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

CONNECTICUT COALITION FOR JUSTICE IN EDUCATION FUNDING INC., et al.	:	SUPERIOR COURT
	:	
	:	COMPLEX LITIGATION DOCKET
Plaintiffs	:	
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: PRESCHOOL

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 evidence sought or offered for the purpose of establishing that any failure to provide or fund services or programs other than public elementary or secondary schools, constitutes, or ought to constitute, violation of the newly-articulated constitutional duties set forth by the State Supreme Court in Connecticut Coalition for Justice in Education Funding, et al. v. Rell, et al., 295 Conn. 240 (2010).

ORAL ARGUMENT REQUESTED
TESTIMONY IS NOT REQUIRED

In support of this motion the defendants respectfully submit a memorandum of law, filed herewith.

DEFENDANTS,
M. JODI RELL, ET AL.

GEORGE JEPSEN
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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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MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER AND/OR ORDER LIMITING THE SCOPE OF PERMISSIBLE EVIDENCE RE: PRESCHOOL

I. Introduction

The defendants respectfully submit this memorandum in support of their accompanying motion for protective order and/or order limiting the scope of permissible evidence. In the motion, the defendants move the Court for the entry of an order limiting the scope of permissible discovery and evidence, whether documentary or testimonial, lay or expert, sought or offered for the purpose of establishing that any failure to provide

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TESTIMONY IS NOT REQUIRED

or fund services other than public elementary or secondary schools constitutes or ought to constitute violation of the newly-articulated constitutional duties set forth by the divided State Supreme Court in this case.[1] The motion is prompted by plaintiffs' allegations regarding preschool (Plaintiffs' Amended Complaint dated November 18, 2010 at paragraphs 50-58), and Plaintiffs' Disclosure of Expert Witnesses dated December 1 and December 21, 2010.[2]

In addressing the merits of this motion, the Court will need to assess and delineate the scope of the constitutional right articulated, and in particular, whether that right encompasses any right to preschool services. As such, this Court will necessarily be guided, as was the State Supreme Court in this case, by the principles and factors set forth by the Connecticut Supreme Court in State v. Geisler, 222 Conn. 672, 684-86 (1992). Based on careful assessment of the relevant Geisler factors, it is apparent plaintiffs can make no legitimate claim that preschool services are part of the state constitutional right at issue in this case. Accordingly, any evidence concerning preschool services is irrelevant, inadmissible and an improper use of judicial resources. Conn. Code of Evidence §§ 4-1 to 4-3.

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1 Conn. Coal. for Justice in Educ. Funding v. Rell, 295 Conn. 240 (2010).

2 Plaintiffs' allegations, at bottom, assert preschool is a constitutionally required component of an adequate educational program.

II. The Geisler Factors

In Geisler, the Court was confronted with the task of determining the scope of Article I, § 7 of the Connecticut Constitution (security from unreasonable search and seizure). The court adopted the following factors for engaging in such analysis:

> In order to construe the contours of our state constitution and reach reasonable and principled results, the following tools of analysis should be considered to the extent applicable: (1) the textual approach; (2) holdings and dicta of this court, and the Appellate Court . . . .; (3) federal precedent . . . .; (4) sister state decisions or sibling approach . . . .; (5) the historical approach, including the historical constitutional setting and the debates of the framers . . ..; and (6) economic/sociological considerations.

Id. (Emphases in original); Accord State v. Glenn, 251 Conn. 567, 571-72 (1999).

It is well-recognized, however, "that 'not every Geisler factor is relevant in all cases.'" Conn. Coal. for Justice in Educ. Funding, 295 Conn. at 296-97 (quoting State v. Morales, 232 Conn. 707, 416 (1995); Kerrigan v. Comm'r of Pub. Health, 289 Conn. 135, 157 (2008). Moreover, in applying the Geisler factors to a given constitutional issue, other principles of constitutional interpretation must be adhered to. In particular,

> [i]n construing the contours of our state constitution, we must exercise our authority with great restraint in pursuit of reaching reasoned and principled results . . .. We must be convinced, therefore, on the basis of a complete review of the evidence, that the recognition of a constitutional right or duty is warranted.

Moore v. Ganim, 233 Conn. 557, 581 (1995); Conn. Coalition, 295 Conn. at 354

(Schaller, J. concurring).

