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A PROFESSIONAL CORPORATION

EDWARD J. DAUBER

November 14, 2016

VIA HAND DELIVERY

Supreme Court of New Jersey
Office of the Clerk
Richard Hughes Justice Complex
25 West Market Street
Trenton, New Jersey 08625-0970

Re: Raymond Arthur Abbott, et al. v. Fred G. Burke, et al.
Docket No. 078257

Dear Sir/Madam:

Please be advised this firm, together with the Attorney General of New Jersey, Christopher S. Porrino, represents defendants. Enclosed please find an original and nine (9) copies of the following:

1. The Commissioner's Brief in Opposition to Movants-Intervenors' Motion to Intervene;

2. Certification of Service; and

3. Copies of unreported decisions cited by defendants: City of Jersey City v. Liberty Storage, LLC, 211 N.J. Super. Unpub. LEXIS 134 (App. Div. Jan. 20, 2011) and Conn. Coalition for Justice in Educ., Inc. v. Rell, 2016 Conn. Super. LEXIS 2183 (Sup. Ct. Sept. 7, 2016).

Kindly file the same, and forward a filed copy to the undersigned in the enclosed envelope. **As this office represents the defendants in their capacity as a State agency, there is no filing fee charged to us.**

Thank you for your courtesies.

Very truly yours,

Edward J. Dauber /MP

EJD:mn
Encls.

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Attorneys for Defendants

RAYMOND ARTHUR ABBOTT, et al., Plaintiffs, v. FRED G. BURKE, et al., Defendants.	SUPREME COURT OF NEW JERSEY Docket No. 078257 Civil Action **CERTIFICATION OF SERVICE**

Michelle Simoes, of full age, hereby certifies and says:

1. I am a legal assistant with the law firm of Greenberg Dauber Epstein & Tucker, P.C., attorneys for Defendants.

2. On November 14, 2016, I caused to be filed an original and nine copies of the following papers with the New Jersey Supreme Court Clerk, via hand delivery: (1) The Commissioner's Brief in Opposition to Movants-

Intervenors' Motion to Intervene, and (2) Certificate of Service.

3. Also on this date, I caused to be served, via hand delivery, two copies of the foregoing papers upon the following:

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I certify that the foregoing statements made by me are true. I am aware that if the foregoing statements made by me are willfully false, I am subject to punishment.

Michelle Simoes

Michelle Simoes

Dated: November 14, 2016

RAYMOND ARTHUR ABBOTT, et al., Plaintiffs, v. FRED G. BURKE, et al., Defendants.	SUPREME COURT OF NEW JERSEY Docket No. 078257 Civil Action

THE COMMISSIONER'S BRIEF IN OPPOSITION TO MOTION TO INTERVENE

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PRELIMINARY STATEMENT

The Commissioner of the Department of Education ("Commissioner") submits this brief in opposition to the motion to intervene by six parents on behalf of 11 Newark public school children. While the Commissioner agrees with the Movants that the current LIFO Statute may impede the ability of children in Newark to receive the constitutionally mandated thorough and efficient education, intervention in Abbott v. Burke is neither procedurally nor substantively appropriate.

Pending before this Court is the Commissioner's motion to modify this Court's Orders in Abbott XX and Abbott XXI based on the overwhelming evidence presented which demonstrates that the tens of thousands of children in the 31 School Development Authority Districts ("SDA Districts," formerly known as "Abbott Districts") are not receiving a thorough and efficient public education as guaranteed by the State Constitution. The Court addressed the past constitutional deficiencies with orders focused primarily on substantially increasing the state levels of funding so that nearly $100 billion of state aid has been spent in the SDA Districts over the last 30 years. Nonetheless, the constitutional deficiencies remain, demonstrating that the solution requires more than increased funding. Rather, the abundant evidence presented in the Commissioner's motion (including Certifications from two nationally recognized

experts) shows that without substantive reform addressing the systemic roadblocks, the constitutional deprivations will persist. In the past, this Court directed certain programmatic remedies -- such as maximum class size, early childhood education and reading programs -- but more is clearly needed to properly rectify the constitutional deficiencies.

