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 / CROSS-APPELLANTS

V.

M. JODI RELL, ET AL.
DEFENDANTS-APPELLANTS / CROSS-APPELLEES

REPLY BRIEF OF DEFENDANTS–APPELLANTS/CROSS–APPELLEES WITH SEPARATE APPENDIX

FOR THE DEFENDANTS-APPELLANTS / CROSS-APPELLEES:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

State Statutes

Other Authority

ARGUMENT

I. JUSTICE PALMER'S CONCURRING OPINION ESTABLISHES THE CONTROLLING NARROW STANDARD FOR JUDGING ADEQUACY OF EDUCATIONAL OPPORTUNITIES

As explained in defendants' initial brief, Brief of the Defendants-Appellants, December 12, 2016, (hereinafter "Defendants' brief"), at 7-10, Justice Palmer's concurrence in Connecticut Coalition For Justice In Education Funding, Inc., et al. v. Rell, et al. (CCJEF I), 295 Conn. 240, 320-347 (2010), establishes the legal standard for constitutionally adequate educational opportunity, and that standard is explicitly narrow and limited. Both law and common sense dictate that when there is no majority opinion, the narrowest views that are supported by a majority of a court constitute the holding of the case. Although plaintiffs do not directly dispute this point, they nevertheless rely primarily on the CCJEF I plurality opinion to support their arguments. They try to justify this reliance by arguing that Justice Palmer's opinion, which strongly advocated *judicial restraint and a minimal standard,* instead actually called for the near-opposite – "a searching examination of all the evidence to consider how and to what extent resources encompassed within the various [CCJEF I] categories met . . . . the requirements of a modern educational system . . . ." Brief of the Plaintiffs-Appellees/Cross-Appellants, January 25, 2017 (hereinafter "Plaintiffs' brief") at 8.

The plaintiffs ignore almost everything Justice Palmer said, plainly and directly, about the minimal nature of his standard (*e.g.,* "[U]nless 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 . . . . [T]o 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." CCJEF I, supra, 295 Conn. 343.) Instead, they focus on an excerpt from one footnote – footnote 20 – of his concurrence, to argue that Justice Palmer actually agreed with the plurality about the sweeping nature of the constitutional review required. Plaintiffs' brief at 7-9.

This argument makes no sense. Why did Justice Palmer need to write a detailed concurrence if he essentially agreed with the plurality, and why would he hide the core of his conclusion in a footnote? Further, by quoting only a portion of the footnote, plaintiffs attempt to disguise its true import. Justice Palmer's footnote 20 begins with the observation that "I acknowledge that portions of the plaintiffs' complaint reasonably may be read as asserting a right to a quality of education . . . . that exceeds the parameters of the right as I conceive it." He then goes on to discuss some of the broad allegations of the complaint and says that "[b]ecause this court is bound to construe the plaintiffs' complaint in the manner most favorable to sustaining its legal sufficiency, I cannot say, as a matter of law, that these claims and factual allegations are insufficient to allege a violation of the standard articulated in this opinion." (Citation omitted; internal quotation marks omitted.) CCJEF I, supra, 295 Conn. 346 n.20. In other words, in this footnote, Justice Palmer acknowledges that there is a chance that plaintiffs, under their Complaint, may be able to prove a case that would meet his standard, and not that his standard was actually far broader than he had just said it was.

II. THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT PLAINTIFFS FAILED TO PROVE THEIR CLAIM OF LACK OF ADEQUATE EDUCATIONAL OPPORTUNITIES BY ANY STANDARD OF PROOF

The plaintiffs concede that "the trial court's findings with respect to the quantity and quality of resources provided by Connecticut schools" are factual findings subject to review for clear error only. Plaintiffs' brief at 18. They then embark on an analysis that completely ignores this standard.

As explained in more detail and with citations in Defendants' brief at 29-31, the plurality opinion, Justice Palmer's concurrence, and Justice Zarella's dissent, joined by Justice McLachlan, in CCJEF I all agreed that performance, outcome or achievement measures, such as standardized test scores or graduation rates, were not proper metrics from which one could draw conclusions about the adequacy of educational opportunities. Nevertheless, ignoring this controlling legal determination, plaintiffs begin their factual analysis by describing in some detail their view that "test scores and other measures of student performance are undeniably key indicators of whether the system is fulfilling its constitutional duty to provide an adequate education to all students." They then assert that the trial court erred by failing to "thoroughly analyze" these indicators. Plaintiffs' brief at 22-24. Because it directly contradicts the direction of CCJEF I, as articulated by at least six justices, plaintiffs' analysis of poor test scores and lower graduation rates in some districts, which it claims as an important basis for its assertion that the trial court's factual conclusions were erroneous, is completely off the mark. Further, the plaintiffs must show clear error to obtain reversal of factual determinations, and "failing to thoroughly analyze" test scores is hardly a basis upon which to find clear error. Additionally, the plaintiffs ignore the trial court's findings about positive facts and developments regarding test scores and

graduation rates. *See, e.g.,* Defendants' Appx., A604 (FOF 209), A605-A606 (FOFs 215-216), A656 (FOFs 621-624), A661-A662 (FOFs 672-673), A664 (FOF 705-706), A666 (FOF 725), A674 (FOF 807), A678 (FOFs 843-845, 850) A681 (FOFs 881, 884), A683 (FOF 907), A685 (FOF 928), A688 (FOFs 954-962), A691 (FOF 991), A693 (FOFs 1012, 1014-1015) A694 (FOF 1023-1025), A695 (FOF 1037), A697 (FOFs 1055-1056).