Such restraint and caution are particularly warranted where, as here, the issue involves the possible recognition of affirmative constitutional obligations. As described by the Moore Court, "[w]e are especially hesitant to read into the constitution affirmative government obligations. In general, the declaration of rights in our state constitution was implemented not to impose affirmative obligations on the government, but rather to secure individual liberties against direct infringement through state action." Id. at 594. As further explained by the Moore Court,

> [o]ur hesitation to articulate affirmative governmental obligations based on our state constitution also is consonant with federal precedent. In the area of economic and social policy, the United States Supreme Court has held that the United States Constitution neither requires the government to remove non-governmentally imposed impediments to the exercise of fundamental rights by indigent persons . . . nor compels the government to provide funding for indigent persons' basic necessities such as housing.

Id. at 589-90.

Notably, the Moore Court cited and quoted Article VIII, § 1 of the Connecticut Constitution to illustrate this principle that affirmative constitutional obligations ought only be recognized where there is clear textual support for such a determination, and that the scope of any such affirmative constitutional obligation must be limited by the relevant text.

> The text of our constitution makes evident the fact that its drafters have been explicit when choosing to impose affirmative obligations on the state. See, e.g., Conn. Const., art. VIII, § 1. ("there shall always be free public elementary and secondary schools in the state.") Indeed, the history of article eighth, § 1, is particularly instructive . . . . This explicit textual provision, and its counterparts, article eighth, §4 (school fund) are the only constitutional provisions, recognized to date, that impose affirmative obligations on the part of the state to expend public funds to afford benefits to its citizenry. Other provisions, such as those in article first, protect individuals from state intrusion.

Id. at 595-596.

Thus, the assessment of the Geisler factors must be conducted in accord with these additional guiding principles of constitutional jurisprudence.

A. The Constitutional Text

Article VIII, § 1 of the Connecticut Constitution provides "[t]here shall always be free public elementary and secondary schools in the State. The General Assembly shall implement this principle by appropriate legislation."

"Fundamental principles of constitutional interpretation require that 'effect must be given to every part of and each word in our constitution . . .." Sheff v. O'Neill, 238 Conn. 1, 28 (1996) (quoting Cahill v. Leopold, 141 Conn. 1, 21 (1989)); Stolberg v. Caldwell, 175 Conn. 586, 597-98 (1978), appeal dismissed sub nom. Stolberg v. Davidson, 454 U.S. 958 (1981). "In dealing with constitutional provisions we must assume that infinite care was employed to couch in scrupulously fitting language a

proposal aimed at establishing or changing the organic law of the State." Id.; Conn. Coal. for Justice in Educ. Funding, 295 Conn. at 425 (2010) (Zarella, J. dissenting); accord, id. at 352 (Schaller, J. concurring ("the two [Geisler] factors that I find to be particularly helpful and persuasive are the text of the educational clause and our own case precedent . . .")).

As noted by the plurality of the State Supreme Court in this case,

> [t]he commonly cited dictionary definitions of the relevant terms in article first, § 1, namely, "elementary," and "secondary" and "school," have a qualitative connotation, as "elementary school" is defined as "a school usu[ally] the first four to the first eight grades and often a kindergarten," and particularly "secondary school" is defined as a "school intermediate between elementary school and college and usu[ally] offering general, technical, vocational or college-preparatory courses. Merriam Webster's Collegiate Dictionary (10th Ed. 1998).

Id. (2010).

It is readily apparent that the text of the constitutional provision at issue makes no reference to preschool or preschool services. In fact, quite to the contrary, the term "schools" is explicitly modified by the terms "free" and "public" – and, most critically, by the terms "elementary" and "secondary." Obviously, "prekindergarten," "preschool" and "early childhood education" are terms used to describe programs which are decidedly not elementary or secondary education. The plain meaning of these terms, especially when coupled with the historical context discussed below, establishes, even without the

need to address the other Geisler factors, that there was no intent by the framers or adopters of this provision, to create any right to preschool or preschool services. To rule otherwise would be to contravene the plain meaning of the constitutional text itself.[3]

B. State Supreme and Appellate Court Decisions

The prior decisions of our state Supreme and Appellate Courts are wholly consistent with the conclusion that the educational clause of the state constitution embodies only a right to public elementary and secondary education, not preschool.