Therefore, in her pending application, the Commissioner seeks confirmation of her discretion to waive, where necessary, certain statutory and contractual restrictions that have been shown to impede attainment of the constitutional imperative. These restrictions include provisions of the Tenure Act, including the so-called last-in, first-out ("LIFO") requirement in the event of a reduction in force ("RIF"), as well as certain provisions in Collective Negotiation Agreements ("CNA") between school districts and teachers, all of which improperly limit the districts' abilities to maximize their students' exposure to and interactions with quality teachers, which is the most important factor to improve education in the SDA Districts.

In the motion to intervene, the Proposed Intervenors focus exclusively on one of the impediments cited in the Commissioner's application, the LIFO requirement. In fact, the Commissioner had argued in the pending motion that the LIFO requirement may impede a thorough and efficient education because: (1) where an SDA District suffers from a declining

student population and commensurate likelihood of potential RIFs, it is unable to attract talented new teachers who know that they will be the first let go in the event of the potential RIF; and (2) more effective but less senior tenured teachers will be released upon a RIF, in favor of retaining less effective teachers with more seniority. The cumulative effect of both factors, as a result of LIFO, is that SDA Districts are disproportionately populated by less effective teachers.

The Proposed Intervenors agree with the Commissioner that students are not receiving a thorough and efficient education, that hiring and retaining quality teachers is paramount, that the LIFO requirement may impede the providing of a thorough and efficient education, and that the Court must address the LIFO issue if students are to receive a thorough and efficient education. The proposal to intervene, however, is inconsistent with the need for expeditious action to prevent another generation of students from failing to receive the quality education they deserve.

Further, there is a key and dispositive difference between the Commissioner's position and the Proposed Intervenors' position with respect to the LIFO requirement. As set forth in the Commissioner's November 10, 2016 brief, the Court has jurisdiction over the Commissioner's motion because, among other reasons, the motion seeks to modify the Court's prior Abbott

Orders, which are limited to the SDA Districts. This Court has repeatedly acknowledged that the Commissioner has special expertise in educational matters and her judgment should be given deference. See, e.g., Abbott v. Burke, 100 N.J. 269, 393 (1985) ("Abbott I") (recognizing Commissioner's "plenary authority"); Abbott v. Burke, 149 N.J. 145, 224 (1997) ("Abbott IV") (Commissioner to "manage, control, and supervise the implementation of … funding to assure it will be expended and applied effectively and efficiently to further the students' ability to achieve"); Abbott v. Burke, 153 N.J. 480, 527 (1997) ("Abbott V") (accepting the Commissioner's "whole school reform" proposals based on the testimony of the Commissioner and other educational experts). Consequently, the Commissioner seeks confirmation that because of her expertise, she may use her discretion to target the specific impediments to fulfilling the constitutional mandate in the SDA Districts.

By contrast, the Proposed Intervenors seek a broad declaration that the LIFO requirement is unconstitutional in Newark and in all as-yet-undefined "similarly situated districts." This Court lacks the requisite jurisdiction, in the first instance, to address the Proposed Intervenor's issues or grant their requested relief. The Abbott orders pertain exclusively to the SDA Districts and in the Abbott decisions,

this Court consistently resisted the requests to apply its rulings outside of the 31 SDA Districts.

While the Commissioner appreciates the voice of the Proposed Intervenors that echoes hers, there is no reason for this Court to permit intervention at this time because these additional parties are unnecessary and do not purport to bring any new information or unique perspective to this matter. Rather, the factual positions taken appear to mirror those already advanced by the State. Ironically, as a technical matter, the Proposed Intervenors are already among the current plaintiffs who purport to represent their interests. Nothing has been provided to suggest that the Proposed Intervenors' interests are not adequately represented by the current parties. If the Proposed Intervenors ultimately believe they have a unique and heretofore unasserted position to offer this Court, they can always seek leave to file an amicus brief, but there is no basis to warrant their inclusion as a party in this matter.

FACTUAL BACKGROUND

The Commissioner provided substantial evidence in support of her pending motion, including the certifications of Eric Hanushek, Ph.D., an expert and Senior Research Fellow at Stanford University's Hoover Institute, and Katharine Strunk, Ph.D., another national expert and Associate Professor of Education and Policy at the University of Southern California,

Rossier School of Education. Also submitted was the Certification of Kimberly Harrington, the acting Commissioner of the Department of Education, and the Certification of David Hespe, the former Commissioner of the Department of Education. From this and other evidence, the Commissioner established that the difference in performance levels between the SDA Districts and non-SDA Districts has not materially changed since the commencement of the Abbott litigation in 1984. There continues to be a significant achievement gap between the State's best and worst performing schools, and the SDA Districts still suffer the negative impact of that disparity. The evidence demonstrates that the most important factor in providing a quality education is the quality of the teaching staff, so that the best way to improve student performance requires specific programmatic changes to put more students in contact with more great teachers.

