

Educators Who Drive With No Hands: The Application of Analytical Concepts of Corporate Law in Certain Cases of Educational Malpractice

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PROLOGUE

The national debate concerning the inadequacies of public schools in the United States and ways to alleviate some of the problems that plague them continues to rage.¹ The performance of children in the United States on standardized tests is dangerously poor,² and the rate of

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1. See Lewis D. Solomon, *The Role of For-Profit Corporations in Revitalizing Public Education: A Legal and Policy Analysis*, 24 U. TOL. L. REV. 883 (1993). "Public school reform has been a 'catch phrase' for a decade. . . . Numerous reports and analyses conducted during the past decade all point to one sorry conclusion: our schools are not doing their job." *Id.* at 886.

2. See Michael Briggs, *Report Finds No Letup in Big-City School Problems*, CHI. SUN-TIMES, Sept. 27, 1994, at 22. "In recent years, American thirteen-year olds have scored thirteenth out of the fifteen industrialized nations on international tests in the

illiteracy dangerously high.³ An alarmingly large number of students do not finish high school.⁴ Education is often compromised because of crowded classrooms⁵ and shortages in school personnel⁶ and textbooks.⁷ Part of the debate about the problems in public education involves the search for someone or something to blame. While societal problems contribute to the failure of some public schools,⁸ the harm caused by inadequate teachers must not be ignored. Some participants in the debate recognize that the improvement of public education depends on improving the quality of teaching itself.⁹

Most of the participants in the discourse about education recognize the importance of an adequate education. In addition to the harm suffered by a poorly educated individual, it is costly and dangerous for society to allow large numbers of its citizens to remain uneducated.¹⁰ For example, most prison inmates are high school dropouts, and the expense of their incarceration drains societal resources.¹¹ Moreover,

areas of math and science.” Solomon, *supra* note 1, at 886.

3. “Thirteen percent of America’s seventeen-year olds are illiterate” Solomon, *supra* note 1, at 887.

4. “One in five students does not finish high school.” *Id.* at 887-88. In Chicago, there is a 45 percent dropout rate in the public high schools. Briggs, *supra* note 2.

5. See Richard Cowen, *Japanese Educators Visit Paterson, Tour Schools Seeking Cures for Crowding*, THE RECORD, Sept. 24, 1994, at A04.

6. *Adults Call Crime Top School Woe Despite Dip in Rate, Poll Says*, COM. APPEAL (Memphis), Aug. 26, 1994, at 4A.

7. See, e.g., Joan Little, *Schools Rewrite the Book on Texts; City District Touts Distribution Plan*, ST. LOUIS POST-DISPATCH, Aug. 19, 1994, at 12A.

8. Substance abuse, gang membership, teenage pregnancy, and low-income and single-parent households are some of the issues facing public schools and their students. See Romel Hernandez, *Should Schools Take on Role of Parents? 7 Denver Facilities Take Mom and Dad Along with the Kids in Expensive Education Experiment*, ROCKY MTN. NEWS, Sept. 25, 1994, at 24A (describing “family resource schools” that confront social problems by offering day care and classes in parenting and family nutrition for students and their parents). Violence, teenage suicide, and homelessness are additional social problems the 1994 National Teacher of the Year says cannot be resolved by educators alone; she believes only community involvement can mitigate such problems. See Jon Glass, *“I’m Not Letting the Community Off the Hook,” Top Teacher Says; Educators are Asked to Solve Problems That are Rooted in All of Society, She Says*, VIRGINIAN-PILOT (Norfolk), Sept. 22, 1994, at B3.

9. *Class Action*, BOSTON GLOBE, Sept. 6, 1994, at 10.

10. *But see* CHARLES MURRAY & RICHARD HERRNSTEIN, *THE BELL CURVE* (1994). Murray and Herrnstein maintain that improvement in education may not provide corresponding benefits for African-Americans, for example, because under their view, African-Americans are genetically less intelligent. The authors’ position is particularly dangerous because they advocate that social services be distributed according to whether such services will actually improve the lives of the recipients. Under this view, there may be no need to improve the education of African-American students.

11. The 1994 National Teacher of the Year has suggested that 85% of those incarcerated have dropped out of high school, and that in San Diego, it would cost \$30,000 to imprison a child but just \$4,900 to educate her. Glass, *supra* note 8.

uneducated individuals will find it difficult to exercise the basic rights guaranteed United States citizens under the Constitution. For example, in order for individuals to most effectively exercise their First Amendment right to speak freely, they must have something to say. Citizens are more likely to have something to say, and to recognize the extent of their constitutionally protected right to say it, if they have been educated, or are at the very least, literate.

Members of the business community have participated in the debate on education, recognizing that "[t]oday's students are tomorrow's work force."¹² Some businesses have participated in school reform efforts by forming partnerships with schools to ensure student exposure to various career opportunities.¹³ Also, private, for-profit corporations have entered the education business by managing schools or owning and operating them, competing with traditionally-managed public and private schools.¹⁴ Large sums have already been spent for education, but because of corruption¹⁵ and inefficient management, business executives are now realizing that pouring more money into failing schools is insufficient.¹⁶ A primary goal for the companies who manage public schools is to establish accountability for educators:

Weak public-school teachers are transferred from building to building, passing problems from one principal to another. Tenure is offered without thorough

12. Don VanderVeen, *Business Ideas Help Grand Rapids Summit*, GRAND RAPIDS BUS. J., Sept. 6, 1994, § A, at 3.

13. *Id.*; see also Glass, *supra* note 8.

14. Education Alternatives, Inc. (EAI) has assumed management responsibilities for schools in Eagan, Minnesota; Paradise Valley, Arizona; Dade County, Florida; and Baltimore, Maryland. Solomon, *supra* note 1, at 894-903. The company may soon manage the entire public school system in Hartford, Connecticut, where the Board of Education is looking to EAI to help resolve problems such as violence, drug addiction, overcrowded classrooms, poorly maintained school buildings, and overworked teachers. *Alternatives Considered for Faltering Public Schools* (CNN television broadcast, Oct. 13, 1994). In Newark, New Jersey, the state is proposing to manage the schools to help resolve problems like laziness, poor administration, and corruption. *State School Takeover Proposed in Newark, New Jersey* (CNN television broadcast, Aug. 3, 1994).

15. See Mike Kelly, *Schooling in Politics*, THE RECORD, Oct. 13, 1994, at C01.

16. Fortune 500 business executives met at the annual Education Meeting of the Conference Board in 1993 to discuss education reform. The former U.S. Secretary of Education, Terrel H. Bell, spoke at the meeting, arguing that "[w]e have spent a great deal of money in school reform - not very effectively. We have a major personnel-management problem in the public schools that needs to be addressed." William L. Bainbridge & William R. Mason, Jr., *Teachers Now Lack Motivation To Excel*, COLUMBUS DISPATCH, Sept. 8, 1994, at 7A.

review. . . . Concepts such as marketplace pay for teachers in areas of shortage, peer review, a revamped work year, recognition systems and site-based management need to be revisited by educators and leaders in government and business.¹⁷

Weak teachers are a problem, but this Article is concerned with the more serious misconduct of some educators and the fact that these teachers are not held accountable. One critical step toward greater accountability for educators would be the imposition of civil liability for educational malpractice in cases where teachers and their supervisors allow a student to remain in an incorrect and harmful placement. In such cases, liability should be imposed if the educator's actions constitute gross negligence.

I. INTRODUCTION

Although many of America's children are poorly educated,¹⁸ there is no legal recourse for recipients of a bad education.¹⁹ This is true even when children suffer severe mental and emotional harm as a result of an educator's grossly negligent evaluation and placement. Even though this harm may be far graver than the harm caused by an inadequate education, students are denied the opportunity to bring an action against grossly negligent educators who misclassify them. This Article suggests that in these cases the judiciary has avoided meaningful analysis by labelling the plaintiff's cause of action as one for educational malpractice and refusing to then recognize such a cause of action.

Part II of this Article sets out the two most common types of educational malpractice and suggests the educational malpractice label is fatal for the plaintiff because the judiciary insists that, for policy reasons, it will not recognize a duty owed from educators to their

17. *Id.*

18. Across the United States, urban public schools have failed to provide a good education to large numbers of students, especially the poor and racial minorities. Gershon M. Ratner, *A New Legal Duty For Urban Public Schools: Effective Education In Basic Skills*, 63 TEX. L. REV. 777, 779 (1985). In some inner city schools, about 70-80% of students drop out before completing high school. Kristin Helmore, *Inadequate Education Is Still Part of the Poverty Problem*, CHRISTIAN SCI. MONITOR, Nov. 20, 1986, at 29. One extremely troubled high school in Los Angeles reported that only five percent of its senior class were reading at grade level. *Id.*

19. See, e.g., *D.S.W. v. Fairbanks N. Star Borough Sch. Dist.*, 628 P.2d 554 (Alaska 1981); *Doe v. Board of Educ.*, 295 Md. 67, 453 A.2d 814 (1982); *Hunter v. Board of Educ.*, 292 Md. 481, 439 A.2d 582 (1982); *Torres v. Little Flower Children's Servs.*, 64 N.Y.2d 119, 474 N.E.2d 223, 485 N.Y.S.2d 15 (1984), *cert. denied*, 474 U.S. 864 (1985); *DeRosa v. City of New York*, 132 A.D.2d 592, 517 N.Y.S.2d 754 (1987).

students. With only one exception,²⁰ plaintiffs in educational malpractice actions have been unsuccessful. Educators are not held accountable for even their most negligent behavior.

This Article is about the lack of accountability of educators and the various factors that encourage the judiciary to either intervene in decision-making processes or to defer to decision-makers, thereby disallowing a cause of action against the educators. In what types of decisions does the judiciary generally intervene? To answer this question, Part III of this Article examines judicial intervention in the decisions of corporate directors. In the corporate context, the judiciary intervenes in certain decisions by recognizing a duty of care owed from corporate directors; it refuses to intervene in other decisions by granting immunity from liability. This Article concludes that the nature of decision-making by corporate management is comparable to decision-making engaged in by educators in the educational malpractice context. In both contexts, the judiciary hesitates to intervene because it does not want to infringe upon the policy-making domain of corporate directors and educators.

This Article explores the applicability in the school setting of certain principles borrowed from corporate law. It examines the concepts underlying the business judgment rule to determine the types of decisions which the judiciary generally will examine. As in the corporate context, courts seek to avoid frivolous lawsuits in the education setting, and Part III looks to shareholder derivative actions for rules that help to deter frivolous litigation. This Article then explains that judicial unwillingness to recognize a duty owed from educators to schoolchildren may be overcome by applying an analogue of the business judgment rule and other corporate law principles to help alleviate some of the judiciary's concerns in this regard.

Judges have refused to recognize a duty owed from educators to their students, and they enumerate various policy and administrative reasons in an attempt to justify this refusal. In Part IV, this Article explores these policy concerns and concludes that such concerns do not justify the

20. See *B.M. v. State*, 200 Mont. 58, 649 P.2d 425 (1982). The student in *B.M.* was misclassified as retarded due to school district's failure to follow statutory and regulatory policies governing the placement of students in the special education program. This plaintiff is the only person in the United States thus far to have successfully brought an educational malpractice suit.

failure of the judiciary to recognize a duty in instances of educational malpractice. In fact, instead of explaining judicial refusal to recognize a duty owed from educators to their students, these policy considerations, when properly analyzed, require the imposition of a duty.

This Article concludes that recognition of a duty owed from educators to students will serve two important tort law goals. First, plaintiffs may be made whole through counselling or compensation. Second, potential liability will serve to deter the type of behavior that causes such mental and emotional harm. An analysis similar to that which takes place under certain formulations of the business judgment rule will allow for the protection of discretionary experimentation with various pedagogical approaches while holding educators accountable when they are grossly negligent.

II. TWO TYPES OF EDUCATIONAL MALPRACTICE: THE CASES THAT SHOULD BE ACTIONABLE

There are two prototypical "educational malpractice" cases: actions for "misclassification" and actions for the "failure to educate." *Hoffman v. Board of Education*²¹ is a "misclassification" case in which the plaintiff, a child of normal intelligence, spent eleven years of school in classes for the mentally retarded. Daniel Hoffman, shortly after entering the New York City public school system, was given an intelligence quotient (I.Q.) test in which he was required to provide oral responses in spite of his known speech defect. Daniel received a score of seventy-four on the test. Children who scored below seventy-five were placed in classes for the mentally retarded. One year before taking this test, the plaintiff received a score of ninety on a different type of I.Q. test where his speech defect was not an impediment to a score that more accurately reflected his ability. The school psychologist who administered the test on which Daniel received a score of seventy-four recommended that he be tested again in two years. The psychologist also recommended speech therapy. Although achievement tests were given twice a year and Daniel showed indications of strong reading potential, he was not retested.²²

21. 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979).

22. Laura F. Rothstein, *Accountability For Professional Misconduct In Providing Education to Handicapped Children*, 14 J.L. & EDUC. 349, 360 (1985). Rothstein writes that this type of misclassification case "is increasingly likely to occur." *Id.* at 361.

For other misclassification cases, see *D.S.W. v. Fairbanks N. Star Borough Sch. Dist.*, 628 P.2d 554 (Alaska 1981); *Smith v. Alameda County Social Servs. Agency*, 90 Cal. App. 3d 929, 153 Cal. Rptr. 712 (1979); *Rich v. Kentucky Country Day, Inc.*, 793 S.W.2d 832 (Ky. Ct. App. 1990); *B.M. v. State*, 200 Mont. 58, 649 P.2d 425 (1982).

*Peter W. v. San Francisco Unified School District*²³ is a "failure to educate" case. Peter W., the eighteen-year-old plaintiff, graduated from twelfth grade with the reading ability of a fifth grader. As in most "failure to educate" cases, plaintiff alleged that educators provided inadequate instruction and supervision, thereby precluding him from attaining basic academic skills.²⁴

The courts in both *Peter W.* and *Hoffman* held that because of public policy considerations, the defendants²⁵ did not owe Daniel Hoffman or Peter W. a duty of care. One possible explanation for judicial refusal to impose a duty on educators is that judges fail to undertake the type of thorough examination of defendants' conduct necessary in educational malpractice cases. They fail to note the important distinctions in the nature of defendants' conduct in these two types of educational malpractice claims²⁶ and, more importantly, they fail to see similarities between the conduct of defendants in the educational malpractice setting and the conduct of defendants in other contexts in which a duty is imposed.

In the "failure to educate" cases, the educators have been inattentive. For the most part, these are cases of nonfeasance consisting of the failure to provide corrective assistance to a student burdened with obvious impediments to learning.²⁷ The claim is that the educators' non-

23. 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).

24. *Id.* at 815, 131 Cal. Rptr. at 855-56; *see also* Donohue v. Copiague Union Free Sch. Dist., 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.W.2d 375 (1979).

25. In *Peter W.*, the plaintiff brought his action against the San Francisco Unified School District, the school superintendent, the school district's governing board, and the individual board members. *Peter W.*, 60 Cal. App. 3d at 815, 131 Cal. Rptr. at 855-56.

26. The distinction between "failure to educate" and misclassification cases is critical when examining the educational malpractice defendant's conduct, yet the judiciary fails to distinguish the two types of malpractice. *See, e.g.*, *D.S.W. v. Fairbanks N. Star Borough Sch. Dist.*, 628 P.2d 554 (Alaska 1981); *Doe v. Board of Educ.*, 295 Md. 67, 439 A.2d 582 (1982); *Torres v. Little Flower Children's Servs.*, 64 N.Y.2d 119, 474 N.E.2d 223 (1984), *cert. denied*, 474 U.S. 864 (1985); *DeRosa v. City of New York*, 132 A.D.2d 592, 517 N.Y.S.2d 754 (1987).

