SUPREME COURT

OF THE

STATE OF CONNECTICUT

JUDICIAL DISTRICT OF HARTFORD

S.C. 19768

CONNECTICUT COALITION FOR JUSTICE IN EDUCATION FUNDING INC., ET AL.
PLAINTIFFS-APPELLEES

V.

M. JODI RELL, ET AL.
DEFENDANTS-APPELLANTS

BRIEF OF DEFENDANTS-APPELLANTS/CROSS-APPELLEES

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STATEMENT OF ISSUES

The principal questions of law upon which this appeal is based are as follows:

1) Whether the trial court erred when, after finding that the plaintiffs had failed to prove, either beyond a reasonable doubt or even by a preponderance of the evidence – a) that the State's public schools failed to provide adequate educational opportunities; or b) that the State's educational system violated requirements of equity or equal protection – the court nevertheless determined that numerous state educational policies were unconstitutional because they were not "rationally, substantially, and verifiably" linked to teaching children.

2) Whether the plaintiffs lack standing to bring this action.

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STATEMENT OF THE FACTS

Plaintiffs, individual parents of public school students and the Connecticut Coalition for Justice in Education Funding, Inc. ("CCJEF"), filed a complaint in December, 2005, alleging, in essence, that the State was failing to provide a constitutionally adequate and equitable education to plaintiffs. Defendants' Appendix ("Appx."), A22-A80. The state asserted that there was no constitutional right to an adequate education and that the claim was not justiciable, and the trial court struck the claim regarding adequate education. Appx., A90-A130. The Plaintiffs applied for certification to appeal pursuant to Conn. Gen. Stat. § 52-265a, which was granted. This Court held, 4-3, with no majority opinion, that the claim was justiciable, Connecticut Coalition for Justice in Education Funding v. Rell, 295 Conn. 240 (2010) ("CCJEF I").

Plaintiffs eventually filed a Third Corrected Amended Complaint, Appx., A275-A322. After extensive further discovery, briefing and other pre-trial litigation, the case was tried from January 12 to June 3 of 2016. Each side presented numerous fact and expert witnesses and offered numerous exhibits, as described below to the extent relevant to this appeal. The trial court entered its partial judgment by Memorandum of Decision, Doc. 359 ("MOD"), Appx., A450-541, accompanied by over a thousand findings of fact, Appx., A542-A698 and by a separate Memorandum of Decision, entitled Appendix Two: Subordinate Rulings, ("Sub MOD") Appx., A699-A704, concerning certain standing and other issues, on September 7, 2016.

The court determined that Justice Palmer's concurring opinion, 295 Conn. at 320, established the constitutional standard for adequate education, Appx., A468, A472-A473, and that the plaintiffs had failed to prove, either beyond a reasonable doubt, as required for constitutional claims, or even by a preponderance of the evidence, that the state's schools do not meet any aspect of this standard. Appx., A475-A476. The court further determined that plaintiffs had also failed to prove their claims that the state was not offering equitable

educational opportunities, Appx., A478, and further that there was no basis to enter any orders regarding plaintiffs' claims about preschool. Appx., A538. The court also found that one of the state's experts testified "convincingly" that there is "no direct correlation between merely adding more money to failing districts and getting better results." Appx., A488[1]. The court found that from 2012 through the current school year, the State has spent over $400 million in new funding solely for the 30 lowest performing school districts. Appx., A476; A545-A546 (FOFs 39-42). The court also concluded that plaintiffs had standing to make their claims. Appx., A701-A702.

On an internationally recognized system of standardized testing called the Program for International Student Assessment (PISA), Connecticut ranked fifth out all ranked educational systems in the world in reading, eighth in the world in science, and above the U.S. average and at the international average in mathematics. Appx., A545 (FOFs 30-36). According to plaintiffs' own expert, Dr. Bruce Baker, Connecticut is one of only four states in the nation that actually increased its spending effort during the Great Recession years from 2008 to 2012. Appx., A1199; A786. See also Appx., A1266 (Dr. Reschly Updated Report showing that from FY 08 to FY 15, Connecticut ranks third in the nation in change in per pupil spending [9.1% increase], and that per pupil spending remains more than 10% lower than in 2008 in 14 states).

Defendants' expert Dr. Michael Wolkoff noted in his testimony that on a per pupil basis, Connecticut has consistently spent far more per pupil than most other states, with a differential from the median in excess of $5,000 in recent years, that the differential has continued to grow, and that Connecticut is consistently ranked sixth, seventh or eighth nationally in per pupil expenditures. Appx., A1147-A1148; A820-A832. Dr. Wolkoff also testified that Connecticut's growth in per pupil expenditures from 2007-8 to 2012-13 was about 16%, or nearly double the growth of the Consumer Price Index over that period.

[1] Professor Podgursky's report and testimony to this effect, to which the court was referring, appear in Appx., 1287-1317; A860-A895.

Appx., A820-A832. Moreover, per pupil expenditures in each of the plaintiffs' six so-called "focus districts" have increased since 2011. See Appx., A1157-A1162 (district expenditure profiles). Regarding spending on preschool, the court found that Connecticut ranked third in the nation in 2014 and fifth in the nation in 2015 in state per pupil spending for pre-k. Appx., A617 (FOFs 310-11). See also Appx., A1347 (FOFs 6-7 (pre-k)).

Regarding teacher salaries, the court found that Connecticut ranked third highest in the country in 2012-13, and that in 2011-12 it ranked seventh in the country in terms of salaries for teachers with a Bachelor's degree and fifth in the country in terms of salaries for teachers with a Master's degree and 20 or more years' experience. Appx., A629 (FOF 410-11). See also Appx., A1353 (FOF 63-4). The court also found that in spite of a severe recession in 2008, the average pay of Connecticut educators and administrators has risen consistently over the last decade and has kept pace with national measures of inflation and wage growth. Appx., A628-A629 (FOF 409). See also Appx., A1353 (FOF 62). Teacher salaries are keeping up with non-teacher salaries in Connecticut better than in most other states. Appx., A629 (FOF 412). See also Appx., A1353 (FOF 66); Appx., A1267-A1286; Appx., A895-A921.

After making these definitive factual findings in favor of the Defendants, *findings that resolved all of the issues properly before the court,* the court struck out in a different direction, without legal authority. Specifically, it said that the state's education spending and various education policies are *also* required to be "rationally, substantially, and verifiably" connected with educational opportunities Appx., A465, and then set out to measure that educational connection, finding the State has failed to meet this new standard in regard to the following areas, which the State would be required to remedy as described:

1) The State must create a new school spending plan that rationally, substantially and verifiably connects education spending with educational need and must follow it every year. Appx., A492, A494-495. This same requirement appears to apply to school construction funding. Appx., A494.

2) The State must submit for court review an objective and mandatory statewide graduation standard that rationally, substantially and verifiably connects secondary school learning with secondary school degrees. Appx., A504-A506.

3) The State must propose a standard that creates a rational, substantial and verifiable definition of elementary school (and what students must learn to complete elementary school). Appx., A511-A513.

4) The State must submit plans to replace its irrational systems for evaluation and compensation of educational professionals that deny students constitutionally adequate opportunities to learn with a plan that connects evaluation and compensation to student education in a rational, substantial and verifiable way. Appx., A522.

5) The State must submit new standards concerning special education which rationally, substantially and verifiably link special education spending with elementary and secondary education. Appx., A537. Apparently these standards should include denial of special education services for students who are "too disabled" to benefit educationally, along with state-mandated consistency in local district determinations about students' eligibility for special education. Appx., A528, A531, A533-A537.

6) The court said that the State bears ultimate responsibility for compliance with constitutional requirements and the court may "weed out any General Statutes holding the effort back." Appx., A459-A460, A540; *see also* Appx., A512. The state is also required to identify any authority it needs, presumably beyond current statutory authority, in order to comply with the court's orders, apparently so that the court can provide its own substitute for that authority. Appx., A512, A540.

On September 15, 2016, the Defendants filed an Application for Certification to Appeal Pursuant to Conn. Gen. Stat. § 52-265a, which also contained a request for a stay. Appx., A705-A716. On September 20, 2016, the Chief Justice granted the Application, and also granted the Plaintiffs' request to review certain issues decided adversely to the Plaintiff, as listed in the Plaintiffs' Opposition to the Defendants' Application. Appx., A728. On the same date, this Court granted the Defendants' request for a stay. Appx., A729. Defendants then filed their Notice of Appeal on September 23, 2016, Appx., A730-A756 and Plaintiffs filed their Notice of Cross Appeal on October 3, 2016. Appx., A757-A766.

ARGUMENT

INTRODUCTION

The court's initial findings – that plaintiffs failed to prove that Connecticut schools do not offer minimally adequate educational opportunities and also failed to prove that state funding is not distributed equitably or equally – effectively resolved all issues before it. The court made the factual determinations that the plaintiffs failed to prove the constitutional inadequacy of educational opportunities provided, and that they also failed to prove that state funding supporting educational opportunities was distributed inequitably or in violation of equal protection requirements, as the state provides far greater funding to the neediest districts than it does to the wealthiest. Appx., A474-A478. As Justice Palmer explained, "unless the plaintiffs can demonstrate that the actions that the state has taken to satisfy the particular requirement in dispute cannot reasonably be defended as minimally adequate, the court must defer to the judgment of the political branches in the matter." CCJEF I, supra, 295 Conn. 343. Accordingly, as the only two "requirements in dispute" were the adequacy of educational opportunity and equitability of education funding, then after making those factual findings, the court had no lawful option except to defer to the decisions of the legislature and the executive branch and enter judgment for the

defendants. In addition, for reasons enumerated below, the plaintiffs all lack standing to bring this action.

STANDARD OF REVIEW

Ordinarily, the standard of review for a court's basic factual conclusions – including the determinations that the plaintiffs failed to prove that the State's schools do not meet any aspect of the applicable standard set by Justice Palmer's concurrence for minimally adequate educational opportunities, that plaintiffs failed to prove that state funding is not distributed equitably, and that there is no direct correlation between merely adding more money to challenged districts and getting better results – is the rigorous "clearly erroneous" standard. The State does not challenge any of these factual findings, but simply notes that factual conclusions generally can be overturned only if this court determines they were clearly erroneous, Town of Stratford v. Jacobelli, 317 Conn 863, 869-870 (2015); Krol v. A.V. Tuchy, Inc., 135 Conn. App. 854, 860 (2012).