Critical among these necessary changes is eliminating the LIFO requirement in the Tenure Act, when that requirement is shown to be an impediment in an SDA District. The Commissioner, therefore, has sought from this Court confirmation of her discretion to remove this and other impediments on a case by case basis to enable the SDA Districts to attract and maintain the highest quality teaching staff and to increase the students' interactions with such staff.

The Proposed Intervenors agree with this evidence, and set forth similar evidence of their own focused on the Newark school district. For instance, the Proposed Intervenors allege that Newark students did not meet the grade level expectations in language arts and math, and that graduation rates within Newark are well below the state average. They further point out that the LIFO statute focuses on seniority to the exclusion of other factors including quality, that Newark has an excessive number of teachers with ineffective or partially effective teacher ratings and that putting students together with effective teachers is the key to improving student performance. See Proposed Intervenors' Brief ("Ib") at 4-8.

While these deficiencies exist in Newark, they likewise exist in other SDA Districts. These and other deficiencies are precisely why the Commissioner filed the pending motion for relief and asked to have this Court promptly confirm her discretion to determine whether these impediments are resulting in a deprivation of the students' rights to a constitutionally guaranteed thorough and efficient system of education.

In their application, however, the Proposed Intervenors mischaracterize the financial aspect of the Commissioner's motion by suggesting that the Commissioner is part of an "effort … to cut funding to SDA districts" and that Newark might lose 69% of its state-aid. Ib15. In actuality, the Commissioner

recognizes the importance of state funding and asked this Court, not to cut current funding, but to maintain the status quo on funding to provide the requested equitable relief an opportunity to work. See September 15, 2016 Brief of the Commissioner, at 93-94; Commissioner's Proposed Order, at ¶3. In FY2017, for instance, the State is providing over $5 billion in funding to the thirty-one SDA Districts, which enables them to spend, on average, $2,000 more per pupil than non-SDA Districts. Certification of Kevin Dehmer at Exhibits A and D.

ARGUMENT

I. THE PROPOSED INTERVENORS HAVE NOT ESTABLISHED THE ELEMENTS TO OBTAIN INTERVENTION AS OF RIGHT

Pursuant to R. 4:33-1, there are four criteria for determining intervention as of right:

> The applicant must (1) claim "an interest relating to the property or transaction which is the subject of the transaction," (2) show he is "so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest," (3) demonstrate that the "applicant's interest" is not "adequately represented by existing parties," and (4) make a "timely" application to intervene.

Chesterbrooke Ltd. Partnership v. Planning Bd., 237 N.J. Super. 118, 124 (App. Div.), certif. denied, 118 N.J. 234 (1989).

> We have construed this rule liberally and stated that "[t]he test is whether the granting of the motion will unduly delay or prejudice the rights of the original

> parties." Atlantic Employers Ins. Co. v. Tots & Toddlers Pre-School Day Care Ctr., 239 N.J. Super. 276, 280, 571 A.2d 300 (App. Div.), certif. denied, 122 N.J. 147, 584 A.2d 218 (1990). As the rule is not discretionary, a court must approve an application for intervention as of right if the four criteria are satisfied. Chesterbrooke, supra, 237 N.J. Super. at 124, 567 A.2d 221.

Meehan v. K.D. Partners, L.P., 317 N.J. Super. 563, 567 (App. Div. 1998).

The Proposed Intervenors cannot establish the elements to warrant intervention as of right. First, the proposed intervenors do not claim an interest in any specific property or transaction. Indeed, there is no property or transaction in the Abbott v. Burke litigation in which they could have an interest. Instead, the Proposed-Intervenors argue that they "have an interest in the LIFO issue" raised in the Commissioner's pending motion. Ib17. But being interested in an argument or position advanced by a party in a pending litigation does not justify or entitle that party to intervene in the litigation. The Movants fail to cite any decision that supports such a novel argument.

