NO. X07 HHD-CV 05-4050526-S

CONNECTICUT COALITION FOR JUSTICE IN EDUCATION FUNDING INC., et al. *Plaintiffs*	:	SUPERIOR COURT
v.	:	COMPLEX LITIGATION DOCKET
RELL, M. JODI, et al. *Defendants*	:	AT HARTFORD
	:	APRIL 10, 2013

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Connecticut's 2012 education reforms and waiver from the requirements of the federal No Child Left Behind law ("NCLB") have substantially changed the educational model on which the plaintiffs base their Corrected Third Amended Complaint ("TAC"). Because any trial of plaintiffs' claims necessarily must be based on the educational model existing at the time of trial, and because the court will not be in a position to properly evaluate the constitutionality of the reformed educational model for at least three years, the plaintiffs' claims are moot and not ripe. Plaintiffs' claims are non-justiciable and should be dismissed.

In opposing dismissal, plaintiffs for the first time in this litigation admit that although their complaint sounds in equity and seeks injunctive relief, the case is really about--and only about-- obtaining significantly more state funding without any regard to other measures that are being or could be implemented to improve education. They state: "The irrational, underfunded ECS formula...is at the core of the Plaintiffs' case." Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss, dated February 22, 2013, (hereinafter "Plaintiffs' Opposition Brief"), p. 12. According to the plaintiffs: "It is universally accepted that the [ECS] formula and

funding levels at the core of Plaintiffs' case are inadequate-untouched by reforms touted in Defendants' brief." Plaintiffs' Opposition Brief, p. 9. In other words, plaintiffs ask the court to assume that public education is constitutionally inadequate and will be at the time of trial, and that the only way to both determine and remedy this inadequacy is by counting the amount of money the state spends on education. On the strength of these breathtaking assumptions, the plaintiffs seek to convince the court to order the General Assembly and Governor to appropriate several billions of dollars more per year to public primary and secondary education.

Plaintiffs rely on their 2005 "cost study" that suggests the State should have spent an additional $2.07 billion in 2003-04 on public education. See Plaintiffs' Opposition Brief, p. 5, Plaintiffs' Exhibit 3. Plaintiffs argue that because the ECS is not based on the "actual cost" of providing suitable and equitable educational opportunities as determined by a "cost study," and because the 2012 reform legislation did not add several billions of dollars per year to the ECS as urged by their "cost study," the reform legislation does not affect the "core of plaintiffs' case." Plaintiffs' reliance on their 2005 "cost study" demonstrates that their case is both moot and not ripe. Plaintiffs' "cost study" defines "adequacy" as the amount of education spending required to achieve standards and goals that no longer apply and will not apply at time of trial. Plaintiffs admit their "cost study" is "intended to be informative, not determinative" and cannot "definitively link resource levels to student outcomes." CCJEF, Estimating the Cost of an Adequate Education in Connecticut, Defendants' Exhibit 9, p. 4. This "cost study," based on 2003-04 data, takes no account of the education system as it will exist at trial.

If it is true, as plaintiffs suggest, that the sole remedy they seek is more state funding—to the exclusion of other remedial measures—sovereign immunity would bar this claim. See DaimlerChrysler Corp. v. Law, 284 Conn. 701, 723 (2007) ("The plaintiff's request for relief —

an order that the defendant refund all sales taxes for which the plaintiff had submitted a claim for refund — must be characterized as a claim for damages. When a plaintiff brings an action for money damages against the state, he must proceed through the office of the claims commissioner") (internal quotations and citations omitted). If that is not the case, plaintiffs cannot defeat defendants' motion to dismiss by asserting that the 2012 education reforms fail to provide the monetary relief plaintiffs desire, while completely ignoring the substantial and significant changes to Connecticut's educational landscape resulting from these reforms.

Plaintiffs further assert that "it is widely recognized that the 2012 Legislation is incapable of producing adequate and substantially equal educational opportunities." Plaintiffs' Opposition Brief, p. 7.[1] This claim is a red herring. The issue is whether the court will be able to properly evaluate the constitutionality of the reformed educational model before the reforms have had a reasonable opportunity to be implemented, at least three years. Plaintiffs do not contest the reasonableness of this time frame. Rather, they respond that because only the State's appropriation of billions of additional dollars per year to the public education system can produce constitutionally required educational opportunities, the reformed educational model is "incapable" of providing these opportunities. Plaintiffs' Opposition Brief, p. 11.

As demonstrated infra, pp. 8-10, plaintiffs support this claim with selective, incomplete and out of context statements made by the Governor and the Secretary of the Office of Policy and Management ("OPM"). Those statements do not in any way indicate a concession that the 2012 reforms fail to address constitutional inadequacies in public education or that any such constitutional inadequacies exist. Contrary to plaintiffs' assertion, the ECS Task Force Report

[1] Plaintiffs' claim assumes the State's education models prior to the 2012 reforms were unconstitutional. The defendants have denied all such claims in their pleadings and briefs, and continue to deny all such claims.

did not "recognize that the 2012 Legislation is incapable of producing adequate and substantially equal educational opportunities" without billions of dollars additional funding. And some CCJEF members participated in creating, publicly endorsing, and supporting the education reforms, further undermining plaintiffs' inaccurate claim that it is "widely recognized" that the 2012 reforms cannot result in a constitutional education system.

