| | | |
|---|---|---|
| **No. HHD-CV05-4050526-S (X07)** | **:** | **SUPERIOR COURT** |
| **CONNECTICUT COALITION FOR JUSTICE IN EDUCATION FUNDING, INC., ET AL.** | **:** | **COMPLEX LITIGATION** |
| *Plaintiffs* | **:** | |
| **V.** | **:** | **AT HARTFORD** |
| **GOVERNOR M. JODI RELL, ET AL.** | **:** | **March 13, 2012** |
| *Defendants* | | |

**MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER AND/OR ORDER LIMITING THE SCOPE OF PERMISSIBLE EVIDENCE RE: SCOPE OF THE CONSTITUTIONAL RIGHT**

## PRELIMINARY STATEMENT

Defendants ask this court effectively to disregard the Supreme Court's landmark decision in *Connecticut Coalition for Justice in Education Funding, Inc. v. Rell*, 295 Conn. 240 (2010) ("*CCJEF*"), through a "motion for protective order and/or order limiting the scope of permissible evidence." *See* Defendants' September 15, 2011 Memorandum of Law ("Defendants' Memo") at 1. Citing frequently to the Supreme Court's dissenting opinions, Defendants look to resurrect the failed arguments raised before and rejected by the Supreme Court. In so doing, Defendants

ignore the critical fact that a majority of the Supreme Court (including Justice Palmer) agreed that the allegations in Plaintiffs' complaint, if proven, are sufficient to establish a violation of the fundamental right to an adequate education found in Connecticut's Constitution. The Supreme Court remanded the case for trial so that a complete factual record could be developed and evaluated by this court. Defendants now attempt to prevent those claims from being developed fully, as the Supreme Court directed, by limiting discovery and evidence based on a flawed analysis of the Supreme Court's controlling opinion in the instant case.

Defendants' motion asks this court to determine what legal standard controls this litigation. The answer, however, is clear: the plurality opinion written by Justice Norcott should supply the source of the governing constitutional standard. The plurality opinion's precedential force has recently come into clear focus as both the entire membership of the current Connecticut Supreme Court and Defendants in this case have utilized the plurality opinion as controlling law. Notably, as Plaintiffs were drafting this memorandum, Justice Palmer himself issued an opinion citing to the *CCJEF* plurality opinion as determinative of the scope of the substantive right to an adequate education. *See Pereira v. State Bd. of Educ.*, No. 18833, 2012 WL 638491, at *25 n.2 (Conn. Feb. 28, 2012) (Palmer, J., dissenting) ("The right [to an education] is a substantive one that 'guarantees Connecticut's public school students educational standards and resources suitable to participate in democratic institutions, and to prepare them to attain productive employment and otherwise to contribute to the state's economy, or to progress on to higher education.'") (quoting *CCJEF*, 295 Conn. at 244-45 (plurality opinion)). Because even Justice Palmer agrees that the plurality opinion controls, the scope of the constitutional right to an adequate education should align with the plurality opinion's original and thorough articulation of the scope of that right.

But even if this court finds that the controlling legal standard can be derived in part from Justice Palmer's concurrence in *CCJEF*, there is no legal basis for Defendants' position that this court should adopt the Palmer concurrence in its entirety. Contrary to the unsupported assertions in Defendants' memorandum on how to treat the Supreme Court's prior ruling in this proceeding, the views of the three dissenting justices (two of whom failed to reach the merits of Plaintiffs' constitutional claims) are irrelevant to the legal standard that should control the flow of discovery and the introduction of evidence in this case. Rather, to the extent the court finds the plurality opinion may not completely control, this court may look only to those parts of Justice Palmer's opinion with which the three-justice plurality would agree: namely, their agreement as to the qualitative dimensions of the constitutional right to an adequate education.

Although Plaintiffs contend that Justice Norcott's plurality opinion provides the controlling legal standard, Plaintiffs also recognize that this court may have good reason to defer judgment on Defendants' motion. Coming in the middle of ongoing discovery and more than two years in advance of trial, Defendants' motion is wholly inappropriate at this juncture of the litigation. Contrary to Defendants' position that their motion will help simplify this litigation, resolution of the motion at this stage would, in fact, needlessly complicate discovery and the fact-finding necessary to determine whether the State is fulfilling its constitutional obligations. The Supreme Court has already weighed in once, finding that Plaintiffs had raised sufficient grounds to pursue their education adequacy claims before the trial court. Ultimately, any further refinement of the governing legal standard will be resolved by the Supreme Court based on the factual record developed by this court at trial.

As a practical matter, determining the constitutional standard that will govern this case has no consequences whatsoever for the appropriate scope of discovery, nor will it affect the

extent to which such discovery may be admissible at trial. Even if this court were to adopt a narrow view of the scope of the constitutional right, Justice Palmer's concurrence is entirely consistent with the plurality on this critical point: The right to education has a qualitative component that must be measured against "modern educational standards." *See CCJEF*, 295 Conn. at 321 (Palmer, J., concurring). To determine whether the education provided by Defendants comports with these standards will require the development of a comprehensive factual record at trial. Defendants have thus far failed to point to any discovery or evidence that would be discoverable and admissible under the plurality opinion, but protected from discovery or inadmissible under the Palmer concurrence. Given that what constitutes "modern educational standards" will inevitably be a fact-intensive inquiry based on the totality of the evidence, it would be impracticable and inappropriate, given liberal discovery rules, to attempt to limit permissible discovery or evidence until the parties have developed a full factual record through discovery and this court has heard all of the facts gathered by the parties.

## FACTUAL AND PROCEDURAL BACKGROUND

*CCJEF v. Rell* came before the Supreme Court after the trial judge granted Defendants' motion to strike three of Plaintiffs' counts involving a right to suitable educational opportunities. *See Carroll-Hall v. Rell*, X09CV054019406, 2007 WL 2938295 (Conn. Super. Ct. Sept. 17, 2007). The Supreme Court reversed, reinstating Plaintiffs' claims and finding that the Connecticut Constitution provides a right to suitable educational opportunities. Writing for a three-justice plurality, Justice Norcott held:

> [A]rticle eighth, § 1, entitles Connecticut public school students to an education suitable to give them the opportunity to be responsible citizens able to participate fully in democratic institutions, such as jury service in voting. A constitutionally adequate education also will leave Connecticut student's prepared to progress to

> institutions of higher education, or to attain productive employment and otherwise contribute to the state's economy. To satisfy this standard, the state, through the local school districts, must provide students with an objectively "meaningful opportunity" to receive the benefits of this constitutional right.

