St. John's Law Review

Volume 57, Spring 1983, Number 3 Article 9

Actions in Breach of Contract and Fraudulent Misrepresentation Against Private Educational Institution Will Not Be Entertained When Allegations of Complaint Attack Quality of Education

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submitted, therefore, that when a plaintiff attempts to include additional parties as defendants in his action, filing a supplemental summons with a county clerk before the motion for leave to serve the new defendants is made does not suffice to afford the plaintiff the benefit of the 203(b)(5) toll. Consequently, since satisfactory filing with the county clerk is a prerequiste to obtaining the additional time within which to serve the new defendants,[33] the service upon the defendants in *Dowling* after the limitations period had expired, even though the motion for leave eventually was granted, would appear untimely.[34]

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DEVELOPMENTS IN NEW YORK LAW

Actions in breach of contract and fraudulent misrepresentation against private educational institution will not be entertained when allegations of complaint attack quality of education

It has been widely held that an educational malpractice claim asserted against a public school for failure adequately to educate its students is not actionable.[35] Notwithstanding the apparent con-

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made before the limitations period expired, and was granted after the statute of limitations terminated. *Id.* at 436, 455 N.Y.S.2d at 629. In *Dowling*, however, the motion for leave to serve the new defendants was not made until after the supplemental summons had been filed with the county clerk, and the defendants were not served until after the prescribed statutory period had expired. *Id.* This was not the situation presented in *Vastola*, and thus, it is submitted that its reasoning is inapplicable to the circumstances of *Dowling*.

[33] CPLR 203(b)(5) (McKinney Supp. 1982-1983).

[34] *See* Arnold v. Mayal Realty Co., 299 N.Y. 57, 85 N.E.2d 616 (1949). In *Arnold*, the Court of Appeals considered whether the date of the commencement of the action, for purposes of determining the applicability of the statute of limitations, is the date on which the motion for leave to serve a supplemental summons is made, or the date on which the supplemental summons and amended complaint actually are served. *Id.* at 60, 85 N.E.2d at 617. The Court favored the latter date, stating that "a Statute of Limitations is not open to discretionary change by the courts, no matter how compelling the circumstances." *Id.* Moreover, timely service of a codefendant will not aid a plaintiff seeking to bring a new defendant into the action through service of a supplemental summons; the statute of limitations will expire if the additional defendant is not served within the prescribed period. Miller v. Farina, 58 App. Div. 2d 731, 732, 395 N.Y.S.2d 867, 869 (4th Dep't 1977); *see* WK&M § 203.05, at 2-67 (1982 & Supp. 1982).

[35] *See, e.g.*, Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 825-28, 131 Cal. Rptr. 854, 861-63 (1976); Hunter v. Board of Educ., 292 Md. 481, 484, 439 A.2d 582, 586 (1982); Hoffman v. Board of Educ., 49 N.Y.2d 121, 125-26, 400 N.E.2d 317, 319-20, 424 N.Y.S.2d 376, 378 (1979); Donohue v. Copiague Union Free School Dist., 47 N.Y.2d 440, 445, 391 N.E.2d 1352, 1354, 418 N.Y.S.2d 375, 378 (1979). In *Donohue*, the plaintiff showed that,

tractual relationship between a private school and its students,[36]