Regarding constitutional questions, the trial court determines issues of fact, subject to review for clear error, while the question of whether plaintiffs' constitutional rights were violated is a question of law subject to plenary review. In Re Cassandra C., 316 Conn. 476, 496 (2015). Phrased slightly differently, the *application* of a rule of constitutional law to the facts is a mixed question of law and fact over which this Court exercises plenary review. Scholastic Book Clubs, Inc. v. Commissioner of Revenue Services, 304 Conn. 204, 225 (2012). Under any of these formulations, the actual determination of the facts by the trial court is subject to review only for clear error.

In regard to the trial court's conclusions of law, including most notably its determination that various state fiscal and educational policies must be "rationally, substantially, and verifiably" connected with educational need, and regarding standing, this Court's review is *de novo*. Freedom of Information Officer v. Freedom of Information

Commission, 318 Conn. 769, 774-5 (2015); McDermott v. State, 316 Conn. 601, 608-9 (2015).

I. THE TRIAL COURT CORRECTLY APPLIED THE APPLICABLE SUBSTANTIVE LEGAL STANDARD FOR ADEQUACY CLAIMS

As noted, the first of Plaintiffs' claims is that the State has failed to provide an adequate education, or adequate educational opportunities, to them. Appx., A277 (Counts 1, 2 and 4). Regarding all of Plaintiffs' claims, Justice Palmer's concurring opinion in CCJEF I, supra, 295 Conn. 320, constituted the holding of the decision, as the narrowest view supported by a majority of the court. See State v. Ross, 272 Conn. 577, 604 n.13 (2005). At trial, the Plaintiffs ultimately conceded that Justice Palmer's opinion controlled on this question. Plaintiffs' Post-Trial Brief, p. 1 (Appx., A1355).

Justice Palmer's central conclusions regarding the nature of the substantive standard required to meet the constitutional requirement of "adequacy" included the following key points:

1) "The right embodied in [article eighth, § 1] is a substantive one that requires the state to provide an educational opportunity to the students of our free public elementary and secondary schools that, at the least, is minimally adequate by modern educational standards." 295 Conn. 320-1.

2) "[T]he plaintiffs will not be able to prevail on their claims unless they are able to establish that what the state has done to discharge its obligations under article eighth, § 1, is so lacking as to be unreasonable by any fair or objective standard." Id., 321.

3) "[T]he legislature is entitled to considerable deference with respect to both its conception of the scope of the right and its implementation of the right."

Id., 332.

4) More specifically, "the following 'essentials,' as explicated by the New York Court of Appeals, are necessary to satisfy the requirement of a minimally adequate education for purposes of article eighth, § 1. Children are entitled to minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn. Children should have access to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks. Children are also entitled to minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas." Id., 342-3.

5) "[T]he deference owed to the political branches in matters of education policy dictates that, unless the plaintiffs can demonstrate that the actions that the state has taken to satisfy the particular requirement in dispute cannot reasonably be defended as minimally adequate, the court must defer to the judgment of the political branches in the matter. Thus, if the state and the plaintiffs disagree as to whether the legislature has met its obligation under article eighth, § 1, with respect to any of the core or essential components of a minimally adequate education, to prevail on their claim of a constitutional violation, the plaintiffs must establish that the action that the legislature has taken to comply with article eighth, § 1, reasonably cannot be considered sufficient by any fair measure. Put differently, the plaintiffs are not entitled to relief unless they can demonstrate that the legislature's formulation of the scope of the right to a minimally adequate public education and its efforts in implementing

that formulation are unreasonably insufficient. Any less demanding standard would give insufficient voice to the reasoned judgment of the legislature." Id., 343-4.

(footnotes and citations omitted throughout).

With the legal background described above, the trial court accurately determined that Justice Palmer's opinion controlled regarding Plaintiffs' adequacy claims. Appx., A467-A468. Applying this standard, the trial court made the following key factual findings:

1) "[B]ecause *Connecticut schools more than meet the New York minimum standard* the upper court pointed to – the state has not violated the constitution by devoting an overall inadequate level of resources to the schools." Appx., A474-A477. (Emphasis added.)

2) "Connecticut schools already go far beyond the New York minimum." Appx., A474-A477.

3) There is "nothing to suggest a statewide failure to provide adequate facilities, including classrooms which provide enough light, space, heat, and air to permit children to learn. Where there are problems . . . . they appear to be already on the state's list to be fixed and fixed mostly with state money. The plaintiffs haven't proved by a preponderance of the evidence, or beyond a reasonable doubt, that the state's schools lack enough light, space, heat, and air to permit children to learn." Appx., A474-A477.

4) "No witness or document suggests that children lack desks, chairs, pencils and reasonably current textbooks either. Again, there is some anecdotal

evidence that teachers in some schools find themselves using older textbooks . . . . *But there is no proof of a statewide problem caused by the state sending school districts too little money.* Many teachers supplement their materials from internet sources and most children have some access to computers. There are certainly some hardships with computers and significant disparities in computer access, but against a minimal standard the plaintiffs have not proved by a preponderance and certainly not beyond a reasonable doubt that there is a systemic problem that should spark a constitutional crisis and an order to spend more on school supplies." Appx., A474-A477. (Emphasis added.)

5) "*Connecticut children have minimally adequate teachers teaching reasonably up-to-date basic curricula* such as reading, writing, mathematics, science and social studies. . . . *In impoverished districts with troubled schools, [the Department of Education] provides very direct help*, including extra money for interventionists, teacher coaches, and technical support. . . . *Judged against a low minimum and judged as a system, the plaintiffs have plainly not met their burden to show beyond a reasonable doubt that Connecticut lacks minimally adequate teaching and curricula nor have they proved it by a preponderance of the evidence.*" Appx., A474-A477. (Emphasis added.)

6) "That Connecticut is spending enough to meet a low constitutional threshold is made even clearer by the host of extras the state provides beyond the conservative minimum. Since 2012, over $400 million in new money has flowed into the 30 lowest performing schools [sic, should be "school districts"] under the State's Alliance Districts program. . . . [W]hen

> temporary federal funds following the Great Recession were cut, Connecticut was one of a handful of states that kept the extra spending going out of its own pocket. . . . State and federal programs also beef up needy school districts by providing students breakfast, lunch and many times food to take home. [Court then describes other additional programs.] The plaintiffs claim that all of these programs are under-effective because they are under-funded. But the existence of these programs means *the state far exceeds the bare minimum spending levels the judiciary is willing to order under the education provision, so the plaintiffs' claims for more overall spending belong in the legislature, not the courts.* The evidence certainly shows that thousands of Connecticut students would benefit from enhancing some of these programs, but once the state spends enough to meet the bare constitutional minimum only the legislature can decide whether to spend more on them or spend on something else." Appx., A474-A477. (Emphasis added.)

The trial court's general factual findings find support in many more specific positive factual findings about education and its funding in Connecticut, including Findings of Fact 1-51, 206, 208, 213-6, 409-12, 413-5, 419, 432-5, 438-42, 453-6, 621-31, 637-9, 643-68, 671, 704-11, 715-43, 793-850, 881-928, 953-91, 1012-56. Appx., A542-547, A604-606, A628-629, A631-634, A656-A661, A664-668, A672-678, A681-685, A687-A691, A693-697.

Comparing Justice Palmer's controlling concurrence with the trial court's factual findings about the adequacy of Connecticut's education funding, it is apparent that the trial court faithfully applied Justice Palmer's standards to the facts before it and made clear and explicit factual findings that the plaintiffs had failed to establish any aspect of their claims that Connecticut's education funding was inadequate or that it resulted in failure to provide adequate educational opportunities. Because the court applied the correct legal standard,

its factual conclusions must stand unless this Court finds them clearly erroneous.

II. THE TRIAL COURT CORRECTLY APPLIED THE APPLICABLE SUBSTANTIVE LEGAL STANDARD FOR EQUAL PROTECTION OR EQUITABILITY CLAIMS

As the trial court correctly noted, "[i]n 1985, in Horton v. Meskill, [195 Conn. 24 (1985) ("Horton III")], our Supreme Court held that an equal protection claim based on spending disparities can only succeed if, among other things, any claimant can show that the disparities 'jeopardize the plaintiffs' fundamental right to education.' " [fn: 195 Conn. at 38]." Appx., A478. The trial court then went on to interpret this discussion to mean that when the state's education funding disparities direct more funds to the poorer districts, there is obviously not a violation of Horton III. Appx., A478. This is an entirely reasonable reading of Horton III.

Taking a slightly different perspective, the State urged below, e.g., Defendants' Brief in Response to the Court's Questions, Appx., 1334-1340, and continues to assert that under Horton III, if plaintiffs fail to prove a lack of minimally adequate educational opportunities, as they did here, then by definition they cannot succeed in an equal protection claim. In Horton III, in considering an equal protection challenge to education financing legislation enacted in 1979, this Court explained that "the sui generis nature of litigation involving school financing legislation militates against formalistic reliance on the usual standards of the law of equal protection, in particular against the requirement that the state must demonstrate a compelling state interest." Horton III, supra, 195 Conn. 35-36. Rather than requiring the state to demonstrate a compelling state interest, the Court adopted a three part test. Under this test, the plaintiffs must first make a prima facie showing that the disparities in educational expenditures are more than de minimis in that they continue to jeopardize the plaintiffs' fundamental right to education. If the plaintiffs make that showing, the state must "justify these disparities as incident to the advancement of a legitimate state policy." Id., 38 and the state must further show that the

continuing disparities are nevertheless not so great as to be unconstitutional. Importantly, the court explained that "a school financing plan must, as a whole, further the policy of providing *significant equalizing state support to local education.*" Id. (Emphasis added.)