Plaintiffs' second claim of factual error in the trial court decision is that the trial court overlooked evidence that the quality of teachers is lower in some poorer districts than in other districts. This claim is another attempt to treat evidence or factual findings favoring plaintiffs' claims as if they stand in isolation and are somehow inherently superior to the evidence and factual findings that do not support, and in fact, undercut, their factual claims.

Plaintiffs' claim can be readily rejected based upon a review of the trial court's general and extensive factual findings, as outlined in Defendants' brief at 9-11. The court made scores of findings in support of its *factual* conclusions that plaintiffs failed to prove, by any standard of proof, any of their claims that Connecticut fails to offer minimally adequate educational opportunities. Among those *factual* conclusions were that

> Connecticut children have minimally adequate teachers teaching, reasonably up-to-date basic curricula such as reading, writing, mathematics, science and social studies. . . . [I]n 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.

Defendants' Appx., A475-A476. It is important to note that while the court says, "judged as a system, the plaintiffs have plainly not met their burden," the court did not find that the

plaintiffs had met their burden for any individual school, classroom or student, either. The court made no finding that any particular school or classroom failed to offer minimally adequate educational opportunities. The court also found as fact that

> 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. . . . When 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. . . . [T]he very 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.

Defendants' Appx., A476-A477.

Moving from the trial court's broad general conclusions to its specific findings about teacher quality, the plaintiffs cite various findings and documents to support their claims of problems and deficits in hiring and retaining teachers in some districts. Plaintiffs' brief at 23-25. They claim, based on nothing the trial court said, that it failed to take these findings into account in reaching its overall conclusions about the plaintiffs' failure to prove their case. The plaintiffs ignore the court's numerous and extensive findings about teacher quality that undercut their claims. For example, the trial court found

- that 98% of students in high poverty districts are taught by highly qualified teachers, Defendants' Appx., A634 (FOF 456),

- that even the poorest school districts filled at least 91% of their open teaching positions by October 1, a percentage only slightly below the statewide average, Defendants' Appx., A632 (FOF 439),
- that the state offers numerous special programs and incentives to support and encourage teachers to teach in poor school districts and to teach shortage area subjects, Defendants' Appx., A632 (FOF 442),
- that Connecticut pays its teachers very well compared to other states and to other professions within our state, Defendants' Appx., A628-A629 (FOFs 409-412),
- that three of the plaintiffs' six focus districts[1] paid their general education teachers and special education teachers more than the state average for those teachers, Defendants' Appx., A629 (FOFs 413, 415),
- that Bridgeport pays its teachers more than several nearby districts, Defendants' Appx., A629 (FOF 418),
- that only 8% of Bridgeport's teachers resigned last year, Defendants' Appx., A658 (FOF 643),
- that teacher turnover has decreased in Windham, Defendants' Appx., A683 (FOF 904),
- that New Britain pays its teachers four thousand to fifteen thousand dollars more per year than any of its adjacent districts, including

[1] Plaintiffs focused their case on six "focus districts" – Danbury, Bridgeport, New Britain, East Hartford, New London and Windham. Defendants' Appx., A775. See also Defendants' Brief at 6.

Farmington, Newington and Southington, Defendants' Appx., A629 (FOF 414),

- that East Hartford performs well in both teacher retention and teacher pay compared to other Hartford County districts, Defendants' Appx., A634 (FOFs 453-455), A665 (FOF 710), A667 (FOFs 731-732),
- that in 2013 the East Hartford public schools were named one of the best places to work in the state, Defendants' Appx., A664-A665 (FOFs 708),
- that focus district teachers have been receiving regular salary increases, Defendants' Appx., A629-A630 (FOFs 420, 421, 423, 424), A658 (FOF 645), A690 (FOF 987), and
- that Connecticut ranks very favorably nationally in student-teacher and student-staff ratios. Defendants' Appx., A631 (FOF 432), A632 (FOFs 438, 440-441).

In sum, there was a great deal of evidence supporting the view that students, including those in the plaintiffs' focus districts, were being taught by highly qualified and well compensated teachers. To whatever extent plaintiffs claim otherwise, there was more than adequate evidence to support the trial court's conclusion that plaintiffs failed to prove their case in this regard.

Plaintiffs also make broad general comments claiming "a pattern of deficits of key resources" in the "focus districts," again asserting that the trial court ignored the facts it found. Plaintiffs' brief at 23-24. Here, too, the plaintiffs are simply ignoring all of the countervailing facts found by the trial court about additional and effective resources in those

districts. *See, e.g.,* Defendants' Appx., A605 (FOFs 213-214), A656 (FOF 626), A657 (FOFs 628-631, 634), A658 (FOF 637), A659 (FOFs 650-651), A659-A661 (FOFs 654-668), A666 (FOFs 722-724), A667-A668 (FOFs 730-743), A672-A673 (FOF 793), A673-A674 (FOFs 795-810), A675-A676 (FOFs 813-830), A676-A678 (FOFs 832-842), A681-A682 (FOFs 885-891, 894), A682-A684 (FOFs 897-920), A684-A685 (FOFs 923-928), A688-A689 (FOFs 964-967), A689-A690 (FOFs 970-987), A693-A694 (FOFs 1013-1022), A694-A695 (FOFs 1026-1036), A695-A697 (FOFs 1038-1051, 1054).