27. *E.g.*, *Peter W. v. San Francisco Unified Sch. Dist.*, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976). It must be noted that in the "failure to educate" cases, the harm inflicted could be described as misclassification. In other words, plaintiffs could claim they remained in classes for students of average ability even though they needed remedial assistance. The lack of remedial help is grievous, but it should not be considered a misclassification case. Defining misclassification in this broad manner could cause the courts to be flooded with claims.

feasance causes an educable student to complete her high school education barely literate.²⁸

Even though the educators' nonfeasance in the "failure to educate" cases causes serious harm, more egregious conduct may be required before the judiciary will overcome its reluctance to involve itself in the seemingly insurmountable problems that plague our schools. If the judiciary does in fact require flagrantly harmful misbehavior rather than mere inattention before intervening,²⁹ the misclassification cases provide a context in which such egregious behavior is present. The misclassification cases are instances of misfeasance, where an educator's affirmative act causes severe harm to a student. The educator's conduct is more conspicuously egregious because it involves more than mere inattentiveness. The misclassification defendants refuse to rectify the severely harmful situations in which they have placed their students. The defendants allow plaintiffs to remain in the harmful placement, ignoring apparent indications that a grievous error has been committed.

Defendants' behavior in misclassification cases can be divided into two phases. The first phase consists of the educators' negligent evaluation, and the misclassification itself. Even though this initial decision is wrong, and perhaps negligently made, this decision alone should not be actionable. Especially egregious behavior should be required in this context because of judicial reluctance to intervene. The conduct in the misclassification cases should become actionable only after the defendant receives notice of the negligent placement and fails to correct the error. This is the second phase of conduct in the typical misclassification case: the failure to remove the student from a severely

28. If a "failure to educate" claim were to be recognized, the student should bear the burden of establishing that she is educable. Educators should not be held responsible when children are unable to learn because of psychological, emotional, or neurological problems. A plaintiff who alleges that educator negligence substantially contributed to his illiteracy should be able to show that literacy was attainable. A plaintiff who is severely retarded, for example, would be unable to meet this burden.

Many of the "failure to educate" cases have been brought against public school defendants. *See, e.g.,* Peter W. v. San Francisco Unified Sch. Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976); Donohue v. Copiague Union Free Sch. Dist., 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.W.2d 375 (1979). "Failure to educate" claims have also been brought against private school defendants. *See, e.g.,* Paladino v. Waldorf Sch., 89 A.D.2d 85, 454 N.Y.S.2d 868 (1982); Helm v. Professional Children's Sch., 103 Misc. 2d 1053, 431 N.Y.S.2d 246 (1980). In *Paladino*, the plaintiff also alleged that the private school breached its contract to provide plaintiff with a quality education and that the school fraudulently misrepresented that plaintiff's education was progressing satisfactorily. The plaintiff was unsuccessful on all claims. *Paladino*, 89 A.D.2d at 86-87, 454 N.Y.S.2d at 870.

29. The requirement of gross negligence before the immunity of the business judgment rule is overcome is one example of especially harmful behavior serving as a prerequisite to judicial intervention. *See infra* text accompanying notes 44-51.

harmful placement.³⁰ The combination of these two phases of conduct—the misfeasance of the first phase coupled with the nonfeasance of the second phase—constitutes gross negligence, that is, conduct egregious enough to be actionable. Thus, even if the inattentiveness in the “failure to educate” cases is not serious enough to warrant intervention, educators should be required to act in a way that will not harm their students and correct any conspicuously harmful behavior upon receiving notice of potential injury to a child.

For practical reasons, only the misclassification cases should be recognized. Because of the nature of both the injury and the educator’s conduct in the “failure to educate” cases, courts could be flooded with these claims if they were recognized. Almost anyone can claim that they have suffered mental and emotional harm as a result of an inadequate education.³¹ The failure to educate can be defined in many ways. Compelling policy reasons warrant an examination of the “failure to educate” cases in order to establish realistic and equitable limitations on the definition of this cause of action before it is recognized. Such an examination, however, is beyond the scope of this Article.

If recognized, an action for misclassification should be defined narrowly. The claim should be limited to *Hoffman*-type cases where there is gross inattention to a student’s placement or reckless disregard of the need to re-evaluate the classification. Only those educators who demonstrate a conscious lack of concern for the student should be held accountable. No liability should be imposed when the educator’s conduct is not egregious or is something less than gross negligence. For

30. At first glance, this second step seems identical to the inattentiveness typical in the “failure to educate” cases. After the negligent placement is carried out, however, the failure to reconsider the student’s placement is more than inattentiveness. In a particularly egregious case, the school’s policy to re-test students after placing them in special education classes was ignored, and the plaintiff remained in the harmful placement for many years. *Hoffman v. Board of Educ.*, 49 N.Y.2d 121, 124, 400 N.E.2d 317, 318-19, 424 N.Y.S.2d 376, 377-78 (1979). Additionally, the defendants had notice they had negligently placed Daniel Hoffman and ignored evidence that he was not, in fact, a retarded child. *Id.*

31. Additionally, the misclassification cases would arise far less often than the “failure to educate” cases simply because misclassification occurs less frequently. This depends, of course, on how misclassification is defined. As the definition broadens, the number of potential cases obviously increases. Any definition, however, must include the type of negligent placement that occurred in *Hoffman*, the problems of negligent tracking, and the “dumping” of students of color in special education programs that will not serve their needs.

example, cases that involve an initial erroneous classification that is rectified in a timely manner should not be actionable. Similarly, actions brought by misclassification plaintiffs who allege trivial harm should not be recognized.³² In a case like *Hoffman*, however, the fact that the plaintiff has been severely harmed may be inferred from the defendant's outrageous conduct, as is done in actions for emotional distress.³³ This approach will lessen the likelihood of feigned claims.

It is important to note that plaintiffs may already be able to recover for educational injury caused by a defendant's intentional conduct. In a recent New York case, *Helbig v. City of New York*,³⁴ an elementary school principal was held accountable for harm to a student caused by his intentional conduct. The principal altered the student's reading scores in an attempt to improve the reputation of his school. This precluded the student from being placed in the type of remedial program best suited for him.³⁵ *Helbig* is a case of intentional misclassification rather than negligent misclassification, even though it has been labelled as an action for educational malpractice.³⁶ The court described the conduct as intentional and particularly harmful, and therefore, the plaintiff in *Helbig* was allowed to recover. Intentional conduct is atypical. *Helbig's* placement in a setting in which he received no remedial help is typical of the injury suffered in the negligent misclassification cases like *Hoffman*. In *Hoffman*, for example, the defendants

32. See, e.g., *Hunter v. Board of Educ.*, 292 Md. 481, 439 A.2d 582 (1982). In *Hunter*, the educators required the plaintiff to repeat the first grade by giving him first grade materials even though he was placed in a second grade classroom; this conduct could not be defined as grossly negligent. Additionally, the plaintiff's harm was less than severe: he alleged that he was embarrassed and experienced "depletion of ego strength." *Id.* at 484, 439 A.2d at 583.

33. See, e.g., *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 338, 240 P.2d 282, 286 (1952). The egregious nature of the defendant's conduct allows a jury to infer that the plaintiff's harm is real. Jurors are able to make this inference based on their personal experience. They are asked to determine whether the defendant's conduct would have caused them to suffer severe harm. See *id.*

34. 157 Misc.2d 487, 597 N.Y.S.2d 585 (1993).

35. *Id.* at 489, 597 N.Y.S.2d at 586. Throughout the plaintiff's time in elementary school, he scored high on standardized tests but performed poorly in the classroom. Even though plaintiff was found to be functioning below average in certain areas upon re-testing, he was denied access to remedial programs because his standardized scores were still remarkably high. After graduating elementary school and proceeding to intermediate school, plaintiff's poor classroom grades continued, and his standardized test scores dropped dramatically from elementary school. He was finally classified as learning disabled and placed in the proper remedial classes. However, by this point the damage was done, as plaintiff was diagnosed as suffering from isolation, heightened emotions, and anxiety as a result of not receiving proper education. *Id.*

36. See Martin Fox, *Education Malpractice Lawsuit Is Allowed; Principal's Inflation of Test Scores a Factor*, N.Y. L.J., Apr. 5, 1993, at 1 (headline refers to *Helbig* as an educational malpractice case).

deliberately ignored indications of plaintiff's normalcy and intentionally refused to retest plaintiff, as was recommended. The difference between intentional and reckless or grossly negligent conduct is one of degree, and in some of the misclassification cases the differences are extremely slight. The similarities between the conduct of the *Helbig* defendant and that of the defendants in cases like *Hoffman* warrant similar outcomes. Like the *Helbig* defendant, misclassification defendants in especially egregious cases should be held accountable.³⁷

III. IN WHAT TYPES OF DECISIONS DOES THE JUDICIARY GENERALLY INTERVENE?

Three points illustrate the incongruity of judicial inaction in the educational malpractice cases when compared to judicial action in other contexts. First, when physicians, attorneys, accountants, architects, and

37. When children are injured in their schools and the injury does not involve physical harm, plaintiffs have looked to theories other than malpractice. Plaintiffs have sought recovery under express or implied contract arguments, misrepresentation, and constitutional law principles. *See, e.g.,* *Scott v. Blanchet High Sch.*, 747 P.2d 1124 (Wash. Ct. App. 1987) (where teacher allegedly engaged in sexual relations with student, parents filed causes of action against school for negligent supervision of teacher and student and for breach of contract); *B.M. v. State*, 200 Mont. 58, 649 P.2d 425 (1982) (parents filed claim alleging that misplacement violated constitutional rights of due process and equal protection). Some plaintiffs have alleged that defendants in misclassification and "failure to educate" cases have violated a statutory or constitutional duty to educate. In *Peter W.*, for example, plaintiff alleged that the school district violated the duty to instruct imposed by the state constitution and the education code. *Peter W. v. San Francisco Unified Sch. Dist.*, 60 Cal. App. 3d 814, 818, 131 Cal. Rptr. 854, 856 (1976). The California Court of Appeal concluded that even if defendant failed to fulfill its mandate to educate, defendant incurred no liability under the constitution or the code. The court found that the code imposes liability only when a defendant's act results in an injury against which the statute was designed to protect. The court concluded that the sections of the code alleged by the plaintiff to have been breached were "administrative but not protective" in nature, and "[t]heir violation accordingly imposes no liability." *Id.* at 826-27, 131 Cal. Rptr. at 862.

In one of his counts the plaintiff in *Peter W.* alleged negligent misrepresentation. The gist of the allegation was that defendants negligently represented to his parents that the functionally illiterate student was progressing satisfactorily on the path to literacy. The court justified its dismissal of plaintiff's action for negligent misrepresentation by invoking the same policy concerns it enumerated in dismissing plaintiff's action for the negligent failure to educate. *Id.* at 827, 131 Cal. Rptr. at 862-63. In the alternative, the *Peter W.* plaintiff alleged intentional misrepresentation. This claim was dismissed because plaintiff failed to establish the reliance element of this cause of action. *Id.*, 131 Cal. Rptr. at 863.

engineers are negligent, they, unlike educators, are held accountable.³⁸ There is no adequate explanation for judicial recognition of a duty of care owing from these individuals to those they serve and nonrecognition of a duty owed from educators to their students. The professionals on whom a duty of care is imposed and the educators who are free of a comparable duty are similarly situated.³⁹ Even after considering the debate about whether educators are to be considered professionals, the fact still remains that even individuals who may be considered less than professional are held accountable for their negligence. Workers engaged in certain trades and hair stylists are two examples.⁴⁰ The distinctions between educators and any of the groups on whom a duty of care is imposed is minimal. The differences between educators and workers who are held accountable do not warrant disparate treatment regarding their accountability.

Second, as acknowledged in *Donohue v. Copiague Union Free School District*, an educational malpractice action satisfies the established elements of a negligence cause of action.⁴¹ The judiciary's refusal to recognize a cause of action for educational malpractice is contrary to established precedent.

Third, the decisions made in the misclassification cases are the types of decisions in which the judiciary generally intervenes. The conduct in misclassification cases such as *Hoffman* is an egregious deviation from already established policy and constitutes the kind of conduct that requires judicial intervention. In other words, the decisions made in the misclassification cases are the types of decisions into which the judiciary generally inserts itself in contexts other than educational malpractice.

These observations illustrate inconsistencies in judicial reaction to similarly situated victims. The following sections of this Article examine the nature of the defendant's conduct in educational malpractice

38. See, e.g., *Howard v. Lecher*, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977) (medical malpractice); *Grago v. Robertson*, 49 A.D.2d 645, 370 N.Y.S.2d 255 (1975) (attorney malpractice); *County of Broome v. Vincent J. Smith, Inc.*, 78 Misc. 2d 889, 358 N.Y.S.2d 998 (1974) (architect malpractice); *Wilkin v. Dana R. Pickup & Co.*, 74 Misc. 2d 1025, 347 N.Y.S.2d 122 (1973) (accountant malpractice).

The debate as to whether teachers are professionals may, at least in this context, be extraneous. School supervisors and administrators are undoubtedly professionals.

39. The incongruity of the judiciary's position is further illustrated by the fact that school psychologists are not held accountable for their negligence even though they would be held accountable under the same circumstances in contexts other than the school setting. See, e.g., *Chambers v. Ingram*, 858 F.2d 351 (7th Cir. 1988); *Bullion v. Gdaleto*, 872 F. Supp. 303 (W.D. Va. 1995).

40. See, e.g., *Wagner v. Kenific*, 161 A.D.2d 1092, 557 N.Y.S.2d 650 (1990) (plumber liability); *Alston v. Monk*, 92 N.C. App. 59, 373 S.E.2d 463 (1988) (hair stylist liability).

41. See *infra* text accompanying notes 115-18.

and the kind of conduct that generally warrants judicial intervention in the corporate context. To undertake this examination, one must first consider the qualified immunity granted to certain decisions of corporate directors.

A. Accountability and Deference—A Corporate Model

A critical distinction must be made between the types of educators' decisions that are deserving of protection and the types that are not. In explaining their rejection of educational malpractice claims, courts have stated that pedagogical policy-making is best left to experts in education rather than the judiciary.⁴² While this explanation may support the full immunity granted to educators' policy determinations, it does not support the complete immunity given to merely administrative decisions or other decisions that do not relate to pedagogical policy. Judicial posture regarding the decision-making of educators and that of corporate directors is similar. In both the corporate and the education contexts, courts reluctant to displace the judgment of experts for their own defer to the judgment of corporate and education management.⁴³ In deferring to educators' decisions in educational malpractice claims, however, courts fail to apply the significant qualifications which they implement when deferring to corporate management decisions.

The decisions of corporate management are protected under the business judgment rule, which grants a broad immunity to management decisions. Even the decisions of corporate management that reflect poor and erroneous judgment are protected under the business judgment rule.⁴⁴ "The business judgment rule exists to protect and promote the full and free exercise of the managerial power granted to . . . directors."⁴⁵ Corporate managers, however, must satisfy certain prerequisites in order for courts to defer to their decisions. The presumption of adequate decision-making will be granted under the business judgment

42. See, e.g., *Peter W. v. San Francisco Unified Sch. Dist.*, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976); *Donohue v. Copiague Union Free Sch. Dist.*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.W.2d 375 (1979); *Hoffman v. Board of Educ.*, 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979).

43. See *id.*; see also *Kamin v. American Express Co.*, 86 Misc. 2d 809, 383 N.Y.S.2d 807, *aff'd*, 54 A.D.2d 654, 387 N.Y.S.2d 993 (1976).

44. *Kamin*, 86 Misc. 2d at 813, 383 N.Y.S.2d at 811.