*CCJEF*, 295 Conn. at 314-15 (plurality opinion).

Justice Palmer, in a concurrence, agreed with the plurality that the Connecticut Constitution "obligates the state to ensure that [its] free public schools provide to the students attending them an educational opportunity of a certain level or quality." *Id.* at 329. Although he used the term "minimally adequate" to describe the constitutional requirement, Justice Palmer wrote that "I perceive no difference between an educational opportunity that is minimally adequate and an educational opportunity that the plurality characterizes as 'soundly basic.'" *Id.* at 321 n.4. Justice Palmer further wrote that the constitutional standard must be measured by "modern educational standards," *id.* at 321, echoing the plurality's view that "a constitutionally adequate public education is not a static concept removed from the demands of an evolving world." *Id.* at 318 (internal quotation omitted). He did not join the plurality, however, because he believed that the legislature is entitled to "considerable deference with respect to the determination of what it means, in practice, to provide for a minimally adequate, free public education." *Id.* at 321.

Justice Schaller joined the plurality opinion, but also wrote separately to provide a potential template for subsequent stages of the litigation. Justice Vertefeuille dissented, agreeing that the case was justiciable but finding that article eighth, § 1 did not require a suitable education. Justice Zarella, joined by Justice McLachlan, dissented on the grounds that the case was not justiciable. Consequently, they did not reach the issue of the content of the right to an adequate education or how that right should be implemented once recognized.

The matter is now presently before this court on Defendants' "motion for a protective order and/or order limiting the scope of permissible evidence."

## ARGUMENT

### I. Both Aspects of Defendants' Motion Are Improper and Procedurally Deficient. Thus, This Court Should Refrain from Limiting the Scope of Discovery and Permissible Evidence Related To the Constitutional Right To an Adequate Education at This Stage in the Litigation.

The unorthodox framing of the Defendants' motion as a dual "motion for protective order and/or order limiting the scope of permissible evidence" reflects the fact that their motion does not properly fall under the ambit of motion practice appropriate for this juncture in the litigation. In making this point, Plaintiffs will address each prong of Defendants' dual motion in turn.

With respect to the motion for a protective order, discovery in this case has been ongoing for years. Despite this, Defendants have not previously attempted to limit discovery. And in this first effort, Defendants fail to point to a single discovery request that would not fall within permissible discovery under their conception of the scope of the constitutional right. Nor do defendants provide evidence of any specific harm that would result in the absence of a protective order. *See* Connecticut Practice Book Section 13-5 (noting that a protective order may be issued only when necessary "to protect a party from annoyance, embarrassment, oppression, or undue burden or expense").

Defendants' simultaneous request for an order limiting the scope of permissible evidence is also procedurally deficient, as Defendants have failed to elucidate either the specific evidence they seek to exclude or the prejudice that could result from its admission at trial. In addition, as Defendants are aware, this court has recently scheduled a July 2014 trial date. Yet Defendants would have this court make a conclusive determination about what evidence to permit at a trial

that is not scheduled to occur for more than two years. Defendants offer no reason why the court should rule on the admissibility of evidence more than two years before trial. In the absence of any reason to do so, this court should refrain from making a premature ruling.

### A. Defendants' Motion for a Protective Order Improperly Attempts To Limit the Scope of Discovery.

The first prong of Defendants' motion seeks an order "limiting the scope of permissible discovery" so as to exclude documents that do not "demonstrate that the legislature's formulation of the scope of the right to a minimally adequate public education and its efforts in implementing that formulation are unreasonably insufficient." Defendants' Memo at 7-8. But this limitation, even if comprehensible (and it is not), ignores the basic fact that the scope of discovery may (and often does) exceed the boundaries of admissible evidence. *See Sanderson v. Steve Snyder Enterprises, Inc.*, 196 Conn. 134, 139 (1985) (holding that "the allowable scope of inquiry at a discovery deposition clearly exceeds the boundaries of admissible evidence"). Section 13-2 of the Practice Book makes explicit that "[i]t shall not be ground for objection that the information sought will be inadmissible at trial…." Defendants' attempt to limit discovery at this juncture is completely inconsistent with the rules and precedent interpreting those rules. Discovery is intended to be broad and not limited to only those matters that would ultimately be admissible at trial.

Furthermore, Defendants' motion for a protective order is otherwise defective because, pursuant to Section 13-5 of the Practice Book, the party seeking a protective order also "bears the burden of establishing the contemplated 'good cause'" to justify the issuance of a protective order. *DiFederico v. Sikorsky Fin. Credit Union*, CV054006583S, 2008 WL 250343, at *2 (Conn. Super. Ct. Jan. 8, 2008). Yet Defendants' memorandum fails to demonstrate the requisite "good cause" beyond conclusory claims that a protective order will help "streamline the

litigation." Defendants' Memo at 7. Moreover, they even fail to support the motion with an affidavit based on personal knowledge that might establish, or even allege, the good cause necessary to serve as a basis for the court to rule in their favor on the motion.

Defendants' motion also must fail in light of the fact that Connecticut has adopted a liberal approach to discovery. *See Tianti, ex rel. Gluck v. William Raveis Real Estate, Inc.*, 231 Conn. 690, 701 n.12 (1995) ("this jurisdiction has liberal discovery doctrines"). These doctrines favor a broad scope of discovery based on an understanding that "the spirit of the rules is more greatly enhanced by liberal discovery." *DiFederico*, 2008 WL 250343, at *1 (internal quotation omitted). While it is true that the court has broad discretion over discovery disputes, "this discretion is limited through the provisions of the rules pertaining to discovery, including the mandatory provision that discovery shall be permitted if the disclosure sought would be of assistance in the prosecution or defense of an action." *DDG Props. Co., Inc. v. Konover Constr. Corp.*, X03CV990501534S, 2000 WL 1513928, at *1 (Conn. Super. Ct. Sept. 19, 2000) (citing *Standard Tallow Corp. v. Jowdy*, 190 Conn. 48, 57-59 (1983)).

