

NO. HHD-CV05-4050526-S (X07)

CONNECTICUT COALITION FOR JUSTICE IN EDUCATION FUNDING INC., et al.	:	SUPERIOR COURT
Plaintiffs	:	COMPLEX LITIGATION DOCKET
v.	:	AT HARTFORD
M. JODI RELL, et al.	:	
Defendants	:	September 15, 2011

**MOTION FOR PROTECTIVE ORDER AND/OR ORDER LIMITING
THE SCOPE OF PERMISSIBLE EVIDENCE
RE: SCOPE OF THE CONSTITUTIONAL RIGHT**

Pursuant to Connecticut Practice Book Sections 13-5(4) and 15-3, the defendants in the above matter respectfully move the Court for the entry of an order or orders limiting the scope of permissible discovery and/or evidence sought or offered to prove a violation of the state constitutional right embodied in article eight, section one of the Connecticut constitution, other than as that right has been enunciated by Justice Palmer in his concurrence to Connecticut Coalition for Justice in Education Funding, et al. v. Rell, et al., 295 Conn. 240, 320-47 (2010).

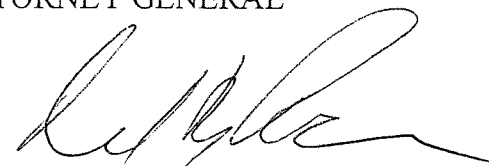
ORAL ARGUMENT REQUESTED
TESTIMONY IS NOT REQUIRED

The defendants contemporaneously submit a supporting memorandum of law which more fully sets forth the grounds for this motion.

DEFENDANTS,
M. JODI RELL, ET AL.

GEORGE JEPSEN
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By:



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ORDER

The foregoing motion having been duly presented to the Court, it is hereby ORDERED:

GRANTED/DENIED.

BY THE COURT

CERTIFICATION

This will certify that a copy of the foregoing has been mailed this 15th day of September 2011, to the following:

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	:	
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MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR PROTECTIVE ORDER AND/OR ORDER LIMITING
THE SCOPE OF PERMISSIBLE EVIDENCE
RE: SCOPE OF THE CONSTITUTIONAL RIGHT

I. Introduction

The defendants submit this memorandum of law in support of their motion filed, pursuant to Practice Book §§ 13-5(4) and 15-3, to obtain the entry of an order or orders limiting the scope of permissible discovery and/or evidence sought or offered to prove a violation of the state constitutional right embodied in article eighth, §1 of the Connecticut constitution, other than as that right has been enunciated by Justice Palmer in his concurrence to Connecticut Coalition for Justice in Education Funding, Inc. v. Rell, 295 Conn. 240, 320-47 (2010)(reversing trial court’s grant of defendants’ motion to strike counts alleging state constitutional right to suitable education).

In particular, based upon well-settled legal principles, defendants seek a ruling clarifying that Justice Palmer’s definition of a “minimally adequate education” and his view of the deference owed to the political branches of government constitute the ruling of the Court as to the scope of the constitutional right guaranteed by article eighth, §1. While Justice Palmer’s concurrence and the plurality’s opinion critically diverge in their respective interpretations of the

scope of this right, as set forth more fully below, Justice Palmer’s concurrence represents the holding that controls this case because it is based on the narrowest grounds of agreement among a majority of the Court’s justices who heard the case.

The defendants seek a ruling from this Court confirming the scope of the constitutional right as defined by Justice Palmer in order to ensure that the efforts and expenditures of the parties are consistent with the controlling legal standard of the case, and to promote judicial economy. Clarifying this issue now will more narrowly define the parameters of the extensive discovery the parties still anticipate, set the legal standard for dispositive motions and any trial, and possibly hasten and shorten a trial, should one occur.

II. The Divided Supreme Court’s Opinions.

A. The Plurality Opinion and Justice Schaller’s Concurring Opinion.

In CCJEF v. Rell, *supra*, seven justices of the Connecticut Supreme Court considered whether article eighth, §1 of the Connecticut constitution (the “education clause”) guarantees public school students the right to a particular minimum quality of education. In finding such a right, a fragmented Court issued a total of five opinions: a plurality opinion of three justices, one concurring opinion by a justice who also joined the plurality, one concurring in the judgment only, and two dissenting opinions reflecting the views of three justices. No opinion garnered the support of a majority of the Court.