45. *Zapata Corp. v. Maldonado*, 430 A.2d 779, 782 (Del. 1981).

rule only if the decision was made without gross negligence, fraud, or dishonesty.⁴⁶ If, however, decisions are made in bad faith, or the decisions result from the exercise of gross negligence, the rule's protection is lost and courts will carefully scrutinize management's behavior.⁴⁷ For example, if a director's decision is not a result of adequate deliberation, or the decision is made in a grossly negligent manner, the director is said to have violated the fiduciary duty of care.⁴⁸ In addition to satisfying the duty of care, another prerequisite to the protection of the business judgment rule is that the director must satisfy the fiduciary duty of loyalty.⁴⁹ The duty of loyalty may be breached when a director's conflict of interest is not disclosed and ratified.⁵⁰ In these circumstances, a conflict of interest may exist when the corporation for which the director serves enters into a contract or engages in a transaction with the director or an entity in which the director has a financial interest, or for which the director serves as an officer or director; such a transaction is voidable unless shown by its proponent to be fair, and reasonable to the corporation.⁵¹

The decisions of school managers, however, are completely immune from judicial review, because the judiciary disallows educational malpractice actions even when educators' decisions are the product of gross negligence.⁵² Unlike corporate managers, education managers have no prerequisites to satisfy before their decisions enjoy complete immunity. Educators have no duties of loyalty or care to satisfy; they

46. *Kamin*, 86 Misc. 2d at 813, 383 N.Y.S.2d at 811.

47. In at least one instance a court will exercise its own business judgment even when the requirements for protection of management decisions under the business judgment rule are met. Delaware courts may disregard a special litigation committee's decision to prevent derivative litigation and substitute its own business judgment to conclude that the derivative suit is in the best interests of the corporation. *Zapata*, 430 A.2d at 783-84.

48. See, e.g., *Joy v. North*, 692 F.2d 880 (2d Cir. 1982); *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985); *Francis v. United Jersey Bank*, 87 N.J. 15, 432 A.2d 814 (1981).

49. *Bayer v. Beran*, 49 N.Y.S.2d 2, 6 (Sup. Ct. 1944). See generally *Lewis v. S.L. & E., Inc.*, 629 F.2d 764, 769 (2d Cir. 1980).

50. See *Bayer*, 49 N.Y.S.2d at 11.

51. *Lewis*, 629 F.2d at 769.

52. The *Peter W.* court acknowledged the abolition of governmental immunity from tort liability. *Peter W. v. San Francisco Unified Sch. Dist.*, 60 Cal. App. 3d 814, 819, 131 Cal. Rptr. 854, 857 (1976). The judiciary, however, in effect restores governmental immunity in a school setting by automatically refusing to recognize plaintiffs' claims, except in the case of physical injuries. This de facto restoration of governmental immunity by the judiciary extends further than the doctrine of governmental immunity itself, which applies only to discretionary acts. In the school setting, however, the de facto immunity applies even though defendant's acts may not be discretionary.

owe no duty at all to their students. The protection of the business judgment rule applies to the decisions of corporate directors only where they have exercised judgment. The exercise of judgment requires some minimal investigation and deliberation. In the negligent misclassification cases, however, the educators failed to deliberate or undertake even a minimal investigation. Thus, there is no justification for the complete immunity educators' decisions enjoy. This becomes especially clear after considering the underlying rationale for the judiciary's deference to corporate management decisions.

The reasons given for deferring to corporate decisions do not apply in the education context, yet the judiciary completely defers to educators' decisions while corporate management decisions enjoy an immunity that is far less complete. For example, courts grant immunity to corporate management decisions under the business judgment rule because shareholders "voluntarily undertake the risk of bad business judgment" when they decide to invest in an enterprise.⁵³ The same assertion cannot be made about schoolchildren. Students have not voluntarily undertaken the risk of bad judgment of those charged with educating them. Shareholders have choices about whether and in what to invest. Students do not enjoy similar choices. All must attend school, and those who attend public schools are compelled to attend a particular school to which their parents must entrust them.

Courts also defer to corporate management decisions because they "recognize that after-the-fact litigation is a most imperfect device to evaluate" such decisions.⁵⁴ Courts realize that the business setting

53. *Joy v. North*, 692 F.2d 880, 885 (2d Cir. 1982).

54. *Id.* at 886. One of the concerns with after-the-fact judicial evaluation is that jurors, or the court, will automatically interpret a bad outcome to be evidence of a negligently made decision. Franklin A. Gevurtz, *The Business Judgment Rule: Meaningless Verbiage Or Misguided Notion?*, 67 S. CAL. L. REV. 287, 306 (1994). In the misclassification cases, however, there is much more than a bad result on which to focus. In *Hoffman*, for example, fact finders would have had a series of grossly negligent decisions by which to measure defendants' conduct. See *supra* text accompanying notes 21-22.

An additional reason the judiciary avoids such second-guessing of business decisions is that courts lack sufficient business expertise to ensure an adequate review. The judiciary makes a similar assertion with respect to pedagogical decisions. One commentator, however, questions the validity of this assertion by observing that the judiciary is required to make similarly difficult evaluations of the decisions of other professionals. Gevurtz, *supra*, at 307. For example, judges, in spite of never having attended medical or engineering school, review the decisions of doctors and engineers

requires quick decision-making, and the hurried and frenetic environment in which business decisions are made is not easily replicated in a courtroom.⁵⁵ Educators, on the other hand, are not required to make their decisions in such an environment. In misclassification cases such as *Hoffman*, educators have months to evaluate and deliberate before making a decision.

Another reason courts defer to corporate management decisions is to create incentives for risk-taking by management that may result in greater profits for investors. The judiciary's deference to corporate management determinations under the business judgment rule is intended to deter "overly cautious corporate decisions" that may preclude profit maximization.⁵⁶ Courts recognize that shareholders are able to decrease the amount of risk to which they are exposed by diversifying their holdings.⁵⁷ While some of their investments expose them to great risk, shareholders, the courts assert, are able to invest in other, less risky, enterprises. While these observations about investors are true, it would seem that caution would be a crucial attribute for educators, since schoolchildren, obviously, are unable to "diversify." When children attend school, they invest their lives and future and should not be expected to incur risks that cannot be offset with safer alternatives. Most children attending inadequate public schools have no alternatives. Expecting educators to be cautious, however, does not preclude immunity for their decisions to experiment with new pedagogical approaches; this type of risk-taking should be encouraged. The potential assignment of liability in misclassification cases such as *Hoffman* would not involve judicial review of an educator's decision to attempt a new pedagogical procedure. No such attempt was made in *Hoffman*. On the contrary, misclassification cases, where the type of egregious conduct that was evident in *Hoffman* is present, involve the type of risk-taking that must be discouraged by the assignment of liability. Educators will not be able to argue that they are discouraged from undertaking new pedagogical techniques if they are liable only for grossly negligent

with the help of expert testimony. It is difficult to see why the same type of assistance from experts would not enable the judiciary to review decisions made by educators. Furthermore, it must be noted that only legal expertise, not educational expertise, is required in order to review the type of grossly negligent decision-making that occurs in misclassification cases such as *Hoffman*.

55. *Joy*, 692 F.2d at 886.

56. *Id.*

57. "[C]ourts need not bend over backwards to give special protection to shareholders who refuse to reduce the . . . risk by not diversifying." *Id.*

conduct which, by definition, will not include experimenting with new pedagogical approaches.⁵⁸

Another argument in support of special liability rules for directors is that these rules shield them from the inordinate level of liability to which they would be exposed under ordinary negligence rules. The argument is that the increased potential for liability that could result in tremendous monetary loss to directors would dissuade qualified individuals from joining the board. Since liability in the education context would be limited to severely egregious conduct under the approach proposed in this Article, conscientious teachers and administrators would not be dissuaded from entering the field.

An often-articulated justification for professional malpractice liability is the possibility of deterring negligent behavior by doctors, lawyers, accountants, directors, and engineers that causes harm to those they serve. Some commentators, however, question the efficacy of director liability, arguing that a director's negligent behavior is effectively deterred by other factors.⁵⁹ These factors include economic incentives such as:

stock ownership by directors in their corporation, compensation schemes which tie financial rewards to corporate performance, the desire of officers and directors to develop and preserve their reputations for business acumen so as to advance their individual careers, and the fear that poor decisions will make the corporation a takeover target and result in the current directors losing their positions.⁶⁰

The argument for accountability of public school educators and administrators is supported by these observations, because none of these economic incentives exist in the education setting to serve as potential sources of deterrence. There are no market incentives for the satisfacto-

58. Corporate directors and doctors, for example, protest that potential liability makes them overly cautious and precludes the type of risk-taking that leads to important new business approaches and medical discoveries. Gevurtz, *supra* note 54, at 305-06. Physicians also complain that the threat of liability forces them to take defensive measures that needlessly increase the cost of health care. The most significant defensive measures that could be taken in the education setting are ensuring that testing is performed without negligence and paying attention to indications that an evaluation was erroneous. These types of defensive measures are highly desirable and are not likely to increase education costs, because they involve behavior in which the educators are already paid to engage.

59. Gevurtz, *supra* note 54, at 319.

60. *Id.* Other actors, including professionals such as trial attorneys, encounter similar market incentives to perform well. *Id.*

ry performance of educators. Teachers have no economic stake in their schools. Merit pay for teachers and administrators is rare and therefore their compensation remains unrelated to their performance. There is no need to ensure an unimpaired reputation in the field because neither advancement nor retention in this career depends on this. After having received tenure, it is unlikely that a schoolteacher or administrator will lose her position for anything other than criminal behavior or conduct that results in a child's serious physical injury.⁶¹

Educators' decisions should be immune from judicial review only if the process by which such decisions are reached satisfies prerequisites similar to those imposed in the corporate setting before the protection of the business judgment rule is bestowed.⁶² Education managers,⁶³ like their corporate counterparts, should not be held accountable for mere errors in judgment or for unsuccessful pedagogical decisions. Like corporate managers, educators should be held accountable only when they are grossly negligent.⁶⁴ Additionally, as with corporate directors,

61. Interview with Margaret Bing Wade, Director of Auxiliary Services for High Schools, New York City Board of Education, in New York, N.Y. (May 22, 1994).

62. Directors must satisfy duties of loyalty and care before the immunity under the business judgment rule will be granted to them or their decisions. *See supra* text accompanying note 48-51. Before similar prerequisites to the granting of immunity can be applied in the education setting, courts should first recognize that educators owe their students a duty of care. *See supra* text accompanying note 39-40.

In the corporate setting the protection of the business judgment rule applies only to top management. Lower-level corporate employees are subject to a higher standard of care under ordinary negligence rules. In the context of educational malpractice, the protection of an analogue to the business judgment rule should be granted to teachers, supervisors, and administrators. Since the judiciary is reluctant to intervene in the decision-making of educators, no employee in the school setting should be subject to ordinary negligence rules. This means paraprofessionals and school volunteers, for example, would be subject to neither a special rule of liability in which an analogue to the business judgment rule is applied, nor to ordinary rules of negligence or malpractice. This conclusion is necessary because teachers, supervisors, and administrators make the types of decisions in the school setting analogous to the business decisions made by corporate directors. Therefore, they deserve similar immunity. On the other hand, paraprofessionals, volunteers, and similarly situated employees make no such determinations and therefore will continue to enjoy immunity under the present no-duty rule applied in the education setting. Finally, school psychiatrists, doctors, or therapists should be subject to the same rules of liability applicable to others in their profession who perform outside the school environment. These professionals in the school setting should not enjoy immunity from liability that their colleagues in other settings do not enjoy.

63. In this context, the term "education managers" includes not only supervisors and administrators, but also the teachers themselves, who should be considered managers of their classrooms.

64. The analysis would be similar to that which occurs under the traditional rules of landowner liability to entrants onto their land. In some states, the landowner owes a lesser duty of care when the entrant is classified as a trespasser or licensee. Conduct that is very close to gross negligence is required before a landowner will be found liable

educators should be required to "inform themselves . . . of all material information reasonably available to them" before making pedagogical decisions.⁶⁵

B. The Business Judgment Rule Helps in Determining the Types of Decisions in which the Judiciary Intervenes

One of the basic formulations of the business judgment rule is that "the directors' business judgment cannot be attacked unless their judgment was arrived at in a negligent manner, or was tainted by fraud, conflict of interest, or illegality."⁶⁶ Some commentators have concluded that this expression of the rule is analytically identical to other liability rules.⁶⁷ One commentator argues that, at least under this formulation, the business judgment rule adds nothing new to the analysis of directors' behavior and that the same principle applies to all other actors. His position is that *no* actor's judgment is attacked unless that judgment is made negligently, fraudulently, or illegally.⁶⁸

to trespassers. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 57 (5th ed. 1984).

It should be noted that this lower standard of care applies in the trespass situation because these entrants are deemed less worthy of protection since they infringe upon the landowner's right to exclusive possession. In spite of their wrongdoing, trespassers are protected under tort law principles. Schoolchildren should at least be granted protection similar to that which is granted this category of entrants.

65. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (describing the duty of care owed by corporate management).

66. ROBERT C. CLARK, CORPORATE LAW 124 (1986).

67. Gevurtz, *supra* note 54, at 293.

68. *Id.* at 303. In his article, Gevurtz questions the utility of the business judgment rule. He contends that the justifications for a special rule of liability for corporate directors also apply to other professionals who do not enjoy protection under special liability rules. Because professionals such as physicians and attorneys, whose decisions are reviewed under ordinary malpractice or negligence rules, are similarly situated to corporate directors, Gevurtz argues that special liability rules for directors are unwarranted.

Gevurtz's evaluation of the business judgment rule is far from universal. In fact, the rule's application was recently extended to yet another context. Demonstrating the continued utility of the rule, J. Carter Beese, Commissioner of the Securities and Exchange Commission, advocated that the protection of the rule be granted to corporate officers who, on behalf of a company offering and selling its securities, make predictions about the future performance of the company, its business, and its securities. *Beese Favors Business Judgment Rule as Safe Harbor for Forward Stat[e]ments*, 26 Sec. Reg. & L. Rep. (BNA) 835, 835 (June 10, 1994).

A second expression of the rule is that directors will be held liable for their decisions only if they are culpable of something more than ordinary negligence. This approach is also criticized because of the absence of consensus as to the exact nature of the special rule of liability for directors. In other words, if something more than ordinary negligence is required, what is the "something more"? Many courts, in analyzing the rule under this formulation, conclude that the requisite conduct for director liability is gross negligence.⁶⁹ The decision to require gross negligence, however, creates additional analytical problems in defining and identifying conduct that is grossly negligent.⁷⁰

Despite these interpretive difficulties with the business judgment rule, it remains an analytical tool that may be useful if its analogue is applied in the judicial review of educators' decisions. Even if one rejects the feasibility of the rule's practical application, the analysis of corporate directors' decisions as performed under the rule is helpful in determining the manner of potential judicial review of educators' decisions. The various approaches taken by courts in formulating the principles and analyses underlying the business judgment rule assist in recognizing the types of decisions in which the judiciary generally intervenes.

One type of decision-making regularly subject to judicial review is decision-making that is grossly negligent. In spite of judicial preferences to defer to corporate directors' decision-making, grossly negligent decisions are not immune from judicial review. Judicial deference applies to protect the policy decisions of directors. Courts are loath to interfere with the judgment and expertise of corporate management. Courts are not reluctant, however, to intervene where directors fail to exercise judgment and make use of their expertise. Such failure on the part of corporate management is the essence of grossly negligent decision-making.⁷¹

69. Other courts inquire about the director's subjective intent when making the challenged decision. *Gevurtz*, *supra* note 54, at 296. The relevant inquiry is whether the director's decision was the result of her belief that she was acting in the best interest of the corporation. This approach is troublesome because it is plagued with the problems of proof and credibility generally involved in any inquiry into an actor's subjective motivation. *Id.* at 296-303.