It is important to consider the potential consequences of accepting CCJEF's invitation to determine both liability and remedy through a myopic focus on state funding. Plaintiffs' articulate their constitutional claim this way: "In a rational system, the [ECS] foundation amount would represent a minimally adequate level of spending per pupil." Plaintiffs' Opposition Brief at 6. In other words, the constitution requires the State to pay 100% of what plaintiffs postulate is the "cost" of providing legally required educational opportunities to public school students.[2] Currently, Connecticut has 166 school districts that serve as agents of the State in their communities for carrying out the State's responsibilities to provide for public education. http://www.sde.ct.gov/sde/cwp/view.asp?a=2604&Q=321686; Pereira v. State Bd. of Educ., 304 Conn. 1, 33 (2012). The State has delegated the duty to provide and administer public education to local and regional school districts. Id. The State has conferred on the local boards of education broad power and discretion over educational policy. Id. These districts, and local control of these districts, exist solely by authority of statutes enacted by the State. Id. If CCJEF succeeds in distilling this case to a funding determination, and in placing educational funding obligations solely on the State to the tune of billions of dollars in increased annual State

[2] One of CCJEF's "Three Key Goals/Objectives" is to "shift the lion's share of funding for school operations away from local property taxes and onto the state." See http://ccjef.org/key-goals-objectives, (last visited 3/25/13). CCJEF's Articles of Incorporation disclose its corporate purposes, including to "engage in activities that relieve the burdens of Connecticut municipalities in funding education." Defendants' Exhibit 10, Attached, Article III.

expenditures, such a result would surely lead some to question whether the State can responsibly continue its treasured tradition of local educational control. Fortunately, the State's compliance with its constitutional obligations is measured not merely in dollars spent, and it can be assessed and achieved without upending the fiscal and structural underpinnings of Connecticut's education system.

Finally, none of plaintiffs' arguments made in their Brief in Opposition carry their burden to prove CCJEF has standing in this case.

ARGUMENT

I. Plaintiffs' Claims Are Not Ripe

The ECS formula is "at the core" or "heart" of plaintiffs' case. Plaintiffs' Opposition Brief, pp. 12, 17. Relying exclusively on their "cost study," plaintiffs argue the 2012 legislation does not change the ECS formula or infuse billions of new dollars annually into the ECS, while totally ignoring the significant, comprehensive and substantive changes to the educational model now being implemented. Plaintiffs' 2005 "cost study" purports to compute how much the state would need to spend in order to achieve compliance with NCLB's student test score requirements by 2014, and certain 2003-04 state student test score goals. These federal requirements no longer apply to Connecticut, and the state "goals" and measurements of attainment have changed substantially. See Defendants' Memorandum in Support of Motion to Dismiss, pp. 8-20. Furthermore, plaintiffs' "cost study" rests entirely on test results despite the Supreme Court's rejection of student test scores as the appropriate measure of the State's compliance with its constitutional obligation:

> Justice Zarella [dissenting] notes that "student achievement is not merely a function of what takes place at school, but is also influenced by economic, social, cultural and other factors, some unknown and perhaps unknowable, beyond the control of the educational system." Justice Zarella, whose observation has been echoed by, inter alia, President Barack Obama; see footnote 20 of the dissenting opinion; undoubtedly is correct, which counsels against an excessive reliance on outputs such as test scores in assessing whether the state has fulfilled its constitutional obligations. See Sheff v. O'Neill, supra, 238 Conn. at 143–44, (*Borden, J.,* dissenting); see also part II B of this opinion.

CCJEF v. Rell, 295 Conn. 240, 266 n.23 (2010) (plurality) (emphasis added).

Moreover, by plaintiffs' own admissions, their "cost study" cannot serve as a litmus test by which the courts can determine the constitutional adequacy of Connecticut's school finance system. In October 2011 Plaintiff CCJEF stated the following about its "cost study:"

> Adequacy cost studies produce estimates that are intended to be informative, not determinative, in revamping state aid formulas and aligning equalization aid with the actual cost of educating all students and undergirding improved performance of students and schools. No costing-out method or other predictive study can definitively link resource levels to student outcomes. How resources are used will always be fundamental to making money matter. Money, as in every enterprise, is indeed necessary, but not sufficient.

CCJEF, Estimating the Cost of an Adequate Education in Connecticut, Defendants' Exhibit 9, p. 4.

Plaintiffs' declared expert Bruce Baker has stated: "It is certainly reasonable to acknowledge that money, by itself, is not a comprehensive solution for improving school quality." http://www.shankerinstitute.org/images/doesmoneymatter_final.pdf by Bruce D. Baker, p. 18 (last visited 3/25/13); see also Bruce D. Baker, David G. Sciarra, Danielle Farrie, Is School Funding Fair? A National Report Card at 1, 14 (2010), http://www.schoolfundingfairness.org/National_Report_Card.pdf (last visited 3/26/13)

(recognizing that the educational needs are not based on money alone and recognizing Connecticut to be ranked 8th in "fairness in funding level per pupil").

> Of course, funding alone will not lead to better academic performance and outcomes for students. Funding also must be invested wisely, focusing on key areas such as quality teaching, strong curriculum, programs for struggling students, effective supervision, and sufficient supports for districts and schools from state education agencies and institutions of higher education. High poverty schools need sufficient funds, effectively and efficiently used, to achieve established outcome goals and prepare their students for high school graduation and for post-secondary education or the workforce.

Id. at 1 (footnote omitted).

Connecticut's 2012 educational reforms are directed to these areas as reflected in the new PEAC educator evaluations and supports, implementation of the Common Core and new Smarter Balanced Assessment Consortia, supports and accountability programs for Alliance Districts and the Commissioner's Network and students struggling within those schools, literacy programs, and additional early childhood opportunities. The reforms infuse not only more money into the ECS grants for the low-performing districts, but also provide for state intervention, support, and training targeted to these districts. The 2012 legislative session added to the ECS grant monies, and appropriated other money directed to education reforms totaling just short of $100 million. Legislators also authorized bond funds in an amount exceeding $83,000,000 to further implement education reforms.