Next, plaintiffs move on to complain about class sizes in some of the focus districts. They acknowledge but then ignore the trial court's specific fact-finding that research varies and is *inconclusive* as to the impact of class size on student achievement. Plaintiffs' Brief at pp 27-28; Defendants' Appx., A631 (FOF 433). They also ignore the trial court's extensive findings of fact that undercut their claims about class size, including the facts that for 2014-15 for grades K-8, there were only small and inconsistent variations in class size in the focus districts as compared to the state average. Defendants' Appx., A631 (FOF 435). See also Defendants' Appx., A667 (FOF 730 (Class sizes in East Hartford below state average)), A673 (FOF 795 (New Britain class sizes comparable to state average)), A681 (FOF 885 (Windham class sizes comparable to state average)), and A693 (FOF 1017 (Danbury class sizes comparable to state average)). In other words, they once again ignore the trial court's sound basis for finding that they failed to prove their case.

Plaintiffs also cite to various testimony about claims by some witnesses that some schools would have benefited from more specialized teaching or support staff of one type or another. Plaintiffs' brief at 28-30. They ignore the trial court's many findings about the valuable and effective use of programs, often with state funding, to provide interventions to

students in the focus districts, *See, e.g.,* Defendants' Appx., A605 (FOF 213), A651 (FOF 567), A657 (FOFs 629-630), A658 (FOF 637, 646), A659 (FOF 651), A667 (FOFs 733, 735), A667-A668 (FOF 737), A675 (FOF 818-819), A676-A677 (FOFs 823-833), A684, A689 and A695 A677 (FOFs 837-840), A684 (FOF 920), A689 (FOF 966), A695 (FOFs 1039, 1041). See also, *e.g.,* Appendix to Reply Brief of Defendants-Appellants (hereafter "Defendants' Reply Appx., RA"), RA1-RA4 (Plaintiffs' Responses and Objections to Defendants' Third Revised Requests for Admission, March 15, 2016, at ¶¶ 222-230) Similarly, plaintiffs complain about what they claim are inadequate socio-emotional supports in some situations, while ignoring the trial court's numerous positive findings about progress, often with state funding and assistance, for such supports. Defendants' Appx., A605 (FOF 213-214), A656 (FOF 622), A657 (FOF 629), A658 (FOFs 638, 646), A665 (FOF 716), A666 (FOFs 724, 726-728), A667 (FOF 733), A673 (FOF 794), A674 (FOF 811), A682 (FOF 895), A684 (FOF 920), A689 (FOF 967), A690 (FOF 988), A693 (FOF 1018), A695 (FOF 1039). What plaintiffs do not and cannot cite is any finding by the trial court that, because of these claimed deficiencies, any student was not offered or any school failed to provide minimally adequate educational opportunities. In the absence of such findings, the trial court was certainly justified in concluding that plaintiffs failed to prove their case.

Finally plaintiffs suggest that the trial court's key factual conclusions were wrong because the trial court failed to weigh pre-school issues in the way the plaintiffs would have preferred. First and foremost, article eighth, § 1 of our constitution guarantees "free public elementary and secondary schools in the state." Plaintiffs have never claimed, and could not credibly claim that preschool falls within the definition of either "elementary" or

"secondary" schools. At any rate, the trial court made no finding that, because of lack of access to high quality preschool, any student was not offered or any school failed to provide minimally adequate educational opportunities. This is hardly surprising in light of the court's finding that Connecticut ranks third in the country in state per pupil spending for pre-K[indergarten], Defendants' Appx., A545 (FOF 38), and in light of the uncontradicted testimony and evidence from *plaintiffs'* own expert witness, Professor Bruce Baker, that Connecticut has the highest percentage of low income children enrolled in preschool of any state in the country, and also has the highest percentage of non-low-income children enrolled in preschool. Defendants' Reply Appx., RA9 (testimony of Bruce Baker, January 27, 2016, at 128); Defendants' Appx., A1204-A1205 (Defendants' Exhibit 6054 at 26-27).

In sum, the evidence fully supports the trial court's factual determination that plaintiffs failed, by any standard of proof, to show that Connecticut students do not have minimally adequate educational opportunities, and there is no credible basis to assert that the court's determination was clearly erroneous. The mere existence of some facts that support some of the plaintiffs' assertions does not affect that conclusion, particularly when extensive factual findings fully support the trial court's ruling.

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

The trial court made up, from whole cloth, a new constitutional standard requiring that, to provide minimally adequate educational opportunities, key educational policies of its choosing must be "rationally, substantially and verifiably" connected with educational need.