Plaintiffs reasonably believe that the documents sought through their first and second Requests for Production (along with any subsequent discovery requests) will lead to information that will assist in proving their case. Defendants have failed to identify a single aspect of those requests that would be beyond the scope of discovery. Therefore, under Connecticut's liberal discovery rules, regardless of whether Defendants or Plaintiffs prevail on their conception of the scope of the constitutional right, that judgment should have no effect on the scope of discovery. This weighs against granting Defendants' motion. Additionally, as a practical matter, Defendants have already provided plaintiffs with extensive discovery, including satisfying many of

Plaintiffs' anticipated document requests. Any attempt to place limits on discovery now will only impede the process and lead to constant and counter-productive wrangling before this court.

**B. Defendants' Motion Improperly Attempts To Limit the Scope of Evidence.**

As with Defendants' efforts to limit discovery through a protective order, their motion is also an inappropriate vessel through which to limit the scope of admissible evidence at trial. Defendants bring their motion for an order limiting the scope of permissible evidence under Practice Book § 15-3. *See* Defendants' Memo at 1. Curiously, however, despite the fact that Section 15-3 governs "Motions *in Limine*," Defendants do not explicitly describe their motion as such. Perhaps this is because Defendants fail to establish even the minimum criteria necessary to exclude evidence pursuant to a motion *in limine*.

Under Section 15-3, the party seeking a motion *in limine* bears the burden of proving that there is "good cause" for the court to entertain the motion. Practice Book § 15-3. In particular, the movant must "describe the anticipated evidence and the prejudice which may result therefrom." *Id.* Despite these clear requirements, Defendants do not describe any particular evidence that they seek to exclude. Nor do Defendants identify any prejudice that could result in the absence of an order limiting the scope of evidence at trial.

Defendants' decision to omit an argument about prejudice makes sense because in this case the potential harm that would result from the improper admission of evidence at trial is much less than the potential harm that would result from the improper *exclusion* of evidence. Thus, if any evidentiary standard is to be used, it ought to be construed broadly and should lean in favor of allowing the admission of evidence. As this is a bench trial, the traditional motivation behind a motion *in limine* – to avoid prejudicing a jury – is not present. *See Sarfaty v. PFY Mgmt. Co.*, CV020394269S, 2008 WL 642641, at *1 (Conn. Super. Ct. Feb. 15, 2008) ("As a

general proposition, the purpose of the motion is to insulate *the jury* from exposure to harmful inadmissible evidence.") (internal quotations omitted) (emphasis supplied). Should the court ultimately find its admission was over-inclusive, it may always decide to strike evidence at a later date. This approach would allow the court to preserve evidence on the record, which is critical because the final decision of this case will likely be appealed to the Supreme Court. As a result, it is important that the case be supported by a full and robust evidentiary record in order to avoid the expense, delay, and inconvenience that would result from conducting a second trial.

In addition to its procedural defects, Defendants' motion is also premature. At the earliest, exclusion of evidence for the purposes of trial ought to be addressed after the close of discovery, when Plaintiffs and Defendants have both had a chance to inspect all relevant documents and evidence and make determinations as to what they plan to proffer at trial, either in support of the Plaintiffs' affirmative claims or the defense. Under Connecticut law, the court is well within its discretion to delay ruling on this motion until a later time. *See Carlson v. Waterbury Hosp.*, 280 Conn. 125, 140 (2006) (explaining that under Connecticut's rules, a trial judge entertaining a motion to exclude anticipated evidence "may reserve decision thereon until a later time in the proceeding") (quoting Practice Book § 42-15).

Defendants claim that their efforts to exclude discovery and evidence that do not "demonstrate that the legislature's formulation of the scope of the right to a minimally adequate public education and its efforts in implementing that formulation are unreasonably insufficient" will help "streamline the litigation."[1] Defendants' Memo at 7-8. The more likely result, however, will be just the opposite. First, both parties will inevitably dispute the applicability of a given standard to discovery. The contentiousness likely to result from allowance of the protective order

[1] Plaintiffs wish to emphasize, however, that they do not concede that this language from Justice Palmer's concurrence is the correct legal standard. In fact, Plaintiffs argue that Justice Norcott's plurality opinion should govern. *See infra*, Part II.

Defendants seek is both unnecessary in light of the parties' discovery dealings to date and inconsistent with Connecticut's liberal approach to discovery.

With respect to permissible evidence at trial, the ambiguous contours of "unreasonably insufficient" will make it difficult, if not impossible, to use as an evidentiary standard until the full factual record is developed. To determine whether an individual piece of evidence was admissible, the court would need to consider whether that piece of evidence, in conjunction with the rest of Plaintiffs' evidence, would demonstrate that the legislature's efforts were "unreasonably insufficient" – essentially requiring a merits determination for each proposed piece of evidence. Moreover, such an imprecise evidentiary standard will fail to provide the meaningful guidance and simplification that Defendants claim to seek. Therefore, because both aspects of the Defendants' motion are procedurally deficient, and because granting Defendants' motion will hinder, rather than aid, the progress of litigation, this court would be justified in deferring judgment on the motion, if not denying it outright.

## II. The *CCJEF* Plurality Opinion Should Control This Litigation.

Should this court decide to reach the merits of Defendants' motion at this stage in the litigation, it should deny the motion. Simply put, Defendants have identified the incorrect legal standard to apply to this case. Defendants' motion seeks to restrict the confines of permissible discovery and evidence to that which falls within the scope of the constitutional right to an adequate education "as that right has been enunciated by Justice Palmer in his concurrence" in *CCJEF*, 295 Conn. at 320-47 (Palmer, J., concurring). *See* Defendants' Memo at 1. But in the limited time since the *CCJEF* opinion was issued, the plurality opinion – *not* Justice Palmer's concurrence – has developed the force of law as controlling precedent. The plurality opinion – not the concurrence – has been cited repeatedly by the Connecticut Supreme Court, including by

Justice Zarella (a dissenter in *CCJEF*) and by Justice Palmer. *See, e.g.*, *Pereira*, *supra*, 2012 WL 638491, at *13 n.28, *25 n.2, *40 (citing to the *CCJEF* plurality opinion to describe the State's constitutional obligation to provide an adequate education). And the plurality opinion – not the concurrence – has been relied upon by Defendants themselves as controlling precedent regarding the constitutional right to education in litigation before the Connecticut Supreme Court. *See* Brief for Defendants-Appellees at *20, *Pereira v. State Bd. of Educ.*,(No. 18833), 2011 WL 5145975 (Conn. Oct. 14, 2011) (citing the *CCJEF* plurality opinion for the proposition that,"[a]s this Court has made clear, the State has a constitutional obligation to ensure that public school students receive suitable educational opportunities").

