp. 187,189). As a result, gifted students are over-represented in early school drop-outs and adolescent delinquency (McGuigan, 1992, cited in Gross, 1994).

The lack of active and coordinated institutional commitment to gifted students and educational equity (Senate, 1988, 2001) stems from Australia’s preoccupation with egalitarianism which ignores the highly able in an attempt to equalise outcomes. Denial of equal educational opportunity for gifted students is discriminatory and can have devastating consequences with long-term negative effects on these children and, ultimately, society. Many, if not most, gifted children do not make it on their own without specialised individualised educational provisions, despite popular opinion to the contrary.

### **Gifted Education in NSW: Legislation and Policy**

While the Education Act 1990 (NSW Parliament, 2000) specifically recognises a State duty to ensure every child receives an education of the highest quality and is assisted to achieve his or her educational potential, and that opportunities are provided to children with special abilities and to parents to participate in their children’s education (sections 4 and 6), this recognition cannot give rise to, or be taken into account in, any civil cause of action (section 127). As noted by Devrome & Spentzaris (2000, p. 4), Ramsay & Shorten (1996, p. 308) and Riley (1997, p. 132), section 127 of the Act is a public policy restriction upon the potential for educational malpractice actions. Section 8(1)(d), providing for study courses to be appropriate for children’s achievement levels and needs, is unencumbered by section 127. Whether or not its intent applies to individual children in schools, it does to individually home-schooled children (Board of Studies NSW, 2001), which raises questions relating to the uniform applicability of legislative requirements for schooling.

The lack of support for gifted students occurs despite more than 10 years of NSW Government policy, arising from the intentions of this Act, imposing a responsibility on schools to provide a range of daily opportunities and flexible learning experiences for gifted students to develop their potential and satisfy their learning needs, and schools having Departmental strategy implementation documents in their possession over this period (NSW Department of School Education, 1991a, 1991b). It occurs despite Board of Studies NSW documents (1997, 2000) notifying schools of its support for the research of Silverman (1993), Gross (1993) and others that much of the emotional trauma and negative outcomes of intellectually gifted students arise from their retention in inappropriate educational environments such as mixed ability classes without appropriate challenge. These documents outline special instruction and teaching strategies schools should offer to prevent this school-induced maladjustment of gifted students. It occurs

despite the requirement that the staff member in charge of a school must manage the school in an equitable manner (clause 10(1) Education Teaching Service Regulation 2001) (NSW Parliament, 2001).

With so little policy compliance and such disregard for the intent of its governing legislation, despite the large body of evidence pointing to the risks and long-term consequences of non-compliance, the option of judicial review of school liability deserves consideration. This consideration needs to take into account impedimental precedential arguments employed by courts in their determinations on educational malpractice claims.

## **Judicial Precedential Deterrents**

Many commentators find the judicial uniformity of rejection of educational malpractice claims, whatever the institution, not only surprising but also untenable (Culhane, 1992; Standler, 2000) cite many references by legal academics and practitioners). In particular, Standler (2000) argues that the reasons offered by courts to protect public schools from liability are precisely the reasons courts throughout the U.S. earlier rejected when ending immunity for torts committed by state and local governments. Others raise questions about the arguments presented by courts to refute these claims, but concede there are difficulties establishing the liability of schools separately from other factors involved in teaching and learning; or that the implications of judicial recognition of educational malpractice for teaching methods and for school resources could be too great to countenance; or that remedies are more properly found in legislative processes (Devrome & Spentzaris, 2000; Karnes & Marquardt, 1991; Smith, 1992).

I believe this continued judicial reasoning only serves to perpetuate the status quo in schools averse to self-review; to sanction the non-compliance of existing educational requirements; to uphold attitudes and practices operating against the best interests of children; and, due a preconceived and unprincipled mindset of courts of the invalidity of educational malpractice claims, to disallow the needed impetus of judicial action for legislative review. Given the substantial economic and psychological costs of litigation, the fear of widespread vexatious claims arising from a court's recognition of a tort of educational malpractice may be ill-founded and denies justice and relief for those who are legally deserving of it; the fear of litigation cramping innovative teaching methodology doesn't say much about the vision and resilience of our current crop of teachers – the existence of legal redress and some court-made humanitarian rules should propel teaching into the responsive intellectual inquiry and sound practice one would expect in schools (indeed, tort lawyers believe that malpractice litigation in other areas has improved levels of care (Standler, 2000)) and be welcomed by those already doing so for its effects on those who aren't; and the argument concerning the unwelcome re-direction of scarce school resources needs to recognise that funding levels and school effectiveness and efficiency are not necessarily positively correlated. Furthermore, this latter argument (excuse?) may no longer be offered when courts start dealing with an escalation of medical malpractice claims against public hospitals following the forecast mass movement of doctors into the public health system after the demise of the largest medical insurer in NSW.