despite his receipt of a diploma from the Copiague High School, he "lack[ed] even the rudimentary ability to comprehend written English on a level sufficient to enable him to complete applications for employment." 47 N.Y.2d at 442, 391 N.E.2d at 1353, 418 N.Y.S.2d at 376-77. The plaintiff sought damages of $5,000,000, alleging that the school promoted him to each successive grade without evaluating his mental capabilities, and that the school failed to provide adequate teachers, psychologists, and other personnel to test and evaluate him. *Id.*, 391 N.E.2d at 1353, 418 N.Y.S.2d at 377. The claim was framed in terms of educational malpractice and negligent breach of a constitutionally imposed duty to educate. *Id.* at 443, 391 N.E.2d at 1353, 418 N.Y.S.2d at 377. The Court of Appeals held that, even though the educational malpractice allegations met the formal pleading requirements, as a matter of public policy the Court should not entertain such claims. *Id.* Noting that the legislative and constitutional system for the control and maintenance of the public school system "is vested in the Board of Regents and the Commissioner of Education," *id.* at 444, 391 N.E.2d at 1354, 418 N.Y.S.2d at 377-78, the Court stated that the purpose behind this system was to remove educational controversies from the courts, *id.*, 391 N.E.2d at 1354, 418 N.Y.S.2d at 378. The Court observed that if it recognized such a cause of action, it would be required to review overall educational policies and their everyday implementation, which it refused to do absent exceptional circumstances demonstrating "gross violations of defined public policy." *Id.* at 445, 391 N.E.2d at 1354, 418 N.Y.S.2d at 378. The Court summarily dismissed the constitutionally based claim, reasoning that the state constitution's imposition of a general obligation on the legislature to support and maintain a public school system does not create a duty that runs from the local public school district to the individual students of that district. *Id.* at 443, 391 N.E.2d at 1353, 418 N.Y.S.2d at 377.

In *Hoffman*, the plaintiff was put in a class of mentally retarded children after he tested below the norm on a standard IQ test. 49 N.Y.2d at 123-24, 400 N.E.2d at 318, 424 N.Y.S.2d at 377-78. The child had a severe speech impediment, which prompted the testers' recommendation that the plaintiff be retested within 2 years. *Id.*, 400 N.E.2d at 318, 424 N.Y.S.2d at 377. No such tests were performed and the child remained in the class for 12 years, until 1969, when he was retested and scored well within the norm. *Id.* at 124, 400 N.E.2d at 318, 424 N.Y.S.2d at 378. Although the school's actions seemingly constituted affirmative acts of negligence, the Court of Appeals stated that "[t]he policy considerations which prompted our decision in *Donohue* apply with equal force to 'educational malpractice' actions based upon allegations of educational misfeasance and nonfeasance." *Id.* at 126, 400 N.E.2d at 320, 424 N.Y.S.2d at 379.

Other public policy grounds for not recognizing a cause of action for failure to provide an adequate education include the difficulty of determining legal cause, uncertainty of damages, lack of a readily acceptable standard of care, fear of a flood of litigation from disaffected students and parents, and an asserted lack of judicial knowledge concerning educational policy. *See* Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 824-25, 131 Cal. Rptr. 854, 861 (1976); Hunter v. Board of Educ., 292 Md. 481, 484, 439 A.2d 582, 585 (1982).

[36] *Cf.* Carr v. St. John's Univ., 17 App. Div. 2d 632, 633, 231 N.Y.S.2d 410, 412-13 (2d Dep't) (catholic students expelled from school for marrying in a civil ceremony), *aff'd*, 12 N.Y.2d 802, 187 N.E.2d 18, 235 N.Y.S.2d 834 (1962). In *Carr*, the court stated that "[w]hen a student is duly admitted by a private university, secular or religious, there is an implied contract between the student and the university that, if he complies with the terms prescribed by the university, he will obtain the degree which he sought." 17 App. Div. 2d at 633, 231 N.Y.S.2d at 413; *see* Goldstein v. New York Univ., 76 App. Div. 80, 83, 78 N.Y.S. 739, 740 (1st Dep't 1902); *infra* note 64 and accompanying text. *But see* Tedeschi v. Wagner College, 49 N.Y.2d 652, 658, 404 N.E.2d 1302, 1305, 427 N.Y.S.2d 760, 763 (1980). In

and that the Education Law provides that students attending private schools should receive an education "at least substantially equivalent" to that received by public school students,[37] it has been unclear whether suits[38] instituted by students or their parents against private schools are cognizable in New York.[39] Recently, in *Paladino v. Adelphi University*,[40] the Appellate Division, Second

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Tedeschi, the Court of Appeals stated that

> [a] [c]ontract theory is not wholly satisfactory [to describe a student-private school relationship] because the essentially fictional nature of the contract results in its generally being assumed rather than proved, because of the difficulty of its application, and because it forecloses inquiry into, and a balancing of, the countervailing interests of the student on the one hand and the institution on the other.