Defendants ask this court to recognize the changed educational landscape in Connecticut and that any trial of this case must be a trial of the reformed system. Plaintiffs' position that the new educational model created by the 2012 legislation and NCLB waiver is "incapable of producing adequate and substantially equal educational opportunities" is beside the point. The issue before this court on this motion to dismiss is whether the court is able to properly evaluate the constitutionality of the reformed education model before the reforms have had a reasonable

opportunity to be implemented – at least three years. Plaintiffs do not contest the reasonableness of this time frame. Rather, they ask the court to perform the difficult and pointless task of assessing the constitutional adequacy of an education system undergoing substantial, but not yet fully implemented change.

Plaintiffs wrongly assert that Benjamin Barnes, Secretary of OPM and the co-chair of the ECS Task Force, accepts that $2 billion additional dollars per year is necessary to make Connecticut's school funding system "adequate." See Plaintiffs' Opposition Brief, p. 7. Plaintiffs have taken his statement from the 6/26/12 ECS Task Force Meeting totally out of context. See Defendants' Exhibit 11, Childress Affidavit dated 4/8/13, ¶ 3 quoting from Education Cost Sharing Study Task Force June 26th Meeting, CT-N (June 26, 2012) http://ct-n.com/ondemand.asp?ID=7930. Secretary Barnes was having a dialogue with CCJEF member and Executive Director of the Connecticut Association of Public School Superintendants (CAPSS") Joseph Cirasuola,[3] and was responding to Mr. Cirasuola's earlier recommendation for an "adequacy system" based on an educational model of "personalized learning." Barnes stated:

[3] http://990s.foundationcenter.org/990_pdf_archive/562/562518924/562518924_201112_990.pdf (CCJEF's 2011 Form 990 lists Mr. Cirasuolo as a designated member of CCJEF).

> At the beginning of your presentation, you mentioned an adequacy system as an appropriate way to think about. I am familiar with them. And I think, well, say we were to just think that you've hit the nail right on the head and we're going to pursue your recommendations, I'm assuming we would then establish an adequacy based formula that relied on your vision of personalized education and maybe alternative structures for governance and education and develop an adequacy based formula around that. I'm going to make this up but I don't think I'm way off. That adequacy, when you do the calculations of what is it going to take to provide this personalized education to all the students in the State and to make available the variety of learning environments and interventions, that one could imagine would follow through is going to result in an overall price tag of an adequate education system which is billions of dollars higher than what we currently spend on education. I am not shocked when I say that -I am not trying to be critical of that idea. That may well be true that it would cost that much to provide that type of education. What concerns me is how do you get there? First of all, we do operate under fiscal constraint at the state level and at the local level perhaps even more acutely. If we were to come up with an extra 2 billion dollars a year, because that's what would drive the adequacy formula, how would districts spend that in a way that would get us to where we want to go?
>
> And how long is it going to take for them to make the changes in how they spend the money, how they organize themselves, how they instruct, and how they do all the things that they do in order to eliminate the achievement gap? I guess it's gets down to, if we were to fund it at those levels as we presumably gradually ramp up funding because it isn't going to happen in one year, how would we then insure that the money is being used toward the changes we know or believe will result in positive changes in outcomes? This is a big struggle. I understand the vision you're laying out but I don't see the way there clearly. That would be very helpful for me to understand that from your perspective.

Education Cost Sharing Study Task Force June 26th Meeting, supra, at 41:55-44:36. It is clear that Secretary Barnes was responding to Cirasuola's recommendations in testimony before the ECS Task Force, not agreeing with them. Nothing in this exchange can be fairly characterized as conceding--or even relating to--constitutional adequacy, and it is disingenuous to suggest otherwise.

Contrary to plaintiffs' assertion, the ECS Task Force Report did not "recognize that the 2012 Legislation is incapable of producing adequate and substantially equal educational

opportunities" without billions of dollars additional funding. See Plaintiffs' Opposition Brief, p. 7. Indeed, the ECS Task Force did not make a specific recommendation for more ECS funding. The Task Force no doubt was aware that during the period FY 2008-2013, the greatest economic collapse since the Great Depression, Connecticut was one of only 13 states to increase spending per student, adjusted for inflation, and only 5 states increased spending more, see Defendants' Memorandum in Support of Motion to Dismiss at 3, and that of the 50 states, Connecticut currently spends the seventh highest amount per pupil. http://www2.census.gov/govs/school/10f33pub.pdf, (last visited 3/25/13).

Plaintiffs also badly mischaracterize Governor Malloy's statements at his February 5, 2013, press conference. Plaintiffs cite not the Governor's words, but a conclusion stated in an article appearing in an on-line news publication. See Plaintiffs' Opposition Brief, p. 8 and Plaintiffs' Exhibit 6. Governor Malloy responded affirmatively to the question of whether his budgeted additional $152 million over the next two years targeted to the lowest performing districts to support the reforms is "adequate."

> Gov. Malloy: I can't wait to read that in one of your editorials of your newspaper that 152 million dollars isn't a lot of money....
>
> Question: Do you think this amount of funding is adequate?
>
> Gov. Malloy: It is. I think the formula, the recommendations of the ECS Task force, and what we did last year, with respect to the Alliance Districts is moving us in that direction....