Second, the Proposed Intervenors cannot establish that the disposition of this action would as a practical matter impair or impede them from protecting their own interests. The Proposed Intervenors argue that this Court's resolution of the Commissioner's motion "could also foreclose all other litigation

challenging the LIFO Statute" without consideration of how the LIFO Statute has negatively affected them. Ib18. That argument, however, lacks merit because, as set forth supra, the Commissioner provided substantial evidence in her pending motion that demonstrated the negative impact that the LIFO requirement, as well as other statutory and contractual impediments, has on student achievement. In other words, the Commissioner has already set forth the position that the Proposed Intervenors desire to articulate. Because their position has already been, and will continue to be, advanced by the Commissioner, the Proposed Intervenors cannot establish that their interests would be impaired or impeded if they are denied the opportunity to intervene.

Third, the Proposed Intervenors have not demonstrated - because they cannot demonstrate - that their interests are not adequately represented by the current parties. The Proposed Intervenors initially suggest that the Commissioner does not adequately represent their interests because they now seek a broader and more expansive remedy than is being sought by the Commissioner. However, the Proposed Intervenors agree with the Commissioner that the SDA students are not receiving the proper education, that more student contact with quality teachers is needed, and that the LIFO requirement may be an impediment to improving student performance. Given this agreement on the key

issues, the Commissioner will adequately represent the interests of the Proposed Intervenors. That the Proposed Intervenors seek a different remedy does not establish that their interests are not adequately represented. "[I]ntervention as of right is not triggered merely because the parties do not see eye-to-eye on every aspect of the litigation. Rather, Rule 4:33-1 requires intervention, assuming the other criteria are met, only if the movant's interest is not 'adequately represented by the parties.'" City of Asbury Park v. Asbury Park Towers, 388 N.J. Super. 1, 11 (App. Div. 2006). Indeed, given the presumption of constitutionality for statutes, see Commissioner's September 15, 2016 Brief, at 79-80, and the deference due the Commissioner for her expertise, it is far more likely that the Commissioner's remedy will be ordered by this Court than the broader relief sought by the Proposed Intervenors.

Next, the Proposed Intervenors argue that the Commissioner cannot represent their interests because, in the past, the State "exercised its discretion in ways that disadvantaged districts like Newark." Ib20. This unfounded speculation should be rejected. See City of Asbury Park, supra, 388 N.J. Super. at 11. ("Asbury Partners has provided no factual basis to support its speculative and conclusory assertion that the City might not seek to acquire the subject parcel at the best price obtainable…"). As a threshold matter, it cannot be overlooked

that it was the Commissioner who initiated the pending motion and provided the evidence of these impediments and sought an order confirming her right to waive the cited impediments.

The Proposed Intervenors agree with all of the Commissioner's positions, and there is no basis for suggesting any lack of motivation by the Commissioner to serve and to represent their interests diligently. See City of Asbury Park, supra, 388 N.J. Super. at 11 ("We also presume that a public entity of this State will act diligently, responsibly and honorably.")

Finally, the Proposed Intervenors argue that their interests are not represented by the existing plaintiffs "because they are uniquely situated because their children are directly and disproportionately affected by the application of the LIFO Statute in Newark." Ib20. The Proposed Intervenors are not unique, but are among the existing plaintiffs in Abbott v. Burke, all public school students in the 31 SDA Districts, including Newark. See, e.g., Abbott II, supra, 119 N.J. at 342-44, and n.18 and 19; Abbott XXI, supra, 206 N.J. at 472 n.2 (listing Newark as a former "Abbott" district); Harrington Cert., at ¶3. Similarly, the factual arguments that the Proposed Intervenors have plead in their Superior Court complaint mirrors the evidence previously submitted by the Commissioner.

In sum, the Proposed Intervenors cannot establish this element because the Commissioner made the same arguments with respect to the LIFO Statute that the Proposed Intervenors seek to articulate separately and on their own. See Builders League of South Jersey, Inc. v. Gloucester Co. Utilities Auth., 386 N.J. Super. 462, 469 (App. Div. 2006) (denying intervention where the intervenor failed to establish that its interest is not adequately represented by the existing parties where its position was the same as that of an existing party). Because the Proposed Intervenors presented no facts to substantiate their contention that the Commissioner cannot adequately represent their interests, their motion to intervene as of right should be denied. See City of Asbury Park, supra, 388 N.J. Super. at 11 ("In the absence of a clear showing, by specifically articulated facts, of conduct by the public entity that palpably evinces a derogation of its fiduciary responsibilities, there is no basis upon which to conclude that the interest of the [proposed intervenor] is not adequately represented in these valuation proceedings. No such showing has been made here.")