Defendants' Appx., A465. Plaintiffs argue that there must be a constitutional requirement of rationality, Plantiffs' brief at 32-36, but do so by ignoring that the Horton cases and CCJEF I addressed solely the requirement to provide adequate *funding* to meet educational needs. Of even more concern, plaintiffs pretend that the trial court applied an ordinary garden variety standard of constitutional rationality, rather than the entirely new and far stricter standard the trial court actually imagined and then applied.

The trial court did acknowledge that under "traditional equal protection case law" a rational basis is "the lowest standard that could possibly apply" and is only violated when a challenger "negative[s] every conceivable basis which might support it." Defendants' Appx., A462-A463. But then, with little discussion or explanation, it leapt directly to the conclusion that Horton requires that important educational policies, whether related to financing or anything else, must meet its new far stricter standard of "rational, substantial and verifiable" connection to legitimate goals, as determined by that court. Defendants' Appx., A463-A465. The trial court states explicitly that this Court "can't have meant to confine these words ["reasonable" and "rational"] to the minimal equal protection analysis." Defendants' Appx., A464. Aside from a reference to the need to meet undefined "legitimate public expectations," Defendants' Appx. A464, the trial court does not explain where this new hybrid standard comes from or how it was formulated. Beyond a reference to the thoughts of Sir Edward Coke, Plaintiffs' brief at 34, the plaintiffs simply ignore this problem. Their argument reads as if they are defending an ordinary requirement that some government policy being challenged on equal protection grounds must be rational – "the lowest standard that could possibly apply" – rather than "rational, substantial and verifiable," a new

standard that appears to give unlimited power to the trial court to override the policy determinations of the other branches of government. Plaintiffs' brief at 33-36.

The plaintiffs also offer no response to the concern, Defendants' brief at 20-23, that the trial court's standard provides a basis for boundless judicial intrusion into issues of educational policy, with no limiting principle whatsoever. This time, the court ordered broad changes in policy regarding such diverse and controversial issues as mandatory objective graduation standards, teacher pay, teacher evaluation, and which students should be entitled to what special education services. There is no logical reason the court could not have applied the same test to any other educational policy, such as what reading or math curriculum is the most rational, whether calculus or computer coding should be required subjects for graduation, what foreign languages must be taught in what grades, or the required role of music or art in the curriculum. Similarly, a court could apply the same standardless requirement of "rational, substantial and verifiable" connection to education to determine such controversial administrative questions as how much authority the state should exercise over local school districts, which school districts are too small or are performing too poorly to be permitted to continue to exist on their own, what class size should be required in each grade, and how large central office staffs should be. All of these issues encompass important policy questions that have been the subject of public discussion and debate, and that should be decided by the people's elected representatives, authorized by our constitution and statutes to decide them, rather than by a judge.

In fact, even the plaintiffs are clearly unhappy with some of the trial court's uses of its rationality standard. Although the headings of each of their arguments about the trial court's specific applications of its rationality test read as if they support them, their actual

arguments do *not* support the trial court's conclusions regarding the need for tougher teacher evaluations, a different method of setting teacher compensation, and the supposed need to cut back on special education services for some of the most disabled students. Plaintiffs' brief at 49-52. Of course plaintiffs are unwilling to admit they do not support some of the trial court's applications of its rationality standard because that admission would confirm the fact that the trial court's rationality standard is in fact no standard at all, but simply a broad license to dictate policy, and plaintiffs agree with some of the trial court's policy prescriptions but not others.

IV. CONNECTICUT'S EDUCATIONAL FUNDING SYSTEM IS RATIONAL

While Connecticut's system of funding public education is complex and perhaps messy in its application, it is surely rational as that term is applied in the law. The trial court appears to suggest that any funding system is irrational unless it is fully explained and justified by its creator, the legislature, to the court's satisfaction. This view simply has no support in our constitutional jurisprudence.

In particular, the trial court expressed one overall concern about the state's funding system – that the legislature did not always precisely follow the ECS formula. Defendants' Appx., A489-A495. While this is true, it ignores two important points. First, while the state's district by district school funding appropriations for the last three fiscal years do not precisely follow the ECS formula, as last funded by the legislature, they are nevertheless very close to that formula, as it has been modified to the benefit of the poorest-performing districts by the Alliance Districts program. For the current (2016-17) fiscal year, as explained in more detail in Defendants' first brief at 26-27, appropriations vary by no more than a percentage point or two from amounts the formula, at the level funded by the

legislature, would have provided for each district at the overall funding level for each of the years in question.

Second, many of the changes have helped less wealthy and poorer-performing districts, and no changes have been made to the overall advantage of the wealthiest districts. For the two prior years, as shown in Defendants' Reply Appx., RA54-RA57 (Defendants' Exhibit 5682); Defendants' Reply Appx., RA14-RA15 (testimony of Kathleen Demsey, April 1, 2016, at 48:25-49:26), the pattern was similar. In addition to ECS funding, the trial court pointed out that many other programs benefit "poor districts but not wealthier districts . . . . on top of basic education aid that has a history of strongly favoring poor districts over wealthier ones." Defendants' Appx., A477. Alliance District funding and some of the other additional funding for poorer districts are shown, for example on Defendants' Reply Appx., RA59-RA71 (Defendants' Exhibit 6226). See also Defendants' Appx., A658 (FOF 637), A659-A660 (FOFs 654-655), A673 (FOF 799), A675 (FOFs 813, 818), A677 (FOF 837), A681 (FOF 886), A683 (FOF 906), A684 (FOFs 914-915), A688-A689 (FOFs 964-966, 972-973). Moreover, the trial court's conclusion that the state's funding system is irrational is inconsistent with its later finding that the state provides far more funding to the poorest districts than to the wealthiest ones. Defendants' Appx., A477-A478 This fact, along with all of the other facts about funding cited in Defendants' brief at 15, describes a funding approach heavily favoring the neediest districts with state funds – essentially a definition of a rational approach.