Originally representing the well-reasoned views of three members of the Connecticut Supreme Court, and ultimately cited by not only all seven members of the current Supreme Court, but also by Defendants themselves, as controlling precedent, Justice Norcott's plurality opinion should guide the future course of this litigation. Accordingly, should the court reach the merits of Defendants' motion, it should deny Defendants' request to utilize Justice Palmer's non-binding concurrence to restrict the scope of permissible discovery and evidence. Instead, this court should find that that the *CCJEF* plurality opinion will control the scope of discovery and evidence at trial.

### A. The Connecticut Supreme Court Has Manifested Its View that the *CCJEF* Plurality Opinion Controls.

Directly contrary to Defendants' claims that Justice Palmer's concurrence should control, the Connecticut Supreme Court has recently provided compelling evidence that the *CCJEF* plurality opinion is the correct governing legal precedent. Even though the *CCJEF* opinion was issued only in 2010, the Connecticut Supreme Court has already cited to the plurality opinion in five of its own majority opinions issued since *CCJEF*. *See Pereira*, 2012 WL 638491; *State v.*

*Rizzo*, 303 Conn. 71, 184 n.81 (2011); *Lestorti v. DeLeo*, 298 Conn. 466, 477 n.11 (2010); *Vincent Metro, LLC v. Yah Realty, LLC*, 297 Conn. 489, 495 (2010); *Bysiewicz v. Dinardo*, 298 Conn. 748, 788 n.38 (2010). While most of these cases did not involve the scope of the constitutional right at issue here, they do indicate the Supreme Court's willingness to credit its own plurality opinion as deserving precedential weight and consideration. Similarly, the Connecticut Court of Appeals has cited to the plurality opinion on two occasions. *See Shenkman-Tyler v. Cent. Mut. Ins. Co.*, 126 Conn. App. 733, 739 (2011); *Abdullah v. Comm'r. of Corr.*, 123 Conn. App. 197, 207 (2011). The Plaintiffs were unable to find a single instance of any court in Connecticut citing Justice Palmer's concurrence for any purpose whatsoever.

Most tellingly, in its first case since *CCJEF* involving arguments about the scope of the constitutional right to an adequate education, a case decided just days ago, the Connecticut Supreme Court relied upon Justice Norcott's plurality opinion instead of Justice Palmer's concurrence. In *Pereira v. State Board of Education*, plaintiffs there challenged the State of Connecticut's decision to disband the existing Bridgeport school board. 2012 WL 638491, at *1. In response, defendants there, the same defendants as here, argued that the State was acting pursuant to its constitutional duty to provide Connecticut schoolchildren with an adequate education. *See infra*, II.B. Faced with a case implicating the same constitutional provisions at issue in *CCJEF*, both the majority opinion and the dissent (collectively representing the views of the entire Court[2]) cited to the *CCJEF* plurality opinion as the definitive statement of the scope of the constitutional right to an adequate education.

[2] Justice Zarella authored the majority opinion, which was joined by Justices Norcott, McLachlan, Eveleigh, Harper, and Chief Justice Rogers. *See Pereira*, *supra*, 2012 WL 634891, at *21. The Supreme Court's remaining active justice, Justice Palmer, filed a dissent, which, as is pointed out below, also cited with approval the original *CCJEF* plurality *See id*. at *25.

In the *Pereira* majority opinion, Justice Zarella wrote that "[w]e are fully cognizant of the dire situation in Bridgeport, and are sensitive to the importance of providing its students, and students throughout this state, with adequate educational opportunities." *Pereira*, 2012 WL 638491, at *13 n.28. Justice Zarella then quoted, with approval, the portion of the *CCJEF* plurality that concludes that "'article eighth, § 1, entitles Connecticut public school students to an education suitable to give them the opportunity to be responsible citizens able to participate fully in democratic institutions, such as jury service in voting. A constitutionally adequate education will also leave Connecticut's students prepared to progress to institutions of higher education, or to attain productive employment, or otherwise contribute to the state's economy.'" *Id.* (quoting *CCJEF* plurality opinion, 295 Conn. at 314-15). Although Justice Zarella's opinion found the *CCJEF* plurality inapplicable to the specific issue in *Pereira*, he made no attempt to argue that the plurality's opinion is not authoritative. Indeed, the fact that six justices signed on to an opinion that quotes the *CCJEF* plurality – and specifically quotes the language contained in that opinion regarding the scope of the constitutional right – provides strong support that the current Supreme Court views the *CCJEF* plurality not only as controlling generally, but also as supplying the standard by which the scope of the constitutional right should be measured.

The argument that the plurality should control is further strengthened by Justice Palmer's extensive use of the plurality in his *Pereira* dissent. In one reference, Justice Palmer cites to the *CCJEF* plurality, 295 Conn. at 314-15, for the proposition that the "state has [the] constitutional obligation to ensure that students receive suitable educational opportunities." *Id.* at *40 (Palmer, J., dissenting) (citing to *CCJEF* plurality). Most notably, in the opening paragraph of his dissent, Justice Palmer argues that in replacing the Bridgeport board of education, the state board was simply "acting in furtherance of its constitutional and statutory duties to ensure that this state's

schoolchildren receive an adequate public education." *Id.* at *25 (Palmer, J., dissenting). Immediately following this reference to an "adequate public education," Justice Palmer provides a footnote that further elaborates on his meaning. Specifically, he writes that:

> Under article eighth, section § 1, of the constitution of Connecticut, the schoolchildren of this state are entitled to a free public elementary and secondary education. . . . The right is a substantive one that "guarantees Connecticut's public school students educational standards and resources suitable to participate in democratic institutions, and to prepare them to attain productive employment and otherwise to contribute to the state's economy, or to progress on to higher education."