Under this Horton III analysis, as long as the state is providing a constitutionally adequate education to the plaintiffs, then plaintiffs are unable to satisfy even the first prong of the Horton III three part test. As noted above, the first prong requires plaintiffs to make "a prima facie showing that disparities in educational expenditures are more than de minimis *in that the disparities continue to jeopardize the plaintiffs' fundamental right to education.*" Id. (Emphasis added.) This prong requires the plaintiffs to prove that any such disparities in educational expenditures have caused inadequate educational opportunities for the plaintiffs before the state is required to justify any disparities. Here, the trial court found as fact that the plaintiffs have more than minimally adequate educational opportunities and so no further Horton III analysis is required and the plaintiffs' claim fails, whether under the trial court rationale that they cannot make their case because the disparities in state support heavily favor them, rather than burden them, or under the state's rationale that once the court has found that plaintiffs have minimally adequate educational opportunities, there is no basis for further review under Horton III.

Plaintiffs claimed in their Claim for Relief, fourth count of their Corrected Third Amended Complaint that "[t]he State's failure to maintain a public school system that provides plaintiffs with suitable and substantially equal educational opportunities has disproportionately impacted African-American, Latino, and other minority students, in violation of Article Eighth, § 1 and Article First, §§ 1 and 20 of the State Constitution . . . ." Appx., A319. If the plaintiffs are suggesting that they can succeed on a state constitutional equal protection claim, without reference to Horton III, as long as they establish a disparate impact upon a protected class of students, they are mistaken. "It is well settled that, as a general matter, this state's constitutional equal protection jurisprudence follows that of the federal constitution." Abdullah v. Commissioner of Correction, 123 Conn. App. 197, 202

(2010) cert. denied, 298 Conn. 930 (2010); see also Kerrigan v. Commissioner of Public Health, 289 Conn. 135, 149 n.13 (2008). An equal protection challenge must establish intentional or purposeful discrimination to succeed. Reynolds v. Barrett, 685 F.3d 193, 201-2 (2d Cir. 2012) (plaintiffs cannot proceed under a disparate impact theory of liability under an equal protection claim; citing, inter alia, City of Cuyahoga Falls v. Buckeye Community Hope Foundation, 538 U.S. 188, 194 (2003); Accord, Golab v. New Britain, 205 Conn. 17, 26 (1987). The court in Abdullah followed the court's holding in Wendt v. Wendt, 59 Conn. App. 656, 685-86 (2000), cert. denied, 255 Conn. 918 (2000),[2] and confirmed that Sheff v. O'Neill, 238 Conn. 1 (1996) "did not intend to allow state constitutional challenges on the basis of disparate impact," explaining that the holding in Sheff was premised, not on the equal protection clause, but on the segregation clause in article first, § 20. Abdullah, supra, 123 Conn. App. 202. Plaintiffs have alleged no such claims of segregation nor of purposeful discrimination in this case.

The trial court's application of the legal standard regarding equal protection was straightforward. After describing some of the state's overall spending on education and its particular focus on poor districts and poor students, the court made the following factual conclusions:

1) "All of this extra spending benefits poor districts but not wealthier districts." Appx., A477-A478.

2) "[The extra spending] is on top of basic education aid that has a history of

[2] "Even assuming, arguendo, that the plaintiff could prove that a disparate impact exists, an equal protection challenge cannot be supported on that basis alone. Intentional or purposeful discrimination must be shown to make a successful equal protection challenge." Wendt, supra, 59 Conn. App. 685-86 (citation omitted). The Wendt court also made clear that "[d]ecisions subsequent to Sheff reveal that the Supreme Court did not open the door to disparate impact challenges." Id., 686 (citing cases).

strongly favoring poor districts over wealthier ones." Appx., A477-A478.

3) "This heavy tilt in state education aid in favor of the state's poorer communities shows the state is devoting to needy schools a great deal more in resources than is required by the modest standard created by the New York court." Appx., A477-A478.

4) "This tilt is also fatal to the plaintiffs' equal protection claim as a basis for an order to increase the total amount the state spends on education. . . . Unlike the disparities in Horton, the state's current education spending disparity favors the impoverished districts with which the plaintiffs are most concerned. They can hardly claim getting more money compared to other towns is the cause of their woes. They claim lack of enough money is the cause of inadequacy, but that claim has no place under the Horton equal protection analysis." Appx., A477-A478.

The court's ultimate factual findings on this issue were supported by numerous more specific findings of fact regarding spending on education and related issues, including Fact Findings 1-51, 206, 208, 213-6, 409-12, 413-5, 419, 432-5, 438-42, 453-6, 478, 536-49, 555-60, 569-80, 621-31, 637-9, 643-68, 671, 704-11, 715-43, 793-850, 881-928, 953-91, 1012-56, Appx. A542-A547, A604-A606, A628-A629, A631-A632, A634, A637-A638, A649-A652, A656-A661, A664-A668, A672-A678, A681-A685, A687-A691, A693-A697. Here, too, the trial court found the facts – that the state spends far more on poor districts than on rich ones – and then correctly applied the law to conclude that plaintiffs had failed to prove their claims. These facts were further supported by the unrefuted and unchallenged testimony of Professor Michael Wolkoff that the state provided 8 to 9 times as much aid per pupil to the poorest districts as to the wealthiest, even in the days before the new Alliance District and Commissioner's Network programs began to provide hundreds of millions of

dollars in additional money to the poorest districts. Appx., A833-A837 (testimony of Wolkoff); A1137-A1144, A476, A545-A546 (FOF 39-42). The court's findings also clearly support the conclusion that the state's school financing plan "further[s] the policy of providing significantly equalizing state support to local education," thus meeting the requirement of Horton III, supra, 195 Conn. 38.

III. THE COURT ERRED WHEN IT CREATED AND APPLIED A NEW LEGAL STANDARD – A REQUIREMENT THAT STATE EDUCATIONAL POLICIES MUST BE RATIONALLY, SUBSTANTIALLY AND VERIFIABLY CONNECTED TO CREATING EDUCATIONAL OPPORTUNITIES FOR CHILDREN – AND THEN APPLIED THAT NEW STANDARD TO INVALIDATE NUMEROUS STATE AND LOCAL EDUCATIONAL STATUTES AND POLICIES

A. Applicable Legal Standard For Review Of Claim That Trial Court Created And Applied Improper Legal Standard.

This court reviews *de novo* claims that the trial court applied an incorrect legal standard in interpreting or applying a constitutional right. In re Cassandra C, 316 Conn. 476, 496 (2015) ("Whether the respondents' due process constitutional rights were violated is a question of law over which our review is plenary . . . .") (citations omitted); State v. Peeler, 320 Conn. 567, 578 (2016).

B. The Trial Court Created And Applied An Erroneous Legal Standard.

Although it found that plaintiffs had failed to prove the state was not offering adequate educational opportunities and failed to prove that the state's funding of education violated constitutional guarantees of equal protection, the court nevertheless created a new rule of constitutional law in the realm of education, a rule requiring that the state's education spending and various educational policies *also* must be "rationally, substantially, or verifiably" connected with educational need. Appx., A465. The trial court cited no

decision of this or any other court that has ever applied this standard. It seems to have derived its inspiration for the standard from a comment in Horton III that "education cases are 'in significant aspects *sui generis* and not subject to analysis by accepted conventional tests or the application of mechanical standards.'" Appx., A463, citing Horton v. Meskill, 172 Conn. 615, 645 (1977) ("Horton I"). The trial court elided over the fact that this Court was discussing not "education cases" in general, but "education equalization cases," Id. At any rate, the trial court certainly did not apply or purport to apply any standard from Horton III. Instead, the court apparently took this comment from Horton III as license to create a new constitutional standard of judicial scrutiny completely outside of this Court's remand in CCJEF I or any other existing caselaw. The court acknowledged, accurately, that, ordinarily, the "rational basis" standard of judicial review is the "lowest standard that could possibly apply," a standard that requires that a statute must be upheld unless the evidence "negative[s] every conceivable basis which might support it" [citing State v. Long, 268 Conn. 508, 534 (2004), cert. denied, 543 U.S. 969 (2004)]. Appx., A462-463. In fact, this Court has repeatedly explained that, in applying the rational basis test, its

> function . . . . is to decide whether the purpose of the legislation is a legitimate one and whether the particular enactment is designed to accomplish that purpose in a fair and reasonable way. If an enactment meets this test, it satisfies the constitutional requirements of due process. . . . In determining whether the challenged classification is rationally related to a legitimate public interest, we are mindful that [t]he test. . . . is whether this court can conceive of a rational basis for sustaining the legislation; we need not have evidence that the legislature actually acted upon that basis. . . . Rational basis review is satisfied so long as there is a plausible policy reason for the classification. . . . [I]t is irrelevant whether the conceivable basis for the challenged distinction actually motivated the legislature. . . . To succeed, the party challenging the

legislation must negative every conceivable basis which might support it. . . .

(Citations omitted; internal quotation marks omitted.) Doe v. Hartford Roman Catholic Diocesan Corporation, 317 Conn. 357, 441, n. 63 (2015) citing Dutkiewicz v. Dutkiewicz, 289 Conn. 362, 381-2 (2008). See also, e.g., Martorelli v. Department of Transportation, 316 Conn 538, 554-55 (2015), Keane v. Fischetti, 300 Conn. 395, 406 (2011).

After creating its new standard, the trial court proceeded to apply it in a manner that clearly exposes it for what it is – a license for a judge to impose his own views of correct educational policy and educational fiscal policy in lieu of the determinations of the elected branches of our government. The improper breadth of this newly crafted legal standard is best illustrated by a brief examination of how the trial court applied it. Specifically, the court found that the State has failed to meet its new standard and thus must correct its policies and practices in regard to the following areas:

1) The State must create a new school spending plan that rationally, substantially and verifiably connects education spending with educational need and must follow it *every year*. Appx., A492, A494-495. This same requirement appears to apply to school construction funding. Appx., A494. The court states no basis, beyond its newly pronounced standard, for imposing this requirement *after* determining that the state's spending and provision of educational services have *not* been proven inadequate or inequitable. Because only the General Assembly can decide how to appropriate funds and then do so, this requirement can only be read to apply directly to that body and to require it to cede a significant part of its appropriations authority permanently to the court. Apparently, the trial court would also give itself veto power over appropriations it deemed unqualified under its new standard. This requirement contravenes the constitutional provision that "[t]he General Assembly shall implement this principle [of free public elementary and secondary schools] by appropriate legislation." Constitution,

Article 8, § 1. It also flies in the face of the rule that no legislature can bind or control the actions of a future legislature, Patterson v. Dempsey, 152 Conn. 431, 439 (1965).