On the balance of probabilities, similar arguments might be presented by Australian courts faced with an educational malpractice claim, although there are two noteworthy qualifications. The first is that Australian law of negligence of teachers and schools derives from English common law (Khan & Williams, 1993, p. 155), and it was an English court that, during a recent appeal hearing (*Phelps v Hillingdon London Borough Council*), considered none of the U.S. court

decisions, invariably disallowed on policy grounds, to be of relevance (Stewart, 2001). The public policy restrictions of section 127 of the NSW Education Act 1990, mentioned earlier, could dash this glimmer of hope, however. The second is that a focus on gifted students rather than on those with learning difficulties can provide a clear known cause of action and thus largely removes the perceived difficulty, found in other cases, of attributing normative educational failure to the educational institution which has proved perhaps the greatest impediment to judicial recognition of those previous claims. Culhane (1992, p. 353) remarks on the obtuseness of lumping educational malpractice claims in the same basket for this very reason – it masks important distinctions between the cases and allows their wholesale and unprincipled rejection.

## **Possible Legal Options in NSW**

The principal base for a cause of action appears to be a common law action against school staff for educational malpractice. Other sources of law may be available as coercive principles for strengthening a plaintiff's case. International conventions, relevant statutory and administrative law, equity law, misrepresentation and malpractice in other professions recognised under tort principles of negligence come to mind as worthwhile areas to investigate.

The UN Convention on the Rights of the Child, ratified by Australia in 1990, provides for legislative and administrative recognition that the best interests of the child should guide his education which should be directed to developing the child's fullest potential (Department of Foreign Affairs and Trade, 1995). These international human rights obligations have not been enacted in Australian domestic legislation (although the Commonwealth has the power to do so) and thus there is no enforceable right or duty to observe them (NSW Law Reform Commission, 1998), although it is ordinarily expected that Australian decision-makers would take their provisions into account (Human Rights and Equal Opportunity Commission, 1999; Stewart, 2001, p. 3). It will be interesting to see the political outcome of current calls by UN agencies assessing Australia's detention centres for Australian Government recognition of children's rights under this convention.

While the Anti-Discrimination (NSW) Act 1977 does not include intellectual ability as one of its proscribed grounds of discrimination, section 17(2) refers to the denial of a benefit provided by a school (Australasian Legal Information Institute 1998). Whether this can be extended to denial of a benefit that should be provided by a school is unknown. Rowe (1987, p. 124) states that even if the cause of discrimination is not a ground identified in the legislation, it (in this case, the same teaching for all) still constitutes differential provision of educational services and may give rise to a common law action. Perry (1999, p. 21) goes further, stating that schools can be held vicariously liable for discrimination by teachers against students and monetary damages can be awarded for emotional loss/damage and injury to feelings. Additionally, the Act recognises discrimination on the grounds of intellectual disability and it may be argued that giftedness is both prejudicial and intellectually disabling in the current public school system.

Of interest is a recent case before the US Court of Appeals (*J.D. v Pawlet School District*) in which an academically gifted boy, beset by emotional disabilities arising solely from school failure to address his intellectual needs, claimed redress under the State's Disabilities Education Act and Rehabilitation Act (Center for Children's Advocacy Inc., 2002). The Court's rejection of his claim highlighted the mediocrity of thinking by both legislators and the Court. Regulations under the Disabilities Education Act mandated special education only where the disability adversely affected educational performance to significantly below expected age or grade norms.

This obviously did not apply to the plaintiff, nor would it to any intellectually gifted child, even if performance in some cases had suffered to a significant extent. The Court considered the school district's accommodation of the plaintiff through concurrent counselling and peer training sessions sufficient to deny him redress under the Rehabilitation Act. The fact that the school district made no attempt to meet the intellectual needs of the plaintiff, the cause of his problems, was immaterial. The fact that standard treatment and expectations are less favourable to gifted children because of their characteristics was ignored.

In NSW, however, where it is alleged a school employee's failure to provide an environment to encourage a child's social and emotional development psychologically harms the child through emotional trauma or impairment of cognitive or intellectual development, this is regarded as a form of child abuse and neglect that the school principal is obliged to notify the Ombudsman of (Ford, 2001, p. 7) and that may be recognised under the Children and Young Persons (Care and Protection) Act 1988 (NSW).

Culhane (1992), particularly, and Standler (2000) provide a comprehensive account of the principles in medical malpractice and product liability cases that could be usefully translated to educational malpractice claims. In a somewhat separate issue, the overlap of medical and educational issues in *Snow v State* allowed judgment in favour of the plaintiff on the grounds of medical, rather than educational, negligence (Culhane, 1992, p. 392; Devrome & Spentzaris, 2000, p. 8; Ramsay & Shorten, 1996, p. 293; Riley, 1997, p. 124; Standler 2000).

A further case example of relevance to gifted children is the judgment awarded against the NSW Education Department for student disadvantage caused by inadequate teaching/teaching weaknesses arising from a lack of appropriate management processes and procedures and a non-specialist supervisory teacher who was not familiar with the specialist field (Devrome & Spentzaris, 2000, p. 10). The large majority of gifted children, including many of the relative few attending academically selective schools, are in the hands of teachers untrained in gifted education (Gross, 2001), yet, as noted by the Senate References Committee (2001), teachers cannot handle gifted children without this training. This view is supported by U.S. court decisions in school personnel cases (Karnes & Marquardt, 1995).