As early as the Court's 1977 decision in Horton v. Meskill, 172 Conn. 615, 642-49 (1977), the State Supreme Court "conclude[d] that without doubt . . . in Connecticut, elementary and secondary education is a fundamental right, [and] that pupils in the public schools are entitled to equal enjoyment of that right, and the state system of financing public elementary and secondary education as it presently exists and operates cannot pass the test of 'strict judicial scrutiny' as to its constitutionality." Id. (Emphases added). In Savage v. Aronson, 214 Conn. 256, 286 (1990) the Court reiterated that the Horton

[3] Notably, the Connecticut General Statutes make reference in some twenty-three instances to the term "preschool." An objective review of those statutes leaves no doubt that preschool, as a phenomenon, is clearly distinguished from elementary school, secondary school and kindergarten. See Conn. Gen. Stat. §§ 10-4, 10-4o, 10-4p, 10-10a, 10-11, 10-16p, 10-16w, 10-76d, 10-76ff, 10-220, 10-231b, 10-265f, 10-266aa, 10-285a, 10-295, 10a-194h, 14-1, 17a-217, 17a-248e, 17a-451f, 17b-112, 17b-749a, and 20-126l.

decision "construed article eighth, § 1 of our state constitution to create a fundamental right to elementary and secondary public school education . . .." Id. (Emphasis added).

In Broadley v. Bd. of Educ., 229 Conn. 1, 10-11 (1994), in holding that there is no right to special education under the state constitution, the court resoundingly rejected any notion that creating statutory programs that may support services beyond regular public elementary and secondary education, thereby expands the scope of the constitutional right established by Article VIII, § 1.

As discussed above, in Moore v. Ganim, 233 Conn. 557 (1995), the high court, citing the education clause, observed that "[t]he text of our constitution makes evident the fact that its drafters have been explicit when choosing to impose affirmative obligations on the state." Id. at 595. Endorsing the plaintiffs' claim that the education clause requires the provision of preschool services, despite the express language of Article VIII, § 1 would violate this bedrock principle of constitutional jurisprudence.

In Cologne v. Westfarms Assocs., 192 Conn. 48 (1984) the Court, assessing its prior state constitutional decisions noted that

> [t]his court has never viewed constitutional language as newly descended from the firmament like fresh fallen snow upon which jurists may trace out their individual notions of public policy uninhibited by the history which attended the adoption of the particular phraseology at issue and the intentions of its authors. The faith which democratic societies repose in the written document as a shield against the arbitrary existence of

> governmental power would be illusory if those vested with the responsibility for construing and applying disputed provisions were free to stray from the purposes of the originators.

Id. at 62; see also Sheff v. O'Neill, 238 Conn. 1, 234-235 (1996) (Borden, J. dissenting).

Such precedent, the history which attended the adoption of Article VIII, § 1, the provision's text, and the intentions of its authors – all of which point to ensuring a right to public elementary and secondary school only – require, as a matter of law, that this Court grant this motion in limine.[4]

C. Federal Precedent

The United States Supreme Court in San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973), held that education is not a fundamental right under the Federal Constitution. Based on that decision, the State Supreme Court's plurality opinion in this case concluded that "federal precedent does not inform our analysis of the plaintiffs' claims . . .." Conn. Coal. for Justice in Educ. Funding, 295 Conn. at 298-99 (plurality opinion).

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[4] Notably, Justice Palmer's concurring opinion addresses the concept of what constitutes "'a minimally adequate education for purposes of article eighth, § 1.'" In addition to describing minimally adequate facilities and textbooks, the opinion declares that "'[c]hildren are also entitled to minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science and social studies . . ..'" Conn. Coal. For Justice in Educ. Funding, Inc. v. Rell, 295 Conn. at 342 (quoting Campaign for Fiscal Equity, Inc. v. New York, 86 N.Y. 2d 307, 317, 631 N.Y.S. 2d 565(1995)). See note 7, infra. Preschoolers are not taught such curricula.

In his concurring opinion, Justice Schaller further concluded that this Geisler factor had "limited relevance in the present case because the federal constitution has no analog to article eighth, § 1, of the state constitution." Id. at 390 (Schaller, J. concurring). However, Justice Schaller expressed the view that the San Antonio decision "supports the trial court's conclusion that there are important prudential considerations that must be considered in determining the scope of the state constitutional right." Id. In particular, Justice Schaller noted with approval the San Antonio Court's concern that "'[e]ducation . . . presents a myriad of intractable economic, social, and even philosophical problems,'" and that "'[i]n such circumstances, the judiciary is well advised to refrain from imposing on the [s]tates inflexible constitutional restraints . . ..'" Id. at 390-91 (quoting San Antonio, 411 U.S. at 42-4).