70. *Id.* at 300. *Gevurtz*, however, also recognizes that "one should not dismiss the term gross negligence too quickly. Even if not amenable to precise definition, most individuals would have no trouble understanding that gross negligence entails some worse level of dereliction than ordinary negligence." *Id.*

71. Judicial willingness to review the grossly negligent decisions of directors extends to decisions derived from inattentiveness. *See, e.g.*, *Francis v. United Jersey Bank*, 87 N.J. 15, 432 A.2d 814 (1981). The misclassification cases involve decision-making characterized by a failure to exercise judgment and by inattentiveness on the educator's part. The first decision in these cases entails the negligently made classification. This is a failure to exercise judgment and is therefore the type of decision

The same principle may be easily applied in the misclassification cases. While it is true that in the educational malpractice context courts are especially reluctant to interfere with the judgment and expertise of educators, the misclassification cases are instances of grossly negligent decision-making characterized by a lack of judgment. The recognition of a duty of care owed from educators to their students in the misclassification cases would not involve judicial interference with the policy determinations of educators. Recognition of a duty in the misclassification cases would require the judiciary to intervene only in those instances where educators are grossly negligent in failing to carry out predetermined policy. The decision-making typical in the misclassification cases is essentially the type of conduct in which the judiciary generally intervenes. More specifically, it is grossly negligent conduct bereft of the exercise of judgment or the employment of expertise.

Specificity in describing the nature of the defendant's conduct in a misclassification case assists in the analysis of potential judicial intervention in the educational malpractice context. If the judiciary's reluctance to intervene in the education setting is explained by its deference to the judgment of educators, it must be noted that the misclassification cases are not limited to instances of mistaken judgment. The negligent evaluation and initial placement involve the exercise of judgment on the educator's part, albeit negligent judgment. The decision to ignore visible indications that a harmful placement has been made and the failure to follow prescribed procedure such as re-evaluation do not in any way involve the exercise of judgment. This conduct is best described as the negligent administration of education. The policy determinations, with which the courts do not wish to interfere, have been previously made by the appropriate educators. The conduct in the misclassification cases involves the grossly negligent refusal to carry out this predetermined policy.⁷²

in which the judiciary has generally been willing to intervene. The essence of the defendant's second decision in the misclassification cases involves inattentiveness or, more specifically, a decision to avoid paying attention. We see this in *Hoffman* where defendants ignored obvious indications that Daniel Hoffman had been negligently placed in a potentially harmful setting. Again, this second phase of the defendant's decision-making involves the type of conduct the judiciary ordinarily will examine outside the educational malpractice context.

72. One of the public policy choices expressed by the courts was adherence to the state constitutional and legislative mandate that governance of public schools should

The defendant's conduct in *Hoffman* is a clear example of decision-making unrelated to the establishment or implementation of policy; it is misfeasance that constitutes gross negligence.⁷³ Defendants' decisions in *Hoffman*⁷⁴ involved more than a mere error in judgment, and this egregious conduct continued long after defendants should have discovered the plaintiff was placed in a severely harmful situation. The educators in *Hoffman* failed to "inform themselves . . . of all material information reasonably available to them[.]" as required of corporate directors,⁷⁵ even after they had notice that they had placed the student

ultimately remain with city and state education officials, and not with the courts. The court was intent upon preserving the power of these governing entities to exercise their "professional judgment and discretion." *Donohue v. Copiague Union Free Sch. Dist.*, 47 N.Y.2d 440, 444, 391 N.E.2d 1352, 1354, 418 N.Y.W.2d 375, 378 (1979). The court wanted no role in judging the "validity" or the "implementation" of "broad educational policies." The court obviously misconstrued the nature of Edward Donohue's complaint. Plaintiffs alleging injury resulting from an educator's negligent teaching do not ask courts to review the validity or implementation of educational policies. On the contrary, the "failure to educate" plaintiff confirms the validity of educational policies and would welcome their implementation. When an educator ignores visible signs of functional illiteracy and continues to promote a student year after year without addressing the student's learning difficulties, the educator defies school policy. The defendant's conduct in these cases is antithetical to sound educational policies. The conduct complained of has nothing to do with the professional judgment and discretion employed to establish educational policy. The *Donohue* court, however, did observe that the judiciary would be compelled to intervene in order to rectify "gross violations of defined public policy." *Id.* at 445, 391 N.E.2d at 1354, 418 N.Y.W.2d at 378. The defendant's conduct in *Donohue* was such a violation. For practical reasons, however, in spite of the foregoing observations, the "failure to educate" cases should not be actionable. *See supra* text accompanying note 31.

73. In *Hoffman*, defendants misclassified plaintiff by placing him, a "normal" child, in a class for the mentally retarded. Plaintiff spent years in the negligent placement, during which time defendants ignored indications that plaintiff was not retarded and failed to implement their own policy of periodic re-testing. *Hoffman v. Board of Educ.*, 49 N.Y.2d 121, 125, 400 N.E.2d 317, 319, 424 N.Y.S.2d 376, 378 (1979).

74. In *Hoffman* and other misclassification cases, the initial decision that involved the negligent placement should not be actionable because the conduct does not rise to the level of egregiousness that should be required in these cases. *See supra* text accompanying note 32. There is, however, a second phase of defendant's conduct in these cases that initially does not seem to involve any decision-making, but which upon deeper analysis is clearly shown to be the making of a decision. In this second phase the educator "decides" to refuse to follow established policies for re-testing and also decides to ignore apparent indications that the student has been negligently placed in a setting that will inflict severe harm. These decisions should be actionable because they involve egregious misconduct. This second phase of defendant's conduct involves the decision not to act, which is essentially "nonfeasance." Defendants in the misclassification cases, however, should only be held liable for their gross negligence when the nonfeasance of the second phase is coupled with their earlier "misfeasance," which was the negligent classification and placement.

75. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

in a severely harmful situation. They ignored the "obvious danger signs"⁷⁶ that should have led them to recognize plaintiff's distress.

Another approach to the business judgment rule is one that emphasizes the director's decision-making process rather than the substance of decisions. This approach requires judicial review of the process by which directors arrive at their decisions and judicial deference to the substance of their decisions.⁷⁷ This approach to the business judgment rule also illuminates the types of decisions which the judiciary will generally review. Under this formulation of the rule, the judiciary is able to avoid interfering with corporate policy-making. By not reviewing the substance of directors' decisions, the judiciary avoids reviewing policy determinations. It remains important, however, for the judiciary to review the process of decision-making. The judiciary is comfortable with its ability to review the decision-making process because it relates to conduct essentially administrative in nature.

Similarly, the misclassification cases involve conduct that is fundamentally administrative. The grossly negligent decisions made in cases like *Hoffman* do not involve the making of policy.⁷⁸ These decisions reflect the failure to implement predetermined policy. Judicial interference with the administrative decisions that form the gist of the misclassification cases will not insert the judiciary into the pedagogical policy-

76. *Graham v. Allis-Chalmers*, 188 A.2d 125, 130 (Del. 1963) (stating in dicta that directors would be liable for corporate losses if they were inattentive to "obvious danger signs of employee wrongdoing").

77. *Auerbach v. Bennett*, 47 N.Y.2d 619, 393 N.E.2d 994, 419 N.Y.S.2d 920 (1979). Another variation of the same approach is to apply a lower standard of care when reviewing a director's substantive decision than the standard used to review the director's decision-making process. For example, The American Law Institute's *Principles of Corporate Governance* require that a director establish that he *reasonably* believed that the appropriate process was used to reach a decision. The standard of judicial review of the substance of the decision is lower. The director need only establish that he *rationaly* believed the decision to be in the corporation's best interest. *Principles of Corporate Governance: Analysis and Recommendations*, 1 A.L.I. § 4.01(c)(3) (1994).

78. In apparent accord with judicial decisions in educational malpractice cases, Prosser writes, "It is to be expected that choice of curriculum or teaching materials, or location of schools themselves, would ordinarily be discretionary matters for which there is no liability." *KEETON ET AL.*, *supra* note 64, § 131, at 1049. Prosser is right. The enumerated matters are policy determinations. These types of decisions must be distinguished, however, from the types of choices made in the misclassification cases which do not involve discretionary matters like curriculum choice or teaching materials. Not even Prosser deals with the extremely difficult issue of the negligent actions of educators that are *not* discretionary, i.e., the decisions that do not establish policy.

making it seeks to avoid. Courts would merely intervene in the *process* of implementing already-established pedagogical policy. As in the corporate context, this process review would involve consideration of whether educators devoted adequate time and attention in reaching the challenged decisions. The relevant inquiry would be whether educators possessed enough information to reach an informed decision.⁷⁹ In *Hoffman*, for example, this type of inquiry would require the conclusion that the defendants' decision-making process was inadequate. The time and attention paid to Daniel Hoffman's disabilities and placement were detrimentally insufficient. All of the decisions concerning Daniel Hoffman were negligently uninformed.

C. *Corporate Principles of Accountability and Their Application to the School Setting: What a Cause of Action in Educational Malpractice Should Look Like*

The accountability of educators is a crucial element of an efficiently administered education system, and would be most effectively achieved in the public school setting by adopting certain corporate law concepts relating to shareholder derivative suits, specifically procedural prerequisites that must be satisfied before such suits may be brought. The establishment of special litigation committees and the application of an analogue to the business judgment doctrine would help to allay some of the judicial concerns that have precluded educator accountability.⁸⁰

79. See *Smith v. Van Gorkom*, 488 A.2d 858, 893 (Del. 1985) (holding that corporate directors must "inform themselves of all information reasonably available to them and relevant to their decision" in order to satisfy their duty of care and enjoy qualified immunity under the business judgment rule).

80. It is natural to look to corporate law principles in resolving certain analytical dilemmas in tort law, as tort law principles have often resolved conceptual problems arising in corporate law. There are two important examples. First, the descriptions of the duty of care owed by corporate insiders to the corporation and its shareholders and the standard of care imposed under tort law are fundamentally identical. An alleged tortfeasor is expected to behave as a reasonable and prudent person under similar circumstances. *KEETON ET AL.*, *supra* note 64, §§ 28-30. Corporate officers and directors are expected to use the care that "an ordinarily prudent person in a like position would use under similar circumstances." N.Y. BUS. CORP. LAW § 717 (McKinney 1977). *But see* *Gevurtz*, *supra* note 54, at 333 ("[S]uch language, to the common lawyer's understanding, is synonymous with the standard for ordinary negligence. This creates an apparent conflict when courts apply the business judgment rule to preclude director liability for ordinary negligence.").

Second, proximate cause discussions are sometimes as important in determining the liability of corporate management as they are in holding alleged tortfeasors accountable. See, e.g., *Francis v. United Jersey Bank*, 87 N.J. 15, 432 A.2d 814 (1981). In *Francis*, a director of a reinsurance broker was held accountable to the corporation's creditors for nonfeasance even though she was elderly and bedridden. The company suffered losses because the two remaining directors, who happened to be defendant's sons, looted the

The application of corporate law and governance principles in the school setting has been extremely efficacious.⁸¹ Chicago's experimental Corporate/Community Schools of America (C/CSA) in North Lawndale is a brilliant illustration of the wisdom of applying corporate principles in the education context.⁸² Teachers at C/CSA are held accountable for their actions. For example, salary increments are based

company. The court found that the breach of the director's duty of care was the proximate cause of the company's losses even though she in no way took part in the theft. She was held liable because she failed to prevent it. *KEETON ET AL.*, *supra* note 64, §§ 42-45. *Id.* at 21, 432 A.2d at 817.

81. Education Alternatives, Inc., a private company organized for profit, has taken over nine Baltimore, Maryland schools and will soon run schools in Hartford, Connecticut. Representatives of the company have also met with the chancellor of New York City's public schools. The company claims that it can improve education for the same amount of money that is now spent by public schools, and of course, the company still plans to profit. Liz Willen, *For-Profit School Firm Eyes City*, N.Y. *NEWSDAY*, Sept. 1, 1994, at A3. This type of arrangement must be distinguished from the proposals made in this article to apply certain corporate principles in the education setting. It may be beneficial to apply corporate governance principles in the school setting. It is quite another thing to allow a private company to run the school. The tension between the imperative profit-maximization goal of the company and the goal to improve education is troublesome. What will happen to the children if the company loses money?

82. The idea for C/CSA originated when its creator encountered a young woman who walked into a community agency with her high school diploma asking that someone teach her how to read it. This stunned Joseph Kellman, C/CSA's president and founder. As a result of this encounter, he solicited corporate support for school reform and raised enough money to underwrite C/CSA. Patricia Skalka, *This School Means Business*, *READER'S DIG.*, Feb. 1994, at 99-100.

The author of the Reader's Digest article recounts several stories of individual success that demonstrate the outrageousness of the judiciary's position that educators should not be accountable to their students because of the inability to prove a tangible connection between an educator's negligence and a student's success or failure. The students of North Lawndale suffer from the environmental and emotional problems described by some courts in explaining why they are unable to find a causal connection between the educator's conduct and the student's harm. Instead of giving up on these troubled children as the judiciary has, Kellman and other entrepreneurs search for answers to the tough problems facing these children and our entire society by providing adequate education. C/CSA provides a caring environment in which discipline and academic achievement are emphasized. All students, regardless of traditional predictors of academic success, participate in innovative programs where much is expected of them, thereby avoiding the stigma that results in tracking students with low predictors. And just as important, the walls of the school were freshly painted so that students learn in a clean and orderly physical environment in which they have sufficient tools and equipment such as computers and a media center. This is in sharp contrast to the filth and dearth of equipment that plagues most public schools attended by poor or minority children. In addition to these educational improvements, C/CSA makes direct attempts to resolve some of the environmental factors that may impede learning, by intervening in severe family problems when necessary. *Id.* at 100-01.

on merit, and teachers who do not meet certain performance standards are discharged.⁸³ The principal, who is also the school's chief executive officer, has the power to hire and fire faculty, administration, and staff. C/CSA is structured as business organizations are and applies principles of corporate governance that include requiring the school's principal to answer to a board of directors on which corporate managers serve. In a neighborhood with extremely high unemployment, where drugs and gangs dominate and consume the lives of many, C/CSA has yielded noticeable academic improvements.⁸⁴

Early in the history of state corporation law, shareholders were empowered with the ability to bring civil actions against directors and officers to hold them accountable for misconduct in running the corporation. These actions, called shareholder derivative suits, are equitable remedies that were "born of stockholder helplessness" in protecting themselves from directors who were "not subject to an effective accountability."⁸⁵ Laws regulating corporate managers were insufficient to protect shareholders from abusive practices, and this insufficiency in the business code eventually led to the institution of management accountability through shareholder derivative litigation.⁸⁶

83. *Id.* at 100. Teachers in the public schools are not held accountable for poor performance. Their salaries are not affected by poor performance, nor is it possible to discharge an ineffective teacher. In one instance, for example, a principal complained about a teacher who was slowly destroying one of her school's programs. He was unable to get along with other teachers in his department and he seemed to care very little about his students. He relied on his colleagues to accomplish most of the tasks that he was expected to perform. The principal lamented that the only remedy available to her to resolve this problem was to transfer the teacher to another program, or another school. He would then be someone else's problem. Interview with Margaret Bing Wade, Director of Auxiliary Services for High Schools, New York City Board of Education, in New York, N.Y. (May 22, 1994).

84. In 1990, some of C/CSA's students ranked in the 26th percentile in math ability and in the 17th in English ability under national standardized tests. When the same C/CSA students were tested two years later, their math scores doubled and their English scores more than tripled. The amount of money spent on each C/CSA student was comparable to that spent in Chicago's public schools. Skalka, *supra* note 82, at 102.

Another indication of success is that over 85% of the parents of C/CSA students regularly attend school meetings, and a majority of them serve as classroom volunteers. *Id.* at 101. This is in sharp contrast to the problem of parental apathy that afflicts many public schools.

85. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 547-48 (1949). The derivative suit is brought on behalf of the corporation. In most instances, the corporation is named as plaintiff AND defendant. Directors and officers are also generally named as defendants in a derivative action. *See, e.g., id.* at 543 ("[This is an] action in the right of the Beneficial Industrial Loan Corporation, a Delaware corporation. . . . The defendants were the corporation and certain of its managers and directors.").