## Case Study Example

A case study example is used to develop a common law action for educational malpractice. It involves a highly gifted primary student clinically assessed as a suicide risk solely due to his intellectual, social and emotional misfit in a regular classroom and the school authorities and counsellors failing to make any adjustments for him, despite repeated approaches to them by his parent. None of the staff is trained in gifted education.

Prior to school attendance, the boy in question, now 10 years old and in Year 6, presented as a well-adjusted, enthusiastic and happy child. He topped his class for the first few years, all the while complaining of intellectual boredom, social and emotional isolation, non-understanding staff, the futility of school and subsequently, of life. By the time he was seven, with an assessed mental and emotional age of a high-school student, he hated school, was diagnosed as suffering from a severe anxiety disorder and severe clinical depression caused by intellectual, social and emotional alienation within his school environment and from his peers, and considered by counsellors to be a suicide risk in need of careful monitoring. Even after a specialist report, at the parent's request, was sent to the school from an outside gifted education clinical psychologist, its advice that the boy's anxiety, depression and suicide risk were due to his unhappiness at

school and recommendation that he be grade-accelerated by two years were ignored and it was not discussed with staff or the boy's parent. During related extended absences from school, his anxiety and depression reduced significantly, and by the end of these periods was not evident at all, his interest in previous outside interests returned as did his interest in living. Is the school liable for educational malpractice?

A cause for action for negligence or educational malpractice must establish that a duty of care exists; that this duty has been breached by a failure to take reasonable care; that injury has resulted from the lack of reasonable care; and that the risk of injury was foreseeable in the circumstances and not too remote in connection (Tronc & Sleight, 1989, p. 5). It also needs to be borne in mind that other sources of law may be called upon.

## **Existence of a Duty of Care**

A duty of care exists where the relationship of teacher and student exists but does this duty include educating this boy? The Macquarie dictionary defines 'teaching' as 'imparting knowledge of or skill in; giving instruction in', and 'educating' as 'developing the faculties and powers of by teaching, instruction or schooling'. There is an implied duty to teach (s. 14(3), (4) Education Act 1990 NSW refers to the acquisition of knowledge and skills by children) but whether this teaching educates gifted children is dependent on the relative superiority of the teacher's knowledge and skills and the teacher's willingness to impart such. Importantly, one of the fundamental principles underpinning the Education Act is a duty of the State to ensure that every child receives the highest quality education – and given that education, not necessarily of the highest quality, is primarily, but not totally, the responsibility of parents, it therefore falls to the State not only to provide the remainder, but also to ensure that it is of the highest quality to prepare children as useful citizens to benefit society. This is recognised by another fundamental underpinning principle of the Act – that of the State's responsibility to provide public education. Thus it is reasonably simple to deduce that the State has a duty to develop or improve children, contrary to the belief of Devrome & Spentzaris (2000, p. 11) and the Federal Court in *Introvigne v. Commonwealth* (Ramsay & Shorten, 1996, p. 305; Riley, 1997, p. 134), although in fairness to the latter, and as previously mentioned, the nature of a claim is singularly important to this determination. After all, the imposition of compulsory attendance is hardly fair if an appropriate education is not offered in return. As Schroeder (2001, p. 16) states, the whole purpose of a school is its duty to teach students properly, and, from Justice Kirby, 'intellectual advancement (of a student) is the primary professional duty assumed by teachers and educationalists' (cited in Ramsay & Shorten, 1996, p. 296) and 'the whole object of having the child (compulsorily) at school is to receive tuition at an appropriate level' (cited in Boer, 1987, p. 18). The Victorian Supreme Court in the *Traeger Park* case affirmed that 'attending' school also meant going there to acquire an education (Ramsay & Shorten, 1996, p. 216). The catch is that this duty is contained in Part 2 of the Act which cannot give rise to, or be taken into account in, any civil cause of action. If a court were to employ the argument offered in *Johnson v. Clark* (Michigan, 1987; Culhane, 1992, p. 403) that if the legislative intent of a provision did not provide a private cause of action, there could be no common law duty to evaluate special education (or special ability in this case) provisions or arguments that a duty to teach appropriately should be recognised, this would be not only irrational, but also morally (if not legally) reprehensible. There are, however, unencumbered references to 'education' by schools elsewhere in the Act (s.17(2),19(f)). This is important because so often schools are defacto child-minding centres for gifted children, rather than institutions that develop their intellectual faculties.

One would reasonably expect that guidelines issued by the Board of Studies NSW (2001) for registration of home schooling pursuant to sections 70 to 74 of the Education Act would cling to the principles and objectives of the Act, and thus offer some enlightenment. They do. References to the development of students' skills as an ultimate aim of schools, the need to ensure that activities to develop these skills are ability-appropriate and the provision by schools of courses which aim to develop the potential of students are useful to the case study claim. Thus there is a government expectation that schools will intellectually develop students. Of note too is the fact that NSW syllabus stages are an intermediate step towards current National Statements of Outcomes (Riordan & Weller, 2000, p. 8) which do not fix achievement levels to any chronological stage.