Although the trial court's only complaint about the rationality of funding was that the legislature did not always precisely follow the ECS formula, the plaintiffs attempt to go farther. In essence, they argue that the ECS formula is not grounded at every juncture in

well-supported research properly explained by the legislature for the benefit of the court, and that it has never been "fully funded." Plaintiffs' brief at 42-46. This further claim of irrationality has no merit.

First, it is important to note that the trial court made no findings that support this claim, and did not fault the specifics of the ECS formula. Second, the central flaw in plaintiffs' claim is that it flies in the face of one of the trial court's key factual findings – that there is "no direct correlation between merely adding more money to failing districts and getting better results." Defendants' Appx., A488. As noted in Defendants' brief at 2, the court, in making this finding, was relying upon the testimony and report of Professor Michael Podgursky. (Defendants' Appx., A1287-A1317; A860-A895) As the trial court found and as Professor Podgursky explained in more detail, neither Connecticut-specific nor national evidence supports claims of a causal relationship between per pupil spending levels and student achievement. In fact, numerous studies, including detailed statistical analyses of all Connecticut students and school districts, have found *no connection at all* between per pupil spending and growth in student achievement, even accounting for such factors as poverty, minority status and previous school performance. Id. Accordingly, as a matter of fact, there is no objective way to determine the "cost" of any particular sort of adequate education, in light of the lack of a provable relationship between spending and educational results. Thus, it is nonsensical to criticize specific details of the ECS formula on the basis that they are not clearly and explicitly based on scientific facts, when the simple truth is that the facts do not support a claim that it is possible to determine necessary educational costs by any formula at all.

The plaintiffs' claim that there is significance to the fact that the ECS grant has never been "fully funded" is equally insupportable. In 1988, the legislature established a precursor to the current ECS formula, P.A. 88-358, codified in Conn. Gen. Stat. § 10-262(f) *et. seq*. That legislation set a formula for ECS grants for that year and a plan for increased grants in future years. The numbers in that formula, which also were *not* based on any scientific or empirical study, have served ever since as numbers that are reported as constituting what the ECS grant would be if it were "fully funded." In fact, in the years after 1988, the legislature chose not to adhere to those plans or projections, as was its prerogative. The law is plain that no legislature can bind a future legislature, and the legislature is always free to set appropriations as it chooses, Patterson v. Dempsey, 152 Conn. 431, 439 (1965). There is no logical or legal connection between the ECS funding plan created by the legislature in 1988 and the questions before this court – whether current state funding supports minimally adequate and reasonably equitable educational opportunities. Plaintiffs have never offered evidence or claimed that the 1988 plan addressed those questions. As the trial court noted during a discussion about this issue during the trial, "the fact that there's something that uses those words ["fully funded"] and it's defined in statute [and] that [it] isn't getting the money, it does not prove that we're not adequately funding education." Defendants' Reply Appx., RA38 (during testimony of Kathleen Demsey, April 5, 2016, p. 84:13-17). Accordingly, arguments about "full funding" have no logical bearing on any issue in this case.

V. CONNECTICUT'S SCHOOL CONSTRUCTION GRANT FUNDING IS RATIONAL

The basis of plaintiffs' disagreement with Connecticut's school construction grant funding is difficult to ascertain. As the trial court found, there was no evidence of a

statewide failure to provide adequate facilities, and where there were problems, the state is working to fix them, mostly with state funds. Defendants' Appx., A474-A475. The state, especially in poor districts, never turns down a proposed local school district construction project, and then pays most of the bill. Id. As provided by statute, the state reimburses local districts according to a sliding scale based on the districts' equalized net grand list per capita (ENGL), with reimbursements for new construction from 70% for the poorest towns to 10% for the wealthiest, and 80% to 20% for various additions, renovations and roof replacements. Conn. Gen. Stat. § 10-285a(a). For 2013 to 2016, the wealthiest towns received reimbursements of approximately 20%, while all of the focus districts received reimbursements at 62% to 79% rates. Defendants' Reply Appx., RA73 (Defendants' Exhibit 6477). It is impossible to understand either how this approach is not rational or how it harms plaintiffs. Therefore, plaintiffs' arguments about constitutionally inadequate facilities were properly rejected by the trial court.