CNB With Governor Malloy to Announce an Increase In Education Cost Sharing Aid , CT-N (Feb. 5, 2013), http://ct-n.com/ondemand.asp?ID=8661 at 9:50-10:03; 12:22-12:37. Of course, determining what is constitutionally adequate is a legal conclusion to be made by this court. In any event, during his efforts to reform Connecticut's public education system the Governor has

never stated that Connecticut's education system or the recent reforms cannot provide constitutionally required educational opportunities to students.

Some CCJEF members have made public statements supporting the 2012 education reforms, belying plaintiffs' claim that "[i]t is widely recognized that the 2012 legislation is incapable of producing adequate and substantially equal educational opportunities." During his appearance before the ECS Task Force, Mr. Cirasuolo, described the reforms as "transformative. See Education Cost Sharing Study Task Force June 26th Meeting, supra, at 46:13-46:21; see also Defendants' Exhibit 11-Childress Affidavit, ¶3. The two teachers' unions that are members of CCJEF, AFT of CT, and the CEA, have recently endorsed the PEAC educator evaluation and support reform system, which they helped develop.[4] See CNB With Governor Malloy to Announce an Increase In Education Cost Sharing Aid, supra, at 6:11-8:03; see also Defendants' Exhibit 11 - Childress Affidavit, ¶ 4.

Plaintiffs rely on Hussein v. State of New York, 81 A.D. 3d 132 (2011), aff'd 19 N.Y.3d 899 (2012) – a New York case not binding on this court – but that case does not support their position that the complaint is ripe. Hussein is distinguishable because the legislation at issue in that case, known as Foundation Aid, dealt only with education funding. It did not include wholesale substantive changes to the educational model, as is the case with Connecticut's 2012 reforms, changes the State is now implementing and will continue to implement over the next few years. In sum, plaintiffs' complaint does not present a ripe controversy capable of adjudication.

---

[4] Plaintiffs explicitly list high quality teachers as an "essential" component of a suitable educational opportunity. TAC at ¶ 63e. Clearly additional time is needed to implement the teacher evaluation reforms and measure their effectiveness, which will reverberate throughout the system. Defendants' Exhibit 5, Seder Affidavit, ¶ 12.

II. Plaintiffs' Claims are Moot

Contrary to the plaintiffs' assertion, the court is NOT able to provide practical relief on the plaintiffs' operative complaint because the operative complaint does not allege facts or data relevant to the new 2012 educational model that will be in place at the time of trial. The 2010 CCJEF decision states what is universally accepted, that the educational model in place at the time of trial is the model that is to be tried against the constitutional standard of adequacy. CCJEF v. Rell, 295 Conn. 240, 318-19 (plurality) and 321 (Palmer, J. concurring) (2010). The court cannot try plaintiffs' claims based on a defunct system that will not be reinstated. The court cannot provide plaintiffs any practical relief based on the old educational model on which the complaint is based.[5] The court cannot provide relief to plaintiffs unless and until it adjudicates the adequacy of the new educational system and finds liability. No adjudication can occur until the reforms are tested by an appropriate measure of time and results are obtained.[6]

Plaintiffs argue that this case is exempt from the mootness doctrine because the legislature can always reduce the amount of ECS funding and that there is no guarantee for additional ECS funds for future years. Again, plaintiffs' argument and the cases they cite in

[5] For example, the plaintiffs continue to allege in the Corrected Third Amended Complaint that NCLB standards are an appropriate metric of student performance, when the waiver the federal Department of Education granted Connecticut refutes any such notion.

[6] Furthermore, no adjudication of the merits of this case can occur until the Court determines the definition of the adequacy standard. Defendants' motion for protective order, Doc. # 144, regarding the "Palmer standard" as the dispositive standard for defining adequacy remains pending before this court. Settling on a definition of adequacy would also guide the parties in their discovery process.

support of it miss the point. Defendants are not asking the court to assume there will or will not be further changes in Connecticut's education system. Connecticut's education system has shifted so dramatically that it would strain credulity to think it can be put back in place like it was when plaintiffs filed this case, and it would be a bizarre waste of resources to litigate a case based on that defunct system.

The plaintiffs' contention that this case falls within the exception for issues that are capable of repetition, yet evading review is also meritless. The court in Loisel v. Rowe, 233 Conn. 370, 384 (1995), held that three factors must be met before establishing an exception to the mootness doctrine. Id. at 382-3. These three factors are 1) insurmountable time constraints such that there is a strong likelihood that the substantial majority of cases raising the question will become moot before appellate litigation can be concluded; 2) a reasonable likelihood that the question presented in the pending case will arise again in the future and that it will affect either the same complaining party or a surrogate; and 3) the question must have some public importance. All three of these factors must be met to come within the exception to mootness. Id.

With regard to the first factor, the plaintiffs argue that students can age out of this case making it capable of repetition, yet evading review. The case of Burbank v. Bd. of Educ. Of Town of Canton, 299 Conn. 833, 838-9 (2011), cited by plaintiffs actually supports defendants' position rather than plaintiffs'. In that case, the school had a policy of conducting warrantless sweeps with drug-sniffing dogs. The court there held the case moot because the student who brought suit had graduated and, thus, the court could provide the student no practical relief from the school's policy. The case did not fall within the "capable of repetition, but evading review" exception. The court explained that students at the school ranged from middle school through

high school and, therefore, had 6 years within which to bring a similar action and that the action before the court had only taken one and a half years from its commencement to its resolution. Id. at 841-2. Here, a student-plaintiff would have thirteen years, or perhaps longer, to litigate a challenge to the adequacy of his or her educational opportunities. Moreover, defendants in our case have never objected to the substitution of student-plaintiffs, and have never argued that graduated students serve as the basis for mootness. Instead, it is the substantial changes in the whole education system that provides the foundation for the defendants' mootness argument.