Because the obligatons of Article VIII, § 1 lack a corollary in our Federal constitution, federal precedent has limited relevance to ascertaining the scope of the state constitutional provision.

D. Sister State Decisions

While the Geisler decision instructs that the judicial decisions of other states can be informative in interpreting the scope of Connecticut constitutional provisions, it is also well-settled that decisions from other states may be of limited utility due to the differing

language of other states' constitutional provisions. Geisler, 222 Conn. at 685-86; Horton v. Meskill, 172 Conn. 615, 644-45 (1977) ("[W]e have not found material aid in the many decisions from the courts of other jurisdictions since most of them depend upon the controlling and differing provisions of the constitutions in the particular jurisdictions.") See also, Conn. Coal. for Justice in Educ. Funding, 295 Conn. at 299 ("The linguistic diversity of the various states' education clauses . . . requires a careful review of the sister state decisions to determine which cases are of the greatest precedential significance.")

Remarkably, in two states with constitutional education clause language very much like Connecticut's – Nebraska and Oklahoma – the high courts of both those states held the respective educational adequacy claims raised were nonjusticiable political questions and dismissed them. Neb. Coal. for Educ. Equity & Adequacy v. Heineman, 731 N.W.2d 164 (2007) (Neb. Const. Article VII, § 1 ("The Legislature shall provide for the free instruction in the common schools of this state of all persons between the age of five and twenty-one years.)); Okla. Educ. Ass'n v. State, 158 P.3d 1058 (2007) ("Okla. Const. Article XIII, § 1 ("The Legislature shall establish and maintain a system of free public schools wherein all children of the state may be educated."))[5]

[5] The Oklahoma Court also held that the plaintiffs lacked standing. Okla. Ed. Ass'n., 158 P. 3d at 1064.

Additionally, several sister state decisions have held that their constitutional education clauses do not create a constitutional right to preschool or preschool services.

In Lakeview School Dist. No. 25 v. Huckabee, 91 S.W. 3d 472 (2002), the Arkansas high court held that the state's constitution did not require the provision of preschool services.

> The state's argument, boiled down to its essence, is that the plain language of Article 14, § 1 does not mandate the chancery court's order of state-provided early childhood education. We agree. Section 1 reads in pertinent part that the General Assembly and public school districts "may spend public funds for the education of persons over twenty-one (21) years of age and under six (6) years of age, as may be provided by law, and no other interpretation may be given to it . . .." While it is uncertain whether the trial court, in its order, was underscoring the need for preschool education or ordering its implementation, we hold the trial court had no power to do the latter. Nor do we agree with the Intervenors that the courts of this state can mandate pre-school education as an essential component of an adequate education. That, again, is for the General Assembly and the school districts to decide. Article 14 contemplates that very thng when it refers to funding pre-six-year-old programs, as provided "by law."

Lakeview School Dist. No. 25 at 501-02.

The North Carolina Supreme Court reached a similar conclusion in Hoke County Bd. of Educ. v. State, 599 S.E.2d 365 (2004), holding that its "reading of the educational and statutory provisions leads us to conclude that the determination of proper age for school children has indeed been placed squarely in the hands of the General Assembly . . . Thus with regard to the issue of whether the trial court erred by interfering with the

province of the General Assembly – establishing the appropriate age for students entering the public school system – we conclude that the trial court did so err." Id. at 391.

However, the defendants in Hoke had "concede[d] that at-risk prospective enrollees in the Hoke County are in need of assistance to avail themselves of their right to the opportunity for a sound basic education. Yet there is a marked difference between the State's recognizing a need to assist 'at-risk' students prior to enrollment in the public schools and a court order compelling the legislative and executive branches to address that need in singular fashion." Id. at 393. The Hoke court concluded such court-ordered remedies would be "inappropriate," given that such responsibility "is clearly designated in our state constitution as the shared province of the legislative and executive branches," and imposition of such a remedy "would effectively undermine the authority and autonomy of the government's other branches." Id. The Hoke Court rejected the contention that the court's earlier decision in Leandro v. State, 488 S.E.2d 249 (1997) had established a constitutional right to pre-kindergarten for "at-risk" children. Hoke at 393, n. 17.