Also useful are the Government's legislative acknowledgment that the standard fare of schools is insufficient to develop gifted children, hence the legislative intention of special provision for this group (s. 6(1)(j)) and the policy documents outlining school-based compensatory strategies for these children. These documents were distributed to schools several years prior to the boy entering school. Legislative intentions for teaching staff to be skilled, dedicated and professional (s. 6(1) of the Act) have not been met at the school in relation to gifted children. No staff member has been trained in gifted education, the principal considers gifted education elitist and unnecessary and staff have consistently refused to believe that lack of intellectual stimulation can result in emotional difficulties, which indicates they either have not read or are unmoved by relevant policy documents. Yet staff see themselves as professionals, especially when resisting parent involvement and expecting parents to defer to their 'expertise'. When staff hold themselves as professional in this regard, Justice Kirby, a member of the Australian High Court, warns that he can see no reason why teachers should not be held accountable for negligence causing intellectual harm (Ramsay & Shorten, 1996, p. 296; Stewart, 2001, p. 2; Sungaila, 1988, p. 171). The accountability issue is of central importance. Why is it that if a child is not 'learning' the minimum curriculum, a 'home-school' teacher can be de-registered but a 'school' teacher cannot? What is the political interference that has kept school teachers for so long immune from performance standards? The professional standards against which a teacher can be held incompetent or negligent are not spelt out in the NSW Teaching Services Act 1980 (Ramsay & Shorten, 1996, p. 92). It particularly behoves primary school staff to be professional, as young children are less able to determine their best interests and, as Standler (2000) points out, whether they are being properly educated. These teachers can also have a powerful influence on children's motivation to learn.

Interestingly, a 1985 report of the NSW Department of Education stated that a teacher's duty of care included continual promotion of the educational development and psychological well-being of children, through the development and implementation of educational programs geared to student needs and which maximise student achievement (Ramsay & Shorten, 1996). It is rather obvious that this duty has not been observed in the case study example. Furthermore, the school counsellors' observations that while all was indeed not well, any and all remedies would have to be supplied by the parent outside school hours as the school itself was not in a position to help a remarkably bright child (this may have been the reason counsellors did not pass relevant information to class teachers) and the counsellors, by their own admissions, were not professionally equipped to deal with such severe emotional difficulties in a child, raises questions about their professional duty both to teachers and the child and their lack of knowledge of their own employer's policy regarding gifted education provisions.

Previous cases have foundered due to non-recognition by courts of a school's general duty to educate and the absence of a workable standard of care (Smith, 1992; Devrome & Spentzaris, 2000, pp. 5-8), although the former restriction did not apply in *Hoffman v. Board of Education of the City of New York* (1978) (Culhane, 1992, p. 391; Devrome & Spentzaris, 2000, p. 6), *E v. Dorset County Council* (Schroeder, 2001, p. 16) and *X (minors) v. Bedfordshire County Council* (1995) (Ramsay & Shorten, 1996, p. 305), and the latter, in *Donohue v. Copiague Union Free School District* (Culhane, 1992, pp. 359 & 387; Smith, 1992). This is because education involves two duties – that of the teacher to teach and that of the student to learn. Thus courts have not held teachers liable for failure of a student to learn, fearing that an actionable duty of care in educators would open the litigation floodgates. Sandler (2000) counter-argues that courts routinely deal with similar conflicting issues in medical malpractice and product liability claims where a poor result due to a plaintiff's failure to follow instructions may be blamed on the doctor or manufacturer. These cases, however, are usually unfettered by the bureaucratic restrictions placed on teacher's operational freedom. Notwithstanding, these education cases, however, have involved students performing significantly below expected educational norms and it would be both surprising and unreasonable if the same general argument were extended by courts to gifted children who cannot be accused of an inability or failure to perform at age-appropriate norms.

The standard of care argument appears to hinge on whether educators are accorded professional status and should offer a professional standard of care as required of other professions. Can we rely upon teachers' educational judgments when those judgments are based on partial evidence only? Without the views of parents and students being welcomed to allow informed judgment, their value is greatly diminished. Although parents and students have limited control over teachers, in the *Donohue* case mentioned above (Ramsay & Shorten, 1996, p. 309; Smith, 1992), the court suggested there was nothing in the law precluding the professional standard of care applying to other professionals from applying to educators. Whether or not teachers are accorded professional status is immaterial to Culhane (1992, p. 388), as long as minimum occupational standards in care, knowledge and ability are met. Khan & Williams (1993, p. 158) report that Australian courts are agreed a high standard of care is expected, requiring positive action by teachers to avoid reasonably foreseeable risks of injury to the student and that anything less, if court action is pursued by an injured pupil, will invariably result in liability. I submit that courts are in a position to rule on standard of care for gifted students. There is a wealth of long-standing research identifying best practice for these students, the consequences of not providing these practices and explicit NSW Government policy and strategies for implementation in schools. In this particular case study claim, however, the central issue for the court to address is relevant legislative intent and non-compliance with departmental policy.