With regard to the second factor, the plaintiffs' claim that the question of the constitutionality of the funding system alleged in their complaint is likely to arise again because while the State has increased ECS and other funding, it has not added billions of dollars per year more to the ECS. A challenge to the ECS statutory formula as it applied to the outdated educational model in the complaint will not likely arise again as the outdated educational model no longer applies. When the reforms are implemented and have been provided a reasonable amount of time to take effect, these or other plaintiffs can bring a challenge to the then-existing public education system. Thus, there is no basis to claim that dismissal of the Third Corrected Amended Complaint will result in alleged harm that is capable of repetition, but evading review. Our supreme court has stated that "[i]n the absence of the possibility of such repetition, there would be no justification for reaching the issue [of capable of repetition, yet evading review.]" Loisel, 233 Conn. at 384.

With regard to the third factor, although public education is generally a matter of public importance, the plaintiffs' constitutional challenge to a no longer existent educational model is of no import. A trial must be based on the reformed system existing at the time of trial. Therefore, because the plaintiffs' complaint does not satisfy any of the three factors, they cannot satisfy the

"capable of repetition, but evading review" exception to mootness. Accordingly, plaintiffs' claims are not exempt from the mootness doctrine.

III. There Are No Disputed Issues of Jurisdictional Fact

Contrary to plaintiffs' claims, there are no disputed issues of jurisdictional fact intertwined with the merits of the case that require a trial before the court rules on this motion to dismiss. See Plaintiffs' Opposition Brief, pp. 11, 30-32. There is no dispute as to the facts necessary to rule on the issues of ripeness and mootness as there is no dispute as to the content of the reforms as they relate to the Corrected Third Amended Complaint. The statutes and NCLB waiver speak for themselves and reflect significant substantive changes to Connecticut's pre-2012 educational model, the one relied on in plaintiffs' operative complaint. The undisputed existence and nature of the reforms is all that is needed to decide whether the case is not ripe and moot.

Plaintiffs' reliance on Conboy v. State, 292 Conn. 642, 653 (2009) as requiring a full trial is misplaced. In Conboy, the issue in dispute on the state's motion to dismiss was whether certain employees were let go due to budgetary constraints or whether there was retaliatory intent prohibited by Conn. Gen. Stat. § 31-51q. This was the same ultimate issue in the case on the merits. Unlike Conboy, there is no intent at issue in our case. The court need only decide whether changes have occurred that require time for implementation before the court is able to determine whether the educational model in place at the time of the trial provides constitutionally required educational opportunities.[7]

[7] Two other cases cited by plaintiffs, Sanders v. State, No. NHHCV116023067, 2012 WL 6743545 (Conn. Super. Ct. Nov. 29, 2012) and PCUW v. Constanti, No. HHBCV126014751S, 2012 WL 3932945 (Conn. Super. Ct. Aug. 15, 2012), are also distinguishable because those

Plaintiffs also mistakenly look to Gordon v. H.N.S. Management Co., 272 Conn. 81, 92 (2004), as support for their position that a full trial need be held before ruling on the motion to dismiss. In Gordon, a hearing was held on the issue of whether defendant could be characterized as an arm of the state so as to assert sovereign immunity. The trial court had not had before it the facts necessary to determine whether or not the sovereign immunity defense applied to bar the suit. The Supreme Court held that sovereign immunity applied and dismissed the action without having to reach the merits. Id. at 105-06. Indeed, case law requires that the court decide this issue of subject matter jurisdiction before the case proceeds further; Liberty Mutual Ins. v. Lone Star, 290 Conn. 767, 812 (2009); and there are no factual disputes necessary to resolve before it can do so.

IV. Plaintiff CCJEF Lacks Standing

Judge Shortall's decision that CCJEF did not meet the first prong of Worrell when it filed the original complaint because at that time CCJEF's members did not include public school students or their parents is dispositive of the standing issue to this day. CCJEF provides no citation to support its position that this defect is curable or to refute the cases cited by defendants that hold that lack of subject matter jurisdiction based on the association's membership at the time of the initial complaint cannot be ignored. See Defendants' Brief in support of Motion to Dismiss, pp. 42-43 and n. 43. CCJEF relies only on the fact that the lower court in this case granted its 2006 request to amend its standing language in its complaint to reflect the addition of parents of Connecticut students after the initial filing, and thus, argues that the court must "necessarily" have found the defect curable. See Plaintiffs' Opposition Brief, pp. 38. But that position is contrary to the applicable principles that associational standing cannot be cured retrospectively

---

cases involved factual disputes as to facts necessary to determining the issues before the court whereas there are no factual disputes as to the content and existence of the 2012 reforms.

and that standing must be established at the time of the original filing. See e.g., Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 574-75 (2004) ("[w]here there is no change of party, a jurisdiction depending on the condition of the party is governed by that condition, as it was at the commencement of the suit." [internal citation omitted.];[8] Lujan v. Defenders of Wildlife, 504 U.S. 555, 569 n.4 and 570 n.5 (1992) (redressability component of standing not satisfied at time of filing defeated jurisdiction); Conn. Assoc. Builders and Contractors v. City of Hartford, 251 Conn. 169, 185-6 (1999) (hereinafter "CABC"); Fairchild Heights Residents Ass'n v. Fairchild Heights, 131 Conn. App. 567 (2011), cert. granted 303 Conn. 928 (2012); Disability Advocates v. N.Y. Coalition for Quality Assisted Living, 675 F.3d 149, 160, 162 n. 17 (2d Cir. 2012) (intervention cannot cure defective standing at time of original filing);[9] Davila v. Morris, No.