*Id.* at n.2 (quoting *CCJEF*, 295 Conn. at 244-45 (plurality opinion)).

As this quotation in *Pereira* reflects, Justice Palmer adopts verbatim the *CCJEF* plurality's definition of the scope of the constitutional right to an adequate education. At no point in his lengthy dissent does Justice Palmer reference or rely upon his concurrence in *CCJEF*. Moreover, nowhere does he suggest that the very language from the *CCJEF* plurality he cites with approval, language which articulates the scope of the constitutional right, is not the standard against which the constitutionality of Defendants' conduct in ensuring the constitutional right to an adequate education should be measured. As a result, through Justice Palmer's exclusive reliance on the *CCJEF* plurality's conception of the right to an adequate education, Justice Palmer himself supports the view that the plurality opinion should dictate the scope of the right in these proceedings.

Taken together, the majority and dissenting opinions in *Pereira* provide unambiguous evidence that every single member of the current Supreme Court views the *CCJEF* plurality opinion, and the standard contained therein, as the controlling statement of the scope of Connecticut's constitutional right to an adequate education.

### B. The State Has Manifested Its View that the *CCJEF* Plurality Opinion Controls.

Despite Defendants' claims that Justice Palmer's opinion constitutes the ruling of the court, the Attorney General's office itself has cited the *CCJEF* plurality opinion as authoritative in at least two separate cases before the Connecticut Supreme Court. *See, e.g.*, Brief of Defendant-Appellee at *17, *Bysiewicz v. Dinardo*, (No. S.C. 18612), 2010 WL 2066508 (Conn. May 14, 2010). In particular, Defendants cited the *CCJEF* plurality as authoritative numerous times in its brief to the Connecticut Supreme Court in *Pereira*. In defending its decision to oust Bridgeport's board of education, the State argued that, "[a]s this Court has made clear, the State has a constitutional obligation to ensure that public school students receive suitable educational opportunities. *Connecticut Coalition for Justice in Education Funding v. Rell*, 295 Conn. 240, 314-15 (2010) ('CCJEF')." Brief for Defendants in *Pereira*, *supra*, at *20. The specific pages that the state cites to are from the plurality opinion, and those cited pages include the following language:

> Thus, we conclude that article eighth, § 1, entitles Connecticut public school students to an education suitable to give them the opportunity to be responsible citizens able to participate fully in democratic institutions, such as jury service and voting. A constitutionally adequate education also will leave Connecticut's students prepared to progress to institutions of higher education, or to attain productive employment and otherwise contribute to the state's economy. To satisfy this standard, the state, through the local school districts, must provide students with an objectively "meaningful opportunity" to receive the benefits of this constitutional right.

*CCJEF*, 295 Conn. at 314-15 (plurality opinion).

In total, the Attorney General's office cited four times to *CCJEF* in their *Pereira* Supreme Court brief. And all four times the Attorney General's office cited to the plurality opinion as authoritative. *See* Brief for Defendants in *Pereira*, *supra*, at *10 ("it remains the State, not the local boards, that has the affirmative constitutional obligation to educate and to ensure

that the education is adequate") (citing to *CCJEF* plurality opinion, 295 Conn. at 314-15); *Id.* at *20 ("the State has a constitutional obligation to ensure that public school students receive suitable education opportunities") (citing to *CCJEF* plurality opinion, 295 Conn. at 314-15); *Id.* at *21 ("'the state . . . must provide students with an objectively 'meaningful opportunity' to receive the benefits of this constitutional right'") (quoting *CCJEF* plurality opinion, 295 Conn. at 315); *Id.* at *23 ("Ensuring the adequacy of public education is *constitutionally* a matter of statewide concern") (citing to *CCJEF* plurality opinion, 295 Conn. at 315).

At no point during their *Pereira* brief do Defendants question the precedential force of the *CCJEF* plurality. Nor do Defendants rely at all upon Justice Palmer's concurrence. In fact, Plaintiffs are unable to find a single instance, other than in this case, in which Defendants have cited to Justice Palmer's concurrence. Therefore, as with the Connecticut Supreme Court's repeated reliance on the *CCJEF* plurality, Defendants have also manifested their view that the *CCJEF* plurality opinion controls. As a result, this court should find that the *CCJEF* plurality opinion must govern discovery and the scope of evidence at trial in this case.

## III. Defendants' Reliance on *Marks v. United States* To Argue That Justice Palmer's Concurrence Should Control Is Both Misplaced and Misguided.

Although the Connecticut Supreme Court's opinions and Defendants themselves have repeatedly relied upon the *CCJEF* plurality as precedential authority, Defendants seek to ignore this inconvenient truth. To do so, they depend upon a single case. Defendants' memorandum cites to a footnote in *State v. Ross*, 272 Conn. 577, 604 n.13 (2005), which in turn quotes *Marks v. United States*, 430 U.S. 188 (1977), for the proposition that Justice Palmer's concurrence should control. *See* Defendants' Memo at 6-7. *Marks* represents an attempt by the Supreme Court to address the issue that arises when "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of [a majority of] Justices. . . ." *Marks*, 430 U.S.

at 193. The solution proposed by the Court in *Marks* was that in such a situation, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." *Id.* (internal quotation omitted).

Relying on *Marks*, Defendants argue that "[t]he two prongs of Justice Palmer's concurrence each earned the support of three additional justices, thereby constituting the single opinion in which a four justice majority supported the judgment of the Court on narrowest grounds." Defendants' Memo at 7. Specifically, Defendants argue that "[t]he plurality concurred with one prong, namely, Justice Palmer's position that the education clause embodies a qualitative dimension. . . ." *Id.* Defendants also claim that "[t]he dissenters concurred at the very least with the other prong, namely, Justice Palmer's position that the political branches' judgments regarding educational adequacy, and hence policy, are entitled to considerable deference." *Id.* Thus, Defendants conclude that since "a majority of the justices, drawn from the plurality and the dissents, at the very least agreed upon the narrow grounds of Justice Palmer's concurrence," then under *Marks*, this court should adopt Justice Palmer's concurrence as controlling. *Id.* at 6. Yet, as the following discussion shows, not only is the *Marks* approach often disfavored by courts, but even applying that precedent to the facts at hand, a proper *Marks* analysis yields a conclusion about the controlling legal standard that is far more expansive than that which Defendants would urge this court to adopt.