86. "Corporate laws were lax and were not self-enforcing, and stockholders, in face of gravest abuses, were singularly impotent in obtaining redress of abuses of trust." *Id.*

Courts have acknowledged that shareholder derivative litigation has been an effective incentive for corporate management to avoid breaches of their fiduciary duties that cause harm to the corporation and derivative harm to shareholders.⁸⁷ Holding educators accountable for grossly negligent conduct that causes severe injury would provide similar incentives for educators to avoid harming their students. Like corporate managers, the conduct of managers in education is highly regulated, but the regulation is not sufficient to help students avoid serious harm caused by educators' egregious conduct, nor does it provide recovery for students who have suffered such harm.

There is an important and fundamental dissimilarity between accountability in the corporate context and potential accountability in the education context. Accountability of corporate management through shareholder derivative litigation is possible only because courts have provided this equitable relief to shareholders who, without this judicial intervention, would lack standing to bring these types of actions. Shareholders lack standing in the derivative litigation context because they have not suffered a direct harm. Their injury derives from harm to the corporation.⁸⁸ This absence of standing was the source of sharehold-

at 547-48.

87. *See id.* Recourse to derivative litigation, however, is far from a perfect solution. First, there is always the threat of the remedy's abuse by shareholders seeking an undeserved settlement, although procedural constraints exist to discourage this type of frivolous litigation. EDWARD BRODSKY & M. PATRICIA ADAMSKI, *LAW OF CORPORATE OFFICERS AND DIRECTORS: RIGHTS, DUTIES AND LIABILITIES* § 9:01, at 2 (1984). Second, derivative litigation can be costly, "time consuming and disruptive." *Id.* at 3. Finally, some argue that derivative litigation fails to deter breaches of fiduciary duties by corporate directors. "Cases hardly ever go to trial. Settlements typically amount to only a small fraction of the claimed damages, and most of the money goes to the corporation's treasury." Kenneth Jost, *New York May Limit Stockholder Suits*, A.B.A. J., Mar. 1994, at 24. The value of derivative litigation, however, continues to be recognized. "The remedy assists lawyers in telling their clients that this is the sort of action that can subject you to litigation That can have a great impact on the way corporate decisions are made." *Id.* (quoting statement of Jill Fisch, Professor, Fordham Law School).

88. Shareholders bring action for direct harm suffered in representative, as opposed to derivative, suits.

[I]f the gravamen of the complaint is injury to the corporation the suit is derivative, but 'if the injury is one to the plaintiff as a stockholder and to him individually and not to the corporation,' the suit is individual in nature and may take the form of a representative class action.

Eisenberg v. Flying Tiger Line, Inc., 451 F.2d 267, 269 (2d Cir. 1971) (quoting 13 FLETCHER, *PRIVATE CORPORATIONS* § 5911 (1970)). The distinction between

er powerlessness in the face of management's misconduct. The judiciary empowered shareholders despite their lack of standing for several reasons: They were empowered for their own protection and also to encourage investment by fostering shareholder confidence, thereby strengthening the economy by assisting business in general, and corporate investment specifically.⁸⁹

In the education setting, students are similarly powerless to invoke judicial review of educators' misconduct even though the harm they suffer is direct, and the standing requirement would be indisputably satisfied. This dissimilarity in judicial approaches illustrates an important contrast. The judiciary enabled shareholders to protect themselves because it viewed the shareholders' interests, even though derivative, worthy of protection. The judiciary perceived the conduct of management and the derivative harm suffered by shareholders to be severe enough to warrant judicial intervention—intervention consisting primarily of radical revisions to long-standing legal principles in that standing was granted to a class that had suffered no direct harm. There is no justification for the absence of similar judicial intervention when an educator's grossly negligent conduct results in severe, *direct* harm to students. As in the corporate setting, liability will not only protect the student, it will improve society by improving school systems. Accountability for educators has ramifications that extend far beyond the obvious.⁹⁰

One reason for judicial refusal to empower students as shareholders have been empowered is that while the judiciary recognizes a duty owed

representative and derivative suits is important in the corporate context because plaintiffs must tender funds as security for the corporation's reasonable expenses, including attorney's fees, before a derivative suit can be brought. See, e.g., N.Y. BUS. CORP. LAW § 627 (McKinney 1986).

In the educational tort context there is no analogue to derivative actions because the harm suffered at the hands of tortious educators is direct and not derivative. Consideration of the history and background of derivative litigation is important in the educational tort context, however, because shareholders, before courts granted such equitable relief, were similarly situated to students in their powerlessness to obtain redress.

89. See generally *Cancun Adventure Tours, Inc. v. Underwater Designer Co.*, 862 F.2d 1044, 1047 (4th Cir. 1988) (Limited liability for shareholders "encourages business investment and fosters stability in commercial transactions."). Empowering investors strengthens the United States economy by encouraging participation in capital markets. See Michael R. Dreeben, *Insider Trading and Intangible Rights: The Redefinition of the Mail Fraud Statute*, 26 AM. CRIM. L. REV. 181, 209-10 (1988).

90. Educators' accountability for grossly negligent and intentionally harmful conduct will serve the deterrence goal of tort law and will inevitably result in fewer government expenditures for welfare, prisons, unemployment, crime and other symptoms of a malady sustained by a society that tolerates educators' negligence which erodes the public school system.

from corporate management to shareholders, all courts, with one exception,⁹¹ have refused to recognize a duty owed by educators to their students. The duty of corporate directors and officers arises from their status as fiduciaries. Educators should be similarly regarded as fiduciaries. Like corporate fiduciaries, obligations of trust and responsibility are imposed upon educators.⁹² For example, one source of these obligations for educators is the doctrine of *in loco parentis*.⁹³

Once courts recognize a duty owed from educators to their students,⁹⁴ the application of certain analytical concepts of corporate law to the educational malpractice context will assist in preventing some anticipated administrative problems. The initial step of a student who has been severely injured by the grossly negligent conduct of an educator should be to exhaust all administrative remedies available.⁹⁵ If administrative remedies are insufficient, as they often are, the student's next step—before initiating litigation—should be to demand that the negligent educator, or those who supervise the educator, take action to rectify the condition that is the presumed source of the student's harm.⁹⁶ The

91. *B.M. v. State*, 200 Mont. 58, 649 P.2d 425 (1982), is the exception. See *supra* note 20 and accompanying text.

92. A fiduciary is "[a] person who stands in a special relation of trust, confidence, or responsibility in his obligations to others." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 488 (William Morris ed., New College ed. 1980).

93. See *infra* text accompanying notes 130-33.

94. The same policy considerations that the judiciary enumerates to support the decision that no duty owes from educators to their students could support the opposite conclusion when analyzed from another perspective. See *infra* part IV.

95. Courts require the exhaustion of any available administrative remedies before hearing a case. "Through the doctrines of primary jurisdiction and exhaustion of administrative remedies, a court will require that the concerned administrative agency be given the opportunity to bring its specialized expertise to bear upon an issue in controversy before the court will intervene." John Elson, *A Common Law Remedy for the Educational Harms Caused by Incompetent Careless Teaching*, 73 NW. U. L. REV. 641, 669 (1978).

96. In the context of shareholder derivative litigation, unless excused, demand is made on the corporation's board of directors to initiate the relevant action. BRODSKY & ADAMSKI, *supra* note 87, § 9.05, at 18. A shareholder could instead demand that the board resolve the issues the stockholder is challenging before initiating a derivative action on behalf of the corporation. *Barr v. Wackman*, 36 N.Y.2d 371, 329 N.E.2d 180, 368 N.Y.S.2d 497 (1975). After demand is made, the corporate board may initiate the derivative suit on behalf of the corporation or take over the suit if already initiated by plaintiff. The board also has the option of refusing plaintiff's demand. BRODSKY & ADAMSKI, *supra* note 87, § 9.05, at 19.

The demand requirement seeks to avoid the wasting of judicial resources by allowing for a possible resolution without resorting to litigation. *Barr*, 36 N.Y.2d at 378, 329

demand requirement allows corrective action to be taken by potential defendants in order to avoid litigation. Frivolous suits are avoided when plaintiff's demand is rightfully refused.⁹⁷ "The requirement of demand . . . derives from one of the basic principles of corporate control—that the management of the corporation is entrusted to its board of directors . . . who have primary responsibility for acting in the name of the corporation."⁹⁸ Courts are similarly concerned about infringing upon the decision-making domain of educators. The demand requirement in the education setting will retain management of the schools in the hands of educators.⁹⁹

The initial goal of the demand requirement would be to remove the student from the harmful situation immediately.¹⁰⁰ For example, in cases similar to *Hoffman*, plaintiff should demand that the remedial steps taken on his behalf include removing him from the harmful placement

N.E.2d at 186, 368 N.Y.S.2d at 505. The requirement also precludes a shareholder's interference with "decisions on matters clearly within the directors' discretion" and suits brought for personal benefit without regard to any potential benefit to the corporation. *Id.*

97. A corporate board's refusal of plaintiff's demand to take corrective action or initiate litigation is generally the last recourse for plaintiff unless plaintiff can establish that the refusal was wrongful. As in the corporate setting, a showing of wrongful refusal of demand would allow plaintiff to proceed against egregiously negligent educators. Such a showing would require proof that the demand was refused without due deliberation or in bad faith. See *United Copper Sec. Co. v. Amalgamated Copper Co.*, 244 U.S. 261, 263-64 (1917).

98. *Barr*, 36 N.Y.S.2d at 378, 329 N.E.2d at 185-86, 368 N.Y.S.2d at 504.

99. In case after case, the judiciary abdicates its responsibility to provide plaintiffs a forum in which the egregious conduct of educators is examined because of its desire to defer to educators' decisions. These courts insist that educators be the sole arbiters of the ways in which schools are operated because the courts lack the authority and expertise to do so. Interestingly, there is no such absolute abdication of judicial intervention in the corporate context. While courts most often defer to the business judgment of corporate management, they do not do so when that judgment was not exercised with due care and in good faith. In at least one context, courts will exercise their own business judgment when management's business judgment is potentially tainted. See *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981). In certain instances, a board will appoint a special litigation committee, consisting of board members who are not involved in the challenged transaction, to determine whether to move to have a derivative suit dismissed. Delaware courts do not defer to such a committee's decision to terminate litigation in some instances. The court intervenes after concluding that intervention is possible because the court "regularly and competently deals with . . . scores of similar problems." *Id.* at 788. Courts "regularly and competently" deal with problems similar to that of an educator's negligence. For example, courts resolve issues arising from the malpractice of attorneys, architects, doctors, and engineers.

100. When making the demand, the plaintiff may request re-evaluation of a misclassification victim. This request is probably made in most misclassification cases, but it is too often ignored. Under the proposal in this Article, the request/demand for re-testing will carry with it, as it does in the corporate context, the threat of litigation. This would mean that the request for re-evaluation would not be easily ignored.

in order to alleviate the emotional distress caused by the misclassification. The persistence of the student's emotional distress for a significant amount of time after corrective action is taken may mean that educational negligence is not the cause of the student's harm, and if this is so, students and their parents must examine other possible causes of injury. If, however, no corrective steps are taken, students who have been severely harmed by the grossly negligent conduct of an educator should be allowed to bring an educational malpractice action in instances of misclassification.

The procedure enumerated in the Model Business Corporation Act would be helpful in this context. First, as required by the Act, written demand will be required in all cases.¹⁰¹ The universal demand requirement "avoids the difficult inquiry and inevitable litigation as to whether or not demand was excused."¹⁰² Second, students should be permitted to bring actions for educational torts a minimum of ninety days after the demand was made. The action may be brought earlier if demand is refused or if the student would be irreparably harmed while waiting for the ninety-day waiting period to expire.¹⁰³

The second concept to be borrowed from the derivative litigation context is the use of a special litigation committee. A corporate board may, by resolution, appoint a litigation committee to determine whether

101. See MODEL BUSINESS CORP. ACT § 7.42 (1984).

102. BRODSKY & ADAMSKI, *supra* note 87, § 9:07, at 30.

In the corporate context, plaintiff is not required to demand that a corporate board take corrective action or initiate litigation. Demand is excused when the board members are so involved in the transaction that they cannot be expected to act independently and in good faith, thus making demand futile. *Barr*, 36 N.Y.2d at 378-79, 329 N.E.2d at 185-88, 368 N.Y.S.2d at 504-05. Under Delaware law, demand is excused when the plaintiff is able to "raise a reasonable doubt as to (i) director disinterest or independence or (ii) whether the directors exercised proper business judgment in approving the challenged transaction." *Grobow v. Perot*, 539 A.2d 180, 186 (Del. 1988).

The notion underlying the determination that demand is futile is that board members will resist taking corrective action or bringing a derivative suit against directors or officers with whom they work or to whom they owe allegiances. *In re Ionosphere Clubs, Inc.* 17 F.3d 600, 605 (2d Cir. 1994).

103. According to the official comment for the Model Business Corporation Act, the standard for determining irreparable injury is the "same as that governing the entry of a preliminary injunction." MODEL BUSINESS CORP. ACT § 7.42 cmt. (1984). The comment also states that irreparable harm may be established by an impending expiration of the statute of limitations, but this depends "on the period of time during which the shareholder was aware of the grounds for the proceeding." *Id.* The same measures for irreparable harm may be used in the educational tort context.

a derivative action would be in the corporation's best interest.¹⁰⁴ The special litigation committee, formed when demand is excused, has several options. If plaintiff initiated the derivative action before the committee was formed, the committee may recommend that the corporation take control of the derivative suit, or the committee may recommend that the action be dismissed. If no action has been brought, the committee may either recommend initiation of the derivative action on behalf of the corporation, or the committee may decide that the initiation of the derivative suit is not in the corporation's best interests.¹⁰⁵ Judicial review of a special litigation committee's recommendations varies. It ranges from deference to the committee's decisions as long as the committee members are not involved in the challenged transaction and follow proper procedure in making the decision, to reaching the decision regarding the derivative suit independently from and with little deference to the committee's recommendations.¹⁰⁶

Since written demand would serve as notice of potential litigation, educators should be able to avail themselves of the option of appointing

104. See DEL. GEN. CORP. LAW § 141(c) (1973) (giving the boards of Delaware corporations the authority to delegate their decision-making power to a committee).

105. See, e.g., *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981); *Auerbach v. Bennett*, 47 N.Y.2d 619, 393 N.E.2d 994, 419 N.Y.S.2d 920 (1979); *Alford v. Shaw*, 320 N.C. 465, 358 S.E.2d 323 (1987).

106. There are four approaches to judicial review of the special litigation committee's recommendations. Some courts will defer to a committee's decision not to pursue derivative litigation without exploring the merits of the committee's decision as long as the decision was reached in good faith, independently, and as a result of deliberative investigation. See *Auerbach v. Bennett*, 47 N.Y.2d 619, 393 N.E.2d 994, 419 N.Y.S.2d 920 (1979). Other courts follow the Delaware approach, using a two-step test for judicial review of a special litigation committee's decisions. Under the first step, the corporation bears the burden of establishing to the court's satisfaction that the committee's decision was reached in good faith, independently, and after a sufficient investigation. The second step requires that the court make an independent judgment about whether the derivative suit is in the corporation's best interests. See *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981). The third approach is almost identical to the *Zapata* court's approach, except that the focus is more on the special litigation committee's report than on making a completely independent determination regarding the derivative litigation. See *Alford v. Shaw*, 320 N.C. 465, 358 S.E.2d 323 (1987). Under the fourth approach, courts will defer to the special litigation committee's decision only if the members of the committee were appointed by directors who were not accused of misconduct. See *Miller v. Register and Tribune Syndicate, Inc.*, 336 N.W.2d 709 (Iowa 1983).

Shareholder derivative litigation has resolved some of the problems of shareholder powerlessness in the face of management abuse, but one frequently litigated issue, the determination of whether demand is required or excused, remains troublesome. This problem can be avoided in the educational tort context by making demand universal as is required under the Model Business Corporation Act. See *supra* note 101 and accompanying text.

a special litigation committee, composed of impartial members,¹⁰⁷ to consider the student's complaints. The committee's first task would be to consider recommending corrective action in order to prevent further harm to the student and avoid litigation. The committee would also determine whether already existing administrative remedies would best serve the student's interests and assess whether such remedies have been exhausted. Finally, the committee should consider and make a recommendation concerning the need for compensation.