[8] The U.S. Supreme Court held that the subsequent withdrawal of Mexican partners from the partnership party-plaintiff did not change the fact that at the time of the initial filing the partnership was made up of partners who were Mexican, thus defeating diversity jurisdiction. Grupo Dataflux, 541 U.S. at 574-75 (court distinguished the dropping of a partnership member from the dropping of a party). Furthermore, the length of time a case has been litigated in federal court is not a basis for ignoring a defect in subject matter jurisdiction. Id. at 571, 582 (case had been litigating for 6.5 years; adherence to the time-of-filing rule necessary regardless of the costs it imposes). See also Hart v. Terminex Int'l, 336 F.3d 541, 541 (7th Cir. 2003) (though it was "regrettable" case had spent eight years in federal court, there was no federal jurisdiction and case had to be remanded).

[9] CCJEF relies on Hackner v. Guar. Trust Co., 117 F. 2d 95 (1941) cited in Disability Advocates, 675 F.3d 149 (2d Cir. 2012), as a basis to urge this court to ignore the general rule that intervention cannot cure the lack of jurisdiction due to defective standing and permit CCJEF to intervene in the future. See Plaintiffs' Opposition Brief, p. 40. However, not only is the question of CCJEF's ability to intervene not yet before the court, there is no guarantee that CCJEF would be granted intervenor status, see Kerrigan v. Comm'r of Pub. Health, 289 Conn. 135, 337 n.15 (2008) (Zarella, J., dissenting) (discussing the denial of the Family Institute's motion to intervene). Moreover, the Hackner case is not an associational standing case and the court in Disability Advocates distinguished Hackner as involving the substitution of two plaintiffs for one plaintiff only 22 days after the complaint was filed before any action by defendants had occurred. Unlike Hackner, the motion to intervene in Disability Advocates occurred 6 years after litigation started and after trial. 675 F. 3d at 161-2. The court in Disability Advocates clearly held that it was not applying Hackner even though the U.S. government-intervenor in Disability Advocates planned to file a separate lawsuit. Id. at 162.

CV085020220S, 2009 WL 5342491 *4 (Conn. Super. Ct. Dec. 4, 2009) ("Because this defect in jurisdiction relates back to the filing of the original complaint, this court is precluded from evaluating the adequacy of the amended complaint, and also from permitting any curative amendments or substitutions.") (footnote omitted)(attached hereto); Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188, 1193 (9th Cir. 2000).[10]

CCJEF not only argues, incorrectly, that Judge Shortall's April 2007 order granting its motion to amend the complaint to allege that its members now included students and parents is tantamount to an express finding that CCJEF has standing, it further argues this order creates "law of the case."

Where a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, in the absence of some new or overriding circumstance. State v. Hoffler, 174 Conn. 452, 462-63 (1978). CCJEF contends that defendants raise no new facts, arguments, or circumstances to warrant revisiting the issue. See Plaintiffs' Opposition Brief, pp. 32, 34. To the contrary, factual circumstances have changed since the time the court granted plaintiffs' request to amend in 2007. CCJEF failed to file its allegedly "curative" language in its next amended complaint filed in November 2010. In fact, the standing language in the November 2010 Second Amended Complaint merely repeated the standing language already adjudicated to be insufficient. (Plaintiffs did amend to include the language Judge Shortall

---

CCJEF's plea for a prudential approach permitting the case to go on because it can simply refile based on its new membership has specifically been rejected by the Supreme Court. See Grupo, 541 U.S. at 581 ("an almost certain replay of the case, with, in all likelihood, the same ultimate outcome" was insufficient to avoid dismissal).

[10] The Connecticut Supreme Court follows federal standing law. Conn. Assoc. of Healthcare Facilities v. Worrell, 199 Conn. 609, 614-15 (1986).

approved in their Third Amended Complaint filed in December 2012.) Significantly, in their 2010 amendment plaintiffs removed the class allegations they had originally pled. When it considered plaintiffs' appeal, our supreme court understood the scope of this case to be limited to the named student-plaintiffs and putative class members and their individualized claims of injury as set forth in the original complaint. See CCJEF, 295 Conn. at 266 (plurality)("[t]he judicial role is limited to deciding whether certain public educational systems, as presently constituted and funded, satisfy an articulated constitutional standard.") (emphasis added.)

The pleadings, briefs and representations made by CCJEF in this case make clear that at the time this lawsuit was filed, CCJEF included only members who on their own or collectively would lack standing to assert the state constitutional rights at issue in this case. During the course of this litigation, CCJEF later added to its membership as-yet-unnamed students and parents (who would have standing on their own) who do not, according to the CCJEF bylaws, enjoy the same power and control over the direction of CCJEF as other members, and who do not pay dues. See Exhibit 10 (CCJEF Articles of Incorporation and Bylaws). On the basis of this addition, CCJEF seeks to bring what is essentially a "back door" class action lawsuit against the entire public education system in Connecticut without having to satisfy the class action requirements. Judge Shortall did not squarely decide the issue of whether CCJEF has associational standing to litigate this action in this manner. Thus, whatever this court infers from Judge Shortall's order granting plaintiffs' motion to amend their complaint in 2007, this order did not create "law of the case" regarding CCJEF's standing. This court should critically scrutinize CCJEF's claim to associational standing under the Worrell analysis, and exercise its discretion not to apply the "law of the case."