A High Court statement in *Bryan v. Maloney* (Ramsay & Shorten, 1996, p. 306), offers little doubt that the duty of care in question is owed to this boy. There is a relationship of proximity between the parties with respect to both the relevant act or omission and the relevant kind of damage.

## **Breach of Duty through Failure to take Reasonable Care**

The school has ignored the wealth of research pointing to the adverse consequences of its attitudes and practices; ignored the direct link between its practices and the child's outcome; ignored the intent and objectives of governing legislation; ignored relevant government policy; ignored repeated feedback from and requests by the parent and ignored outside specialist advice and recommendations relating to the child's education and requests for meetings relating to that

advice. The principal has not managed the school in an equitable manner nor ensured training of staff in gifted education; successive school counsellors have failed to pass relevant information to the child's class teachers; the child has been improperly placed in a regular classroom and taught as an 'average' student, that is, remedially both in content and methodology; and the school has failed to use known and available educational alternatives. On no occasion has the principal or teaching staff initiated any adjustments or made approaches to the parent. Some teaching staff advise they haven't the time to offer extension work. The child's right of reply is actively discouraged by teachers, and thus for a child to indicate that the teacher's exercises are doing little to serve his educational needs would not only be inordinately intimidating for the child but also likely would invite school disciplinary action. Teachers are also well aware that children do not wish to appear different from the crowd and are therefore likely to internalise their needs and preferences, often with adverse consequences, and it thus behoves teachers to be proactive in this regard.

Under section 20 of the Education Act, schools can receive assistance for gifted children in the form of funding, staff, staff training and courses of study. The school executive has not sought this assistance. Due to parent pressure, the school introduced some extension activities half-way through the child's primary education but required parents to fund these activities. As a consequence of the school's attitude and limits of parents' purses, these extension activities occur in a haphazard manner, with 45 minutes per week being offered at best – educational fraud, according to Gallagher (2000, p. 10). The daily opportunities for gifted children, required by the school's employer in recognition of the fact that gifted children are gifted all the time and not just during their 45 minute session, have never been offered.

In *Centennial School District v. Department of Education*, 1988, heralded as a seminal precedential case in the United States, a landmark decision in gifted education and binding on Pennsylvanian school districts (the jurisdiction in which the decision was made), the court held that a gifted 'pull-out' program for several hours a week did not serve as appropriate education for gifted students, in that it did not adequately address their needs, and that a school was required to meet the needs of gifted students through individual education plans and individualised instruction (Karnes & Marquardt (1991, pp. 60-62). It is of note that individual education plans are legally mandatory throughout the U.S. for all handicapped school children (Culhane, 1992, p. 403).

Failure of a school to follow written policy requirements promulgated by the Education Department and to offer work inappropriate to a child's achievement levels and needs is a failure to discharge its duty of care. For a school authority to ignore the wealth of research and the warnings implicit in it is to fail to discharge its duty of care (Ford, 2001, p. 13). For a school to do nothing in response to parental reporting of school events detrimentally affecting a child's mental and emotional well-being, is inviting it being successfully sued for negligence, as was the case in *Davis v. Monroe County Board of Education (U.S.)* (Ford, 2001, p. 13). The repeated non-disclosure of relevant facts by school counsellors to class teachers to allow their fulfilment of a duty of care to the child (whether or not it would have been forthcoming) indicates professional negligence and a failure to exercise the expected level of care (of relevance is *X (Minors) v. Bedfordshire County Council (1995)* (Devrome & Spentzaris, 2000, p. 9; Ramsay & Shorten, 1996, p. 300)), as does the repeated failure of the principal and class teachers to act on reasonable advice from the parent throughout the past five years, despite the Education Act giving parents a greater role in the education of their children at school. The known disparagement of the principal toward the 'elitism' of special educational provision for gifted students is both irrational and below the minimum standard of care expected of professional educators, and especially so when

those views significantly determine the extent (if any) of gifted student provisions within the school. The Senate References Committee (2001, p. 70) comments on the unhealthy power of unsympathetic principals in relation to gifted education support.

### **Injury Resulting from Lack of Reasonable Care**

Courts have dismissed claims on the basis of a failure to disclose a known cause of action. As previously noted, this difficulty should not often arise for gifted students. In this particular case, problems were not evident prior to attending school, reduced significantly when the boy was periodically removed from the school environment and the child's parent made every effort to compensate for the school's shortcomings and repeatedly notified the school of the consequences of its actions. Out-of-zone schools had been investigated by the parent and were, by their own admission, no more supportive of gifted students. This, and the compulsory attendance laws, forced an unwilling continuing reliance on the school in question.