II. THE PROPOSED INTERVENORS HAVE NOT ESTABLISHED THEIR ENTITLEMENT TO PERMISSIVE INTERVENTION

Where intervention of right is not allowed, a party may obtain permissive intervention under R. 4:33-2:

> Upon timely application anyone may be permitted to intervene in an action if his claim or defense and the main action have a question of law and fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties….
> "The test is 'whether the granting of the motion will unduly delay or prejudice the rights of the original parties.'" Looman Realty Corp. v. Broad St. Nat. Bk. of Trenton, 74 N.J. Super. 71, 78, 180 A.2d 524 (App. Div.), cert. den., 37 N.J. 520, 181 A.2d 782 (1962). …

Atlantic Employers Ins. Co. v. Tots & Toddlers Pre-School Day Care Ctr. Inc., 239 N.J. Super. 276, 279-80 (App. Div. 1990).

Permissive intervention is not warranted here because the claims and arguments of the Proposed Intervenors would complicate the current litigation and would cause substantial delay, further prejudicing the rights of the tens of thousands of children in the SDA Districts for years.

In addition to the arguments set forth in Point I, supra, the Proposed Intervenors would complicate the current matter because their claims go well beyond the issues presented in the Commissioner's pending motion and they are admittedly pursuing different and broader goals. See Ib23 ("Movants-Intervenors

have already filed a Complaint at the trial court level, seeking a broader ruling than the State does here.") The Proposed Intervenors ignore the other possible constitutional impediments raised by the Commissioner other than LIFO, and with respect to the LIFO requirement, they seek an Order invalidating it and enjoining its enforcement, not only in Newark but in all "similarly situated" school districts throughout New Jersey. The Proposed Intervenors have also asserted equal protection, due process and civil rights claims, and sought recovery of their attorneys' fees for their claims, all of which necessitate far-reaching and legally complex questions that are unnecessary to the essence of the Commissioner's motion, the violation of the education clause. Given these differences, permissive intervention should not be allowed. See Allan-Deane Corp. v. Bedminster, 121 N.J. Super. 288, 293 (App. Div. 1972) (affirming the denial of motion to intervene because intervenors sought to inject "broad challenges" to the zoning polices at issue, which would complicate and delay the existing litigation); City of Jersey City v. Liberty Storage, LLC, 2011 N.J. Super. Unpub. LEXIS 134, *9-10 (App. Div. January 20, 2011) ("Undoubtedly, Impact's intervention would delay the condemnation proceeding because it would require litigating the factual complexities of Liberty's relationship with Impact. In short, those issues have nothing to do with adjudicating the fair market value of the

property as determined by the procedures set forth in the EDA. Moreover, if Impact was permitted to intervene, the extent of its participation in the condemnation action is subject to some speculation and assuredly would interfere with the trial court's ability to control the limited issues presented by the condemnation appeal.").

Furthermore, Proposed Intervenors seek to establish an evidentiary record in the Superior Court proceeding that they just commenced. Ib23. Presumably, they seek to stay action on our motion in order to create a record on their complaint in the Superior Court. Not only is this approach unnecessary in light of the absence of material factual disputes in our respective positions, but it would inevitably result in years of further delay, harming the school children that we are all seeking to help. Indeed, the Proposed Intervenors are not unlike the plaintiffs in Connecticut Coalition for Justice in Educ. Funding, Inc. v. Rell, 2016 Conn. Super. LEXIS 2183 (Conn. Super. Ct. Sept. 7, 2016), who likewise pursued civil rights claims, only to end up languishing for six years before the trial court after remand by the Connecticut Supreme Court. See Connecticut Coalition for Justice in Educ. Funding Inc. v. Rell, 295 Conn. 240, 320 (2010) (remanding). Such a result here would be particularly disheartening, given that there is no real dispute as to the existence and persistence of the achievement

gap in the SDA Districts, that LIFO is a contributing cause of that achievement gap, and a means to rectify it.