In Hancock v. Comm'r of Educ., 822 N.E.2d 1134 (2005), a plurality of the Massachusetts Supreme Court, concurring in the judgment, concluded that relief via judicial order was unwarranted, and determined that the provision of preschool services,

even for "at-risk" students, was a "policy decision for the Legislature," not the courts. Id. at 1156.

Finally, even in the seemingly endless Abbott litigation in New Jersey, where the courts have been perhaps among the most aggressive in the nation in dictating steps they see as needed to achieve specific educational outcomes, the court declined to reach the issue of whether preschool education is constitutionally required, noting instead the statutory powers granted the state's Commissioner of Education. Abbott v. Burke, 710 A.2d 450, 464 (1998).

These judicial decisions of sister states establish – whether based on determinations of nonjusticiability or that principle's close cousin of judicial deference to other branches of state government – that plaintiffs' claims to preschool services as part of the limited constitutional right established by the Connecticut Supreme Court's prior decision in this case must fail as a matter of law.[6]

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[6] The plurality in this case noted the similarity to the education clause of the South Carolina constitution, which provides that "[t]he General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the state . . .." Conn. Coal. for Justice in Educ. Funding, 295 Conn. at 306. However, while similar to Connecticut's Article VIII, § 1, notably the South Carolina provision, unlike Connecticut's, does not refer explicitly to "elementary" and "secondary" schools. It was based on South Carolina's more inclusive language, in contrast to Connecticut's, that the court in Abbeville County School District, et al. v. State of South Carolina, No. 93-CP-31-0169 (2007) (¶ 60) found the defendants had not lived up to the state constitutional mandate by failing to provide sufficient early intervention services for poor students.

E. Historical Factors

The historical record, as it relates to Article VIII, § 1, leaves little doubt that preschool or preschool services do not fall within the scope of the constitutional right.

The plurality opinion in Conn. Coalition discussed the historical context of the constitutional provision at some length, noting that the Ludlow Code of 1650 called for establishment of "Grammar School[s]" wherever 100 families occupied a town. Conn. Coal. for Justice in Educ. Funding v. Rell, 295 Conn. at 293. In addition, the plurality, like so many other court opinions, quoted Simon Bernstein, the sponsor of what would become Article VIII, § 1, at the state constitutional convention of 1965, wherein Mr. Bernstein told the assembled delegates to the convention that "when I served on a board of education . . . [I] was surprised to find that Connecticut with its traditional good education had no reference to it in the [c]onstitution . . . so we do have the tradition which goes back to our earliest days of free good public education and we have h[ad] good public schools so that this again is not anything revolutionary, it is something which we have . . .." Proceedings of Connecticut Constitutional Convention (1965), Pt. 3, p. 1039, remarks of Delegate Bernstein (Emphases added); Conn. Coal. for Justice in Educ. Funding v. Rell, 295 Conn. at 294.

Justice Palmer's concurring opinion in this case[7] also reiterates his conclusion that the intent of the delegates in amending the state constitution to include what is now Article VIII, § 1 was to provide constitutional recognition for what was already occurring in the state, not to create expanded rights to something new. Justice Palmer noted that in addition to Delegate Bernstein's comments to that effect, Delegate Woodhouse described it as "extremely fitting that we should finally put into our [c]onstitution a reference to our great public schools . . .." Conn. Coal. for Justice in Educ. Funding v. Rell, 295 Conn. at 330 (Palmer, J. concurring) (quoting Proceedings at Constitutional Convention (1965), Pt. 3, p. 1062).

In her dissent, Justice Vertefeille was even more direct in reaching the same conclusion. Challenging the plurality's determination that the constitutional provision embodies a qualitative standard or requirement, she noted that she "would conclude that the statements of the delegates to the constitutional convention support a conclusion that the framers merely intended to guarantee that the legislature would continue to provide

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[7] No opinion carried a majority of the State Supreme Court in Conn. Coal. for Justice in Educ. Funding. It has long been the case 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 that position taken by the members who concurred in the judgment on the narrowest grounds." United States v. Marks, 430 U.S. 188, 193 (1977) (internal quotation marks and citations omitted); see also State v. Ross, 272 Conn. 577, 604 n.13 (2005). As the narrowest opinion reinstating plaintiffs' stricken claims, Justice Palmer's concurrence thus constitutes the holding of the court.

the free public schools that it traditionally had provided." Conn. Coal. for Justice in Educ. Funding v. Rell, 295 Conn. at 393 (Vertefeille, J. dissenting) (Emphasis added).