2) The State must submit for court review an objective and mandatory statewide graduation standard that rationally, substantially and verifiably connects secondary school learning with secondary school degrees. Appx., A504-A506. As current procedures and requirements for graduation standards are set by state law, e.g., Conn. Gen. Stat. §§ 10-221a, 10-223a, and 10-14n(e), only the General Assembly could establish a new standard.

3) The State must propose a standard that creates a rational, substantial and verifiable definition of elementary school (and what students must learn to complete elementary school). Appx., A511-A513. As no state official or agency presently has the authority to create such a thing, only the General Assembly would have the legal authority to do so.

4) The State must submit plans to replace its irrational systems for evaluation and compensation of educational professionals that deny students constitutionally adequate opportunities to learn with a plan that connects evaluation and compensation to student education in a rational, substantial and verifiable way. Appx., A522. The court does not explain what it means by students' constitutional "opportunities to learn," but only the General Assembly could dictate such standards or systems, which would also, of necessity, interfere with and upend current collective bargaining agreements and procedures.

5) The State must submit new standards concerning special education that rationally, substantially and verifiably link special education spending with elementary and secondary education. Appx., A537. Apparently these standards should include denial of special education services for students who are "too disabled" to benefit educationally. Appx., A528, A531. While only the General

Assembly could set such standards, as defendants pointed out at trial and in post-trial briefs and explain below, any such standards would almost certainly violate federal law. Appx., A1343-A1345.

6) In various discussions, the court stated that the State bears ultimate responsibility for compliance with constitutional requirements and the court may "weed out any General Statutes holding the effort back." Appx., A459-A460, A540; see also Appx., A512. The state is also required to identify any authority it needs, presumably beyond current statutory authority, in order to comply with the court's orders, apparently so that the court can provide its own substitute for that authority. Appx., A512, A540.

The most important point about each of these rulings, and all of them together, is not simply that they are patently incorrect in concluding that such broad swaths of the state's well-established educational policies are not even rational, but that the sweep of the court's findings and orders demonstrates how deeply those findings and orders intrude into core educational and fiscal policy matters that courts have no particular competence to decide. It is common knowledge that each of these issues has been the subject of extensive debate, discussion, and dispute, by educators and by citizens. As Justice Palmer explained in his controlling opinion in CCJEF I,

> . . . . [T]his court has recognized . . . . the legislature's significant discretion in matters of public elementary and secondary school education. Sheff v. O'Neill, supra, 238 Conn. at 37, 41, 678 A.2d 1267. The judicial branch must accord the legislative branch great deference in this area because, among other reasons, courts are ill equipped to deal with issues of educational policy; in other words, courts "lack [the] specialized knowledge and experience" to address the many "persistent and difficult questions of educational policy" that invariably arise in connection with the establishment

and maintenance of a statewide system of education. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 42, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). Thus, these issues are best addressed by our elected and appointed officials in the exercise of their informed judgment. See *id.* As the United States Supreme Court has observed, "[e]ducation . . . . presents a myriad of intractable economic, social, and even philosophical problems. . . . The very complexity of the problems of financing and managing a statewide public school system suggests that there will be more than one constitutionally permissible method of solving them, and that, within the limits of rationality, the legislature's efforts to tackle the problems should be entitled to respect. . . . On even the most basic questions in this area the scholars and educational experts are divided. Indeed, one of the major sources of controversy concerns the extent to which there is a demonstrable correlation between educational expenditures and the quality of education. . . . Related to the questioned relationship between cost and quality is the equally unsettled controversy as to the proper goals of a system of public education. . . . The ultimate wisdom as to [the] . . . . problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues. In such circumstances, the judiciary is well advised to refrain from imposing on the [state] inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions." (Citations omitted; internal quotation marks omitted.) Id., at 42-3, 93 S.Ct. 1278.

Special deference is warranted in the present case due to the fact that the framers reserved to the legislature the responsibility of implementing the

> mandate of a free public education under article eighth, § 1, by "appropriate legislation." The ordinary meaning of these words vests the legislature with significant discretion. Indeed, because the framers provided no express guidance as to the nature or scope of the "appropriate" legislation required under article eighth, § 1, it is apparent that they intended to leave that determination to the reasoned judgment of the legislature.

CCJEF I, supra, 295 Conn. 335-7.

Justice Palmer went on to note that

> it is unrealistic to believe that a remedy can be devised that will not give rise to separation of powers concerns. . . . As recent education adequacy cases have demonstrated, there is no way that courts can avoid involvement in complex funding and education policy issues at the remedy stage merely by permitting the legislature to attempt to satisfy the court's mandate; the issues involved at that stage are likely to be too complicated and the parties' views too divergent for the court to be able to remove itself from the remedy phase.

Id., 338, n.12.

It is difficult to imagine a clearer confirmation of Justice Palmer's concerns than the trial court's present sweeping order, rejecting in wholesale fashion the legislature's, state executive branch's, and local districts' policy determinations regarding (1) education funding far beyond the requirements of minimum adequacy, (2) the pros and cons of strict objective high school graduation standards, (3) the requisite content of elementary school curricula, (4) the complex issues of evaluation and compensation of education professionals, and (5) the details of the operation of special education, all apparently

without deference to existing statutes or local authority.

Of course, the trial court's attempt to mask the sweep and intrusiveness of its orders by saying that it is up to the state to determine *how* to change its policies is a transparent fiction. In fact, insisting that the state must change its statutory and administrative policies in all of these broad areas without explaining how to do so simply invites an extended variant of blind man's buff in which the legislature is invited to guess what educational policy changes might satisfy the particular trial judge assigned to the matter, who has no expertise as to those questions and has offered little guidance. While this Court did leave remedies to the legislature in both Horton v. Meskill, 172 Conn. 615 (1977) (Horton I) and Sheff, supra, 238 Conn. 1, the relatively specific nature of the remedies ordered in those cases bears no resemblance to the sweeping and unfocused orders in this case.

In Horton I, this Court upheld a determination that the state's then-existing financial system of supporting education, leaving all financial responsibility to towns except for a flat $250 state grant per pupil, regardless of a district's taxable property or student needs, violated state constitutional requirements of equal protection. The Court ordered nothing more than a rearrangement of the funding system to make it more fair, while noting that its order would not require total state financing of education, loss of local control over educational decisions, or bringing every town to the same financial standard. The Court also noted that "absolute equality or precisely equal advantages are not required and cannot be attained except in the most relative sense," and explicitly recognized the "uncertainty of the extent of the nexus between dollar input and quality of educational opportunity." Horton I, supra, 172 Conn. 651-2. Even so, that litigation was continuing at least seven years later, Horton III, supra, 195 Conn. 24.

Similarly, in Sheff, this court, relying in part on the explicit prohibition on segregation contained in article first, § 20 of our constitution, Sheff, supra, 238 Conn. 30-3, found only the specific legal requirement that students attend schools in their own districts, as applied, unconstitutional, and ordered the legislature only to find a way to reduce racial isolation of

students in the Hartford public schools, Id., 44-7. This Court can take judicial notice of the fact that even that relatively limited order remains the subject of continuing litigation over twenty years later. Hartford Judicial District, No. HHD-CV89-4026240-S, available at http://civilinquiry.jud.ct.gov/CaseDetail/PublicCaseDetail.aspx?DocketNo=HHDCV894026240S (last visited 12/7/2016).

In other words, the basic orders in Horton I and Sheff were both quite specific in comparison to this trial court's orders demanding a wholesale revamping of wide areas of educational policy. Nonetheless, even those relatively plain orders in Horton and Sheff led to many further years of litigation. The court's orders in this case, if upheld, would entangle the judiciary in the determination of core educational policies that are properly committed to the legislative and executive branches for at least decades to come.

In addition, the court's new legal standard suffers from another conceptual flaw. The court would require virtually all educational policies to be clearly connected to educational need. In fact, however, at least as long as the state is providing adequate and equitable educational opportunities, there is no legal or logical reason the state cannot or should not also seek to further other policies, not directly related to education, in setting policies that affect education. For example, it would be perfectly appropriate for the legislature to consider job creation and economic stimulus effects in determining school construction grants, or to consider how best to address social and medical policy issues in deciding how to structure and allocate special education funding.

IV. THE COURT ERRED IN ITS APPLICATIONS OF ITS NEW STANDARD TO THE FACTS OF THIS CASE

STANDARD OF REVIEW

As noted above, the application of a rule of constitutional law to the facts presented at trial is a mixed question of law and fact over which this court exercises plenary review.

Scholastic Book Clubs, Inc. v. Commissioner of Revenue Services, supra, 304 Conn. 225.

A. The Court Erroneously Applied Its New Standard.

Even if the trial court were somehow justified in imposing sweeping constitutional requirements about all of the broad policy issues it took on, there is no justification in the record for its conclusions that the state's policies in those areas were *irrational*. Of course, the court said it was requiring that numerous educational policies must be "rationally, substantially, and verifiably" connected with educational opportunities. Appx., A465. Because the court never defined or explained what it meant by "substantially and verifiably," and those terms, unlike "rational basis," are not defined in our constitutional or other caselaw, one must assume that the court is attempting to turn the requirement of "rationality" into something far more exacting than Connecticut jurisprudence provides.

B. The Court's Finding That Legislative Funding Is Irrational Was Erroneous.

It requires only a brief review to demonstrate how far unmoored the court's findings of lack of rationality are from any basis in the extensive record of the trial. The first area where the court found the state's efforts irrational was in its method of funding its Education Cost Sharing (ECS) grants to local school districts. After finding that the Plaintiffs had failed to prove their claims that the state was not providing minimally adequate educational opportunities or that the state was not distributing funds in accordance with the requirements of equal protection, the court nonetheless decided that it was also its responsibility to examine the funding system to see if it is rational, and it found it wanting.