As set forth in her November 10, 2016 brief, the evidence presented on the Commissioner's application is overwhelming and more than sufficient to substantiate this Court's modification of the prior Abbott orders. Indeed, the Proposed Intervenors have agreed with the Commissioner that Newark's students have underachieved compared to their peers, that quality teachers are the key to increasing student achievement, that the LIFO requirement may be an impediment to student success in order to provide a thorough and efficient education to Newark's students. Complicating the Commissioner's motion by adding the Proposed Intervenors to this proceeding, or ordering a hearing on undisputed facts, will only delay the needed remedy and further set back the children we all are attempting to help.

Even if this Court does conclude that it needs a more detailed record, the most appropriate method would be for the Court to appoint a Special Master dedicated to this matter, as it has done in connection with prior Abbott orders, which would be the best means for gathering any needed evidence and, most important, for doing so in a prompt and expeditious manner.

CONCLUSION

For the foregoing reasons, the motion to intervene should be denied.

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Attorneys for Defendants

Dated: November 14, 2016

DECISIONS

No *Shepard's* Signal™
As of: November 4, 2016 1:33 PM EDT

City of Jersey City v. Liberty Storage, LLC

Superior Court of New Jersey, Appellate Division

December 14, 2010, Argued; January 20, 2011, Decided

DOCKET NO. A-4111-09T2

Reporter
2011 N.J. Super. Unpub. LEXIS 134; 2011 WL 166285

CITY OF JERSEY CITY, a Municipal Corporation of the State of New Jersey, Plaintiff, v. LIBERTY STORAGE, LLC, a New Jersey Limited Liability Company, Defendant-Respondent, and STERLING CAPITAL, LLC, a New Jersey Limited Liability Company, METRO REALTY CORP., a New Jersey Corporation, NVE BANK, LAKELAND BANK, GORTEX CAPITAL, LLC, a New Jersey Limited Liability Company, PRIVATE CAPITAL SERVICES, LLC a New Jersey Limited Liability Company, G.X.R. AUTO BODY CORP., a New Jersey Corporation, GREENBERG PROPERTY, LLC, a New Jersey Limited Liability Company, ARNOLD G. SHURKIN; NACIREMA ENVIRONMENTAL SERVICES COMPANY, INC., CBS OUTDOOR, INC., a Delaware Corporation, STATE OF NEW JERSEY, JERSEY CITY MUNICIPAL UTILITIES AUTHORITY, a Body Corporate and Politic of the State of New Jersey and JOHNSON ELECTRIC, INC., a New Jersey Corporation, Defendants. IMPACT REALTY ASSOCIATES, INC., Appellant.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-5422-09.

Core Terms

condemnation action, intervene, certification, parties, motion to intervene, condemnation

Counsel: Jaime R. Placek argued the cause for appellant (Kaufman, Bern, Deutsch, Leibman, LLP, attorneys; Dennis S. Deutsch and Mr. Placek, on the brief).

Thomas Olson argued the cause for respondent Liberty Storage, LLC (McKirdy & Riskin, PA, attorneys; Mr. Olson, John H. Buonocore, Jr., and Cory K. Kestner, on the brief).

Judges: Before Judges Graves and Messano.

Opinion

PER CURIAM

Impact Realty (Impact) appeals from the denial of its motion to intervene in a condemnation action brought by the City of Jersey City (the City) against numerous defendants, including Liberty Storage LLC and Sterling Capital LLC (collectively, Liberty). [1] Impact contends that it satisfied the requirements of *Rule* 4:33-1 (Intervention as of Right), or, alternatively, that the Law Division judge mistakenly exercised his discretion pursuant to *Rule* 4:33-2 (Permissive Intervention) by denying its motion. We have considered the arguments raised in light of the record and applicable legal standards. We affirm.

For purposes of this appeal, we accept the allegations contained in the certifications supporting Impact's motion to intervene and the pleading that accompanied it. Impact is a licensed real estate broker; Liberty owns certain property in Jersey City designated as Block 1510, Lots 0000X, 0000Y, and 00029 (the property). [2] Impact and Liberty entered into an "Open Listing Realty Agreement" (the agreement) in September 2008. [3] Pursuant to its terms, Liberty agreed to pay Impact 5% of "the sale price should [Impact] find a purchaser ready, willing and able to pay for the property or such other

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[1] The exact relationship between Liberty LLC and Sterling Capital LLC is undisclosed by the record; however, the parties refer to themselves [*2] as a single entity and we shall do the same throughout this opinion.