To maintain the causal chain between school malpractice and injury to the child in the absence of a justifiable reliance on schools to make optimal educational judgments, Culhane (1992, p. 389) states that parents must have sufficient knowledge upon which to act and schools must be responsive to parents concerns. Judicial recourse should be permitted upon strong showing that parental efforts to work toward a solution were consistently frustrated by the school's inaction.

Had the school adjusted its actions early in the boy's schooling, when first notified of problems by his parent, had the school accepted and acted on advice from its own Department, its own government curriculum advisors, outside experts and the child's parent, and had it demonstrated reasonable care and skill it would have in all probability prevented the boy's severe anxiety, severe clinical depression, prolonged suicide risk and deep-seated distaste of schools and the teaching offered therein. Had the school not offered a situation of remedial learning to the boy throughout his primary school years, he may have developed the powers of sustained effort and steady work habits – skills he will require in high school and throughout life.

The school failed to take reasonable care to alleviate foreseeable difficulties arising from its non-provision for gifted students, by choosing to ignore all pertinent evidence, advice and policies informing it of the consequences of non-provision. Where the failure of a school to follow written policy requirements issued by its employing authority causes significant harm to a student, as it has in this case, this, in itself, constitutes a valid tort claim (Standler, 2000).

Smith (1992) warns that failure to educate may not be regarded as an 'injury' within the meaning of tort law, although this again is in the context of students performing below expected norms, and thus should not be considered applicable beyond this context. Boer (1987, p. 18) reports that it is immaterial whether the injury is physical or intellectual and points to other areas of tort law where recovery is permitted for non-physical injuries. I believe the legislative intent for gifted student education and the promulgation of related policy measures to schools is to provide for equal education opportunity for these children which is much more than a 'benefit' or 'expectancy interest' due to them and, as such, entitles them to legal redress in the event of injury resulting from non-compliance by schools. This belief is confirmed by Standler (2000). Additionally, the severe emotional distress arising from the school's non-compliance is worthy of legal damages (Ford, 2001, pp. 14-15). As pointed out by Justice Kirby, the harm resulting from indifferent, ill-motivated, incompetent or lazy teaching is perhaps a more relevant and usually more profound professional injury (than physical injury) (cited in Ramsay & Shorten,

1996, p. 296). I believe that whether the injury is physical or intellectual should not give rise to discriminatory sympathies and decisions from the judiciary.

Ford (2001, pp. 14-15) advises that although traditional common law rule recognises psychological damage resulting from sudden impact, such as shock, but not gradual deterioration in mental health, in *Mount Isa Mines Ltd v. Pusey*, the court acknowledged that severe emotional distress can be the starting point of a lasting disorder and, for that, if it is the result of a tortious act, damages may be had. Courts, however, must acknowledge that a tortious act may be ongoing, that schools' non-compliance of policy may be ongoing, and thus result in a gradual and prolonged deterioration in the plaintiff. It is therefore reassuring to note the successful claims, cited by Stewart (2001, p. 6) and Poulton (1999, p. 8), for psychological damage and adverse school performance arising from prolonged bullying in schools.

If the Sydney local council of Waverley is not legally immune (surprisingly, I admit) from the unsafety of the sea at Bondi, as a recent case demonstrated, why should a State school be immune from the demonstrated psychological unsafety for some students of compulsory attendance at school? There may be a number of state institutions that a person enters in good health and exits in bad health, but schools are not generally expected to fall into this category.

Additionally, if the accidental death of a student due to the school environment can make the school authority liable for prosecution for criminal negligence, why should the school be legally immune from causing the symptoms that precede a suicide? Under s.286, Chapter 27 of the Criminal Code, it is the duty of persons who have care of a child to take precautions to avoid danger to the child's life or health (Davis, 1999, pp. 11, 13).

## **Risk of Injury Foreseeable and Causally Connected**

The risk of injury should have been reasonably foreseeable by the school and the school's conduct is closely and significantly connected with the injury. It is foreseeable and likely that a gifted student will suffer intellectual and emotional harm in a regular classroom with no adjustments, given that 80% of gifted students do (refer page 2).

What is sought is legal redress against the school's employer for a lack of appropriate education, and for consequential emotional damage including a deep-seated resistance to traditional schooling which will have negative effects on the child's attitude and approach throughout his high school years. Where is the useful citizen here that the State claims to have produced? The redress sought is not for the individual – it is for public recognition of the current suffering of many gifted students, for statutory mandate to alleviate what schools and governments have failed to and for procedural safeguards to ensure ongoing appropriate education is offered. Although compensation for loss of future earnings is not being sought, it is worth mentioning because of courts' reluctance to assign a monetary value to loss of learning, due to the difficulty of its measurement and to the speculative nature of the relationship of education levels to particular occupations, whereas this reluctance by courts does not occur in cases of physical injury even though it would appear that similar difficulties may arise. Nor does it prevent court action on environmental issues, where damages are often difficult to assess.