The court's concern was *not* that the state was not spending enough money on education generally, nor that it was not heavily weighting its spending towards the poorest districts. Rather, its concern was that the state, while it had constructed and often used a complex formula to allocate school funds to localities by adjusting for factors including the

number of students in a district, the district's real property wealth, average income of district residents, the proportion of poor students in the district, and other factors, did not always follow the formula precisely. Sometimes the legislature either adjusted the formula from time to time or simply appropriated specific amounts to each district for a particular year. Appx., A492-A495. In addition, the funds for school construction and maintenance are not distributed according to a district by district formula, although there is no finding or basis for any finding that it is distributed unfairly or inappropriately. Appx., A492-A495. The court expressed dismay at the fact that in certain years, including the current one, the legislature has made minor adjustments to allocations for individual districts outside of the application of the ECS formula. Appx., A489-A491. But the court ignored or dismissed the fact that the relative magnitude of these adjustments in proportion to the amount of aid is trivial.

Although the court didn't say so, it was clearly taking its facts described above, about 2016-2017 ECS funding, from Defendant's Exhibit 6488, (Appx., A443-A447) showing dollar and percentage comparisons of ECS spending for 2015-2016 and this current year, a year of enormous budget cuts across most of state government. In reviewing this exhibit, this Court can note that the 30 lowest performing districts are designated as "Alliance Districts" in the second column, see Conn. Gen. Stat. § 10-265u, and the 15 districts among the Alliance Districts designated as particularly in need per Conn. Gen. Stat. § 10-266p are noted as the "Priority School Districts" in the third column of that exhibit. The exhibit shows that in this period of intense statewide budget cutting, the 15 Priority districts saw reductions in ECS funding of generally one-half percent or less, with one district (Putnam) being cut by 1.31%, and two Priority Districts (Stamford and Danbury) receiving increases in funding. Turning to the rest of the Alliance Districts, the data show that of the remaining 15, none suffered cuts greater than 1.3%, most of the cuts were about one-half percent, and one district (Hamden) received a slight increase. By comparison, wealthier districts suffered cuts as large as 90% or more. Communities such as Easton, Fairfield, Greenwich, Madison, Westport and Wilton, among others, were cut

more than 50%. Fairfield was reduced over $1.9 million and Greenwich over $1 million. While the trial court suggested that about $5 million was taken from some of the state's poorest districts and moved to some wealthier ones, Appx., A489-A490, the court could equally have concluded, based on this exhibit, that the legislature took far more than $5 million (out of a total of over $20 million in reductions) from wealthier communities and used that money to give more funding to some very poor communities and to avoid much greater cuts for other poor communities.

In calling the current funding irrational, the court also appeared to ignore the undisputed facts that state aid generally is so heavily tilted in favor of the poorest districts that those districts received *eight times or more* as much state aid per student as the poorest districts, even *prior* to the initiation of additional funding through the Alliance District program, and *prior* to the most recent cuts to the wealthiest districts See, e.g., Appx., A1148-A1150, A1134, A1142 and A833-A837.

Plaintiffs certainly can, and did, argue that funding for poor districts was nevertheless inadequate or inequitable, but the trial court explicitly rejected those claims as a matter of fact. Once the court has found that education spending is constitutionally adequate and equitable, it cannot be the court's role to investigate and insist upon justification for variances of one-half or one percent in one line or another out of over two billion dollars in ECS appropriations, or to demand that the legislature set one formula for eternity. That sort of fly-specking cannot be justified or required by a constitutional requirement for rationality in funding. If it were otherwise, courts would become permanent auditors of every penny of ECS appropriations every year according to some unknown standard, which goes far beyond basic rationality. That approach cannot be found in our constitution nor in any case interpreting or applying it.

The trial court also found that the state's extensive spending on school construction failed to meet its new standard of rational connectedness to education. Appx., A493-A494. This conclusion too, clearly illustrates the impermissible sweep of the trial court's

determination that the law requires every significant educational policy to be substantially and verifiably linked to educational achievement in the absence of any findings of inadequacy or inequitabilty.

C. The Court's Determination That The State's Approach To High School Graduation Standards Is Irrational Was Erroneous.

Connecticut's high school graduation standards are primarily set through a number of state statutes, including Conn. Gen. Stat. §§ 10-221a (setting detailed and specific requirements, increasing over time, for course credits in various subjects, and specifying acceptable means of acquiring those credits subject to certain local discretion), 10-223a (requiring local boards of education to have policies including objective criteria for promotion and graduation, the measuring and reporting of student progress per those standards, and a process to assess student competency prior to graduation), and 10-14n(e) (providing for standardized mastery tests for students in grades 3 through 8 and 10 or 11 in reading, writing and mathematics, and stating that passing such a test may not be the sole criterion for graduation). The rationale for and use of these high school graduation standards was further explained, at substantial length, in the testimony of Commissioner of Education Dianna Wentzell (Appx., A789-A806, A808-A809, A840-A849), Deputy Commissioner Ellen Cohn (Appx., A1056-A1073), and Chief Performance Officer Ajit Gopalakrishnan (Appx., A986-A987, A990-A991, A993-A1047, A1052-A1053). See also, Appx., A594-A598, A602-A604, A1348, A1318-A1324, A1151-A1156, A1230-A1264.

The trial court's principal complaints about the state's graduation standards appear to be two-fold: that the state agrees it needs new graduation standards but is taking too long to establish them, Appx., A497-A499, and that too many students with poor standardized test scores are permitted to graduate, Appx., A499-A504. Of course, unless the state's current graduation standards are in fact irrational, it cannot matter, as a matter of constitutional law,

how or when the standards will be changed. As to why it believed the state's graduation standards are irrationally inadequate, the trial court offered only one reason – the fact that standardized test scores and graduation rates, on average, are substantially lower in poorer school districts than in wealthier ones. Appx., A501. The court offers no other basis for its complaints about graduation standards. And yet the court's sole reliance on those measures flies directly in the face of the instructions the trial court received from this Court about this case. The plurality in CCJEF I noted that

> "*any appropriate standard* by which to measure the state's assumed obligation to provide a minimally adequate education *must be based generally, not on what level of achievement students reach, but on what the state reasonably attempts to make available to them*, taking into account any special needs of a particular local school system"); Sheff v. O'Neill, supra, at 144, 678 A.2d 1267 (Borden, J., dissenting) ("[a]lthough schools are important socializing institutions in our democratic society, they cannot be constitutionally required to overcome every serious social and personal disadvantage that students bring with them to school, and that seriously hinder the academic achievement of those students"). Put differently, although we acknowledge the state's significant responsibilities under the constitution, we nevertheless recognize that the education clause is not a panacea for all of the social ills that contribute to many of the achievement deficiencies identified by the plaintiffs in their complaint; a constitutionally adequate education is not necessarily a perfect one.

CCJEF I, supra, 295 Conn. 319-20. (Emphasis added; some citations omitted.)

Similarly, in his controlling concurrence, Justice Palmer noted that

> I agree with the observation that *"[p]erformance or achievement of the student population, taken generally, cannot . . . . be the principle [on] which [a constitutionally required minimally adequate education] is based.* There is nothing in either the language or the history of article eighth, § 1, to support such a standard. . . . "

Id., 345, n.19. (Emphasis added.)

Justice Zarella's dissent makes the same point,

> The difficulty of developing standards in the present case is brought into stark relief by the plaintiffs' complaint, which, as I previously noted, describes the "essential components of a suitable educational opportunity" in vague generalities, such as "appropriate" class sizes, "highly qualified" administrators and teachers, an "adequate" number of hours of instruction and a "rigorous" curriculum with a "wide breadth" of courses, and proposes to measure whether a suitable education has been attained by evaluating student achievement, a concept that is far removed from the plain meaning of article eighth, § 1, and is devoid of any substantive content. I would suggest that *the court is not equipped to evaluate these "inputs" and "outputs" or to provide them with the content now lacking to determine whether Connecticut schoolchildren are being provided with an adequate education.*

Id., 436-37 (Emphasis added; footnote omitted).

In the face of these clear instructions, after finding that Connecticut *did* provide minimally adequate educational opportunities, the trial court nevertheless relied primarily, if not solely, on "outputs" – standardized test scores and graduation rates – in coming to the conclusion that Connecticut's graduation standards are not rational. This reasoning is plainly erroneous because it is in fundamental opposition to this Court's direction in

CCJEF I. In addition, the overall rationality of the state's approach is well-supported by the testimony of Seder (Appx., A975-A977, A1122-A1130, A1120) and Rice (Appx., A795). See also, Appx., A975-A977; A1122-1130, A1120, A795, A1132-A1135, and A1142-A1144; A778, A781-A782, A1082-A1083 (testimony of Quesnel); A1091 (testimony of Rabinowitz); Appx., A980, A983 (testimony of Villanova); A789-A791 (testimony of Pascarella); and Appx., A992-A993, A1026-A1027 and A1031 (testimony of Gopalakrishnan).

D. The Court's Determination That The State's Approach To Elementary School Standards Is Irrational Was Erroneous.

After finding the lack of fully objective high school graduation standards irrational, the trial court went on to find it irrational not to have what the court considered a rational definition of an elementary school education, and, again, required standards. Appx., A507-A511. The court's explanation of this conclusion appears to be based on nothing more than that it follows from the necessity of rational high school graduation standards, and that some elementary school students have low standardized test scores. Appx., A507-A511. Accordingly, it suffers from the same deficiencies discussed above, and does not merit further separate discussion.