The committee's consideration of whether compensation is required should be made both when remedial action has been taken *and* when it has not. Even when curative steps are taken, a student may be so severely harmed that compensation is the only means to make the student whole. Additionally, it may simply be too late for remedial steps, and monetary damages would be the only way to begin to resolve the student's problems.¹⁰⁸ The committee's decisions concerning compensation should serve as recommendations, and if monetary damages are advised, it will be necessary for a court to make the requisite determinations regarding the educator's negligence.

The function of the special committee in the education context would essentially parallel the role fulfilled by corporate boards in the context of threatened litigation, but should differ from corporate special litigation committees in two fundamental senses. First, the committee in the school setting should serve as a locus for mediation among the injured student, his or her parents, and the allegedly negligent educators. Second, unlike the corporate litigation committee in some jurisdictions, the education committee should not have the power to make binding recommendations concerning compensation, administrative remedies, corrective action, or the potential plaintiff's ability to bring an action against negligent tortfeasors.¹⁰⁹ For example, if the committee con-

107. Committee members may be selected from groups of educators and parents who are not involved in or affected by the challenged behavior. Corporate managers and other business people may be willing to serve, in the interest of working toward improved education that will produce competent potential employees.

108. For example, the student may have graduated from the school in which the negligence took place, as was the case in *Peter W.* *Peter W. v. San Francisco Unified Sch. Dist.*, 60 Cal. App. 3d 814, 817, 131 Cal. Rptr. 854, 856 (1976).

109. In Delaware, for example, when demand is required and properly refused, the corporate board can move to dismiss derivative litigation already commenced by a disgruntled shareholder. See *Zapata*, 430 A.2d at 782. The board's conclusion that the suit would not be in the best interest of the corporation is in most cases determinative.

cludes that an action is warranted, this recommendation should serve merely as one component of plaintiff's evidence. The committee's conclusion that the action is not warranted may dissuade the student from initiating the suit¹¹⁰—thereby conserving judicial time and resources—but may not preclude it.

In considering the committee's substantive recommendations, the court, or jury, should exercise its independent judgment and consider two aspects of the committee's decision-making process. First, the court should ensure the decision was reached by a committee composed of completely independent members who were not involved in the dispute that led to the threatened litigation. An integral part of this first consideration is an examination of how the committee members were chosen. Committee members should be chosen through an objective process to ensure their disinterestedness in the challenged behavior. Second, the court should examine the adequacy of the procedure used by the committee in reaching its decision. This examination should include a determination of whether the committee's decisions were reached in good faith and after adequate deliberation.¹¹¹ The type of judicial review described here does not involve an interference with policy determinations but rather a review of the adequacy of the process used by the committee in arriving at its conclusion.

In recognizing and analyzing an educator's duty of care, a duty that must be satisfied before immunity is granted, several characteristics should be emphasized. First, as in the corporate setting, the articulation of the educator's duty of care must retain flexibility, because the duty will depend upon the circumstances and should be "proportioned to the occasion."¹¹² Second, educators should be held accountable whenever they have notice that their conduct, or a subordinate's conduct, has the

To *properly* refuse demand, the decision must have been reached without breach of the directors' fiduciary duties of care and loyalty. *Pogostin v. Rice*, 480 A.2d 619, 624-25 (Del. 1984).

110. Plaintiff will be discouraged because the committee's decision is to be made by independent and disinterested members, thereby enhancing the apparent validity of the committee's determination. This is obviously helpful in precluding frivolous litigation.

111. The court's review of the committee's decision-making suggested here combines the approaches of the *Miller* and the *Zapata* courts in reviewing the decisions made by corporate committees. *See supra* note 106.

112. *Bayer v. Beran*, 49 N.Y.S.2d 2, 5 (Sup. Ct. 1944) (describing the corporate fiduciary's duty of care).

Existing tort law allows for flexibility of the duty of care for all tortfeasors. *See infra* notes 123-24 and accompanying text.

potential to inflict severe harm upon a student.¹¹³ This second prong would require teachers to observe and monitor their students. They would have to act when they observe that a student is exposed to a situation that could inflict serious injury. Similarly, supervisors and administrators would have to monitor teachers' behavior in order to prevent severe harm to a student. When they receive notice that such harm could occur, they would be required to intervene. The vigilance required should be that required of a reasonable and prudent person under similar circumstances. Finally, with respect to this second point, teachers, supervisors, and administrators should be allowed to rely upon the assurances of others who are qualified to give such assurances, that no action need be taken to prevent harm to a student.¹¹⁴

IV. POLICY CONSIDERATIONS ON WHICH COURTS HAVE BASED THE NO-DUTY RULE

At least two courts have recognized that a *prima facie* case for negligence in education can be established.¹¹⁵ One court recognized a cause of action for educational malpractice.¹¹⁶ In the other case,

113. *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125 (Del. 1963). The notice requirement is especially crucial in the school setting, considering the density of the population of most classes, schools, and school districts. With respect to notice and corporate directors, the *Allis-Chalmers* court wrote, "The very magnitude of the enterprise required [the directors] to confine their control to the broad policy decisions" instead of monitoring employee activity. *Id.* at 130. While the *Allis-Chalmers* court found it unnecessary to hold the defendants liable, the court stated that a finding of liability would be warranted if the directors had "reposed confidence in an obviously untrustworthy employee, . . . refused or neglected cavalierly to perform his duty as a director, or . . . ignored either willfully or through inattention obvious danger signs of employee wrongdoing." *Id.*

District superintendents, principals, and other administrators and supervisors in the misclassification cases have in too many instances "reposed confidence" in "obviously untrustworthy employees" (a flagrantly negligent teacher, for example), yet they remain immune from liability. The defendants in the *Hoffman* case, for example, "cavalierly" refused to perform and negligently ignored the "obvious danger signs" that plaintiff had been negligently classified as a retarded student.

114. In performing her duties, a corporate director may "rely on information, opinions, reports or statements . . . presented by" officers or employees of the corporation, attorneys, accountants, or a board committee. *See* N.Y. BUS. CORP. LAW § 717 (McKinney 1994).

115. *See* *B.M. v. State*, 200 Mont. 58, 649 P.2d 425 (1982); *Donohue v. Copiague Union Free Sch. Dist.*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.W.2d 375 (1979).

116. *See* *B.M. v. State*, 200 Mont. 58, 649 P.2d 425 (1982).

Donohue v. Copiague Union Free School District, the court conceded that plaintiffs' arguments in educational malpractice cases fit within tort law principles of negligence.¹¹⁷ The *Donohue* court correctly analyzed the duty element of a negligent instruction case by recognizing that it is possible to formulate a standard of care by which to measure an educator's conduct. Tacitly recognizing the debate regarding the status of educators, the court concluded that if, in fact, teachers are considered professionals, the finding of a duty of care owed to their students makes sense, especially in light of the imposition of a duty of care owing from other professionals, such as "doctors, lawyers, architects, and engineers," to those they serve.¹¹⁸

Reference to two fundamental principles of tort law highlight the incongruity of imposing a duty of care on doctors without imposing a similar duty on educators. First, in most instances, tort liability is not imposed unless the actor is at fault. Comparison of the fault attributable to the various parties involved in a controversy is a consistent theme of tort law. The fault of the plaintiff is compared to that of the defendant under contributory and comparative negligence principles. Also, when a plaintiff's harm is caused by more than one defendant, the fault of each defendant is compared, and each tortfeasor is required to pay his or her assigned percentage of the plaintiff's damages under the rules of joint and several liability.

A final example is the comparison of the various types of fault under tort law, where the liability depends on the degree of blameworthiness of the defendant's conduct. When establishing an intentional tort, the elements of proof are simpler and more straightforward than the elements required for proof of negligence. With respect to conduct that is not intentional, there are varying degrees of culpability, including negligence, gross negligence, and recklessness. The very appellations given the various types of conduct invoke a comparison of culpability.

117. *Donohue*, 47 N.Y.2d at 444, 391 N.E.2d at 1354, 418 N.Y.W.2d at 377.

118. Some commentators argue that teachers are not in fact professionals and that teaching is a role in which discretion of individual members is limited and which does not require the trust or confidence that the work of a doctor or attorney requires. Patrick D. Halligan, *The Function of Schools, The Status of Teachers, and the Claims of the Handicapped: An Inquiry into Special Education Malpractice*, 45 MO. L. REV. 667 (1980). Others suggest that teaching should be labeled a semi-profession, similar to nursing or social work. Frank D. Aquila, *Educational Malpractice: A Tort En Ventre*, 39 CLEV. ST. L. REV. 323 (1991).

Even if one concludes that teachers are not professionals, the fact still remains that injuries that occur in "educational malpractice" cases result not only from a teacher's misconduct, but also from the negligence of the teacher's supervisors — the school's principal or the district superintendent or governing board, for example. Clearly those who supervise teachers are considered professionals.

As the preceding examples illustrate, tort law analysis sometimes involves behavior comparison and an evaluation of the blameworthiness of an actor's conduct. Comparing the nature and extent of a negligent physician's blameworthiness to that of a negligent educator illustrates the incongruity of recognizing a duty of care for doctors but not for educators. The type of prolonged inattentiveness that is typical in the misclassification cases is more reprehensible than the momentary inattentiveness that characterizes many of the medical malpractice cases. We have all lapsed into the type of fleeting inadvertence that causes harm in the medical malpractice cases. Few of us are allowed to engage in the type of prolonged irresponsibility in our professional lives that characterizes cases like *Hoffman*, *Donohue* and *Peter W.*

A comparison of culpability invokes notions of morality. This brings us to the second tort law principle that highlights the incongruity of imposing a duty of care on doctors without similarly recognizing an educator's duty of care. The imposition of tort liability is not based on moral fault but depends instead on custom and community expectation.¹¹⁹ Surely the expectation of the members of our society is that educators refrain from the type of egregious behavior typified in *Hoffman* and *Peter W.* No one can reasonably expect that an actor be perpetually and invariably attentive. We all recognize that doctors are human, yet they are held liable for the momentary lapses of attention that we all inevitably suffer.¹²⁰ Since momentary inadvertence is a violation of societal custom and expectation that is not to be tolerated, it would seem logical that the more egregious violations of social praxis, such as those that occur in some of the educational malpractice cases, should not be endured.¹²¹

119. Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772 (1985).

120. This argument is not intended to advocate that doctors should be free from accountability for their negligence.

121. The absence of judicial empathy for educational malpractice victims may explain why members of the judiciary are more tolerant of the negligence of educators than they are of the negligence of doctors. Because of the socioeconomic status of most judicial members, and the availability to them of educational opportunity, neither they nor their children are likely to be victims of the types of misconduct that occur in cases like *Hoffman*, *Donohue*, and *Peter W.* Judges may be more intolerant of medical malpractice since it is far more likely that they may be exposed to a physician's negligence.

In order to bring an action for negligence, plaintiff must plead and prove duty, breach, causation, and injury.¹²² The first element of the prima facie case, determining whether educators owe a duty of care to their students, is a flexible concept. “[D]uty is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.”¹²³ One of the factors considered by the courts in determining whether a duty exists is “the workability of a rule of care, especially in terms of the parties’ relative ability to adopt practical means of preventing injury.”¹²⁴ One frequently made assertion is that a duty of care cannot be imposed on educators because it is impossible to formulate a feasible standard of care when a myriad of pedagogical approaches exist.¹²⁵ In *Peter W.*, the California court compared the activity of drivers to that of educators, arguing that divergent educational philosophies rendered the articulation of an educator’s standard of care impossible. The court implied that it is possible to create a standard of care for drivers because opinions about driving are not as varied as opinions relating to pedagogical approaches.¹²⁶

122. DAN B. DOBBS, *TORTS AND COMPENSATION* 107 (2d ed. 1993).

123. *Dillon v. Legg*, 68 Cal. 2d 728, 734, 441 P.2d 912, 916, 69 Cal. Rptr. 72, 76 (1968) (quoting *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* 332-33 (3d ed. 1964)).

124. *Peter W. v. San Francisco Unified Sch. Dist.*, 60 Cal. App. 3d 814, 822, 131 Cal. Rptr. 854, 859 (1976). It is especially clear in the misclassification cases that the educator is most capable of preventing the injury caused by the negligent placement. The student relies on the educator’s expertise in evaluating his ability and placing him in the setting most suitable. The educator is the only party in a position to avoid negligent evaluation and placement.

125. *Id.*

126. Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might—and commonly does—have his own emphatic views on the subject.

Id.

This is a judicial ignorance argument where judges claim to lack the expertise required to evaluate the decisions made by professionals. Another commentator rejects this argument:

[T]he proposition that a judge and jury cannot ultimately determine the legality of a particular agency decision because of the difficulty untrained laymen would presumably have in understanding the basis of the decision has no precedent in the law. Furthermore, the proposition rests on a fundamentally unsound premise: that an individual’s technical expertise in a given field of endeavor in itself qualifies him to safeguard the various ethical, jurisprudential, personal, and pragmatic social interests which the law serves.

Elson, *supra* note 95, at 669. Judges review complicated and highly technical decision-making whenever actions for malpractice are brought against doctors, architects, accountants, and engineers. The same devices employed to educate the judge and jury

This court's comparison of the highway to the classroom, however, fails to explain why courts are unable to create a standard of care for educators. With respect to the "activity of the highway," there are "different and conflicting theories" of how to drive without injuring others. In sanctioning negligence on the highway, a standard of care does not include specifics about driving, like keeping both hands on the steering wheel. A driver can drive with one hand and satisfy the reasonable and prudent person standard of care. Other drivers believe that the only reasonable and prudent way to drive is with two hands on the wheel at all times. Regardless of the nebulousness of the standard of care for drivers, however, all drivers readily agree they will have breached the standard of care if they drive with no hands on the wheel. Similarly, educators are able to readily agree on what should *not* be done with respect to a child's education. The defendants in *Hoffman* did not choose one of the different and conflicting theories of how or what a child should be taught. They negligently classified plaintiff as retarded and subsequently overlooked visible indications of "normalcy." There is no theory of education that recommends that educators ignore indications that a child has been negligently evaluated and placed. This conduct in the educational context is equivalent to driving with no hands.

While it is true there are numerous approaches to education, it is not true that it is impossible to articulate some basic standard of care for educators. A flexible but workable standard of care can be formulated, as one has been for drivers. In 1993, Congress and the President agreed on a voluntary national system of skill standards and certifications for public schools. The Educate America Act, 20 U.S.C. section 5801, encourages standard-setting regarding the education of teachers and the quality of their performance, the student-teacher ratio, student performance, the curriculum, and the conditions of school buildings and equipment used by students.¹²⁷ Even though the standards are voluntary, the law demonstrates that basic minimum standards of care in education can be articulated.

in these cases may be employed in an action for educational malpractice.
127. S. REP. No. 103-85, 103d Cong., 2d Sess. 1-3 (1993).

Courts also refer to a form of Learned Hand risk-utility analysis in determining whether a duty exists.¹²⁸ Under this type of analysis, when the social utility of an actor's conduct outweighs the risks of her conduct, no duty of care will be imposed on the actor. Without explicitly saying so, the courts in the educational malpractice cases conclude that the social utility of the defendant educators' conduct outweighs the risks inherent in their conduct. This conclusion, however, requires a characterization of school district conduct that is overly broad. The defendants' conduct could be described as an attempt to educate the plaintiff. Seen in this way, one can argue that the social utility of education, even education attempted and failed, outweighs the risks involved. When, however, defendants' conduct is properly described, a more accurate assessment of the social utility of an educator's behavior can be made. The risks inherent in negligently evaluating and placing a child, and allowing the misclassification to continue even after observing indications that a severely harmful error has been committed, are tremendous. This is conduct that has no social utility.