Justice Zarella's dissent was even more strident on this point, quoting Justice Borden's thoughtful and exhaustive dissent in Sheff, 238 Conn. at 120, wherein Justice Borden had concluded that Delegate Bernstein "'made clear that [article eighth, § 1] was intended only to constitutionalize the then-existing system of free public education . . ..'" Conn. Coal. for Justice in Educ. Funding v. Rell, 295 Conn. at 407 (quoting Sheff v. O'Neill, 238 Conn. at 120 (Borden, J. dissenting) (first emphasis in original)). See also Conn. Coal. for Justice in Educ. Funding v. Rell, supra at 408 (Zarella, J. dissenting); see also, Moore v. Ganim, 233 Conn. 557, 595-596 (1995) ("the purpose of article eighth, §1, was to give our system of public education . . . the same constitutional sanctity as our bill of rights . . ..) (Internal quotations omitted)).

There was not in 1965, nor is there today, a statutory mandate to provide public preschool or preschool services.[8] Some twenty-three separate state statutes refer to preschool, including schemes establishing grant programs to support public and private

[8] The federal special education law, the Individuals with Disabilities Education Act, 20 U.S.C. 1400 et seq. and corollary state laws (see Conn. Gen. Stat. § 10-76a et seq.) of course require the provision of "special education" to children identified as having exceptional needs as the result of recognized disabilities which can at times require the provision of preschool services as one of many possible special education or "related services." Not only are these limited mandates clearly statutory, there is no question that they post-dated the 1965 constitutional convention.

preschool programs or services, and family resource centers. While these statutory provisions encourage and support the development of preschool programs, whether in private or public facilities, none mandate such programs.

Neither the historical context nor the present day legal landscape support an interpretation that Article VIII, § 1 embodies a right to preschool or preschool services. See Broadley v. Board of Education, 229 Conn. 1, 10-11 (1994) (In creating a statutory right to special education the legislature did not expand the scope of the constitutional right to elementary and secondary public education.)

F. Economic and Sociological Considerations

The last Geisler factor in constitutional interpretation is described as "economic/sociological considerations." Geisler, 222 Conn. at 685. The case law cited by the Geisler Court (and subsequent courts citing the Geisler factors (see, e.g. State v. Glenn, 251 Conn. at 572)) in fact provide little concrete guidance as to the phrase's meaning, especially given that in those cases, as in Geisler itself, the courts were interpreting the scope of state constitutional protections against certain potential governmental activities. By contrast, in this case the court grapples with one of the affirmative constitutional obligations set forth in our state's constitution. (See, Moore,

233 Conn. at 595-596 (noting the education and higher education clauses as the only ones imposing affirmative constitutional duties to expend public funds)).

In Geisler, three cases are cited in support of the validity of using "economic/sociological considerations" in assessing the scope and reach of a particular constitutional provision, two from the Connecticut Supreme Court and one from Vermont's highest court. All three are criminal cases involving state constitutional search and seizure issues, and thus are, as discussed earlier, of limited utility as templates for addressing affirmative constitutional obligations. The Vermont case, State v. Jewett, 500 A. 2d 233, 237 (1985), is simply an explanation by the court of efficacious approaches to briefing state constitutional questions. The Jewett court endorses the use of "economic and sociological materials," citing Louis Brandeis' (later Supreme Court justice) use of reports and statistics in support of the constitutionality of a law limiting hours of labor. In State v. Barton, 219 Conn. 529, 546 (1991) the Connecticut Supreme Court opined that "[o]ur adoption here of federal constitutional precedents that usefully illuminate the open textured provisions of our own organic document in no way compromises our obligation independently to construe the provisions of our state constitution," and that "[r]espect for settled interpretations of the organic law of our own state, moreover, requires that we examine changes in the interpretation of federal constitutional provisions to determine

whether they are consistent with the history and policy concerns of analogous Connecticut constitutional provisions before adopting such changes as a matter of state constitutional law." Id.