[2] The property is also known as 13-15 East Linden Avenue, Block 1510, Lots X1, Y and 29, and Block 1505.5, Lot D1.

[3] The agreement was executed by Impact and Liberty LLC only.

sum as may be accepted by" Liberty. The agreement specifically provided that Impact was authorized "to submit and pursue the interests of [the City] to consider purchasing the . . . property," and it also contained a non-exclusivity clause that permitted Liberty to find its own purchaser and list the property with other brokers.

In his certification supporting the [*3] motion to intervene, Robert Pimienta, Impact's president, alleged that Liberty knew his company "had a working business relationship with [the City]," and that Impact "secured [the City] as a ready, willing purchaser able to pay for the property." Pimienta further alleged that Impact "work[ed] vigorously" to obtain environmental information and "to resolve other issues in order to consummate a deal between" Liberty and the City.

In December 2008, the City's outside counsel advised Liberty of the municipality's "consideration [of the property] for acquisition" under the Eminent Domain Act (the EDA), *N.J.S.A.* 20:3-1 to -50. Pimienta objected to Liberty's "scheme to attempt to avoid paying Impact its commission on the transaction." However, apparently in April 2009, Liberty offered to sell the property to the City for $24,125,000. Attached to Impact's counsel's certification was a letter from Liberty's attorney to the City's corporation counsel setting forth the purchase price and additional terms.

Pimienta further alleged that Impact demanded its commission but Liberty refused to pay. The motion to intervene was accompanied by a proposed pleading in which Impact asserted claims of breach [*4] of contract, breach of the covenant of good faith and fair dealing, quantum meruit, unjust enrichment, and fraud against Liberty.

It suffices to say that Liberty's opposing certification took issue with Pimienta's characterization of the facts. Liberty noted that "[d]espite . . . extended negotiations, [the City] would not agree to [its] terms of sale." We note that there were indeed significant details that the parties attempted to negotiate other than the purchase price, including the costs of environmental remediation, satisfaction of existing mortgages and relocation costs, among other things. In his reply certification, Pimienta emphasized his active involvement in negotiating these issues, and Liberty's attempts to reduce any commission due to Impact throughout the negotiations.

On October 30, 2009, the City filed a declaration of taking for the property alleging that "just compensation" based upon appraisals was $19,167,000. [4] *See N.J.S.A.* 20:3-17. On January 5, 2010, the Law Division judge entered an order vesting the City with title to the property pursuant to the EDA effective January 31, 2010.

On April 30, 2010, the judge denied Impact's motion to intervene. As stated in his hand-written notes on the order, the judge determined:

> Impact . . . seeks to recover a real estate commission from the defendant Liberty[/Sterling]. Such a claim is not germane to the condemnation action and can/should be brought in a separate complaint alleging this discrete cause of action. This *is not* a ruling on the merits as to the substantive claim of Impact.

This appeal ensued.

We were advised at oral argument that Impact indeed filed a complaint against Liberty in the Law Division seeking its alleged commission, and that the litigation is in the discovery period. We were further advised that Liberty has appealed from the report of the commissioners in the condemnation action, *Rule* 4:73-6(a), and that the matter is proceeding to trial.

Rule 4:33-1 provides:

> Upon timely application anyone shall be permitted to intervene in an action if the applicant claims an interest relating [*6] to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

We have said the *Rule*

> establishes the four criteria for determining intervention as of right: The applicant must (1) make a timely application; (2) claim an interest relating to the property or transaction which is the subject of the action; (3) show it is so situated that disposition of the action may as a practical matter impair or impede the ability to protect that interest; and (4) demonstrate its interest is not adequately represented by existing parties.

[***City of Asbury Park v. Asbury Park Towers, 388 N.J. Super. 1, 7 n.4, 905 A.2d 880 (App. Div. 2006)***.] "We have construed this rule liberally" and "[a]s the rule is not discretionary, a court must approve an application for intervention as of right if the four criteria are satisfied." *Meehan v. K.D. Partners, L.P.*, 317 N.J. Super. 563, 568, 722

[4] It is unclear whether the declaration of taking dealt solely with the property. Other [*5] parties are named as defendants and their interests are not disclosed in the record. Additionally, the properties subject to the declaration of taking are described differently than in the agreement and Pimienta's certification.