Additionally, with regard to the second prong of the Worrell analysis, the parties and Judge Shortall did not have the benefit of the Fairfield County Medical Assoc. v. Cigna, No. X06CV075007159S, 2008 WL 4150210 (Conn. Super. Ct. Aug. 19, 2008)(attached hereto), case before issuing its 2006 decision on defendants' Motion to Dismiss and its 2007 decision on plaintiffs' Request to Amend. The court in Fairfield County Medical Assoc. adopted the majority position of a variety of federal appellate courts applying germaneness to include consideration of obvious or serious conflicts existing between members of the association as a basis to deny standing. Furthermore, because the defendants are raising the germaneness argument for the first time in this motion in light of the Fairfield County Medical Assoc. case, there is no "law of the case" issue related to it.[11]

CCJEF argues that the court should not now consider the third prong of Worrell, as the court previously found in its favor on that prong. See Plaintiffs' Opposition Brief, p. 45. However, Judge Shortall did not address the third prong until after concluding that CCJEF had failed to meet the requirements of the first prong. Because Judge Shortall's finding on the first prong itself was dispositive and the finding on the third prong was not at all necessary to the disposition of the motion, Judge Shortall's decision on the third prong was mere dicta. See State v. Courchesne, 296 Conn. 622, 738 n.79 (2010). Judge Shortall wrote:

> The court concludes that the coalition has failed to establish that it meets the first standard of Worrell, i.e., that any of its members would have standing to sue in their own right. While this is sufficient to warrant that the defendants' motion to dismiss the coalition's claims be granted, the court will address their argument that the coalition fails to meet the third standard of Worrell as well.

[11] CCJEF argues that because "defendants are unable to point to any appellate Connecticut or Second Circuit authority" that there is no such "lack of conflict requirement." See Plaintiffs' Opposition Brief, p. 42-43. Defendants submit that such a thorough and well reasoned decision of a sister trial court, as in Fairfield County Medical Assoc., has substantial persuasive application to this case.

Doc. #110.00.

Turning to the merits of the standing test, it is equally clear that CCJEF has failed to satisfy any of the three factors. With regard to the first prong, CCJEF cannot refute the appellate holdings in the CABC, Fairchild Heights, and Disability Advocates cases that standing must be adjudicated by the association's membership at the time of the initial filing and cannot be cured retroactively.[12]

With regard to the second prong, the conflicts apparent amongst the diverse members of CCJEF are not limited to "conflict at the remedial stage" as CCJEF has mischaracterized defendants' position. Defendants have pointed out that the diverse natures of many of the members reflect their diverse interests, needs and solutions. See Defendants' Brief in Support of Motion to Dismiss, pp. 46-56. For example, the complaint impugns the schools and teachers at certain schools while their websites have publicly lauded the quality of their teachers and education provided. Furthermore, CCJEF mislabels as a "cynical hypothetical" and "unsupported allegation" defendants' statement that teachers' unions would want any increased monies as a result of this lawsuit to increase the pay, benefits, and number of teachers. See Plaintifs' Opposition Brief, p. 44. To the contrary, it is axiomatic that "a union exists to represent its members as to working conditions." Conn. State Police Union v. State Dep't of Emergency Servs & Pub. Prot., No. HHDVC116024776, 2012 WL 386679 (Conn. Super. Ct. Jan. 13, 2012), cert. granted May 15, 2012 (SC 18967) (attached hereto); see also Thomas B. Mooney, Unions Act in Teachers' Interest – Not Students', Hartford Courant, Feb. 26, 2012, available at

[12] It is of no import that our case involves multiple plaintiffs because each plaintiff must establish its own standing.

http://articles.courant.com/2012-02-26/news/hc-op-mooney-unions-stymie-school-reform-0226-20120226_1_teachers-unions-teacher-certification-negotiations.pdf (unions exist to represent the interests of their members in negotiations over wages, hours and conditions of employment.)[13]

CCJEF offers to provide an affidavit to reflect the litigation was properly authorized, "should the Court request it." See Plaintiffs' Opposition Brief, p. 44, n. 15. However, it is the plaintiff CCJEF's burden to establish proper authorization at this time because the defendants have put it in issue. Retired Chicago Police Ass'n v. City of Chicago, 76 F.3d 856, 865 (7th Cir. 1998). In light of the numerous apparent conflicts among its many members, the failure to allege and demonstrate proper written authorization from all its members is fatal to CCJEF's standing. Fairfield County Medical Ass'n., 2008 WL 4150210 *5 . Because CCJEF's parents and students – the only members of CCJEF who can have standing on their own – do NOT have voting rights, the defendants contend that proper authorization cannot be established. See Exhibit 10– Excerpts from Form 1023, CCJEF's Articles of Incorporation, p. 3, Article V (individuals can't vote) and CCJEF's Bylaws, p. 6, Article II, Sec. 10 Quorum ("the quorum necessary for the transaction of business shall consist of a majority of the Members who are entitled to vote.") (attached). Mountain States Legal Found. on behalf of Ellis v. Dole, 655 F. Supp. 1424, 1431 (D. Utah 1987) (association lacked standing as it failed to establish that members had authorized suit; decision to sue had been made by association's Board of Directors rather than by members as a whole.); see also Disability Advocates, 675 F.3d at 158-59 (key indicia of membership include power to elect its directors, make budget decisions, or influence association's activities

[13] As noted previously by defendants, Attorney Mooney is an attorney and author on school law issues. See Doc. #153.00 at 20-21 (Defendants' Reply Brief to Motion for Protective Order re the Palmer Standard).

or litigation strategies). CCJEF has failed to cite a single case in which such a diversely constituted group was permitted associational standing.

