NO. X07 HHD-cv-05-4050526-S	:	SUPERIOR COURT
CONNECTICUT COALITION FOR JUSTICE IN EDUCATION FUNDING INC., ET AL., Plaintiffs	: : :	COMPLEX LITIGATION DOCKET AT HARTFORD
v.	:	
RELL, M. JODI, et al., Defendants	:	JANUARY 9, 2013

MOTION TO MODIFY SCHEDULING ORDER
REGARDING DEPOSITIONS AND DISCLOSURE OF EXPERTS' MATERIALS

A. Background Facts and Current Deadlines

By order dated December 12, 2011, the court amended the scheduling order that sets dates for disclosing experts, disclosing experts' reports, deposing experts and fact witnesses, filing summary judgment, and commencing trial. (Doc. # 146.00)[1] Under the present scheduling order, defendants have until January 31, 2013 to complete depositions of plaintiffs' 18 disclosed expert witnesses and additional fact witnesses. Plaintiffs have disclosed reports authored by seven expert witnesses. Plaintiffs disclosed the last four experts' reports to defendants on July 16 and July 23, 2012. On December 21, 2012, plaintiffs filed their Request to Amend Complaint

[1] 1) Plaintiffs to disclose 18-22 experts by 1/31/12.
2) Plaintiffs to disclose remaining 4 experts' reports by 7/16/12.
3) Defendants to depose fact witnesses and plaintiffs' experts by 1/31/13.
4) Defendants to disclose experts by 3/15/13.
5) Plaintiffs to depose fact witnesses and defendants' experts by 8/1/13.
6) Dispositive motions to be filed by 10/1/13; response by 11/15/13; reply by 12/16/13.* Summary Judgment motion must be accompanied by joint stipulation of fact.
7) Oral argument to be scheduled by the parties to occur no later than January of 2014.** Oral argument should be scheduled to occur at least six months before the beginning of the trial and any motions for modification of this order must take this into account. It is the parties' responsibility to schedule oral argument with the court several months in advance.
8) Trial beginning 7/1/14. Estimated duration is 12 weeks or 48 days.
9) Parties to consider mini trial concept combining summary judgment and trial.

and their Third Amended Complaint. (Doc. # 160.00). On January 7, 2013 plaintiffs filed a "Corrected Third Amended Complaint" (Doc. #163.00). In addition to this Motion to Modify Scheduling Order, defendants have filed a Motion to Dismiss the complaint based on lack of ripeness, mootness, and lack of associational standing this same day.

The Connecticut Supreme Court has made clear that the trial court must determine the constitutional claims in this case based on the model of education and educational funding existing at the time of the trial. CCJEF v. Rell, 295 Conn. 240, 318-19 (plurality) and 321 (Palmer, J., concurring) (2010); see also Edward Balf Co. v. Town of E. Granby, 152 Conn. 319, 323 (1965) (in "actions praying for a declaratory judgment or injunctive relief, since the remedy sought is prospective, the right to such relief is determined by the situation at the time of trial and not by that existing at the time the action was begun."); Holt v. Wissinger, 145 Conn. 106, 115 (1958) ("equitable relief, whether injunctive or otherwise, is to be granted, if at all, only on the situation as it exists at the time of trial"). As is described more fully in plaintiffs' Memorandum of Law in Support of Motion to Dismiss, the 2012 educational reforms recently enacted by the elected branches of government have dramatically and comprehensively altered the public education system the plaintiffs ask this court to declare unconstitutional. The Governor, legislature, and the Connecticut State Department of Education (SDE) accomplished much during 2012 despite substantial state budget constraints, including obtaining a waiver for Connecticut from the requirements of the federal law commonly referred to as "No Child Left Behind" ("NCLB"). They will continue to make significant efforts in the field of educational reform, focusing their efforts on the lowest performing schools and school districts.