## **Conclusion**

While there may be good reason to limit the scope of liability for negligence to protect educators and society, there is not good reason to allow continuation of the discriminatory judicial and political recognition of claims for student physical injury but not intellectual injury, or the so

often ignored contributory negligence on the part of the student (and family in absentia) in physical injury cases, while holding it as a major impediment to the success of any intellectual injury case. As previously noted, however, this impediment should not prevent successful claims in relation to gifted children. Nor is there good reason to not recognise gradual mental and emotional deterioration arising from school attendance, when that deterioration is caused by ongoing school processes and practices rather than by a sudden blow of unexpected proportion. I submit that arguments based on policy considerations are incompatible with fairness and natural justice and are singularly applied in this area without valid foundation.

An educational malpractice claim has been developed for recognition of the direct and vicarious liability for intellectual and emotional injury to a gifted student by a school through its failure to provide opportunities to promote equity for children with special abilities in accordance with the objectives of the Education Act and stated government policy. The aim of the claim is not to denigrate specific individuals, who happen to hold popular, but misguided, beliefs, as some of the basic ingredients reflect systemic failings beyond the control of individual teachers. Nor is it to seek individual redress. Rather, it is to highlight, through litigation, the effects of these systemic deficiencies on individual students, to increase awareness of and sensitivity to their unmet needs and so bring much needed change to better reflect their best interests. Similar claims would be able to be made against many schools, and all it takes now is for someone to present such a claim, either individually or as a class action. That someone could be me. This is the story of my son.

## References

- Australasian Legal Information Institute (1998). *Anti-Discrimination Act 1977, NSW Consolidated Acts*. Updated 11 March 2002, accessed 12 March 2002, from [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/aa1977204](http://www.austlii.edu.au/au/legis/nsw/consol_act/aa1977204)
- Board of Studies NSW (1997). *Guidelines for Accelerated Progression*. Sydney: Board of Studies NSW
- Board of Studies NSW (2000). *Guidelines for Accelerated Progression*. Sydney: Board of Studies NSW.
- Board of Studies NSW (2001). *Guidelines for Registration for Home Schooling*. Sydney: Office of the Board of Studies.
- Boer, B. (1987). Legal rights and obligations of teachers. In R. Chisholm (Ed.), *Teachers, Schools and the Law*, (pp. 10-31). Kensington, NSW: NSW University Press.
- Center for Children's Advocacy, Inc. (2002). *Case: J.D. v Pawlet School District*. Accessed 20 May 2002, from [http://www.kidscounsel.org/kcdb/cases\\_detail/977509161.html](http://www.kidscounsel.org/kcdb/cases_detail/977509161.html)
- Chisholm, R. (Ed.) (1987). *Teachers, Schools and the Law*. Kensington, NSW: NSW University Press.
- Culhane, J.G. (1992). Reinvigorating educational malpractice claims: A representational focus. *Washington Law Review*, 67, 349-414.
- Davis, R. (1999). Schools' liability for child death. *School Law 1999 Seminar Papers* (pp. 1-14). Sydney: LAMS Publications.

- Department of Foreign Affairs and Trade (1995). Convention on the Rights of the Child. *Australian Treaty Series 1991, No. 4*. Canberra: AGPS.
- Devrome, J., & Spentzaris, C. (2000). The duty to provide an education – educational malpractice. *School Law 2000 Seminar Papers* (pp. 1-11). Sydney: LAAMS Publications.
- Edwards, J., Knott, A., & Riley, D. (Eds.) (1997). *Australian Schools and the Law*. Sydney: LBC Information Services.
- Elkind, D. (1988). Our President: Acceleration. *Young Children*, 43(4), May, accessed 8 May 2001, from <http://www.hoagiesgifted.org/elkind.htm>
- Feldhusen, J.F., & Moon, S.M. (1992). Grouping gifted students: Issues and concerns. *Gifted Child Quarterly*, 36(2): 63-67.
- Ford, D. (2001). The law: A help or a hindrance for the bullied student? *School Law 2001 National Conference Papers* (pp. 1-23). Sydney: LAAMS Publications.
- Gagne, F. (2000). How many persons are gifted or talented? *Understanding our Gifted*, 12(2), 10-13.
- Gallagher, J.J. (2000). Unthinkable thoughts: Education of gifted students. *Gifted Child Quarterly*, 44(1), 5-12.
- Gross, M.U.M. (1993). *Exceptionally Gifted Children*. New York: Routledge.
- Gross, M.U.M. (1994, October). *Planning defensible programs for gifted and talented students: Rejecting the myths, accepting the realities*. Paper presented to the Gifted Education Seminar, University of New South Wales, Sydney.
- Gross, M.U.M. (1997). To group or not to group: Is that the question? *Gifted*, April, 25-29.
- Gross, M.U.M. (2001). GERRIC submission to Senate Employment, Workplace Relations, Small Business and Education References Committee inquiry into *The Education of Gifted Children*, October 2001. Canberra: Commonwealth of Australia.
- Gross, M.U.M., Sleep, B., & Pretorius, M. (1999). *Gifted Students in Secondary Schools: Differentiating the Curriculum*. Sydney: GERRIC, University of New South Wales.
- Human Rights and Equal Opportunity Commission (1999). *Human rights brief No. 1*. Updated 2 Dec. 2001, accessed 7 March 2002, from [http://www.hreoc.gov.au/human\\_rights/briefs/brief\\_1.html](http://www.hreoc.gov.au/human_rights/briefs/brief_1.html)
- Karnes, F., & Marquardt, R. (1991). *Gifted Children and the Law: Mediation, Due Process, and Court Cases*. Dayton: Ohio Psychology Press.
- Karnes, F., & Marquardt, R. (1995). Gifted education and the Courts: Teacher certification and employment decisions. *Roeper Review*, 17(4), May/June, 229-231.
- Khan, A., & Williams, P. (1993). The liability in negligence of teachers and schools in Australia. *Education and the Law*, 5(3), 155-163.