With regard to the third prong of the standing test, CCJEF claims that representational testimony from its members is all that is required and that there need be no individualized proof from individual members as to their damages because they are only seeking declaratory and injunctive relief as to a claim that the educational school system is unconstitutional. See Plaintiffs' Opposition Brief, pp. 45-47. Yet, on p. 46, they quote from the Supreme Court in CCJEF, 295 Conn. at 266: "[t]he judicial role [in this case] is limited to deciding whether certain public educational systems, as presently constituted and funded, satisfy an articulated constitutional standard." (emphasis added.). See also Plaintiff's Opposition Brief, p. 25. CCJEF's position further ignores the import of the Supreme Court's recognition that facts regarding educational opportunities "provided the public school students in this case" will necessarily require testimony from its student and parent members as well as its municipal board of education members in support of their individualized claims in order to ascertain the constitutionality of "certain" public educational systems as presently constituted and funded. This case is not a class action case and, thus, individualized testimony is required to satisfy plaintiffs' burden to establish a constitutional violation of the rights of CCJEF's student members and named plaintiffs. Otherwise, plaintiffs will both reap the benefits of a class action without having to satisfy class requirements, and suffer none of the preclusive effects.

CCJEF's explanation that it only seeks declaratory and injunctive relief conflicts with their claim that the "core" of their case is more ECS money. See Plaintiffs' Opposition Brief, pp. 3-9, 11-23, 26-29, 32, 41. Each of CCJEF's student/parent members will necessarily have to

testify as to their own resource needs and opportunities in order to establish the constitutional inadequacy of educational opportunities each allegedly receives.

The fact-intensive individualized nature of the evidence required in our case distinguishes our case from Assoc. of Am. Physicians & Surgeons v. Tex. Med. Bd., 627 F.3d 547 (5th Cir. 2010), cited by CCJEF on p. 47 of its opposition brief.[14] The court in Assoc. of Am. Physicians & Surgeons held that its case fell closer to the line of cases that involved challenges to the enforcement of a practice or policy that was alleged to have applied equally against a large number of association members and could be proven by taking evidence from only a few representatives of an association's members, such as a breach of contract or a practice of coercing tax exempt hospitals into making payments in order to governmental benefits. Id. at F.3d at 551-2 ("Proving the illegality of the pattern or breach of contract required some evidence from members, but once proved as to some, the violations would be proved as to all.") (citing Hosp. Council of W. Pa. v. City of Pittsburgh, 949 F.2d 83, 85 (3d Cir. 1991)); Retired Chicago Police Ass'n. v. City of Chicago, 7 F.3d 584, 601-03 (7th Cir. 1993). However, the court in Assoc. of Am. Physicians & Surgeons also recognized the validity of denying associational standing when a detailed economic examination of individual members was required to prove the association's specific claims. Assoc. of Am. Physicians & Surgeons, 627 F.3d at 552 (representative evidence acceptable as long as no need for a fact intensive individual inquiry) (citing Kansas Health Care Ass'n. v. Kan. Dept. of Social & Rehab. Servs, 958 F.2d 1018 (10th Cir. 1992) (determining the adequacy of Medicaid rates would "necessarily require individual participation of the associations' members.")) Clearly determining the adequacy of educational

[14] In Assoc. of Am. Physicians & Surgeons, the association sued the Texas Board of Medical Examiners alleging constitutional violations based on the systemic practice of the Board's use of anonymous complaints and other retaliatory actions. 627 F.3d at 549, 553.

opportunities for the named student-plaintiffs from different school districts and with different needs and demographics makes this case analogous to the Kan. Health Care Ass'n and distinguishable from Assoc. of Am. Physicians & Surgeons.

Finally, even if the current system of local control of public education were to survive any court ordered increase in ECS funding, these additional monies would go to the municipal members of CCJEF (who cannot sue the state regarding public education) and not to any student or parent member of CCJEF whose constitutional rights the State has allegedly violated. "In general, 'an association's action for damages running solely to its members would be barred for want of the association's standing to sue.'" Assoc. of Am. Physicians & Surgeons, 627 F.3d at 551 quoting United Food and Commercial Workers Union Local 751 v. Brown Group., 517 U.S. 544, 546 (1996). Accordingly, CCJEF lacks standing as a plaintiff in this case.

CONCLUSION

For the foregoing reasons, the defendants respectfully request that the court grant their motion to dismiss.

DEFENDANTS

GEORGE JEPSEN
ATTORNEY GENERAL

Darren P. Cunningham
Eleanor M. Mullen
Assistant Attorneys General

BY: Beth Z. Margulies

Beth Z. Margulies
Assistant Attorney General
Juris No. 085054
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
Tel: (860) 808-5318
Fax: (860) 808-5388
Beth.Margulies@ct.gov

Stephen R. Park

Stephen R. Park
Assistant Attorney General
Juris No. 085104
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
Tel: (860) 808-5318
Fax: (860) 808-5347
Stephen.Park@ct.gov

CERTIFICATION

This will certify that a copy of the foregoing has been mailed this 10th day of April, 2013, to the following:

Helen V. Cantwell, Esq.
Megan K. Bannigan, Esq.
Rebecca Jenkin, Esq.
Debevoise & Plimpton, LLP
919 Third Avenue
New York, New York 10022
T: (212) 909-6312 F: (212) 909-6836
Email: hvcantwell@debevoise.com

David N. Rosen, Esq.
David Hunter Smith, Esq.
David Rosen & Associates, P.C.
400 Orange Street, New Haven, CT 06511
T: (203) 787-35 F: (203) 789-1605
Email: info@davidrosenlaw.com

Michael D. Weisman, Esq.
Davis, Maim & D' Agostine, P.C.
One Boston Place, Boston, MA 02108
T: (617) 589-388 F: (617) 305-3184
Email: mweisman@davismal.com

Beth Z. Margulies
Assistant Attorney General