The plurality found that the education clause embodies a qualitative standard for the determination of whether students have received a constitutionally deficient education. The plurality stated that students are entitled

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.... [and] will leave [them] 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 ... must provide students with an objectively "meaningful opportunity" to receive the benefits of this constitutional right.

295 Conn. at 314-315 (plurality; footnote omitted). In addition, the plurality endorsed certain specific "essential" components requisite to a constitutionally adequate education. Again, this reasoning did not command a majority of the Court.

Justice Schaller joined the plurality opinion, but also authored his own separate concurrence, which among other things suggested a preliminary template for the next stages of the litigation. Most critically for this analysis, Justice Schaller's concurrence adopted the broadly drawn constitutional right to an adequate education found by the plurality. *See generally* 295 Conn. at 347-383.

B. Justice Palmer's Concurring Opinion.

By contrast, Justice Palmer concurred only in the judgment of the plurality. He construed the scope of the right guaranteed by article eighth, §1 of the education clause far more narrowly, and insisted on deference to the political branches in the determination of the meaning of the right:

In particular, I believe that the executive and legislative branches are entitled to considerable deference with respect to the determination of what it means, in practice, to provide for a minimally adequate, free public education. Thus, it is the prerogative of the legislature to determine, within reasonable limits, what a minimally adequate education entails. Consequently, in my view, the plaintiffs will *not* be able to prevail on their claims *unless* they are able to establish that what the state has done to discharge its obligations under article eighth, §1, is so lacking as to be unreasonable by any fair or objective standard.

295 Conn. at 321(Palmer, J., concurring in the judgment)(emphasis added). Thus, although he agreed with the plurality that article eighth, §1, requires the state to provide students with an educational opportunity of a certain level or quality, Justice Palmer concluded in his concurrence that the right established under article eighth, §1:

requires only that the legislature establish and maintain a minimally adequate system of free public schools. I also conclude that the legislature is entitled to considerable deference with respect to both its conception of the scope of the right and its implementation of the right.

295 Conn. at 332. Justice Palmer went on to adopt certain essential educational components articulated in a parallel case by the New York Court of Appeals that he found necessary to satisfy the requirements of a minimally adequate education for purposes of article eighth, §1:

“Children are entitled to minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn. Children should have access to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks. Children are also entitled to minimally adequate teaching of reasonably up-to-date curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas.” *Campaign for Fiscal Equity, Inc. v. New York*, 86 N.Y.2d 307, 665 N.E.2d 661, 631 N.Y.S.2d 565 (1995).

295 Conn. at 342.

Although the plurality also endorsed these essential components of an adequate education, it went well beyond them in broadly drawing the contours of the standard. Notably, Justice Palmer rejected the plurality’s view “that it is appropriate to craft the constitutional standard ‘in broad terms.’ ” 295 Conn. at 342, n. 17, quoting the plurality opinion. He expressly declined to follow the plurality’s expansive standard noted above, namely, that the education clause guarantees students “an education suitable to give them an opportunity to be responsible citizens able to participate fully in democratic institutions ...[and] to progress to institutions of

higher education, or to attain productive employment and otherwise contribute to the state's economy." 295 Conn. at 314-315.

Instead, Justice Palmer explicitly concluded that the deference owed to the political branches dictates that "the plaintiffs are *not* entitled to relief *unless* they can 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. Any less demanding standard would give insufficient voice to the reasoned judgment of the legislature." (Emphasis added.) 295 Conn. at 343-344.

In short, Justice Palmer's two part concurring opinion carefully circumscribes the scope of the constitutional right to provide a standard of minimal educational adequacy, and finds that the political branches must be afforded great deference in determining what an adequate education entails, and whether the political branches have made reasonable efforts towards its implementation.

C. The Dissenting Opinions.

Applying different analyses, the two dissenting opinions -- representing the respective positions of three justices -- both found that the education clause does not contain a qualitative standard, and that the plaintiffs' requests for relief must be directed to the political branches of state government.¹ In so finding, the three dissenters concurred with that portion of Justice