E. The Court's Determination That The State's Approach To Evaluation And Compensation Standards Is Irrational Was Erroneous

The court's determinations that teacher evaluation and compensation are irrational are also insupportable. The court made no attempt to tie its concerns in this regard to any particular failures of students nor to any particular missing educational opportunities. Instead, it simply criticized the current approaches to evaluation and compensation as irrational, apparently because the court found that the current evaluation system is toothless and that change has been too slow in coming, and because teacher

compensation is not tied directly and consistently to the difficulty of attracting teachers in different districts and to the objectively proven teaching capabilities of each individual teacher. Appx., A513-A522. It is obvious from the simple restatement of the court's conclusions that the areas of the court's criticism are highly debatable areas of educational policy, rather than issues susceptible to constitutionally required rules. In addition, the record is replete with detailed explanations and reasons for the state's current and developing approaches to teacher and administrator evaluation, e.g., Appx., A924-A972 (testimony of Barzee); A1076, A1079 (testimony of Cohn); A1357-A1360 (testimony of Gopalakrishnan); A807, A810-A817 (testimony of Wentzell). In the face of all that testimony, it is impossible to assert that the state's standards do not meet the minimal standard of rationality. As to teacher compensation, the record is clear that this is a matter of collective bargaining between local districts and unions. Appx., A630-A631, A665, See also, A1342-A1343. There is nothing in the record to show that setting compensation by collective bargaining is irrational, as opposed to being a policy that one trial judge happens to think is not the best choice. Once again, the trial court has portrayed its personal disagreement with current standards as if the court's opinion about how things should be done should be enshrined as a constitutional requirement.

F. The Court's Determination That The State's Approach To Special Education Is Irrational Was Erroneous.

The court's findings and conclusions regarding special education in Connecticut are probably the least supportable of all of its erroneous determinations. The trial court appears to have two central concerns with special education in Connecticut – that districts sometimes spend too much on students who will not gain educational benefit from that spending and that districts vary in their rates of identification of students who require

special education. Appx., A522-532. The factual and legal errors wrapped in these conclusions are patent.

The court provides no specific facts in support of its conclusions. There was *no evidence about even a single example* of a special education student in Connecticut upon whom money was spent unnecessarily, and there was *no specific evidence of any particular determinations by local districts* to include or exclude students from special education that were claimed to be inappropriate. There was also not a shred of evidence that any plaintiff failed to receive needed special education services and therefore failed to receive adequate educational opportunities. In other words, the record is utterly devoid of any evidence to support the court's rulings regarding special education.

Further, the state's expert upon whom the court relied, Prof. Daniel Reschly, clearly reported and testified, without contradiction, that overall, and in comparison with other states, Connecticut does a good job in providing special education services. Appx., A852, A1118. Also, the evidence at trial demonstrated that the vast majority of school districts in Connecticut identify students for special education at rates consistent with the state's overall identification rate, which is roughly the national median rate. Appx., A1118. Dr. Reschly testified that based on Connecticut's identification rate the state was not, on its face and as a whole, over identifying or under identifying students with disabilities. Appx., A853. Dr. Reschly also testified that his research and the research of others in the field has come up with "virtually nothing" that explains why there are variations across districts around the country in disability identification. Appx., A856. He further noted that the variations in identification rates "have to be understood as the culmination of decisions made by individuals," Appx., A857, as required by federal law.

Not only are the court's special education rulings factually baseless, but they also ignore and are inconsistent with controlling federal law. Discussion of this issue must begin with the overlay of federal law concerning special education. Under federal law[3] each student who qualifies for special education services is entitled to an individualized determination; each student has rights of due process and access to federal court if dissatisfied with her special education services, including the requirements of a "free appropriate public education" ("FAPE") in "the least restrictive environment." 20 U.S.C. § 1412(a)(1), (5). The IDEA mandates that "[t]o the maximum extent appropriate, children with disabilities . . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(5)(A). Because there is "tension between the IDEA's goal of providing an education suited to a student's particular needs and its goal of educating that student with his non-disabled peers as much as circumstances allow . . . . courts have used a case-by-case analysis in reviewing whether both of those goals have been optimally accommodated under particular circumstances."

[3] The Individuals with Disabilities in Education Act ("IDEA") is not, strictly speaking, a federal mandate. Rather, states such as Connecticut agree to abide by the due process requirements of the IDEA and, in exchange, receive federal funding. 20 U.S.C. § 1415(a); M.C. ex rel. Mrs. C. v. Voluntown Board of Education, 226 F.3d 60, 62 (2d Cir. 2000) ("Under the Act, states that receive funding from Congress are required to provide 'all children with disabilities' with a 'free appropriate public education.'"). Put another way, states are free to forgo federal IDEA funds in which case they do not have to comply with the IDEA's due process requirements. All states now participate. See Clare McCann, Federal Funding for Students with Disabilities: The Evolution of Federal Special Education Finance in the United States 15 (New America 2014). Appx., A1435-A1468.

P. ex rel. Mr. & Mrs. P. v. Newington Board of Education, 546 F.3d 111, 119 (2d Cir. 2008) (internal citations omitted).

Although the IDEA requires the states to establish "procedural safeguards," 20 U.S.C. § 1415(a), the fact that each disabled student is guaranteed an individualized determination necessarily weighs against statewide dictates affecting special education identification rates and services. Indeed, establishing arbitrary referral quotas or implicitly pressuring school officials to reduce special education referrals, regardless of individual student needs, would be illegal. See, e.g., Jose P. v. Ambach, 557 F. Supp. 1230, 1237-8 (E.D.N.Y. 1983). The IDEA's "principal mechanism" for achieving the law's purpose is an individualized education program ("IEP"), which is a "written document that must include the child's level of performance, goals for [his] improvement, and a plan about how to achieve that improvement." T.K. v. New York City Department of Education, 810 F.3d 869, 875 (2d Cir. 2016). "The particular educational needs of a disabled child and the services required to meet those needs must be set forth at least annually in a written" IEP. M.C. ex rel. Mrs. C. v. Voluntown Board of Education, supra, 226 F.3d 62. The IDEA provides that a parent or guardian of a disabled child may present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6). The State of Connecticut is not even a proper party to such a special education appeal. See Quatroche v. East Lyme Board of Education, 604 F. Supp. 2d 403, 411 (D. Conn. 2009). Thus, if a disabled student's parent is dissatisfied with his special education services or identification, she has the right to bring a claim under the IDEA against the local educational agency ("LEA") and the state has no right to participate as a party in that process.

Additionally, as Dr. Reschly testified, it would be improper to deny educational services to students simply on the basis of their disabilities.[4] Appx., A854. Therefore the State does not and cannot make determinations as to which special education students can or "cannot profit from educational services" or are "incapable of receiving a primary and secondary education." Appx., A1102, A1103-1104. In fact, in passing the predecessor to the IDEA – appropriately titled the Education for All Handicapped Children's Act – Congress acknowledged that a purpose of the federal law was to bring into the public schools many special education students otherwise excluded. See "Statement of Findings and Purpose," P.L. No. 94-142 (current version at 20 U.S.C. §§ 1400-1420 (2012)) ("one million of the handicapped children in the United States are excluded entirely from the public school system. . . . ")

In other words, even if there were any factual basis for the court's rulings, controlling federal law bars the trial court's efforts to deny or limit services to some children on the basis of the extent of their disabilities alone. Further, federal law requires that local districts, and not the state, acting in consultation with parents, educators, and experts familiar with the child and the child's needs and capabilities, make determinations about whether a child requires special education services and the nature of the services required. The trial court's orders that the state should find ways to reduce or eliminate services for some of the most disabled students, and that the state should set required standards that local

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[4] The trial court asked "[w]hy wouldn't it make education sense" to determine whether certain low incidence students were not worthy of receiving services." Appx., A854-A855. In response Dr. Reschly stated: "I think we're – your Honor, I think we're very reluctant to make that judgment because of the potential pernicious effects of starting to reject children based on our judgments of their ability to profit from an education. I think the – I think the concern from a special educators point of view, if you reject this child, then what about the next one and the next one? And pretty soon it's not a law that protects all children but a law that only protects some children with disabilities." Appx., A834-A855.

districts must follow in arriving at special education determinations are both at odds with the federal requirements that all of these decisions are to be made at the local level based on the individual facts of each individual student's needs and abilities. They are also unsupported by any evidence.

V. ALL PLAINTIFFS LACK STANDING TO BRING THIS ACTION

A. Standard Of Review

A trial court's determination concerning subject matter jurisdiction based on a plaintiff's lack of standing is a conclusion of law subject to plenary review on appeal. Isabella D. v. Department of Children and Families, 320 Conn 215, 228 (2016); Fairfield Merrittview Limited Partnership v. City of Norwalk, 320 Conn. 535, 547-8 (2016).

B. Introduction To Standing

For several different reasons, all plaintiffs in this action lack standing, and accordingly, this case should have been dismissed below and must now be remanded for dismissal. This case was brought by named parents on behalf of their minor children, and also by the plaintiff Connecticut Coalition for Justice in Education Funding, Inc., a corporation which claimed "associational standing" on behalf of some of its asserted members. App., A89-A90, ¶ 47.[5] Because standing implicates subject matter jurisdiction, the plaintiff bears the burden of establishing standing. Isabella D., supra, 320 Conn 227. In this case, plaintiffs failed to establish any individual harm as to any of the named plaintiffs. Plaintiff CCJEF also failed to establish any individual harm, and, in addition, lacks

[5] At the time this case was filed, and when it was first considered by this Court in CCJEF I, it was a putative class action, Appx., A41-A42, ¶¶ 37-42, and so these other issues of standing were not at the forefront. Ultimately, however, plaintiffs did not pursue their class action claims, leaving as plaintiffs only named individuals and CCJEF. Appx., A277-A321.

standing because the nature of the claims CCJEF is trying to assert require the participation of allegedly impacted individuals, rather than an association, it has inherent conflicts within its membership that preclude it from having standing, it has never had any actual members with standing and it had no members with any conceivable standing at the time it brought this action.

C. Individual Plaintiffs And CCJEF Lack Standing Because There Is No Evidence In The Record Of Any Specific Harm To Specific Individual Plaintiffs.

> [T]o have standing to bring this action, the plaintiffs necessarily must establish that they are classically aggrieved. In other words, they must demonstrate a specific, personal and legal interest in the subject matter of the controversy and that the defendants' conduct has specially and injuriously affected that specific personal or legal interest.