Applying these principles to this case leads to certain obvious observations. First, the state constitutional provision at issue here, Article VIII, §1, is hardly "open textured." As set forth supra at 5-7, the text explicitly ensures the maintenance only of "free public elementary and secondary schools in the state." These terms are not in the least ambiguous, and do not include preschool or early intervention services. Moreover, the history of the provision similarly makes clear, as discussed above, that the provision was adopted in 1965 to enshrine Connecticut's "traditional good education . . . something which we already have . . .." It was never intended to be "anything revolutionary." Proceedings of Connecticut Constitutional Convention (1965), Pt. 3, p.1039, remarks of Delegate Bernstein (sponsor). The history and policy purpose were to ensure preservation of what already existed, namely, public elementary and secondary schools. No amount of rhetorical exhortation concerning the potential benefits of preschool services can alter that history and public policy purpose.

The language of State v. Dukes, 209 Conn. 98, 115 (1988), also cited by Geisler for this purpose, is more expansive. In the context of determining the scope of reasonable searches incident to motor vehicle stops, the Court observed that:

> [c]onstitutional provisions must be interpreted within the context of the times. The Connecticut constitution is an instrument of progress, it is intended to stand for a great length of time and should not be interpreted too narrowly or too literally so that it fails to have contemporary effectiveness for all our citizens.

Id.

Notably, the search and seizure context, wherein law enforcement has new technologies and options available to it with each passing year, is clearly an area in which the protections against unreasonable searches and seizures must be reinterpreted to ensure continued "contemporary effectiveness." Moreover, such reinterpretation is in the context of checking governmental power, not imposing additional affirmative obligations on government. In latter instances, courts must heed the more explicit warnings of the Moore Court, wherein the court declared that courts must be "especially hesistant to read into the constitution [especially here, where the text itself provides otherwise] affirmative governmental obligations." Moore, 233 Conn. at 594.

Finally, here, where affirmative state constitutional obligations are at issue, it is difficult to envision how any even moderately expansive reading or interpretation of this Geisler factor of "economic/sociological considerations" does not run afoul of settled

principles of nonjusticiability, particularly the political question doctrine, wherein a matter is committed textually or otherwise (here textually) to a co-equal branch of state government. Office of the Governor v. Select Committee of Inquiry, 271 Conn. 540, 573 (2004). Notwithstanding that a slim majority of the high court in this case found the matter justiciable, the sixth Geisler factor cannot have been intended as an entrée for courts, under the guise of "economic" or "sociological" consideratons, to usurp the primary role the legislative and executive branches of state government have, as elected officials, in setting state educational policy – especially in contravention of the express language of the constitutional provision at issue. The expenditure of vast amounts of the public fisc on preschool services by judicial fiat, rather than as the result of the reasoned deliberations of elected officials (as indeed, such elected officials have, in certain circumstances already chosen to do; see n. 3 supra at 7) because one court felt it would be sociologically efficacious, would surely constitute such judicial usurpation.[9]

Whatever the sociological value of preschool services, this court should decline to usurp the policy-making powers of the executive and legislative branches – which have

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[9] President Lincoln, in his first inaugural address, referring to the U.S. Supreme Court's ignominious decision in the Dredd Scott case, perhaps said it best: "[T]he candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by the decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that effect practically resigned the government into the hands of that eminent tribunal." A. Lincoln, First Inaugural Address, March 4, 1861.

already selectively supported preschool services – under the guise of consideration of the sixth Geisler factor, particularly where, as here, the text of the affirmative constitutional obligation clearly indicates such services are not within the scope of the constitutional obligation. Furthermore, prudential considerations also weigh in defendants' favor. In his concurrence, Justice Palmer expressed concern over, on remand, this case turning into "long, protracted and expensive litigation." Conn. Coal. for Justice in Educ. Funding, 295 Conn. at 341 (Palmer, J. concurring). The three dissenting justices expressed similar concerns. Given that plaintiffs have already disclosed an extensive list of experts in various areas of public education, this Court should refrain from permitting unwarranted expansion of the matters to be covered at what will no doubt be a lengthy and comprehensive trial.

III. Conclusion

Application of the Geisler factors in this case, as tempered by the Court's admonitions in Moore concerning the risk of judicially-created constitutional obligations, leads inexorably to the conclusion that a right to preschool services is not to be found in Article VIII, §1 of the Connecticut Constitution. The text of the provision itself, its history, judicial decisions from this and other states, as well as the federal courts, and appropriate application of economic and sociological considerations, all dictate such a

conclusion. As such, this Court should grant defendants' motion for protective order and/or order limiting the scope of permissible evidence.

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CERTIFICATION

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