VI. CONNECTICUT'S GRADUATION AND PROMOTION STANDARDS ARE RATIONAL

Plaintiffs' position on graduation and promotion standards is unclear. While they say "the trial court appropriately held that the state must reasonably define standards for promotion from elementary and high schools," Plaintiffs' brief at 48, they offer no clue as to what they think is wrong with the current standards or what they think appropriate standards would be. As noted in defendants' initial brief, the record is replete with extensive explanations of current graduation and promotion standards and the reasons for them. See citations at Defendants' brief at 28. It is possible for anyone to say they disagree with the standards, but it is incomprehensible how a court could conclude that they are not rational.

VII. CONNECTICUT'S TEACHER COMPENSATION AND TEACHER EVALUATION STANDARDS ARE RATIONAL

Plaintiffs' position, or, more accurately, lack of position, on this question, is telling. Plaintiffs refuse to say whether they agree with the trial court's conclusions that present teacher evaluation and compensation systems are irrational. Plaintiffs' brief at 49-50. This lacuna must be a manifestation of the irreconcilable conflicts under which plaintiff CCJEF labors. If CCJEF's voting membership could agree on a position, then surely they would state it. The fact that they do not do so simply confirms that its member teachers' unions cannot agree with its member school districts and superintendents' organization, for example, about what their position should be. Plaintiffs' unwillingness to state a position on this important issue supports the defendants' repeated arguments that CCJEF is riven by such irresoluble conflicts that it cannot establish standing as a plaintiff in this litigation. See Defendants' brief at 41-44. In addition, plaintiffs' refusal to take a position on this question could be attributed to their recognition that they dare not dispute any of the trial court's findings of irrationality regarding state policies, because to do so would be to confirm that the trial court's standard of rationality is not tied to any ascertainable or defensible standards at all. At any rate, the rationale for the state's teacher compensation and evaluation standards is discussed in Defendants' brief at 31-32. It is sensible and obviously rational within any reasonable constitutional definition of that term.

VIII. CONNECTICUT'S APPROACH TO SPECIAL EDUCATION IS RATIONAL

Plaintiffs contend that the trial court's determination that Connecticut does not have a rational system for funding special education is correct. Plaintiffs' brief at 50-52. They offer absolutely no comment on the trial court's shocking conclusions on the need to

provide far fewer services to some of the most profoundly disabled students, Appx. A526-A532. No doubt this silence is also motivated by their need to avoid any concession that any of the trial court's findings of irrationality in state policies are wrong, because of their legitimate concern that such concessions would highlight the standardless and unlawful nature of the trial court's "rationality" standard.

While ignoring the trial court's views on the most disabled students, plaintiffs maintain the trial court was correct that special education funding by the state is irrational for two other reasons. The first is that the state should do more somehow to "help" districts better identify special education needs. Plaintiffs' brief at 52. In light of the undisputed facts that special education placement and program determinations must be individualized, and resolved between parents and local school districts, Defendants' brief at 34-37, it is impossible to understand how whatever role the state chooses to take or not in the process could be characterized as constitutionally "irrational," as opposed to "not the most preferable policy, in the court's opinion."

Plaintiffs also argue the state should contribute a larger share of the costs of special education, because, in their view, special education costs do not leave local districts with enough money to pay for the needs of their other students. Plaintiffs' brief at 51-52. Obviously, spending on anything competes with spending on other things, but this argument ignores the trial court's factual findings that the plaintiffs failed to prove their claims that the state did not offer minimally adequate educational opportunities. Against that backdrop, the fact that spending on special education is part of the overall matrix of spending obligations and choices for available funds cannot constitute a constitutional violation. At any rate, defendants have explained the rationality of the present special

education system, and the need to comply with controlling federal law, in their initial brief at 31-38 and will not repeat those arguments here.

IX. THE TRIAL COURT'S CONCLUSION THAT THE PLAINTIFFS FAILED TO PROVE THEIR EQUITY CLAIM IS NOT CLEARLY ERRONEOUS UNDER THE APPLICABLE LEGAL STANDARD

In arguing that the trial court was incorrect in its conclusion that they failed to prove Connecticut does not offer equitable educational opportunities, plaintiffs wrongly apply the controlling legal standard and again attempt to use factual data about student outcomes, such as graduation rates and test scores, in a manner that this court has plainly rejected.

In the context of the equity claim, plaintiffs embrace the first half of the first part of the Horton III standard, asserting that funding disparities are more than *de minimis*, but ignore the requirement that the plaintiffs must prove much more than the existence of disparities to satisfy the first prong of the Horton III three part test. Plaintiffs' brief at 55-57. This Court described the first prong as follows:

> First, the plaintiffs must 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*.

(Emphasis added.) Horton v. Meskill (Horton III), 195 Conn. 24, 38 (1985). In other words, the plaintiffs have the burden to prove that non *de minimis* spending disparities actually prevent identified students from receiving minimally adequate educational opportunities. Simply proving disparities, even if they were more than *de minimis*, does not meet this first requirement. As noted in more detail in Defendants' brief at 12-13, the trial court found as fact that students have more than minimally adequate educational opportunities and it did not find that any students lacked such opportunities. Accordingly, even if the trial court was incorrect in concluding that the very heavy weighting of state support to needier districts

was fatal to plaintiffs' claims of inequity, the fact remains that plaintiffs have not, by any reasonable interpretation, met even the first essential requirement of proving inequity under Horton III.