¹ Justice Vertefeuille, in her dissent, after analyzing the factors used to determine the scope of constitutional clauses, concluded that the factors "weigh[] heavily against interpreting article eighth, §1, to contain a qualitative standard, and in favor of leaving the crafting of a remedy to the legislature." 295 Conn. at 398. Justice Zarella, in his dissent (joined by Justice McLaughlin), found the question of whether students in Connecticut have been denied their constitutional right to a suitable education nonjusticiable. Justice Zarella also found that the legislature deserves complete deference with respect to the scope and implementation of the education clause. Justice Zarella based his finding of nonjusticiability on, among other grounds, his conclusion that there is no enumerated constitutional right to a suitable or a minimum standard of education, and there is a textually demonstrable commitment of issues concerning education to the legislature as part of its express constitutional obligation to enact laws to provide a free education. 295 Conn. at 425. He also reasoned that "judicial intervention to resolve an issue with potentially vast

Palmer's concurrence which requires deference to the legislature in determining what a constitutionally adequate education entails, and whether sufficient efforts have been made to implement such an education. The dissenting opinions went beyond Justice Palmer's concurrence in their conclusions that the legislature is entitled to complete deference, not just Palmer's requirement of considerable deference.

In short, a review of all of the opinions as a whole establishes that the narrowest grounds of assent by four justices on this issue are those advanced by Justice Palmer's advocacy of considerable, though not complete, deference to the legislature's determination regarding educational adequacy.

III. Justice Palmer's Articulation of the Scope of the Constitutional Right Is the Holding of the State Supreme Court and Therefore Controls This Case.

Although a four member majority of the Connecticut Supreme Court found a constitutional right to an adequate education, no single rationale for the decision enjoyed the support of this majority. Only three members agreed to the expansive scope of the right propounded by the plurality, insufficient to command a majority. On the other hand, a majority of the justices, drawn from the plurality and from the dissents, at the very least agreed upon the narrow grounds of Justice Palmer's concurrence.

It is well-settled law that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of [a majority of] Justices, the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds...." (Internal quotation marks omitted.) State v. Ross, 272 Conn. 577,

financial consequences demonstrates a lack of respect for a coordinate branch of government because the court is treading on a constitutional prerogative of the legislature regarding education *and* the legislature's exclusive authority to appropriate funds." 295 Conn. at 440.

604, n. 13 (2005), quoting Marks v. United States, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977); Gregg v. Georgia, 428 U.S. 153 169, n.15 (1976) (“Since five Justices wrote separately in support of the judgments on Furman, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”) The 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 the narrowest grounds. The plurality concurred with one prong, namely, Justice Palmer’s position that the education clause embodies a qualitative dimension, albeit one that espouses the narrower standard of minimal adequacy. The 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.

Thus, the narrowest grounds of the several articulations of the scope of a constitutionally adequate education are those set forth by Justice Palmer in his concurrence. It is on these grounds alone that a four member majority of the Court agreed. Therefore, it is the scope of the constitutional right set forth in Justice Palmer’s decision that constitutes the holding of our state Supreme Court which now controls this proceeding.

IV. An Order at This Stage of the Litigation Limiting the Scope of Permissible Discovery and Precluding the Admission of Evidence Inconsistent with the Palmer Concurrence Will Promote Economy and Efficiency.

An order limiting the scope of permissible discovery and ensuring that the evidence offered at trial only addresses the right to a minimally adequate education as enunciated by Justice Palmer’s concurrence will narrow the issues of fact and streamline the litigation for the

parties during discovery, any dispositive motions, pretrial proceedings and at trial, should trial become necessary.

Adherence to the legal standard of the Palmer concurrence will preclude the plaintiffs from seeking or offering any evidence that does 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.” 295 Conn. at 343-344. Compliance with this controlling standard will limit the extensive discovery still anticipated by the parties, and effectively elucidate any summary judgment motions filed by the parties and the applicable standards for trial. In addition, adherence to the standard may well accelerate the trial date and shorten the length of any trial. Absent a ruling adhering to this controlling standard, the pretrial proceedings and trial in the case promise to become a morass of opinion and evidence, wherein educational and fiscal “best practices” masquerade as constitutional requirements. Defendants respectfully submit that this Court is duty-bound to prevent such a result.

V. Conclusion.

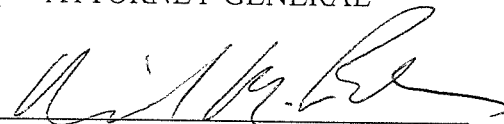
Well-established legal principles dictate that Justice Palmer's narrower articulation of the scope of the constitutional right guaranteed by the education clause controls this case. For all of the foregoing reasons defendants respectfully urge this Court to limit the scope of permissible discovery and evidence sought or offered, other than as may be consistent with Justice Palmer's articulation of the constitutional right.

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CERTIFICATION

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