Id. (citations omitted).

[37] N.Y. EDUC. LAW § 3204 (McKinney 1981 & Supp. 1982). Section 3204 of the Education Law provides: "Instruction given to a minor elsewhere than at a public school shall be at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides." *Id.*; *see In re* Franz, 55 App. Div. 2d 424, 426, 390 N.Y.S.2d 940, 941 (2d Dep't 1977) (standard of instruction and subject matter taught at a place other than a public school must conform to that of the local public school board).

[38] In addition to claims that sound in educational malpractice, both breach of contract and intentional tort have been advanced in other states as possible theories of recovery for a public school's failure to educate. *See, e.g.*, Hunter v. Board of Educ., 292 Md. 481, 483, 439 A.2d 582, 586 (1982). In *Hunter*, parents alleged that the board of education's employees "intentionally and maliciously" provided them with false information about their son's learning abilities, altered school records to conceal their actions, and demeaned the child. *Id.* at 484, 439 A.2d at 583. The Maryland Court of Appeals held that the parents were entitled to attempt to produce adequate evidence to meet the "formidable" burden of proof. *Id.* at 490-91, 439 A.2d at 587. According to the court, public policy considerations that otherwise would preclude liability, *see supra* note 35, could not be used to shield the intentional torts of educators. 292 Md. at 490, 439 A.2d at 587. The breach of contract claim, however, was summarily rejected by the *Hunter* court because "the uncertainty of damages, the difficulty in determining legal cause, and the public policy factors precluding negligence claims remain true whether the allegations state breach of contract or tort." *Id.* at 490 n.5, 439 A.2d at 586 n.5.

In a number of other cases, actions in negligence alleging a general failure to educate, either by misfeasance or nonfeasance, have been uniformly rejected. *See infra* note 54 and accompanying text. Significantly, commentators have suggested several other theories of recovery including a statutory duty to provide an effective education, promissory estoppel, and third-party beneficiary of a contract. *See generally* Funston, *Educational Malpractice—A Cause of Action in Search of a Theory*, 18 SAN DIEGO L. REV. 743, 759-90 (1981); Lipsig, *Educational Malpractice—Recovery Theories Needed*, N.Y.L.J., June 28, 1979, at 1, col. 1; Note, *Educational Malfeasance: A New Cause of Action for Failure to Educate?*, 14 TULSA L.J. 386, 390-403 (1978); Comment, *Educational Malpractice: When Can Johnny Sue?*, 7 FORDHAM URB. L.J. 117, 118-40 (1978).

[39] *But see* Helm v. Professional Children's School, 103 Misc. 2d 1053, 1054, 431 N.Y.S.2d 246, 247 (Sup. Ct. App. T. 1st Dep't 1980) (claim of educational malpractice against a private school is not cognizable because the public policy considerations that preclude such actions against public schools are "equally applicable to . . . private education").

[40] 89 App. Div. 2d 85, 454 N.Y.S.2d 868 (2d Dep't 1982).

Department, held that breach of contract and fraudulent misrepresentation actions asserted against a private elementary school for failure to supply a quality education may not be entertained by a New York court.[41]

In *Paladino,* Michael Paladino was enrolled by his parents in the Waldorf School, a private educational institution, which he attended from the nursery school level through the fifth grade.[42] After Michael exhibited learning difficulties in 1979,[43] his parents sought an independent evaluation of their son's academic progress.[44] Tests administered by a private testing agency established that Michael was not equipped with the academic skills needed by a fifth grader and that he was "several grades below the fifth grade level in arithmetic, reading, and writing."[45] Upon receiving this information, the school declined to promote the child to the sixth grade.[46] Thereafter, on behalf of his son and himself, Michael's father commenced an action alleging breach of contract[47] and fraudulent misrepresentation,[48] each claim based largely upon the

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[41] *Id.* at 86, 454 N.Y.S.2d at 870.