Although the trial court did not find a factual basis to go beyond the first prong of the Horton III test, the plaintiffs go on to claim that they have met not only the first prong, but the other two, as well. Those claims are baseless. In support of their claims of unconstitutional disparities, the plaintiffs again rely upon differences in test scores and graduation rates among different districts, asserting that "outputs . . . . are clear signals of material deficiencies in the educational system," Plaintiffs' brief at 60, even though this Court has directly rejected that argument. As noted above at page 3, six justices of this Court in CCJEF I agreed that outcome measures are *not* a proper measure of whether the state is meeting its constitutional obligations. The plaintiffs also argue that they put on substantial evidence about how more money could help certain districts and students, Plaintiffs' brief at 59, while again ignoring the trial court's finding that there is "no direct correlation between merely adding more money to failing districts and getting better results." Defendants' Appx., A488. Similarly, the plaintiffs repeat their claims about teacher quality in poorer districts, Plaintiffs' brief at 58-59, continuing to ignore all of the compelling factual findings and evidence about overall high teacher quality and working conditions, as noted above at pages 5-7.

The spending differences among districts noted by the plaintiffs in their brief at 55-57 do not satisfy their burden. Plaintiffs' statistics come from 2012-13, which was only the first year of the Alliance District program. Since that year, and through 2015-16, the 30 poorest performing school districts in Connecticut alone have received over $407 million in

additional funding. Defendants' Appx., A545-A546 (FOF 39-42) Further, Plaintiffs have failed to show how much of the variation in spending is attributable to local decisions by local governments. They have also ignored the trial court's finding that in one of the focus districts, Windham, per pupil expenditures "are well above the state average, and have steadily increased since 2011-12." Defendants' Appx., A681 (FOF 883)

The plaintiffs argue that applying a ratio expenditure analysis used at the Horton trial in the 1980s after the Horton II decision (Horton v. Meskill (Horton II), 187 Conn. 187 (1982)), and then discussed by this Court in Horton III, in 1985, supports their claims. Plaintiffs' brief at 56-57. This argument is unavailing. First, to the extent this ratio expenditure analysis was used at the Horton III trial, it must have been based on evidence and testimony that such an analysis was legally meaningful and relevant. There was no such testimony or evidence in the trial of this case, and no findings about these ratios or their significance, if any, and plaintiffs point to none. Relying on no expert testimony or findings, the plaintiffs simply point this Court to PA1265 (Plaintiffs' Exhibit 961), a chart of the Net Current Expenditures per Pupil (NCEP) by district for FY 2013. This chart, and ratios derived from comparing top and bottom towns on this list, do not support plaintiffs' claims.

As noted, FY 2013 was the first year of the Alliance Districts program, which has since, not including the current fiscal year, provided *additional* funding of, at the very least, over $407 million solely for the 30 lowest performing school districts, which include *all* of plaintiffs' "focus districts." Defendants' Appx., A545-A546 (FOF 39-42) None of that recent additional funding is reflected in the cited exhibit. In addition, it is apparent that the 95:5 ratio analysis, comparing the NCEP for a town in the 5th percentile by property wealth with

one in the 95th percentile by property wealth, could not be informative in relation to the evidence in this case. That is because four of the eight towns at the top of the 2012-13 ENGL and all eight of the towns listed at the top of the 2012-13 Net PPE (per pupil expenditure) list are very small towns. Plaintiffs' Appx., PA1271, PA1265 (Plaintiffs' Exhibit 961 at 110, 116). Such small school districts, such as Cornwall (151 students), Roxbury (258 students) and Washington (356 students), require much larger per pupil expenditures simply because they lack economies of scale, but they are obviously not appropriate or useful comparators to places such as Bridgeport (19,872 students) or Danbury (10,300 students). Defendants' Reply Appx., RA50-RA54 (Defendants' Exhibit 3356 at 12-16 (column 1 (on page 12, RA50) shows number of students in each district); RA12-RA13 (testimony Kathleen Demsey, April 1, 2016, at 20:27-21:4). Further, only two of the plaintiffs' six focus districts rank in the lowest eight districts in per pupil expenditures, Plaintiffs' Appx., PA165 (Plantiffs' Exhibit 961), even when using these figures which predate most of the infusion of additional Alliance District Funding to the focus districts. Accordingly, comparisons of the 5th and 95th percentile towns are meaningless in relationship to the issues plaintiffs presented in this case.

Plaintiffs ignore another large flaw in their analysis of NCEP figures for different school districts – the undisputed fact that the figures are substantially inaccurate, particularly concerning some larger school systems, including Bridgeport and New Britain. The formula used to compute the figures does not accurately reflect the effects of magnet schools and the funding for those schools. These inaccuracies portray the NCEP figures for systems such as Bridgeport and New Britain as lower than they actually are. Defendants' Reply Appx., RA72 (Defendants' Exhibit 6306); RA16-RA34 (testimony of

Kathleen Demsey, April 1, 2016, at 118:16-119, 140:25-27, 148:5-153, 155:20-156:20) New Britain, for example, received per student ECS funding for 11,061.5 students, even though 1348 of those students were being educated in out-of-district magnet schools for which New Britain was not, except for some special education and possibly transportation costs, financially responsible. In other words, 12% of the students for whom New Britain received ECS funds were not generally attending schools funded by New Britain, but these students were still counted as New Britain students in calculating New Britain's NCEP. Defendants' Reply Appx., RA72 (Defendants' Exhibit 6306); RA26-RA31 (testimony of Kathleen Demsey, April 1, 2016, at 148-153) Were these "phantom" students not counted, New Britain's NCEP would have been significantly higher. As demonstrated in Defendants' Exhibit 6306 (Defendants' Reply Appx., RA72) and in the testimony of Ms. Demsey (Defendants' Reply Appx., RA18-RA35 (April 1, 2016, at 140-157)), there were similar issues with other focus districts.