**A. *Marks* Is Not Well-Settled Law.**

Although Defendants refer to the *Marks* approach as "well-settled law," Defendants' Memo at 6, they provide no Connecticut authorities besides *Ross* in defense of their position. This lack of support is unsurprising because the *Marks* test has not been consistently adopted either by the U.S. Supreme Court or within Connecticut. In fact, recent precedent suggests that

*Marks* is disfavored. *See generally* James A. Bloom, *Plurality and Precedence*, 85 Wash. U. L. Rev. 1373 n.22 (2008) ("both the Supreme Court as well as other courts and commentators have balked at treating the Marks approach as the default rule for interpreting pluralities").

Several U.S. Supreme Court cases are instructive here. *See City of Bristol v. Tilcon Minerals, Inc.*, 284 Conn. 55, 88 (2007) (noting that "[i]n the absence of authoritative Connecticut case law" on a given issue, it is appropriate to "turn for guidance to federal law"). Most recently, in the affirmative action case *Grutter v. Bollinger*, 539 U.S. 306 (2003), the U.S. Supreme Court disclaimed any strict reliance on *Marks* in the face of calls to adopt Justice Powell's solo concurrence in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), as controlling law. Specifically, the Court declined to adopt Justice Powell's concurrence as binding precedent. *Grutter*, 539 U.S. at 325. In so doing, the *Grutter* Court concluded that the *Marks* test is often "more easily stated than applied," and refused to rely on *Marks* to decide the case. *Id.* (internal quotation omitted). Similarly, the Court found it "not useful to pursue the *Marks* inquiry" in *Nichols v. United States*, 511 U.S. 738, 745-46 (1994), noting that rigid application of *Marks* may baffle and divide lower courts. *See id.* at 746 (internal quotation omitted).

In light of the fact that *Marks* is often disfavored, courts frequently look to plurality opinions as persuasive or controlling authority. The Connecticut Supreme Court has repeatedly cited to plurality opinions and relied upon them as controlling authority. For example, in *Misthopolous v. Misthopolous*, 297 Conn. 358, 365 (2010), the Court concluded that its "resolution of this issue is controlled by the plurality opinion in this court's recent decision, *Maturo v. Maturo*." And in its high profile opinion in *Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135 (2008), the Court relied extensively upon the plurality opinion in *Frontiero v.*

*Richardson*, 411 U.S. 677 (1973). *See Kerrigan*, 289 Conn. at 192 n.31 ("Although *Frontiero* was a plurality opinion, its holding subsequently has been approved repeatedly by the court"). The U.S. Supreme Court has taken a similar approach. In *Texas v. Brown*, 460 U.S. 730, 737 (1983), the Supreme Court noted that a previous plurality opinion, "as the considered opinion of four Members of this Court . . . should obviously be the point of reference for further discussion of the issue."

Additional examples of courts relying on plurality opinions as controlling abound, both inside and outside of Connecticut. *See, e.g.*, *Bell v. Cone*, 543 U.S. 447, 454 (2005) (referring to the "controlling plurality opinion" in *Godfrey v. Georgia*, 446 U.S. 420 (1980)); *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 780 (2004) (referring to the "controlling plurality opinion" in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990)); *State v. Santiago*, 224 Conn. 494 (1993) (reaching its decision based on the plurality opinion in *United States v. Santana*, 427 U.S. 38 (1976)); *see also Santiago* at 504-05 (Borden, J., dissenting) (noting that despite being a plurality opinion, "the federal and state courts have uniformly considered *Santana* to be binding and authoritative," which "is consistent with other cases based upon [a plurality vote] that were considered to be the law").

Given that *Marks* is not consistently applied even by the federal courts, this court need not rely on an opinion almost never invoked in Connecticut. Instead, this court should look to the substantial evidence emanating from the Connecticut Supreme Court and Defendants' own previous arguments, both of which establish that Justice Norcott's plurality opinion has developed the force of law as controlling authority.

### B. Even if This Court Chooses To Follow *Marks*, Justice Palmer's Concurrence Does Not Constitute the Court's Holding.

Defendants argue that Justice Palmer's view on the deference owed to the legislature constitutes the holding of the Supreme Court. *See* Defendants' Memo at 7. As discussed *supra*, however, Plaintiffs argue that the plurality opinion controls and thus Justice Palmer's position is irrelevant. But should this court choose to look beyond the plurality opinion, application of *Marks* to the opinions in this case reveals that Justice Palmer's view on legislative deference failed to garner the support of a majority of justices concurring in the judgment. In fact, it failed to garner the support of *any* other justice who concurred in the judgment.

Simply put, the plurality does not agree with Justice Palmer that it must give the legislature extreme deference in determining the appropriate implementation of the right to an adequate education. *See, e.g.*, *CCJEF*, 295 Conn. at 258 ("the judiciary has a constitutional duty to review whether the legislature has fulfilled its obligation"). As such, Justice Palmer's opinion on deference to the political branches should not be seen as part of the Court's holding. *See Marks*, 430 U.S. at 193 (explaining that in the absence of a majority opinion, the holding of the Court may be found from the shared views of those justices *who concurred in the judgment* on the narrowest grounds).

### C. The Opinions of the Dissenting Justices Are Not Relevant To the Scope of the Constitutional Right To an Adequate Education.

Dissents do not make law. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, n.13 (1995) (noting that dissents do "[not] bind or authorize a later majority to reject a precedent"). Yet Defendants ask this court to disregard this fundamental legal maxim, arguing that the opinions of the dissenters in *CCJEF* mean that Justice Palmer's view about giving significant deference to the legislature should be a part of the controlling legal standard in this

case. *See* Defendants' Memo at 5-7. Defendants make this argument by invoking *Marks* to support the proposition that adding the three dissenters together with Justice Palmer's concurrence can, through some form of jurisprudential alchemy, convert a concurrence and dissents into a "majority" in favor of extreme legislative deference. *See id.* at 7. But the plain language of *Marks*, which permits the crafting of a controlling precedent through combining the opinions of those justices who concur "*in the judgments*," rejects any attempt to create a binding legal rule based on the views of dissenting justices. *Marks*, 430 U.S. at 193 (emphasis supplied). Applying *Marks* to the instant case, there was only one justice (Palmer) concurring in the judgment who took the position that the legislature should be given significant deference in crafting the scope of the constitutional right to an adequate education.