B. The Defendants Should Not Be Required To Incur the Enormous Expense Of Deposing Plaintiffs' Experts Twice.

In the Corrected Third Amended Complaint, plaintiffs have added seven new plaintiff-students attending eight new schools in three new school districts, updated information about other existing student-plaintiffs and removed from the lawsuit other student-plaintiffs. Plaintiffs have also added statistics relating to the schools attended by student-plaintiffs in the years 2009-2010 and 2010-2011. Aside from alluding to funding increases for the Alliance Districts in paragraph 131(b) of the Corrected Third Amended Complaint, and to P.A. 12-116 generally in paragraph 159, plaintiffs have not included any allegations related to the comprehensive substantive reforms provided by P.A. 12-116, the several other 2012 legislative acts relating to public education, or the NCLB waiver. Indeed, in their Third Amended Complaint plaintiffs continue to rely on the requirements and assessments of the NCLB law. ¶¶ 95-98; 148.

None of the plaintiffs' experts, even those who disclosed their reports in July 2012 – after the Governor signed the 2012 education reforms into law -- has offered any opinion related to these reforms or stated that s/he even considered the existence of these reforms. Plaintiffs' disclosed experts' reports are based on data generated before the 2012 education reforms. For example, the 2005 Palaich "cost study" submitted by the plaintiffs is based on data from 2003 and 2004 derived from a Connecticut model of education that has changed significantly due to the new reforms. In addition, plaintiff's 2011 expert's report by Bruce Baker relies heavily on this 2005 Palaich "cost study." Even Plaintiff-CCJEF recognized the outdated status of the

Palaich report in its testimony before the Education Committee opposing Senate Bill No. 24, the Governor's proposed education reform submission.[2]

The significant educational reforms adopted in 2012 and the approximately $92 million appropriated by the legislature to begin implementing these legislative reforms will, among other things, generate new student data. New curricula, assessments, and accountability procedures are to be implemented giving rise to new measurements of student results.[3]

The results of many of Connecticut's 2012 education reforms will be seen at the earliest in two years and in earnest starting three years following the first year of implementation and carrying over into subsequent years. The benefits of early intensive reading reforms and early diagnosis of reading deficiencies in kindergarten may be seen within two years, with long term benefits seen in six to nine years. See Seder Affidavit attached hereto as Exhibit 1, ¶¶ 7, 8.

It is reasonable to assume plaintiffs will not rely solely on data generated before the 2012 education reforms in their attempt to prove defendants are failing to provide constitutionally required educational opportunities to students **at the time of trial**. It is reasonable to expect that plaintiffs' experts will create and submit additional reports. Many experts on both sides of this case work in academia and reside in states throughout the country. The parties have agreed that

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[2] CCJEF stated in its Feb. 22, 2012 testimony before the Education Committee, p. 5: "Unless and until the state commissions an up-to-date adequacy cost study (preferably with CCJEF collaboration so that its results are accepted by all), no foundation level or student need weights can be assumed to be legitimately reflective of what it takes to meet the state's constitutional obligation to adequately and equitably fund the public schools …." http://www.cga.ct.gov/2012/EDdata/Tmy/2012SB-00024-R000222-Connecticut%20Coalition%20for%20Justice%20in%20Education%20Funding-TMY.PDF (last visited Nov. 30, 2012).

[3] A specific, detailed explanation of the nature of the education reforms based on legislation, receipt of a waiver from NCLB obligations, implementation of the Common Core State Standards and other initiatives is presented in defendants' Memorandum in Support of Motion to Dismiss based on lack of ripeness and mootness filed this same day. Defendants will not repeat that explanation here, but incorporate it by reference.

the party taking an expert's deposition may have one of its own experts present during the deposition. Aside from the logistics and travel involved in scheduling and taking the experts' depositions, the cost will be considerable. Defendants should not be required to incur the enormous expense of deposing plaintiffs' experts twice (first on their opinions based on an outdated set of data derived from an outdated education model, and a second time on their opinions based on new and different assessment tools and data generated after implementation of the 2012 education reforms).

Defendants move the court to modify the scheduling order of December 12, 2011, to relieve defendants from the requirements to depose and disclose expert and fact witnesses within the time periods contained in that order. Defendants suggest it would be reasonable to consider an appropriate schedule following a ruling on the Defendants' Motion to Dismiss the Corrected Third Amended Complaint, which may vitiate any need for further discovery if dismissal is granted.