- NSW Department of School Education (1991a). *Policy for the Education of Gifted and Talented Students*. Sydney: NSW Department of Education and Training.
- NSW Department of School Education (1991b). *Implementation Strategies for the Education of Gifted and Talented Students*. Sydney: NSW Department of Education and Training.
- NSW Law Reform Commission (1998). The wider issues: Impact of the Constitution, international human rights obligations on discrimination law. *Law Reform Commission Reports: 2*, updated 10 August 1998, accessed 12 March 2002, from <http://www.agd.nsw.gov.au/lrc.nsf/pages>
- NSW Parliament (2000). *Education Act 1990 No.8*, Reprint No. 4. Sydney: NSW Government Information Service.
- NSW Parliament (2001). *Education Teaching Service Regulation 2001 No. 668*, Gazette No. 132, 31 August. Sydney: NSW Government Information Service.
- Perry, E. (1999). Discrimination – bias in education: A cause of action for education malpractice? *School Law 1999 Seminar Papers* (pp. 1-24). Sydney: LAAMS Publications.
- Phelps v Hillingdon London Borough Council [2000] 3 WLR 776.
- Poulton, D. (1999). New torts. *School Law 1999 Seminar Papers* (pp. 1-17). Sydney: LAAMS Publications.
- Ramsay, I., & Shorten, A. (1996). *Education and the Law*. Sydney: Butterworths.
- Reis, S.M., Westberg, K.L., Kulikovich, J., Caillard, F., Hebert, T.P., Purcell, J.H., Rogers, J., Smist, J., & Plucker, J.A. (1992). *An Analysis of the Impact of Curriculum Compacting on Classroom Practices: Technical Report*. Storrs: The National Research Center on the Gifted and Talented.
- Reis, S.M., & Purcell, J.H. (1993). An analysis of content elimination and strategies used by elementary classroom teachers in the curriculum compacting process. *Journal for the Education of the Gifted*, 16(2), 147-160.
- Reis, S.M., Westberg, K.L., Kulikowich, J.M., & Purcell, J.H. (1998). Curriculum compacting and achievement test scores: What does the research say? *Gifted Child Quarterly*, 42(2).
- Riley, D. (1997). Educational malpractice. In J. Edwards, A. Knott & D. Riley (Eds.), *Australian Schools and the Law* (pp. 121-135). Sydney: LBC Information Services.
- Riordan, G., & Weller, S. (2000, December). The reformation of education in NSW: The 1990 Education Reform Act. Paper presented to the AARE Conference, Sydney.
- Rogers, K.B. (1991). Research synthesis on gifted provisions. Accessed 10 March 2001, from <http://www.nswagtc.org.au/info/articles/RogersResearchSynthesis.htm>

- Rowe, G. (1987). Different children: Legal responses to discrimination in schools. In R. Chisholm (Ed.), *Teachers, Schools and the Law* (pp. 117-148). Kensington, NSW: NSW University Press.
- Schroeder, R. (2001). Legal liability of schools. *School Law 2001 National Conference Papers* (pp. 1-19). Sydney: LAAMS Publications.
- Senate Select Committee on the Education of Gifted and Talented Children (1988, March). *The Report of the Senate Select Committee on the Education of Gifted and Talented Children*. Canberra: Commonwealth Government Publishing Service.
- Senate Employment, Workplace Relations, Small Business and Education References Committee (2001), *The Education of Gifted Children*. Canberra: Commonwealth of Australia.
- Silverman, L.K. (1993). *Counselling the Gifted and Talented*. Denver: Love.
- Smith, R. (1992). *Educational Malpractice: Given the National Goals for Education, are Courts Prepared to Recognize this Cause of Action?* Accessed 20 May 2002, from <http://www.law2.byu.edu/jel/sp1992/html/rsmith.htm>
- Standler, R.B. (2000). *Educational Malpractice in USA*. Accessed 20 May 2002, from <http://www.rbs2.com/edumal.htm>
- Stewart, D. (2001). Overview of legal issues for school administrators. *School Law 2001 National Conference Papers* (pp. 1-8). Sydney: LAAMS Publications.
- Sungaila, H. (1988). *Litigation in Education*. Sydney: Gavemer Publishing.
- Tronc, K., & Sleight, D. (1989). *Australian Teachers and the Law*. Sydney: Butterworths.