Defendants offer no case law or other authority to support their view that a legal rule can be derived from agreement between a single concurring justice and three dissenters. No Connecticut courts have used *Marks* to elevate dissenting opinions to majorities, nor has the U.S. Supreme Court. In *King v. Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991), the *en banc* D.C. Circuit expressly rejected the idea that *Marks* allowed for reliance on dissenting opinions, noting that "*Marks* has never been so applied by the Supreme Court." The *King* court concluded that:

> we do not think we are free to combine a dissent with a concurrence to form a *Marks* majority. As the Court said in *Marks* itself, "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by *those members who concurred in the judgments* on the narrowest grounds."

*Id.* (quoting *Marks*, 430 U.S. at 193). The limited number of courts that have looked to dissents in cases with splintered opinions have done so only in unusual circumstances distinguishable from the instant case. For example, the First Circuit has looked to the convergence of dissenting justices with justices in the majority only when the dissent

explicitly adopted the views of the justices in the majority. *See United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006). In *CCJEF*, however, the dissenters did no such thing.

In fact, the limitation of *Marks* to justices who concurred in the judgment of the court holds particular sway here because two of the dissenters – Justices Zarella and McLachlan – held that Plaintiffs' claims were nonjusticiable. *See CCJEF*, 295 Conn. at 399-400. Thus, neither justice addressed the merits question regarding the existence of a constitutional right to an adequate education. Yet, since a majority of the Court held that Plaintiffs' claims *were* justiciable, *see id.* at 244, 326, Justices Zarella and McLachlan stand as outliers in failing to express their opinion about the scope of the right. Despite this, Defendants inexplicably ask this court to treat the views of these two justices as determinative of the right to an adequate education. Because the contours of the right to an adequate education are beyond the reach of their joint opinion, however, the dissents of Justices Zarella and McLachlan cannot inform the scope of that right.

Based on both legal precedent and common sense, Defendants should not be permitted to transform dissenting opinions into binding law. As a result, this court should reject Defendants' efforts to utilize the dissenting opinions to dictate the scope of permissible discovery and evidence.

### D. The Plurality Does Not Favor Extreme Deference To the Legislature in Determining the Scope of the Right Under Article Eighth, § 1 of the Connecticut Constitution.

Defendants' attempt to use the *CCJEF* dissenting opinions to create a mythical "majority" in favor of legislative deference underscores the fact that the three-justice plurality does not agree with Justice Palmer's position on legislative deference. Defendants' memorandum of law does not even attempt to argue that the plurality agrees with Justice Palmer's conception

of deference to the legislature. Among those justices concurring in the judgment, Justice Palmer stands alone in his view that prudential concerns favor deferring to the political branches in defining the parameters of the constitutional right.

Indeed, Justice Palmer specifically describes his belief that "the executive and legislative branches are entitled to considerable deference" as the primary reason that he is "unable to join the plurality opinion." *CCJEF*, 295 Conn. at 321. For example, Justice Palmer argues that the article eighth, § 1 requirement to implement the right to education "by appropriate legislation," indicates that "the framers reserved to the legislature the responsibility of implementing the mandate of a free public education." *Id.* at 336.[3] In contrast, the plurality believes that "appropriate legislation" implies "a judicial role in disputes arising thereunder, particularly when coupled with the word 'shall,' which itself implies a 'constitutional duty' that is 'mandatory and judicially enforceable.'" *Id.* at 259. The plurality further notes that "[j]ust as the legislature has a constitutional duty to fulfill its affirmative obligation to the children who attend the state's public elementary and secondary schools, so the judiciary has a constitutional duty to review whether the legislature has fulfilled its obligation." *Id.* at 258. The strong disagreement between the plurality and Justice Palmer on the appropriate level of deference indicates that Justice Palmer's deferential view cannot represent the shared view of the justices concurring in the judgment, and therefore does not bind this court.

Because the plurality disagrees with Justice Palmer's deferential view, this court should reject Defendants' position that Justice Palmer's solitary perspective on deference to the

[3] Plaintiffs do not argue that the views of the political branches are irrelevant to this court's determination of what the Connecticut Constitution requires. The State Board of Education and State Department of Education have provided significant guidance in official documents about the necessary elements of an appropriate education and mechanisms for providing such an education, and those views should be considered as one part of the court's inquiry into what article eighth, § 1 requires. However, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

legislature should limit permissible discovery or evidence in this case. Instead, this court should be guided by the fact that a plurality of the Connecticut Supreme Court agreed that the judiciary has a strong, independent obligation to review the legislature's constitutional obligation to provide students with an adequate education, a position that the current Supreme Court has cited with approval.

## IV. The Plurality and Justice Palmer Agree that the Connecticut Constitution Contains a Substantive, Qualitative Right To an Adequate Education that Must Be Factually Developed at Trial.

Even if the court were to disregard the subsequent reliance of the Connecticut Supreme Court on the *CCJEF* plurality opinion in its recent decisions, there are ample grounds to find a wide range of commonality between the plurality opinion and Justice's Palmer concurrence in *CCJEF*, just not in the narrow way urged on this court by Defendants. As a result, to the extent the court wishes to look for such grounds of commonality as constituting the true "majority" of the Supreme Court on the questions before the Court in *CCJEF*, there are sufficient bases upon which to do so, and this can be done without relying, as Defendants suggest, on Justice Palmer's lone commitment to judicial deference to the legislature.

Indeed, although some aspects of Justice Palmer's concurrence, such as his view on legislative deference, are not supported by the plurality and therefore cannot constitute the holding of the Court, there are some fundamental points of agreement between Justice Palmer and the plurality. In particular, Justice Palmer and the plurality agree in large part about the substantive guarantee to an adequate education. They also agree that the right to an adequate education is an evolving standard that will depend on facts developed at trial. Should this court find that the plurality does not control, these areas of agreement may be instructive.