Andross v. Town of West Hartford, 285 Conn. 309, 324 (2008); see also Gannon v. State, 298 Kan. 1107, 319 P.3d 1196, 1210-2 (2014). Individual plaintiffs presented no evidence, as the law requires, that any one of them has been specially and injuriously affected in any way. The record, including over 11,000 pages of transcript, is completely devoid of any evidence that any individual plaintiff's student suffered any loss or deprivation of any kind. There is no evidence in the entire record of this case that a single student plaintiff was unable to take a particular class, had a poor teacher, didn't receive enough help or attention from a teacher, received a poor score on a standardized test, failed to graduate or was not on track to graduate, graduated without required competencies, was not on track for college or career success, was deprived of needed special education services, was deprived of the needed services of a guidance counselor or school psychologist, lacked a needed textbook, library material, or school supply, lacked adequate assistance in learning

English, would have benefited from but was unable to attend preschool, suffered any personal ill effects from the conditions of school facilities, or suffered any other personal loss or effect of any kind because of a lack of funding for the school she attended. No parent, student, teacher or administrator offered any such testimony.

Because there is no evidence establishing standing for the individual plaintiffs, their claims must be dismissed. Id. citing Warth v. Seldin, 422 U.S. 490, 501-2 (1975).

Apparently plaintiffs assert that because they put on some evidence of asserted deficiencies in some schools, and some, but by no means all, of the plaintiffs attended some of those schools, or because they showed some variation in per pupil expenditures among school districts, that standing was established. Plaintiffs' claims are akin to those of a personal injury claimant who asserts standing because he drove on a dangerous highway, but fails to show that she suffered any specific personal injury. There is simply no basis upon which a court could conclude that any plaintiff has shown that she has suffered an actual injury.

Similarly, with regard to plaintiff CCJEF's claim of associational standing, there is no evidence that any CCJEF member students in Connecticut public schools or parents of those students – who are the only members able to provide standing to CCJEF – have been specially and injuriously affected. Thus, CCJEF lacks standing on this basis as well.

D. Plaintiff CCJEF Lacks Standing.

Plaintiff CCJEF claims that it has associational standing on behalf of its parent members as guardians of their students. Appx., A289-A90. In fact, CCJEF did not establish associational standing for several reasons.

1. CCJEF Lacks Associational Standing Under The Hunt/Worrell Three Part Test.

CCJEF has never claimed standing because of any injury to its own interests as an

organization, nor could it. Simon v. E. K. Welfare Rights Organization, 426 U.S. 26, 40 (1976). Nevertheless, as this court determined in Connecticut Association of Health Care Facilities, Inc. v. Worrell, 199 Conn. 609, 616 (1986) (adopting test of Hunt v. Washington State Apple Advisory Commission, 432 U.S. 333, 343 (1977)).

> An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

CCJEF, as a plaintiff organization, fails each of the three requirements of associational standing adopted by this court in Worrell.

2. CCJEF's Claims Require The Individual Participation Of Its Members.

Beginning this review with the third Hunt/Worrell requirement, which presents the most obvious difficulties in this case, it is readily apparent that both the claims asserted and the relief sought require the participation of individual members in the lawsuit. Education is an individual and personal process. Every student, school, and school district is different. Plaintiffs' allegations that the state fails to offer minimally adequate educational opportunities must rise or fall on the adequacy of the opportunities offered to individual students. The minimum services needed for a precocious reader, an "average" student, a multiply handicapped student, a student from a troubled home life, a student whose native language is not English, a student with mild cognitive impairment, or any other student, are plainly all different.

The trial court in Disabled Americans for Firearm Rights, LLC v. Malloy, No. CV136016992, 2014 WL 1012285, *5 (Feb. 6, 2014) ("DAFR") carefully examined claims by an association of disabled citizens that their constitutional right to bear arms was infringed by certain Connecticut statutes banning firearms with certain features. The court concluded that the association's challenge to state law based on the constitutional right to bear arms

> would clearly require the participation of individual members of [the association]. In their complaint, the plaintiffs allege that disabled persons, including members of [the association], require certain features [of firearms] prohibited by Public Act 13-3 in order to exercise their rights. A determination of this allegation would require evidence of the specific physical disabilities of each individual.

Id., 5. DAFR, like this case, involved an association seeking to challenge state law on the basis of a constitutional claim. And, similar to the situation in DAFR, a court cannot determine whether the pertinent members of CCJEF have been denied their constitutional right to a substantially equal and minimally adequate public education without considering specific evidence as to those individuals. Every student's education and educational experiences are different, and this court has no evidence at all about those individual personal experiences for even a single CCJEF member. Accordingly, CCJEF fails to meet the third prong of the Hunt/Worrell test.

3. CCJEF Fails The Germaneness Test

CCJEF also fails the second Hunt/Worrell test (interests germane to organization's purpose) because its membership is irremediably riddled with inherent conflicts regarding educational policy issues germane to this case. In Fairfield County Medical Association v. CIGNA Corporation, No. X06CV075007159S, 2008 WL 415210 (Aug. 19, 2008), the trial court, while noting that "the cases disagree," adopted

> [W]hat appears to be the majority position, that the second prong of the [Worrell] test cannot be met when an association's lawsuit creates an obvious or direct conflict with or among its members that is serious or profound, particularly when no evidence is presented indicating that the conflicts have been addressed by the association itself through an authorization of the litigation in accordance with the association's rules or bylaws.

Id., 11-14, 17. This "lack of conflict" requirement precludes associational standing for an association such as CCJEF that is made up of and controlled by various interest groups, see Appx., A1325-A1331, with *overwhelming* inherent conflicts. It is self-evident that teachers' and administrators' unions, local school boards, and local municipalities each have obvious important interests on which they are structurally at odds. From a broader perspective, CCJEF's structural conflicts are impossibly disqualifying. CCJEF seeks a broad reordering of school funding in Connecticut. Yet its membership, Appx., A1325-A1331, includes municipalities and boards of education from places as diverse as Bridgeport, Simsbury, Windham, Newtown, New Britain and Branford, along with the two major teachers' unions, the CEA and the AFT. While all of these organizations might agree on one single point – that they want the State to put more money into education – it is obvious that they would not agree on how that money should be divided, and especially on how money should be reallocated among all of the different competing legitimate interests. Similarly, it is the role of boards of education and teachers' unions to engage in collective bargaining to determine how much of any addition or reduction in available funds will affect teacher salaries, as opposed to other priorities. Viewed somewhat differently, this problem is another version of the problem that the claims in this case require the participation of individual plaintiffs (the third prong of Hunt/Worrell) because of the myriad specific separate interests involved. From whatever lens the conflicts among the plaintiffs in this case are viewed, they disqualify CCJEF from associational standing in this litigation. Further, the

court heard evidence of a few examples of those conflicts.[6]

Indeed, these foregoing issues highlight a broader standing problem with the entire attempt to use CCJEF as a proxy for all of Connecticut's public school parents and students. As noted above, this case originated as a class action, although those allegations were later dropped by plaintiffs. Class actions are governed by Practice Book §§ 9-7 through 9-10, and those provisions provide important safeguards, including requirements that "the claims or defenses of the representative parties are typical of the claims or defenses of the class," "the representative parties will fairly and adequately protect the interests of the class" and that "the questions or law or fact common to the members of the class predominate over any questions affecting only individual members." §§ 9-7, 9-8. Presumably, the third prong of the Hunt/Worrell test ("neither the claim asserted nor the relief requested requires the participation of individual members") is an

[6] For example, Danbury Superintendent Pascarella testified that the Connecticut Association of Public School Superintendents – a dues paying member of CCJEF – is opposed to Connecticut's laws on binding arbitration regarding teacher pay. Appx., A1163-A1174, A792. The Connecticut Education Association ("CEA") and the American Federation
of Teachers ("AFT") are both dues paying members of CCJEF and this position is squarely at odds with the interests of their dues paying members. Appx., A1163-1174. Similarly, Superintendent Rabinowitz of CCJEF member Bridgeport testified that she would change teacher termination laws and due process requirements to make it easier to terminate ineffective leaders or teachers. Appx., A1085-A1097. She would terminate "many more" if the process was easier. Appx., A1086-A1089. She would also change the certification process, which is "too stringent." Appx., A1090. These positions are contrary to those of the CEA and AFT. Rabinowitz also testified that she has pushed for union concessions on teacher salary increases but that the unions refuse to consider it, despite that she believes teachers would not leave Bridgeport if they did not receive annual pay increases. Appx., A1092-A1097.

attempt to address those concerns in somewhat different terms.

It is important to remember, however, that the iconic cases granting associational standing bear no resemblance, in the breadth of their claims, to this case. In seminal cases such as Hunt and Sierra Club v. Morton, 405 U.S. 727 (1972) (recognizing that those who use a threatened national resource have standing to protect it), it was obvious that all members of the plaintiff association would be affected in the same way by the challenged action. In Hunt, all Washington State apple growers suffered the same economic harm from North Carolina's attempted protectionism in violation of the commerce clause, and, in Sierra Club, if an area's natural beauty were destroyed by a huge development, that development would impact all who visited the area and wished to continue to do so. This Court recognized the same principle in Fairchild Heights Residents Association, Inc. v. Fairchild Heights, Inc., 310 Conn. 797, 823-24 (2014) (relief sought would necessarily inure to benefit of all injured association members). When it comes to the application of educational funding and policy, however, everything and everyone is different. Potential changes in finite funding that benefit one student or district are as likely to harm as to help a different student or district. Plaintiffs put on their case by focusing their evidence at trial on six school districts – Danbury, Bridgeport, New Britain, East Hartford, New London and Windham – which they referred to as "focus districts." Appx., AA775. Plaintiffs offered no evidence and made no claim that these districts or the students within them were "typical" or "adequately representative" of all Connecticut students, nor did they even offer any evidence as to why or how they selected these six districts. They certainly made no claim that evidence about these six districts would properly address any potential concerns of any other districts or students. If associational standing can be permitted to hold sway in a case of this nature, then it simply becomes an unjustified path around the important protections required for class actions.