In sum, there is no reason to believe the trial court overlooked or improperly failed to consider additional evidence about claimed disparities in education spending, and to factor that evidence into its Horton III analysis. The facts regarding the existence, nature and extent of and, reasons for, disparities in education spending were all strongly contested at trial. The trial court was not required to adopt the factual view of the plaintiffs on these issues.

Finally, although plaintiffs are not satisfied that the state is spending up to nine times more in the poorest and neediest districts than it is in the wealthiest, they would still find fault even if per pupil expenditures were exactly the same in every district. Their position has always been that some districts require not merely equal funding, but more per pupil

funding than others, because of the needs of their students. Of course the trial court, as a matter of fact, rejected the claim that more money necessarily leads to better student outcomes. Defendants' Appx., A488. At any rate, plaintiffs claim that equity requires that some students receive substantially more funding from all sources in total than others do. The trial court did not find facts to support this claim, and the claim fails under any workable constitutional standard.

The state already provides far more funds to poorer districts, and this Court has said that per pupil spending need not be the same in every district. Horton v. Meskill (Horton I), 172 Conn. 615, 652 (1977) ("None of the . . . . plans to equalize the ability of various towns to finance education requires that all towns spend the same amount for the education of each pupil. The very uncertainty of the extent of the nexus between dollar input and quality of educational opportunity requires allowance for variances . . . ."). Similarly, in Horton III, this Court, after noting with approval that the state's share of local education costs had increased from 29.8% to 42.9% from 1978 to 1984, explained that "[i]t was therefore reasonable for the trial court to conclude the remaining disparities did not undermine the basic policy of equalizing state support for education." Horton III, supra, 195 Conn. 40. By comparison, by FY 2013, even before most of the new Alliance District funding was in place, for the 10% of school districts with the highest proportion of free and reduced price lunch students (i.e., poor students), the state paid, on average, roughly 90% of education costs, and the local districts contributed under 10%, Defendants' Appx., A1135-A1136 (Defendants' Exhibit 2434, Chart 9), Defendants' Reply Appx., RA41-RA47 (testimony of Michael Wolkoff, April 14, 2016, at 51-57), a very strong indication of the powerful effect of current funding in focusing aid on the poorest districts. Similarly, for the poorest 10% of

school districts in terms of district property value per capita, the state paid over 60% of education costs, and the local districts contributed under 30% (with federal funds adding the balance). Defendants' Appx., A1144-A1145 (Defendants' Exhibit 2434, Chart 17); Defendants' Reply Appx., RA48 (testimony of Michael Wolkoff, April 14, 2016, at 60)

Indeed, if NCEP, accurately calculated, were required to be the same everywhere, plaintiffs would still see that as inadequate support for some towns, while towns would lose a key element of their incentive to support their local schools. If this Court determines that our constitution requires it to evaluate the funding of every district in the state to determine whether it is equitable considering the particular needs of the students in that district, regardless of whether funding and opportunities are minimally adequate, then this Court will effectively arrogate to itself the right to determine every aspect of spending on education. That spending is, of course, one of the most central factors of education policy, a factor that the courts are neither equipped nor empowered to determine.

X. ALL PLAINTIFFS LACK STANDING

As noted in defendants' initial brief, one of the reasons plaintiffs lack standing is that CCJEF's claims require the individual participation of its members to establish its claims, because "[e]very student, school and school district is different." Defendants' brief at 40. In their standing argument, plaintiffs argue that "individual participation of CCJEF's members is not necessary to prove CCJEF's claim that the entire public education system in Connecticut is unconstitutional and inadequate . . . . [as] CCJEF's claims rise and fall with the condition of the education system, not the attributes of individual students." Plaintiffs' brief at 69. Defendants will not repeat here the reasons, explained previously, that this standing argument is insupportable. Defendants' brief at 40-41. Plaintiffs' standing

argument is completely inconsistent with their earlier argument in that same brief that "[t]he specific educational resources that are required will vary depending on the particular student needs within a classroom, school or district." Plaintiffs' brief at 21. This latter claim is obviously true, and illustrates why plaintiffs lack standing. They never, in the entire trial, offered any evidence, nor are there any findings, as to the claimed inadequacy of educational resources available to any identified child in any school in any district. No plaintiff has standing to complain of theoretical inadequacies in the system in the absence of any evidence of harm to any specific child in any specific way.

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,

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CERTIFICATION

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2, that on March 1, 2017:

(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 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

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(5) A copy of the brief and appendix has been sent electronically 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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