### A. Justice Palmer and the Plurality Agree that Connecticut Public School Students Have a Constitutional Right To An Adequate Education Evaluated Against Modern Educational Standards.

First and foremost, Justice Palmer and the plurality agree that Connecticut schoolchildren have a substantive Constitutional right to an adequate education. *See CCJEF*, 295 Conn. at 320-21 (Palmer, J., concurring) (concluding that the right to an education "is a substantive one"). Specifically, Justice Palmer writes that "article eighth, § 1, of the state constitution is not merely precatory or hortatory." *Id*. at 329. Instead, Justice Palmer agrees with the plurality that the Connecticut Constitution "obligates the state to ensure that [its] free public schools provide to the students attending them an educational opportunity of a certain level or quality." *Id.*; *compare id.* at 315 (plurality opinion) ("[T]he state . . . must provide students with an objectively 'meaningful opportunity' to receive the benefits of this constitutional right.").

Justice Palmer goes on to summarize the issue before the Court as "whether article eighth, § 1, obligates the state to ensure that those free public schools provide to the students attending them an educational opportunity of a certain level or quality," before expressing his conclusion: "I believe that it does." *Id.* Put another way, Justice Palmer insists that the State cannot permissibly establish and maintain public schools that are "manifestly inferior or substandard." *Id.* at 330. In his words, to do so would be "inconsistent with the purpose underlying article eighth, § 1, namely, to underscore the importance of free public schools by elevating that principle to constitutional status." *Id.*

Justice Palmer also agrees with the plurality about the fundamental importance of education in our democratic society. Justice Palmer begins the conclusion of his concurrence with a long quotation from *Brown v. Board of Education*: "Compulsory school attendance laws and the great expenditures for education both demonstrate [the court's] recognition of the

importance of education to our democratic society." *Id.* at 344 (quoting *Brown*, 347 U.S 483, 493 (1954)). Justice Palmer continues to quote: "It is required in the performance of our most basic public responsibilities. . . . It is the very foundation of good citizenship. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Id.* (internal quotations omitted).

Finally, the plurality opinion and Justice Palmer also agree that a constitutionally adequate education must be measured by "modern educational standards." *Id.* at 321. The phrase "modern educational standards" echoes the language in the plurality opinion that a broad standard is necessary because "the specific educational inputs or instrumentalities suitable to achieve this minimum level of education may well change over time, as a constitutionally adequate public education is not a static concept removed from the demands of an evolving world." *Id.* at 318 (plurality opinion) (internal quotation omitted).

While Justice Palmer and the plurality disagree on the level of deference due to the legislature, they agree significantly on the general contours of the right to an education found in article eighth, § 1. Providing more specific content to that right based on modern educational standards will be part of the task of this court at trial.

### B. Justice Palmer and the Plurality Agree that the Scope of the Constitutional Right To an Adequate Education Is Partly an Issue of Fact To Be Resolved at Trial.

As his reliance on the fact-specific phrase "modern educational standards," suggests, Justice Palmer's opinion does not purport to lay out the full scope of the constitutional right. For instance, he writes that the state is constitutionally required "to provide an educational opportunity . . . that, *at the least*, is minimally adequate by modern educational standards." *Id.* at 321 (emphasis added). Justice Palmer also cites to the "essentials" explicated by the New York Court of Appeals as "necessary" to satisfy the constitutional requirement – but does not say those

elements are sufficient. *Id.* at 342. By refusing to define the precise contours of an adequate education, Justice Palmer suggests that a determination as to what constitutes "modern educational standards" is a question of fact to be resolved at trial.

Tellingly, at one point Justice Palmer writes that "instrumentalities of learning also may include modern technologies, such as computers, that are essential to a minimally adequate education. I express no view, however, as to whether such technologies, and if so, which ones, may be necessary for a minimally adequate education." *Id.* at 342 n.16. By deliberately choosing not to specify the precise components of an adequate education, Justice Palmer indicates that these requirements are questions of fact to be determined at trial. Justice Palmer's view that the exact constitutional requirements of an adequate education must be determined at trial thus aligns with the plurality's view that the contours of the right to an adequate education will need to be further developed at trial. *Id.* at 318 (plurality opinion).

Justice Palmer and the plurality agree that determining the full parameters of the constitutional right to an adequate education involves questions of fact judged against "modern educational standards." As a result, under either the plurality opinion or Justice Palmer's concurrence, Plaintiffs should be able to pursue discovery and present evidence that establishes both the contours of this fact-specific standard, as well as Defendants' failure to satisfy it.

## CONCLUSION

Based on extensive precedent, Defendants' own litigation positions in other proceedings, and – most critically – the unambiguous views of the current Supreme Court, it is clear that Justice Norcott's plurality opinion controls this case. Should this court choose to defer judgment on Defendants' motion, however, there are ample grounds to do so. Failing to meet the standard procedural criteria for either a protective order or a motion *in limine*, Defendants' motion is an

inappropriate attempt to relitigate their unsuccessful arguments before the Connecticut Supreme Court and achieve something akin to partial summary judgment.

For the foregoing reasons, Plaintiffs respectfully urge this court to deny Defendants' motion on the grounds that Justice Norcott's plurality opinion controls the scope of discovery and the admissibility of evidence at trial, or, in the alternative, to defer judgment on Defendants' motion until at least the close of discovery.

THE PLAINTIFFS

BY:

S/_____
Raymond Brescia
Counsel for Plaintiffs
Juris No. 415403
Yale Law School
P.O. Box 209090
New Haven, CT 06520
Phone: (203) 436-3530
Fax: (203) 432-7998
ray.brescia@yale.edu

On the Brief:
David Simons
Joshua Meltzer
Jessica Reich
Ryan Watzel
Haiyun Zhao
Law Student Interns
Yale Law School

Michael D. Weisman
Davis, Malm & D'Agostine, P.C.
One Boston Place
Boston, MA 02108

David N. Rosen
David Rosen & Associates, P.C.
400 Orange Street
New Haven, CT 06511

**CERTIFICATION**

This is to certify that a copy of the foregoing has been sent by regular mail on this 26th day of March, 2012 to:

Stephen Park
Assistant Attorney General
State of Connecticut
55 Elm Street
Hartford, CT 06106

S/_____
Raymond Brescia
Counsel for the Plaintiffs