[42] *Id.* Michael Paladino was enrolled at the Waldorf School from 1972 through 1979.

[43] *Id.* After Michael entered the first grade, his parents began to receive reports from the Waldorf School concerning their son's status and academic progress in each subject area. *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* The child later was enrolled in a public school in which he was required to repeat the fifth grade. *Id.*

[47] *Id.* In the complaint, Michael's father alleged that the school breached its agreement to provide a quality education, necessary tutoring, and "qualified and expert teachers." *Id.* In addition, he alleged that the school furnished false and misleading reports on Michael's academic progress, promoting him each year when he was not qualified for the next grade. *Id.* at 93, 454 N.Y.S.2d at 874.

[48] *Id.* at 86-87, 454 N.Y.S.2d at 870. Under New York common law, four elements must be proved by the plaintiff to establish a prima facie case of fraudulent misrepresentation: (1) "misrepresentation, concealment or nondisclosure of a material fact;" (2) "intent to deceive;" (3) "justifiable reliance upon the misrepresentation;" and, (4) injury. Idrees v. American Univ., 546 F. Supp. 1342, 1346 (S.D.N.Y. 1982); *see* Channel Master Corp. v. Aluminum Ltd. Sales, 4 N.Y.2d 403, 406-07, 151 N.E.2d 833, 835, 176 N.Y.S.2d 259, 262 (1958). The plaintiff must prove these elements by clear and convincing evidence. Ajax Hardware Mfg. Corp. v. Industrial Plants Corp., 569 F.2d 181, 186 (2d Cir. 1977); Simcuski v. Saeli, 44 N.Y.2d 442, 452, 377 N.E.2d 713, 719, 406 N.Y.S.2d 259, 265 (1978).

In *Paladino,* the plaintiffs alleged that the defendant intentionally represented itself to be a school of the highest quality that would provide Michael with a better education than could be obtained at the local public school, that the child would receive individualized tutoring when required, and that the parents would receive accurate, periodic reports on their child's progress. 89 App. Div. 2d at 92, 454 N.Y.S.2d at 873. The plaintiffs contended that these representations were false because the progress reports were inaccurate and the tutorial services were not provided when needed. *Id.*

school's failure to provide the quality of education that it allegedly had promised to afford.[49] The trial court denied the school's motion for summary judgment,[50] distinguishing these causes of action from educational malpractice suits which have been held, on public policy grounds, to be nonactionable in the New York courts.[51]

On appeal, the Appellate Division, Second Department, reversed,[52] holding that breach of contract and fraudulent misrepresentation actions against private educational institutions are not cognizable in New York when the allegations of the complaint attack the quality of the education provided.[53] Stressing that educational malpractice claims uniformly have been rejected on public policy grounds,[54] Justice Brown, writing for a unanimous panel,[55] concluded that the same policy reasons mandate the court's refusal to entertain breach of contract claims.[56] After observing that the state has established a regulatory scheme to monitor the quality of education provided by private schools,[57] the court declared that

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[49] 89 App. Div. 2d at 86-87, 454 N.Y.S.2d at 870. The breach of contract action brought on Michael's behalf was based upon a third-party beneficiary theory. *Id.*

[50] Paladino v. Adelphi Univ., 110 Misc. 2d 314, 315, 442 N.Y.S.2d 38, 39 (Sup. Ct. Nassau County 1981). Special term emphasized that the school, by making the motion for summary judgment, had prevented the plaintiffs from timely discovering certain documents supporting their claims. *Id.* at 316, 442 N.Y.S.2d at 39; *see* CPLR 3214 (1970) (motion for summary judgment will stay discovery).