4. CCJEF Fails The First Prong Of The Hunt/Worrell Test.

CCJEF also fails the first prong of the Hunt/Worrell test (the association's members would otherwise have standing to sue in their own right). The only members of CCJEF who possibly could provide a basis for its associational standing would be members who are the parents or legal guardians of students in Connecticut public schools, because the right to sue to enforce the state constitution's educational provisions belongs to the students, Horton I, supra, 172 Conn. 648-9, and minors may sue only through a guardian or next friend, usually a parent, Mendillo v. Board of Education of Town of East Haddam, 246 Conn. 456, 460, n.3 (1998), overruled on other grounds, Campos v. Coleman, 319 Conn. 36 (2015). In the case of CCJEF, it is apparent and undisputed that the members who control CCJEF by voting and paying dues – the municipalities, boards of education and teachers' unions – have no standing to raise claims regarding the rights of students and their parents to adequate educational opportunities. Boards of education and municipalities are creatures of the state that cannot challenge the constitutionality of legislation, Connecticut Association of Boards of Education v. Shedd, 197 Conn. 554, 558-9 (1985); See Pereira v. State Board of Education, 304 Conn. 1, 33, 44-5 (2012); R.A. Civitello Co. v. New Haven, 6 Conn. App. 212 (1986). Teachers' unions obviously have no standing to raise the rights of students and their parents. Therefore, CCJEF's claim of associational standing through its members must rise or fall on the claims of its parent members, if any.

As the record of this case clearly establishes, however, the parents whom CCJEF claims as members are not in fact "members" in any real sense. The record includes two different versions of CCJEF's bylaws, the first dated August 4, 2005, Appx., A1163-1174, and the second dated December 11, 2013. Appx., A1104-A1116. Both versions are important, as the earlier version controlled CCJEF at the time this litigation was initiated, and the latter version controlled CCJEF through the latter part of the litigation and the trial. Both versions expose the essential sham at the core of CCJEF's attempt to claim associational standing through its parent members – the fact while it calls them "members,"

these so-called members don't pay dues and can't vote, and so they are not "members" in any real or meaningful sense. The teachers' and other unions, organizations and municipalities that are paying for the organization have the ultimate control of it, and parents do not share in this control. They are simply pawns added in an attempt to provide standing.

In the 2005 version of the bylaws, Appx., A1163-1174, Article III, Section 1, provides that CCJEF "shall act by and through its Board of Directors . . . . The Board's powers include, but are not limited to, the power to initiate and pursue litigation, ... and to make spending decisions." Article II, Sections 1, 2, and 3 specify the various categories of membership. Each membership category except for "individual members" consists of various types of organizations, and so parents could only possibly be "individual members." Article II, Section 6, Subsection A, provides that the Voting Members "shall have the right to vote: (i) as to the election or removal of members of the Board . . . . ," and that "[e]ach Voting Member shall be entitled to one vote on each matter submitted to a vote at a meeting of the Members . . . ." Subsections B through H then enumerate the voting rights of all other members. In sum, for every other category of member, each member in the category receives a vote or receives a vote in selecting a director. The one exception is Subsection H – Individual Members and Others, which provides that "[i]ndividual members . . . . shall not vote for directors." In sum, this version of the Bylaws, in operation when this litigation was initiated and through most of the intervening years, gave the power to initiate and pursue litigation to a Board over which the parent members had no voice whatsoever.

In the 2013 version of the Bylaws, Appx., A1104-A1116, the parents' lack of control of litigation actions is continued. In this iteration, according to Article II, Section I, the powers of the corporation reside with the Members of the Corporation. . . . . The Corporate Members' powers include, but are not limited to, the power to initiate and pursue litigation. . . ." Membership classes are specified in Article II, Sections 2 and 4, and now include a

specific category for "Parents." Article II, Section 5 describes the voting rights of the various classes of members. It provides that

> Voting Members of the Corporation are: Municipal Members, Board of Education Members, Designated members, Non-Profit Organization members, Parent-Teacher Association Members, Special Education Members, and Business Members. . . . . Parent Members, Individual members, and Provisional Members may participate in General Membership meetings but shall not have the right to vote. . . . . Each Voting Member has one vote on each matter submitted to a vote at a General Membership meeting except for election or removal of Members of the Steering Committee, the procedure for which is set forth below. Individual Members and parent Members are not entitled to vote.

Finally, Article IV, Section 6 provides that "[e]xcept as provided in Section 1(e) of the Article, no committee may: . . . . (e) initiate, discontinue, or settle litigation on behalf of the corporation . . . ." In sum, under this version also, parent so-called "members" have no control over initiating, pursuing or settling litigation, even though CCJEF's only claim to standing is through those so-called members who have no control over the litigation in question. Plainly, if the parents are not really members in any comprehensible sense of that term, then CCJEF cannot have associational standing through them.

The trial court dismissed this concern in a brief paragraph in MOD Appx Two: Subordinate Rulings, 3-4 (Appx., A701-A702). Although it did not say so, it referred in its analysis only to the 2013 Bylaws, with no discussion of why it could ignore the earlier version, in effect through the initiation and most of the course of the litigation. (Appx., A1104-A1116.) The court said that

> Article II, Section 2 of the CCJEF bylaws says parents are members. Section

> 1 of the same article says all members are "Corporate Members" and the "The Corporate Members' powers include, but are not limited to, the power to initiate and pursue litigation, to hire experts and other staff, and to make spending decisions." The State points to Article II Section 5. That section cuts parents out of its definition of "Voting Members" and reserves certain decisions to them [Voting Members] . . . . This means parents can vote on some very important things – including money and lawsuits – but not everything.

A701-A702.

The interpretation of a written legal document such as corporate bylaws is a question of law, subject to plenary review by this Court. See, e.g., Howard-Arnold, Inc. v. T.N.T. Realty, Inc., 315 Conn. 596, 602 (2015) ("The standard of review for a lease, which is a contract, is plenary.") The trial court's interpretation of the 2013 bylaws, that parents may take part in decisions about litigation, is insupportable. If parents cannot vote, it is obvious that they have no control over litigation, even though control of litigation is part of the enumerated powers of all members. A theoretical power with no avenue to exercise it is no power at all, and the trial court offers no suggestion as to how parents could exercise their alleged power in this regard. Because parent members of CCJEF had no control over litigation, they cannot provide associational standing for CCJEF.

Finally, CCJEF lacks standing for an entirely different reason. It cannot meet the first Hunt/Worrell prong – that its members would otherwise have standing to sue in their own right – for an additional reason: because at the time of the original complaint, plaintiff CCJEF did not have or plead that it had any members who were parents of public school students or were public school students. Plaintiff's original complaint, filed December 12, 2005 alleges:

29. Connecticut Coalition for Justice in Education Funding, Inc. (CCJEF) is a

> Connecticut not-for-profit corporation, which is committed to ensuring that public school children in Connecticut receive suitable and substantially equal educational opportunities. CCJEF's membership includes parents, teachers, education advocacy organizations, community groups, teachers' unions, and parent-teacher organizations. CCJEF draws its members from throughout Connecticut, ...

Appx., A38.

The plaintiff CCJEF admitted in an affidavit of record, Appx., A28, that no parents were members at the time of the original complaint. No later amendment can cure that defect because a court must look to the original complaint when determining whether a plaintiff has standing. Fairchild Heights Residents Association, Inc. v. Fairchild Heights, Inc., 131 Conn. App. 567 at 575 n.8 (2011); revsd. in part on other grounds, 310 Conn. 797 (2014). The Appellate Court in Fairchild Heights stated:

> The operative complaint for jurisdictional purposes is that included with the writ of summons. "The lack of subject matter jurisdiction to render a final judgment cannot be cured retrospectively." Serrani v. Board of Ethics, 225 Conn. 305, 309, 622 A. 2d 1009 (1993).

Id. See also, Connecticut Associated Builders and Contractors v. City of Hartford, 251 Conn. 169, 185-6 (1999) (no standing at the time of filing); Disability Advocates v. N.Y. Coalition for Quality Assisted Living, 675 F.3d 149, 160 (2d Cir. 2012) ("[I]f jurisdiction is lacking at the commencement of [a] suit, it cannot be aided by the intervention of a [plaintiff] with a sufficient claim."). CCJEF admits that no parents were members of CCJEF at the time of the original filing. The original complaint does not allege public school students or their parents are members of CCJEF. Thus, CCJEF fails to satisfy the first prong of the Hunt/Worrell test for this separate reason, also.

CONCLUSION

This Court should determine that all plaintiffs lack standing and remand this case to the trial court for dismissal. Alternatively, this Court should determine that the trial court correctly determined that plaintiffs failed to prove their case, and remand this case to the trial court for entry of judgment for the defendants.

Respectfully submitted,

Defendants-Appellants/Cross-Appellees
M. Jodi Rell, et al.

GEORGE JEPSEN
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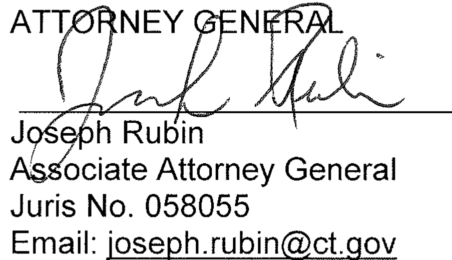

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CERTIFICATION

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2, that on December 12, 2016:

(1) the electronically submitted brief and appendix has been delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address has been provided; and

(2) the electronically submitted brief and appendix and the filed paper brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and

(3) the brief and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; and

(4) the brief complies with all provisions of this rule; and

(5) a copy of the brief and appendix has been sent to each counsel of record and to any trial judge who rendered a decision that is the subject matter of the appeal, in compliance with Section 62-7 at the following addresses:

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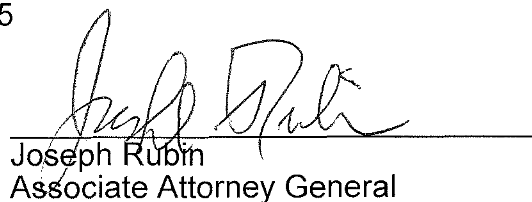

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