"[T]he kind of person with whom the actor is dealing" is another factor to consider in determining the existence of a duty of care.¹²⁹ In considering "the kind of person with whom" educators deal, it is helpful to consider the principle of *in loco parentis* under which parental authority is delegated to public school officials.¹³⁰ The *in loco parentis* doctrine "supersedes the usual rule that members of the general public do not have a general duty to come to the aid of a person in danger."¹³¹ The duty under this doctrine has been imposed upon educators only in cases of physical injury to students. The recognition of a duty in such instances, however, is illuminative of "the kind of person with whom the actor is dealing." The doctrine of *in loco parentis* embodies the public policy determination that because the actor in this context deals with a child, a duty will be recognized where it ordinarily would not, since the child is unable to avoid injury without the help of the

128. Learned Hand described the negligence determination as consisting of three variables: the probability of the injury occurring (P), the gravity of the resulting injury (L), and the burden of adequate precautions (B). Hand postulated that if the burden of adequate precautions is less than the gravity of the injury, discounted by the probability of the injury occurring ($B < P * L$), then a duty has been breached. If the cost of prevention is greater than the gravity of the injury, discounted by the probability of occurrence ($B > P * L$), then no duty has been breached. This risk-utility analysis is used by courts to determine whether an actor breached a duty of care to take adequate precautions. *United States v. Carroll Towing*, 159 F.2d 169 (2d Cir. 1947).

129. *Peter W.*, 60 Cal. App. 3d at 818, 131 Cal. Rptr. at 856.

130. Donald L. Beci, *School Violence: Protecting Our Children and the Fourth Amendment*, 41 CATH. U. L. REV. 817, 823 (1992).

131. *Id.* at 817.

educator. The doctrine of *in loco parentis* requires educators to prevent the infliction of severe harm on students. This responsibility, if it is to have any significance at all, must include a duty to prevent the kind of harm suffered by schoolchildren in some of the educational malpractice cases.¹³² It seems logical that the delegation of authority from parents to school officials should not only require educators to prevent physical harm to students but must also require educators to refrain from inflicting severe mental harm on the students they are charged with protecting.¹³³

An additional factor considered by courts in determining duty is "the relative ability of the parties to bear the financial burden of injury."¹³⁴ Many of this nation's public schools suffer severe financial hardship.¹³⁵ It would be extremely difficult for these financially troubled school districts to bear the costs of plaintiff's injury by providing damages. The financial difficulties of these schools would be less significant if plaintiffs were restricted to seeking injunctive relief, but limiting plaintiffs to injunctive relief may be inadequate in some cases. In those cases where injunctive relief alone is insufficient, one must remember that this particular policy judgment calls for the consideration of the parties' *relative* ability to bear the costs of miseducation. In spite of the financial troubles of many school systems, one must compare the burden of liability on the school district to the burden on the student. Liability may enlarge the school district's financial hardships, but the possibility of paying damages may deter future detrimental conduct, so that school districts pay out less and less in damages as time goes on. The educational malpractice victim who remains uneducated, functionally illiterate, and emotionally scarred, however, loses more than money. She

132. See *infra* notes 154-63 and accompanying text.

133. This principle would apply even when the harm to be prevented is mental or emotional in nature. See *infra* text accompanying notes 154-63.

134. *Peter W.*, 60 Cal. App. 3d at 818, 131 Cal. Rptr. at 859.

While not a party to an educational malpractice action, society bears an enormous financial burden when its members remain uneducated. See *supra* notes 10-12 and accompanying text.

135. It is very likely that mismanagement of funds is the primary cause of financial hardships in some school systems. Custodians, on the average, earn twenty thousand dollars more per year than teachers, while school buildings remain in a serious state of disrepair. Jodi Mailander, *Pay Dilemma Tough Lesson for Teachers*, MIAMI HERALD, Nov. 22, 1992, at 1BR.

loses her life. Her ability to earn a living and function in society on even the most basic levels is severely hampered.

One must also consider “the body of statutes and judicial precedents which color the parties’ relationship” and “the prophylactic effect of a rule of liability” in determining whether a duty exists.¹³⁶ There is much law governing the relationship between a student and her educators. But, as this Article indicates, the statutes and common law that govern this relationship have proven inadequate in protecting schoolchildren. The consideration of “the prophylactic effect of a rule of liability” goes to one of the fundamental goals of tort law, the deterrence of injury caused by intentional or negligent acts. As in other areas of tort law, the goal of a system of potential liability for negligent evaluation and classification is to force educators to more carefully discharge their responsibilities. Whether such a system would be effective, however, is debatable. It has been argued that the imposition of liability under the tort system “falls short as a deterrent.”¹³⁷ The threat of liability for medical malpractice, for example, may fail to deter conduct that results in harm to a patient since injuries inflicted by doctors are generally caused by a physician’s momentary inadvertence. It is unlikely that potential tort liability will deter the inadvertent errors that result from this type of transitory inattention.¹³⁸ The eventuality of deterring harmful behavior implies that the possibility of an actor considering the consequences of his conduct is not precluded by the ephemeral nature of the actor’s negligence. Tort liability is less likely to deter harmful conduct when the actor’s fault is fleeting. It is more likely to deter behavior that is repetitive, or behavior that occurs after an opportunity to deliberate.¹³⁹

Unlike medical malpractice cases, the educational malpractice cases do not involve instances of momentary inadvertence. The negligence of defendants in misclassification cases like *Hoffman* persists for a

136. *Peter W.*, 60 Cal. App. 3d at 822, 131 Cal. Rptr. at 859.

137. Stephen D. Sugarman, *A Restatement of Torts*, 44 STAN. L. REV. 1163, 1180 (1992).

138. *Id.*

139. As one commentator has suggested:

Negligence is, at bottom, the result of the defendant’s inadvertence; the notion of assessing damages as a result of harm caused by that conduct works best to deter ongoing or repeated incidents of negligence, not merely the single inadvertent act of one defendant. In essence, we, as human beings, all act unreasonably at times; people can be broadly influenced to take greater care in their conduct, but we cannot necessarily expect tort law to shape that character in specific instances of negligence.

Michael A. Mogill, *And Justice for Some: Assessing the Need to Recognize the Child’s Action for Loss of Parental Consortium*, 24 ARIZ. ST. L.J. 1321, 1390 (1992).

significant period of time and is conscious and deliberate. It is more likely that an educator's negligence will be deterred because educators have time to think about the consequences of their actions.

"[I]n the case of a public agency defendant, the extent of its powers, the role imposed upon it by law and the limitations imposed upon it by budget" are additional considerations enumerated by courts in finding a duty.¹⁴⁰ The "power" to be exerted with respect to a child's education lies with the child's educators. It is power that is shared only with the student and his or her parents. Furthermore, while many of this nation's school districts are limited by serious financial constraints, a more responsible plan for spending school funds may mitigate financial hardship in some instances. At any rate, financial difficulties should not preclude the accountability of educators for their grossly negligent behavior.

In refusing to recognize a duty of care for educators, courts enunciate another policy concern, "the prospect of limitless liability for the same injury."¹⁴¹ The problem of limitless liability can be resolved under existing tort law principles that limit liability in other contexts. The proximate cause analysis severs liability when the defendant's conduct is only remotely connected to the plaintiff's injury; a defendant will not be held accountable for every possible consequence of an act.¹⁴² Additionally, analytical concepts borrowed from corporate law and derivative litigation would serve to alleviate the threat of limitless liability.¹⁴³

The *Peter W.* court also described a "practical" policy consideration in support of its "no-duty" finding. "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."¹⁴⁴ The court seemed to conclude that since the school

140. *Peter W.*, 60 Cal. App. 3d at 822, 131 Cal. Rptr. at 859.

141. *Id.* at 823, 131 Cal. Rptr. at 860.

142. The requirement of proximate causation involves a network of policy considerations designed to exert some control over potentially limitless liability. *See, e.g., Sheehan v. City of New York*, 40 N.Y.2d 496, 354 N.E.2d 832, 387 N.Y.S.2d 92 (1976).

143. *See supra* notes 94-114 and accompanying text. For example, a special litigation committee, formed to consider the merits of a potential action for educational malpractice, should undertake the proximate cause analysis that prevents limitless liability for tortfeasors.

144. *Peter W.*, 60 Cal. App. 3d at 825, 131 Cal. Rptr. at 861.

system is plagued with so many serious problems, it is best to leave the system alone. It would seem, however, that the existence of so many problems supports the recognition of a duty owing from educators to their students, at least in certain circumstances. Some amount of accountability for educators would logically protect students from the harmful conduct that provokes some of the controversy and public dissatisfaction by making educators more careful.

Consideration of the evolution of landowner liability cases is also helpful in the educational malpractice context.¹⁴⁵ In *Rowland v. Christian*,¹⁴⁶ the Supreme Court of California enumerated several relevant factors to be considered in determining whether a landowner owes a duty of care to those who enter her land, and the extent of that duty if it in fact exists. The court listed the following factors:

[F]oreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, [and] the extent of the burden to the

145. Traditionally, the nature and extent of a landowner's duty is based upon the status of those who enter her land. Entrants are divided into three categories: trespasser, licensee (one who enters the land for his own purposes but with the landowner's consent), and invitee (one who is invited onto the land and whose entrance confers a benefit to the landowner, for example, where the entrance is connected with the landowner's business). The landowner owes the highest duty of care to invitees, a lesser duty to licensees, and even less to trespassers. See, e.g., *Rowland v. Christian*, 69 Cal. 2d 108, 113, 443 P.2d 561, 565, 70 Cal. Rptr. 97, 101 (1968). "It has been suggested that the special rules regarding liability of the possessor of land are due to historical considerations stemming from the high place which land has traditionally held in English and American thought, the dominance and prestige of the landowning class in England during the formative period of the rules governing the possessor's liability, and the heritage of feudalism." *Id.* at 113, 443 P.2d at 564-65, 70 Cal. Rptr. at 100-01. Many jurisdictions have to varying extents abolished these categories and apply the common law standard that requires the behavior of a reasonable and prudent person in similar circumstances. See *id.* at 114, 443 P.2d at 5, 70 Cal. Rptr. at 101; *Scurti v. City of New York*, 40 N.Y.2d 433, 354 N.E.2d 794, 387 N.Y.S.2d 55 (1976). The evolution of the categories, however, illustrates the judiciary's ability to regulate the nature of an actor's duty of care depending upon certain policy considerations. Specifically, under the traditional approach, landowners are granted immunity from liability. They owe no duty when the entrant trespasses upon the land. The immunity decreases, and the duty grows, with the status of the entrant. In spite of its overwhelming concern for the protection of landowners, the judiciary refrained from creating a blanket immunity for landowners. In the context of educational malpractice, however, the judiciary has not demonstrated such flexibility. Educators, for policy reasons, are completely immune from liability.

There is another interesting comparison between the landowner rules and the "no-duty" approach in the educational malpractice cases. The complete immunity enjoyed by landowners is extended only when the entrant onto the land has been deemed to be less deserving of protection. *Salima v. Scherwood S., Inc.*, 38 F.3d 929, 931-32 (7th Cir. 1994). Educators, however, enjoy complete immunity even though schoolchildren who are harmed by an educator's negligence deserve and require protection.

146. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach.¹⁴⁷

The court in *Peter W.* applied these factors in concluding that the defendant educators owed no duty to their student.¹⁴⁸ It is difficult, however, to see how the court's analysis of the *Rowland* factors supports its refusal to impose a duty on educators. Especially in the cases where egregious conduct causes severe harm, the application of the *Rowland* factors requires the conclusion that an educator's duty of care be recognized. The *Rowland* factors are examined in the paragraphs that follow.

In the negligent misclassification cases, it is both foreseeable and certain that plaintiff's cognitive development will be seriously impeded. While factors other than the educator's conduct may contribute to plaintiff's learning difficulties, the educator's continued failure to address the student's problems is inextricably connected to the student's injury. The educators who negligently place the student impose upon him an injury quite separate from the student's learning disabilities. When the negligent placement itself causes mental and emotional harm, there is a foreseeable and certain connection to the defendant's conduct uninterrupted by the neurological, intellectual, or environmental problems that existed before the wrongful placement.

In those cases where plaintiff can show that the defendant ignored visible signs of serious learning difficulties or inappropriate placement, the moral blameworthiness of defendant's conduct with, which the *Rowland* court was concerned, is obvious.

The policy of preventing future harm articulated in *Rowland* would be served by the recognition of a duty, at least in the negligent misclassification context, in order to achieve the often articulated societal goal of protecting children who are incapable of protecting themselves.

Finally, the only burden imposed on the defendant is the requirement that he perform his job in a non-negligent manner, an obligation imposed on virtually everyone in the workplace. The benefits to the community include a more educated generation and an allayment of some of the troubles that afflict a society besieged by large numbers of illiterate citizens.

147. *Id.* at 112, 443 P.2d at 564, 70 Cal. Rptr. at 100.

148. *Peter W.*, 60 Cal. App. 3d at 825, 131 Cal. Rptr. at 861.

The policy considerations enumerated by the judiciary do not support or explain the disallowance, without qualification or exception, of the educational malpractice cause of action. The educational malpractice decisions are wrong as a matter of policy. This conclusion is reached by performing a realistic, conscientious, and logical analysis of all of the policy factors articulated by courts in support of their refusal to recognize an educator's duty to students. The Court of Appeal in *Peter W.* acknowledged that the concepts underlying the recognition of a duty of care are not "immutable."¹⁴⁹ And one court has conceded that under existing rules, it *is* possible to find a duty of care owed by educators to their students.¹⁵⁰ That court, however, did not go far enough. Not only is it *possible* to find a duty of care in this context, existing principles of tort law *require* the recognition of a duty, at least in certain contexts. Professor Alexander Bickel wrote that "in achieving integration [in the schools], the task of the law . . . was not to punish law breakers but to diminish their number."¹⁵¹ Similarly, one of tort law's goals is to deter injury by diminishing the number of tortfeasors. Tort law principles require the recognition of a duty of care where practical. If the remaining elements of negligence can be established, the educational malpractice defendants are tortfeasors. Tort law's deterrence goal is served, and the number of tortfeasors is reduced, by recognizing a duty of care.¹⁵² The judiciary in the educational malpractice decisions ignores social reality by adhering to the "no-duty" rule and refuses to face the seriousness of the problems in this nation's schools and the impact of these problems on our society.¹⁵³

149. *Id.* at 821, 131 Cal. Rptr. at 858.

The court illustrates the mutative character of the duty concept with the bystander injury rule. At one time, a duty of care was not recognized in this context but courts now recognize a duty upon plaintiff's showing that the injury was foreseeable.

150. *See* *Donohue v. Copiague Union Free Sch. Dist.*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.W.2d 375 (1979).

151. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 251 (1962).

152. *See supra* notes 136-39 and accompanying text.

153. This is not the first time the courts have adhered to anachronistic ideas that caused the wrong result. Professor Bell describes the Supreme Court's reluctance to intervene during the Great Depression:

People were starving, and for at least half of the population, the economy held little hope of future employment. Even so, the Court rejected several pieces of New Deal corrective legislation—including even some laws favored by many business leaders. . . . [T]he Court insisted on venerating grand rules that had little to do with the modern context of poverty and misery.

DERRICK A. BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 100 (1992).

V. DUTY DEPENDS UPON HOW HARM IS CHARACTERIZED

Judicial disallowance of a remedy for students harmed by grossly negligent educators, without qualification or exception, may be explained by the improper characterization of plaintiff's harm. This section considers the judiciary's mistaken analysis of the injury in the misclassification cases. The judiciary has severely misunderstood the nature, and has consistently underestimated the extent, of the harm caused by an educator's grossly negligent conduct in the misclassification cases. The inadequate education resulting from Daniel Hoffman's negligent placement is only one small part of the harm he suffered. The gist of the plaintiff's harm is the mental and emotional anguish that results when a child of "normal" development is labelled as a mentally retarded child for over a decade. Daniel Hoffman's injury is easily recognized as mental and emotional harm.