[51] Paladino v. Adelphi Univ., 110 Misc. 2d 314, 315, 442 N.Y.S.2d 38, 39 (Sup. Ct. Nassau County 1981). Special term reasoned that the educational malpractice cases in New York were based upon "the discretionary conduct attending the educational function of an institution," *id.*, while the Waldorf School allegedly had acted in violation "of good faith, reasonableness, rationality, and even basic fairness," *id.* The court specifically stated that "representations, allegedly fraudulent in nature, were made to the plaintiff parent. . . ." *Id.*

[52] Paladino v. Adelphi Univ., 89 App. Div. 2d 85, 454 N.Y.S.2d 868 (2d Dep't 1982), *rev'g*, 110 Misc. 2d 314, 442 N.Y.S.2d 38 (Sup. Ct. Nassau County 1981).

[53] *Id.* at 93, 454 N.Y.S.2d at 873.

[54] *Id.* at 87, 454 N.Y.S.2d at 870; *see, e.g.*, Hoffman v. Board of Educ., 49 N.Y.2d 121, 125-26, 400 N.E.2d 317, 319-20, 424 N.Y.S.2d 376, 378 (1979); Donohue v. Copiague Union Free School Dist., 47 N.Y.2d 440, 444, 391 N.E.2d 1352, 1354, 418 N.Y.S.2d 375, 378 (1979); *see also* Helm v. Professional Children's School, 103 Misc. 2d 1053, 1054, 431 N.Y.S.2d 246, 247 (Sup. Ct. App. T. 1st Dep't 1980). In *Helm*, the court held for the first time that "courts should not entertain a cause of action in educational negligence . . . against . . . *private* schools." 103 Misc. 2d at 1054, 431 N.Y.S.2d at 246 (emphasis added).

[55] Presiding Justice Mollen and Justice Rubin, the other members of the panel, joined in Justice Brown's decision.

[56] 89 App. Div. 2d at 92-93, 454 N.Y.S.2d at 873. The court stated that "[t]here is nothing novel about a contract action that would permit for judicial intervention into the process of learning. For in effect, the claim still requires judicial displacement of complex educational determinations made by those charged with the responsibility to instruct the child." *Id.* at 90, 454 N.Y.S.2d at 872.

[57] *Id.* at 90, 454 N.Y.S.2d at 872; *see* N.Y. EDUC. LAW § 5003 (McKinney 1981 & Supp.

public policy precludes judicial consideration of a "controversy [which] requires the examination of the efficacy of the course of instruction."[58] Justice Brown also reasoned that since the Commissioner of Education may take disciplinary action against a private school for "good cause," an alternative means exists to ensure the quality of education obtained by schoolchildren.[59] In dictum, the court noted that a breach of contract action might lie if the school had provided no academic services in exchange for tuition and fees, or if it had promised to provide specific kinds and hours of services and failed to perform.[60] With respect to the causes of action based upon the school's alleged fraudulent misrepresentation, the second department initially observed that a knowing misrepresentation may result in the imposition of liability.[61] Justice Brown ruled, however, that misrepresentations related to the quality of education, such as those present in the case, are not actionable because they "are not statements of facts capable of proof, but rather opinions which ought not provide a basis for the imposition of liability."[62]

It is submitted that the *Paladino* court erred in holding that a breach of contract claim against a private educational institution based upon the school's failure adequately to educate its students is not actionable in New York.[63] Unlike the situation in which a

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1982); [1979] N.Y.C.R.R. § 126. *But see infra* note 67.

[58] 89 App. Div. 2d at 92, 454 N.Y.S.2d at 873.

[59] *Id.* at 90, 454 N.Y.S.2d at 872. *But see infra* note 67.

[60] 89 App. Div. 2d at 92, 454 N.Y.S.2d at 873.