C. The Court Should Modify the Scheduling Order to Require Disclosure of Experts' Materials Sixty Days In Advance of a Noticed Deposition.

The present scheduling order does not speak to the issue of how far in advance of experts' depositions the parties should receive the experts' materials that will be set forth in a subpoena duces tecum. The defendants have requested to receive such documents sixty (60) days in advance of an expert's deposition, with notice provided two weeks before that sixty days deadline. The plaintiffs will only agree to a 30 day advance disclosure deadline. The parties also disagree as to the scope of expert discovery as detailed below. After numerous unsuccessful attempts to resolve their differences, the defendants now bring this impasse before the court. See Margulies Affidavit attached hereto as Exhibit 2.

The current Connecticut Practice Book § 13-4(b)(3) requires disclosure of experts' materials fourteen days before the deposition. P.B. § 13-4(i) states that "[t]he version of this rule in effect on December 31, 2008, shall apply to cases commenced on or before that date." Therefore, the fourteen day rule set out in the current P. B. § 13-4(b)(3) does not apply to this case, which was filed in 2005. However, P. B § 13-4 (2008) does not set out a specific time frame for producing these materials. See Exh. 3, attached. Due to the complexity of the issues the experts are testifying about, the voluminous documents that must be reviewed, and the number of depositions that will be taken in this case, it is quite reasonable for defendants to have these materials at least sixty days prior to the experts' depositions. Not only do defendants need time to review any documents subpoenaed for a deposition, but defendants' experts will also need time to review them. Such preparation will enable the depositions to be comprehensive in scope and proceed in a more expeditious manner. The parties have agreed that the party taking an expert's deposition may have one of its own experts present during the deposition at its own expense.

The plaintiffs have taken the position that producing documents sixty days prior to the deposition would be "too far in advance to be workable." With regard to those experts who have already provided reports, the materials created or obtained by them and considered by them in reaching their opinions already exist. Likewise, with regard to the remaining experts who will not submit reports, materials presently exist that were considered by them in arriving at their opinions as stated in plaintiffs' Third Notice of Disclosure, which certainly could be disclosed at least sixty days in advance of depositions.

More specifically, the defendants have clarified that the materials they seek within the sixty day advance disclosure notice are those documents related to data, spreadsheets,

worksheets, and the like that each expert considered, whether or not such were accepted or rejected in arriving at the experts' opinion. At this time, defendants are not requesting that plaintiffs produce every article read by the expert.

Plaintiffs disagree that they should disclose materials considered but rejected by their experts. Defendants contend that information rejected by experts in the process of forming their opinion falls within appropriate discovery requests based on Klein v. Norwalk Hospital, 299 Conn. 241 (2010). In Klein, our supreme court held that the consideration and elimination of other possible causes is critical to establishing causation. Id. at 252, 256-58. The court in Klein reversed the lower court, and held that the disclosure of an expert for causation necessarily permitted that expert to testify not only about what he thought was the cause of the medical condition at issue, but also about what the expert thought was not the cause of the medical condition and why it was not. Id.

WHEREFORE, the defendants hereby move the court to modify the scheduling order of December 12, 2011, to relieve defendants of the requirements to depose and disclose expert and fact witnesses within the time periods contained in that order. Defendants further request an order requiring disclosure of expert materials 60 days in advance of an expert's noticed deposition; to require the disclosure of experts' materials considered, whether or not accepted or rejected, in arriving at the experts' opinions; and to require that the parties shall have a continuing duty to disclose additional materials their experts consider after disclosure, pursuant to Conn. P.B. § 13-15.

Defendants respectfully suggest that a status/scheduling conference be convened to address the resetting of scheduled deadlines and the schedule and process for addressing

defendants' motion to dismiss. Because that motion raises subject matter jurisdiction, it must be resolved before the case proceeds further. FDIC v. Peabody N.E., Inc., 239 Conn. 93, 99 (1996).

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ORDER

The foregoing motion, having been heard, is hereby GRANTED/DENIED.

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By the Court

CERTIFICATION

I hereby certify that a copy of the foregoing Defendants' Motion for Scheduling Order re disclosure of experts' materials was mailed, first class postage pre-paid, this 9th day of January, 2013 to:

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