Analysis of the policy considerations in educational malpractice claims can only be performed when plaintiff's harm is correctly characterized as mental and emotional.¹⁵⁴ Applying the first of the *Rowland* policy factors to the negligent misclassification cases such as *Hoffman*, one must conclude that the injury to plaintiff's mental well-being is foreseeable and certain. The mental, emotional, and psychological suffering of a "normal" child who is negligently classified and placed with mentally retarded children is indisputable. Peripherally, plaintiff's harm in the misclassification cases involves elements of having been poorly educated. The injury is notably similar to the harm in the "failure to educate" cases, but in addition, the plaintiff has clearly suffered profound mental and emotional injury. The component of

154. In addition to the policy considerations analyzed above, courts have considered two administrative factors in deciding not to recognize educational malpractice causes of action: the possibility of "feigned claims" and difficulty in proving harm. *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 823, 131 Cal. Rptr. 854, 860 (1976). The judiciary voiced identical administrative concerns when it first considered tort liability for negligent and intentional infliction of emotional distress. When tort liability for mental harm was first considered, the fact that emotional injury was difficult to prove and easier to contrive than physical harm precluded recovery for mental or emotional injury. Eventually, courts recognized that these administrative concerns should not preclude the recognition of a duty of care. Questions relating to credibility and the sufficiency of plaintiff's proof are rightfully resolved by the jury, as they are in other contexts.

plaintiff's harm, which is having been badly educated, or not having been educated at all, eclipses the real and essential harm suffered by plaintiff—the severe emotional injury inflicted upon an educable and “normal” child who is labelled retarded.

The connection between the conduct of the educational malpractice defendant and plaintiff's injury, another of the *Rowland* factors required to be present before a duty is imposed, is clarified when the harm is correctly characterized as mental or emotional. The connection between the placement of a child who is not retarded with those who are and the mental and emotional harm that results is inextricable. While there may be many factors contributing to plaintiff's learning problems, defendant's complete failure to address them causes the emotional harm that results when a student is egregiously misclassified.

When an injury like Daniel Hoffman's is seen as emotional harm, the moral reprehensibility of the defendant's conduct, an additional *Rowland* factor, is unquestionable. Clearly, our society seeks to protect the interests of its children in being free from mental and emotional harm. The “consequences to the community,” another factor articulated by the *Rowland* court in determining the existence of a duty of care, will be clearly favorable when a duty to prevent emotional harm to children is recognized. The “extent of the burden to the defendant” of imposing such a duty, the final *Rowland* factor to be considered, is infinitesimal when compared to the value to society of recognizing the duty.

The judiciary's argument that it is impossible to establish causation because of the existence of contributors other than the defendant to plaintiff's harm¹⁵⁵ has even less merit if the harm in educational malpractice cases is properly regarded as mental or emotional. Under traditional tort law analysis, a defendant's conduct proximately causes plaintiff's injury when the harm is foreseeable.¹⁵⁶ In the misclassifica-

155. The *Peter W.* court wrote:

Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified.

Peter W., 60 Cal. App. 3d at 824, 131 Cal. Rptr. at 861; see also *Hunter v. Board of Educ.*, 292 Md. 481, 439 A.2d 582 (1932); *Donohue v. Copiague Union Free Sch. Dist.*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.W.2d 375 (1979); *Helm v. Professional Children's Sch.*, 103 Misc. 2d 1053, 431 N.Y.S.2d 246 (1980). This discussion occurs in the context of determining whether a duty of care exists, but it is essentially an argument that the causation element is lacking.

156. *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928); *Overseas Tankship (U.K.), Ltd. v. Morts Dock & Eng'g Co., Ltd.*, A.C. 388 (Privy Council 1961).

tion cases such as *Hoffman*, the negligent educator is the sole source of plaintiff's mental and emotional injury. Whatever the student's personal problems, the severe emotional and psychological harm suffered by plaintiffs in cases similar to *Hoffman* is directly linked to the negligent evaluation and placement. Some of the concern relating to the proof of causation is eliminated in the misclassification cases because of the difference in the nature of the injury. The problems encountered in establishing causation are essentially resolved in the misclassification cases because the mental and emotional harm inflicted upon a "normal" student forced to spend years in classes for the retarded is clearly foreseeable and attributable to the defendant.

Whether a misclassification plaintiff recovers should depend upon the extent of her harm. Some cases have been brought by plaintiffs compelled to repeat a grade, or by students not permitted to graduate when expected.¹⁵⁷ The allegation in these claims is that the plaintiff has been misclassified as someone who does not deserve to graduate or be promoted. While these plaintiffs have suffered emotional harm, a cause of action should not be allowed because their injury is not severe, and the defendant's conduct cannot be described as egregious. If, however, an educable student with obvious learning difficulties can show that these difficulties were flagrantly ignored by his educators, causing him to remain in a severely harmful and negligent placement, as was clearly the case in *Hoffman*, he should be compensated for his emotional suffering.¹⁵⁸

In addition to the need to avoid compensation for harm that is not severe, vigilance is required to preclude any attempts by plaintiffs to manipulate the definition ascribed to the misclassification cases. If

157. See, e.g., *Brookhart v. Illinois State Bd. of Educ.*, 697 F.2d 179 (7th Cir. 1983); *Board of Educ. v. Ambach*, 90 A.D.2d 227, 458 N.Y.S.2d 680 (1982), *aff'd*, 60 N.Y.2d 758, 457 N.E.2d 775, 469 N.Y.S.2d 669 (1983), *cert. denied*, 465 U.S. 1101 (1984). In *Brookhart* and *Ambach*, the plaintiffs were disabled students whose high school diplomas were invalidated due to their inability to pass basic competency tests. See also *Morgan v. Board of Educ.*, 22 Ill. App. 3d 241, 317 N.E.2d 393 (1974) (student denied promotion to first grade due to inability to pass a readiness test).

158. In other types of misclassification cases, such as negligent tracking situations where students are dumped into special education classes where they do not belong, injunctive relief should be the sole remedy. It is likely that these types of cases will be more numerous, and monetary compensation will unnecessarily drain the already scarce resources of this nation's school systems. The granting of timely injunctive relief will insure that the negligent placement is rectified before irreversible emotional harm is inflicted as was the case in *Hoffman*.

misclassification is too broadly construed, the distinction between these cases and “failure to educate” claims will be meaningless. If the judiciary agrees that a duty owed from educators should only be recognized in the misclassification context, plaintiffs whose injury essentially results from a failure to educate may attempt to recast their claims so they will be considered misclassification claims. For this reason, if a cause of action is recognized only in the misclassification cases, such claims must be narrowly construed and limited to cases of affirmative negligence on the educator’s part. For example, the educator’s misfeasance must involve grossly negligent evaluation and placement of a student that constitutes more than a mere error in judgment. There must be some notice to the educators that the classification was negligently made, coupled with a failure on the educators’ part to rectify the harmful placement.¹⁵⁹ And finally, severe mental and emotional injury must result from the educators’ negligence. The severity of the plaintiff’s harm may be inferred from the egregiousness of the defendant’s conduct, as is done in some intentional infliction of emotional distress cases.¹⁶⁰ All of these factors were present in the *Hoffman* case where the court nevertheless denied recovery, arguing that defendant owed no duty to refrain from this type of egregious conduct in order to avoid severe harm to plaintiff.

Even if courts eventually recognize that plaintiff’s injury has been improperly characterized, misclassification plaintiffs may still be unsuccessful because of judicial reluctance to compensate for harm that is purely mental or emotional.¹⁶¹ At one time, courts were reluctant

159. A parent’s expression of concern should be sufficient to serve as notice to educators. Educators, however, will be held liable only if the placement involved gross negligence.

160. See *State Rubbish Collectors Ass’n v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952). The nature of the defendant’s conduct helps to assure that severe emotional harm resulted. “From their own experience jurors are aware of the extent and character of the disagreeable emotions that may result from the defendant’s conduct . . .” *Id.* at 338, 240 P.2d at 286.

161. As is the case in some tort actions for defamation, privacy, assault, false imprisonment, and battery, defendant’s conduct causes harm to plaintiff’s dignity. See, e.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) (defamation); *Washington v. Harper*, 497 U.S. 210 (1990) (assault); *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261 (1990) (privacy); *Wilson v. Garcia*, 471 U.S. 261 (1985) (battery); *Thigpen v. United States*, 800 F.2d 393, 397 (4th Cir. 1986) (assault and battery). Defendant’s conduct also injures plaintiff economically in the misclassification and “failure to educate” cases. Plaintiffs’ economic interests are protected under traditional tort law principles in actions brought for defamation, injurious falsehood, and interference with contract. See, e.g., *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155 (3d Cir. 1988); *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981). There is no reason to deny protection of plaintiff’s economic and dignity interests merely because the harm is caused by educators.

to allow recovery for other than physical injuries. It is now clear, however, that tort law principles allow protection of a plaintiff's interest in being free from purely emotional and mental harm.¹⁶² The judiciary has recognized plaintiffs' claims for mental and emotional harm in contexts that seem far less meritorious than the situation where severe emotional harm is inflicted upon a child. More specifically, defendants whose conduct is far less egregious than that of the defendants in *Hoffman* have been held accountable for the mental harm their conduct has caused, even when the harm was likely to be far less severe than that inflicted upon Daniel Hoffman.¹⁶³ The incongruous result of the incorrect characterization of plaintiff's harm is that while recognizing an educator's duty to protect students from physical harm, the judiciary refuses to protect the schoolchild's interest in being free from mental harm, even though, in certain circumstances, it provides this protection from emotional harm to plaintiffs outside the school setting.

CONCLUSION

The question explored in this Article is whether the conduct of the defendants in the educational malpractice cases is the type of conduct which the judiciary generally examines. One must conclude that it is

162. See *Simon v. Solomon*, 385 Mass. 91, 431 N.E.2d 556 (1982); *Birkenhead v. Coombs*, 143 Vt. 167, 465 A.2d 244 (1983). In both cases tenants recovered for emotional distress when landlords failed to provide adequate facilities. See also *Christensen v. Superior Ct.*, 54 Cal. 3d 868, 820 P.2d 181, 2 Cal. Rptr. 2d 79 (1991) (relatives, who did not themselves contract for burial services, allowed to recover for emotional distress when defendant mortuaries sold human organs from the remains of the deceased); *Miley v. Landry*, 582 So. 2d 833 (La. 1991) (plaintiff allowed to recover for mental suffering caused by automobile collision).

Also relevant are actions for negligent infliction of emotional distress where bystanders are allowed to recover when they observe or perceive physical injury to a close relative. See *Thing v. La Chusa*, 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989); *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

163. See, e.g., *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980) (recognizing plaintiff's claim for emotional distress against a doctor who erroneously told his wife that she had contracted syphilis); *Gilper v. Kiamesha Concord, Inc.*, 302 A.2d 740 (D.C. 1973) (plaintiff's claim of emotional distress when she bit into and spat out a cockroach that was in a salad at defendant's place of business is a jury question even though there was no physical harm); *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961) (recognizing a child's claim for emotional distress when defendant's employee at a ski center failed to secure the belt in a chair lift).

and that the judiciary should intervene in educators' decisions, at least in the misclassification cases.

Plans for improved pedagogical approaches will be helpful only if educators are held accountable for their grossly negligent acts and omissions. A special state commission appointed by the governor of New York issued a report that lamented the "lack of accountability for school performance."¹⁶⁴ When an educator's conduct is grossly negligent and plaintiff's injury severe, courts should recognize a cause of action for educational malpractice, at least in the misclassification cases. The judiciary has failed to intervene because it wants to leave pedagogical policy determinations to education specialists. The judiciary claims an inability to adjudge pedagogical policy determinations. Courts are equally vigilant about protecting the policy-making powers of corporate managers,¹⁶⁵ yet the decisions of directors and officers are immune from judicial review only if they have satisfied fiduciary obligations. If the decision made by corporate management results from self-dealing, bad faith, or gross negligence, courts will intervene.¹⁶⁶ Similarly, the judiciary should refrain from interfering with decisions regarding pedagogical approaches. Educators' policy decisions *should* be completely immune from judicial review. Decisions relating to pedagogical procedure, such as curriculum choice, should continue to enjoy the full immunity that they now enjoy. Those decisions, however, that do not establish or implement policy must be actionable if they are grossly negligent or reached in bad faith.

The common law is on its way to resolving some of the incongruities in judicial reaction to the decision-making of educators when compared to judicial reaction in other contexts. In *Helbig*, a principal's decision to alter a student's grades in order to improve the school's reputation was deemed to have been reached in bad faith. The *Helbig* plaintiff was

164. James Dao, *Albany Panel Asks Changes For Schools*, N.Y. TIMES, Dec. 21, 1993, at B1. The governor created a commission composed of educators, business people, and politicians to investigate the public schools' budget management after discovering that a school superintendent's retirement package was worth almost one million dollars. *Id.*

165. "[C]ourts of equity will not undertake to control the policy or business methods of a corporation, although it may be seen that a wiser policy might be adopted and the business more successful if other methods were pursued." *Wheeler v. Pullman Iron and Steel Co.*, 143 Ill. 197, 208, 32 N.E. 420, 423 (1892). It is not for the courts to "resolve for corporations questions of policy and business management." *Davis v. Louisville Gas & Elec. Co.*, 16 Del. Ch. 157, 169, 142 A. 654, 659 (1928).

166. If, for example, directors are involved in a conflict of interest, they will no longer enjoy the presumption granted their decisions under the business judgment rule and will bear the burden of proof as to the fairness and reasonableness of the challenged transaction. *Lewis v. S.L. & E., Inc.*, 629 F.2d 764 (2d Cir. 1980).

successful because, as with corporate directors, educators are to be held accountable for decisions made in bad faith. In the education setting, this idea should be extended to decisions that result from gross negligence, as is done with such decisions made by corporate directors.

Is improvement of our public schools a judicial task? Yes. In spite of extensive action on the part of most state legislatures, many of our schools remain severely inadequate. Accountability for educators in egregious cases of misclassification would be an important step toward improved school systems. The judiciary has intervened to make the world safer for shareholders by arming them with derivative litigation.¹⁶⁷ It has done the same for the malpractice victims of other professionals.¹⁶⁸ Under the proposal made in this article, the courts would be used sparingly. Adoption of certain corporate law principles in the school setting will enhance educator accountability and will allow for the opportunity to take corrective action before an action is ever filed. Potential tort liability in the most egregious misclassification cases will prevent harm.

The recognition of an action for malpractice in the misclassification cases would expand tort law's reach when many advocate that tort law liability be limited.¹⁶⁹ This expansion is justified in the most severe misclassification cases. The educators' conduct in these cases involves more than the momentary inadvertence that is typical in many negligence cases. The misclassification defendants have time to think about potential liability and change their behavior. The driver who accelerates rather than brakes in a careless and fleeting moment does not. Potential liability is likely to deter the harmful conduct of educators who misclassify and fail to rectify their error. These cases are much more likely to serve tort law's deterrence goal than cases where the actor is culpable only of momentary lapses of attention.

The genius of our common law has been its capacity for growth and its adaptability to the needs of the times. Generally courts have accomplished the desired result indirectly through the molding of old forms. Occasionally they

167. See *supra* text accompanying notes 85-87.

168. See *supra* notes 38-40 and accompanying text.

169. Two examples are proposals to limit punitive damages in negligence actions and recoveries for the victims of medical malpractice. See *Dellmuth v. Muth*, 491 U.S. 223 (1989) (limiting tuition reimbursement); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984) (limiting a related service under the Education of the Handicapped Act); *Allen v. Wright*, 468 U.S. 737 (1984) (limiting damages in biased school setting).

have done it directly through frank rejection of the old and recognition of the new. But whichever path the common law has taken, it has not been found wanting as the proper tool for the advancement of the general good.¹⁷⁰

Judge Jacobs would be disappointed in the lack of genius of the common law as it relates to educational malpractice. In the context of the negligent performance of educators' tasks, it has failed to take the path that would most advance the general good.

170. A.P. Smith Mfg. Co. v. Barlow, 13 N.J. 145, 154, 98 A.2d 581, 586 (1953) (Jacobs, J.).