[61] *Id.* at 93-94, 454 N.Y.S.2d at 874; *see supra* note 48.

[62] 89 App. Div. 2d at 94, 454 N.Y.S.2d at 874; *see, e.g.*, Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 827, 131 Cal. Rptr. 854, 863 (1976). *But see* Hunter v. Board of Educ., 292 Md. 481, 490-91, 439 A.2d 582, 586-87 (1982) (plaintiffs entitled to maintain intentional tort action against school and teachers). For a case which holds that a student adequately had pleaded and proved fraudulent misrepresentation under New York law, see Idrees v. American Univ., 546 F. Supp. 1342, 1349-50 (S.D.N.Y. 1982). In *Idrees*, the court found that the plaintiff-student established, by clear and convincing evidence, that a medical school materially misrepresented its facilities and faculty, and that he reasonably relied upon these representations in making his decision to attend the school. *Id.* In *Paladino*, on the other hand, the court found that the school adequately informed the student's parents of his academic deficiencies, contrary to the plaintiffs' allegations. 89 App. Div. 2d at 94, 454 N.Y.S.2d at 874. As for their claim that the school failed to provide the necessary tutorial services for all 6 years of attendance, the court stated that the plaintiffs were "relegated to contractual remedies" unless it could be shown that, at the time the promise was made, the school did not intend to provide such services when needed. *Id.* at 96, 454 N.Y.S.2d at 875. *But see id.* at 92, 454 N.Y.S.2d at 873; *infra* note 63.

[63] *See generally* Lipsig, *supra* note 38, at 2, col. 2 (schools should be held accountable for educational injuries caused by failure to educate adequately).

breach of contract action is brought against a public school, an essential element of the claim, the existence of a contract to provide an adequate education in exchange for the payment of tuition and fees, is present in a suit instituted against a private institution.[64] Though recognition of a contract action in this instance would result in the anomoly of a private school student possessing a cause of action which is unavailable to a public school student,[65] it is suggested that there is no resultant unfairness since public school students may resort to administrative remedies that are not available to pupils who attend private schools.[66] Indeed, it seems that the appellate division improperly relied upon the disciplinary provisions of the Education Law and its accompanying regulations as

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[64] Whereas a public school student would have "to rely on such factors as compulsory education statutes and school regulations describing standards or courses of conduct in order to claim a contractual relationship," Note, *supra* note 38, at 401; Comment, *Educational Malpractice*, 124 U. PA. L. REV. 755, 785-86 (1976), New York courts have recognized that, at least with respect to private university education, an implied contract is created when the school accepts tuition and fees in exchange for the provision of academic services, Goldstein v. New York Univ., 76 App. Div. 80, 83, 78 N.Y.S. 739, 740 (1st Dep't 1902); Samson v. Trustees of Columbia Univ., 101 Misc. 146, 148, 167 N.Y.S. 202, 204 (Sup. Ct. N.Y. County), *aff'd mem.*, 181 App. Div. 936, 167 N.Y.S. 1125 (1st Dep't 1917). *See generally* Note, *Contract Law and the Student—University Relationship*, 48 IND. L.J. 253, 255-62 (1973). Moreover, as the second department itself noted, if the school agrees to provide certain services such as tutoring, its failure to supply these services will make a contract remedy appropriate. 89 App. Div. 2d at 92, 454 N.Y.S.2d at 873.

Additionally, a statutory obligation has been placed upon private schools to provide, at the very least, a "substantially equivalent" education to that provided by the local public school. N.Y. EDUC. LAW § 3204 (McKinney 1981 & Supp. 1982); *see supra* note 37. Thus, it is submitted that should the school fail to provide such an education, recovery ought to be allowed for the cost of remedial instruction, tuition and fees, based upon the school's breach of a statutory duty. *See generally* Comment, *Consumer Protection and Higher Education—Student Suits Against Schools*, 37 OHIO ST. L.J. 608, 615 & nn. 34-36.

[65] *See generally* Funston, *supra* note 38, at 760-63.

[66] *See* Donohue v. Copiague Union Free School Dist., 47 N.Y.2d 440, 445, 391 N.E.2d 1352, 1355, 418 N.Y.S.2d 375, 378 (1979); N.Y. EDUC. LAW § 310(7) (McKinney Supp. 1981-1982) (any aggrieved person may appeal to the Commissioner of Education to review any "official act or decision of any officer, school authorities or meetings concerning any other matter" with respect to the common school system). It has been suggested that even an administrative review is of no aid to public school students:

> [S]uch procedures are meaningless unless the administrative body is somehow forced to take affirmative action to remedy problems. In essence, the failure of the law to provide any judicial remedy for educational malpractice removes the pressure on the system to develop its own effective internal procedure for the out-of-court resolution of conflicts.
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> Under these circumstances, reliance solely on administrative relief increases both the likelihood and probable severity of educational injuries by eliminating the deterrent effect on . . . misconduct.

Lipsig, *supra* note 38, at 2, col. 2.

a basis for refusing to recognize a breach of contract action against private schools, since the statute specifically exempts certain institutions, such as the Waldorf School, from its coverage.[67]

By preventing purchasers and recipients of private academic services from seeking judicial redress for the failure to be provided with an adequate education, the court apparently has sanctioned the nonaccountability of private educational institutions.[68] It is submitted, moreover, that the appellate division, in straining to respect the integrity of an educator's policy determinations,[69] unjus-

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[67] *See* N.Y. EDUC. LAW §§ 5001-5004 (McKinney 1981 & Supp. 1982). The purposes of sections 5001 through 5004 of the Education Law are "to require occupational and correspondence schools, business schools, and enrollment agents for such schools to conform to specified standards, to provide for their licensing, registration, and certification respectively, and to provide for supervision by the State Education Department." Memorandum of the State Educ. Dep't, *reprinted in* [1972] N.Y. LEGIS. ANN. 117, 117. Furthermore, since "[s]chools other than correspondence schools, providing kindergarten, nursery, elementary or secondary education" specifically are exempted from the statute's licensing requirements, N.Y. EDUC. LAW § 5001 (McKinney 1981), it becomes clear that most private schools are not subject to disciplinary action under section 5003, *id.* § 5003 (McKinney 1981 & Supp. 1982). It therefore is submitted that, contrary to the *Paladino* court's assertion, there exists no administrative scheme that insures the quality of education provided by private schools.

[68] *See* 89 App. Div. 2d at 91-92, 454 N.Y.S.2d at 872-73 (failure to educate adequately is a societal problem with respect to which a breach of contract action is inappropriate); *see also* Helm v. Professional Children's School, 103 Misc. 2d 1053, 1054, 431 N.Y.S.2d 246, 247 (Sup. Ct. App. T. 1st Dep't 1980) (malpractice actions against private schools not recognized). It is apparent, therefore, that relief may not be had by private school students or their parents since both educational malpractice and breach of contract claims, based upon the private school's failure to educate adequately, are not actionable in New York, and the elements of a claim in intentional tort are very difficult to establish. *See supra* note 62.

[69] *See* 89 App. Div. 2d at 91, 454 N.Y.S.2d at 873. All of the appellate division's policy arguments can be grouped under the rubric of judicial inappropriateness to resolve the problems of the educational system, be it public or private. *Id.*; *see* Elson, *A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching*, 73 NW. U.L. REV. 641, 671 (1978). It is suggested, however, that the *Paladino* court's contentions are not persuasive. First, legal cause of an injury is a question to be resolved at trial, Donohue v. Copiague Union Free School Dist., 64 App. Div. 2d 29, 41, 407 N.Y.S.2d 874, 883 (2d Dep't 1978) (Suozzi, J., dissenting), and the court will have ample opportunity to study and evaluate the facts which the parties present to support their claims, Elson, *supra*, at 678. Second, even if private elementary and secondary schools were subject to the provisions of the Education Law and the state constitution, which vest the administration of the general school system in the Board of Regents and Commissioner of Education, *see* N.Y. CONST. art. V, § 4; *id.* art. XI, § 2; N.Y. EDUC. LAW §§ 207, 305 (McKinney 1969 & Supp. 1982), this should not preclude "judicial responsiveness to individuals injured by unqualified administrative functioning." Hunter v. Board of Educ., 292 Md. 481, 497, 439 A.2d 582, 590 (1982) (Davidson, J., dissenting). Third, the fear of a flood of litigation by disaffected students and parents should not be controlling, *see* 64 App. Div. 2d at 42, 407 N.Y.S.2d at 883 (Suozzi, J., dissenting), since presently, such an argument is hardly more than a cliche, *see* Goss v. Lopez, 419 U.S. 565, 600 n.22 (1975) (Powell, J., dissenting) (despite flood-of-litigation argument, Supreme Court acknowledged that students have constitutional rights).

tifiably has ignored the detriment suffered by children who are deprived of an adequate education.[70] As a consequence of the court's decision, neither a judicial nor an administrative remedy is available when a private school fails to provide the bargained-for education.[71] It is hoped that the Court of Appeals soon will have the opportunity to rectify this most unfortunate result.

Diane M. Trippany

A criminal defendant has no constitutional right to standby counsel while conducting a pro se defense

The sixth amendment to the federal Constitution affords a criminal defendant the right to effective assistance of counsel[72] and the right to appear pro se.[73] Although it appears that a defendant

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[70] *See, e.g.*, Donohue v. Copiague Union Free School Dist., 64 App. Div. 2d at 39, 407 N.Y.S.2d at 882-85 (Suozzi, J., dissenting).

[71] *See supra* notes 68-69.

[72] The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. CONST. amend. VI. This amendment has been held to guarantee to criminal defendants the right to effective assistance of counsel. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 344 (1963); Johnson v. Zerbst, 304 U.S. 458, 462 (1938). The court will determine that there has been a denial of effective representation by counsel "only when the representation given is so patently lacking in competence or adequacy that it becomes the duty of the court to be aware of it and correct it." People v. Tomaselli, 7 N.Y.2d 350, 356, 165 N.E.2d 551, 555, 197 N.Y.S.2d 697, 702 (1960).

Although the sixth amendment right to effective assistance of counsel has been held applicable to the states by virtue of the fourteenth amendment, Powell v. Alabama, 287 U.S. 45, 71 (1932), New York has afforded criminal defendants this protection independently of the fourteenth amendment, *see* People v. Settles, 46 N.Y.2d 154, 161, 385 N.E.2d 612, 615, 412 N.Y.S.2d 874, 876 (1978); N.Y.CONST. art. I, § 6; CPL § 210.15(2) (1971). Specifically, the New York Constitution provides that "[i]n any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel." N.Y. CONST. art. I, § 6; *see* CPL § 210.15(2) (1971). For a discussion of the right to counsel guarantees that New York has granted to criminal defendants, see Galie, *State Constitutional Guarantees and Protection of Defendant's Rights: The Case of New York, 1960-1978*, 28 BUFFALO L. REV. 157, 178-92 (1979).

[73] *See* Faretta v. California, 422 U.S. 806, 819 (1975). The right to appear pro se has been recognized as implicit in the sixth amendment right to the effective assistance of counsel. *Id.* In *Faretta*, the Supreme Court stated:

> [T]he right of an accused to conduct his own defense seems to cut against the grain of . . . decisions holding that . . . no accused can be convicted and imprisoned unless he had been accorded the right to the assistance of counsel.
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> . . . .
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> [However,] [i]t is one thing to hold that every defendant . . . has the right to the assistance of counsel, and quite another to say that a State may compel a defen-