A.2d 938 (App. Div. 1998) (citations omitted).

Impact contends that contrary to the judge's determination that its pleading was not "germane" [*7] to the condemnation action, it should have been permitted to intervene as of right because its claim is based upon "an interest relating to the property or transaction which is the subject of the action." Liberty argues that Impact has "no lien, equitable or otherwise" on the property because it has no legitimate claim to a commission since the property was condemned by the City. Thus, Impact had no right to intervene under *Rule* 4:33-1. Liberty likens Impact's attempt, in this regard, to "*prejudgment attachment* of the condemnation proceeds to 'secure' its unliquidated . . . claim for a commission." *See R.* 4:60-1.

Impact's claim for a commission rests in part upon its allegation that it was denied its earned commission by Liberty's wrongful conduct, i.e., Liberty's decision to forego a sale and "move forward with a condemnation by the City." *Seee.g., Ellsworth Dobbs, Inc. v. Johnson*, 50 N.J. 528, 551, 236 A.2d 843 (1967) (holding that "if the failure of completion of the contract results from the wrongful act or interference of the seller, the broker's claim is valid and must be paid"). Since a commission is usually due at closing, *id.* at 552, Impact claims it has an "interest relating to the property [*8] or transaction which is the subject" of the condemnation action, and thus, it should be able to participate in the condemnation action as of right, and recover its commission out of any proceeds payable to Liberty.

We need not examine the likely merits of Impact's claim for a commission in order to decide whether it possessed the right to intervene pursuant to *Rule* 4:33-1. Impact has failed to demonstrate in any way that "it is so situated that the disposition of the [condemnation] action may as a practical matter impair or impede the ability to protect [its] interest." Impact has not alleged that there would be insufficient proceeds from the condemnation action or other assets to satisfy any judgment if indeed it prevailed on its commission claim. Thus, we agree with the result reached by the motion judge denying the motion to intervene as of right.

Alternatively, Impact argues that even if it were not entitled to intervene as of right, the judge mistakenly exercised his discretion by denying its motion under *Rule* 4:33-2. That *Rule* provides:

> Upon timely application anyone may be permitted to intervene in an action if the claim or defense and the main action have a question of law or [*9] fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Liberty counters that permissive intervention was properly denied because Impact's commission claim shared no commonality with the condemnation action and would delay that proceeding.

We find no mistaken exercise of the judge's discretion to deny Impact's permissive intervention in the condemnation action. While the actual amount of Impact's commission claim relates to the ultimate price paid for the property, we do not believe that such a peripheral connection satisfies the requirement of *Rule* 4:33-2's that the "claim . . . and the main action have a question of law or fact in common."

The eminent domain action concerns only one issue — setting a "'just compensation' for the property obtained, which is defined as 'the fair market value of the property as of the date of the taking, determined by what a willing buyer and a willing seller would agree to, neither being under any compulsion to act.'" ***Asbury Park, supra, 388 N.J. Super. at 9*** (quoting *State v. Silver*, 92 N.J. 507, 513, 457 A.2d 463 (1983)). Undoubtedly, [*10] Impact's intervention would delay the condemnation proceeding because it would require litigating the factual complexities of Liberty's relationship with Impact. In short, those issues have nothing to do with adjudicating the fair market value of the property as determined by the procedures set forth in the EDA.

Moreover, if Impact was permitted to intervene, the extent of its participation in the condemnation action is subject to some speculation and assuredly would interfere with the trial court's ability to control the limited issues presented by the condemnation appeal. In ***Asbury Park, supra, 388 N.J. Super. at 14***, we affirmed the denial of intervention in a condemnation action to the municipality's designated redeveloper. Among other things, we noted the difficulty managing the litigation if intervention were permitted, and the proposed intervenor's "ability to reject a settlement and . . . withhold consent to a stipulation of dismissal of the condemnation action." ***Id. at 13***. Refusing to permit Impact to intervene in the condemnation action pursuant to *Rule* 4:33-2 was not a mistaken exercise of the judge's discretion.

Affirmed.

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Conn. Coalition for Justice in Educ., Inc. v. Rell

Superior Court of Connecticut, Judicial District of Hartford, Complex Litigation Docket at Hartford

September 7, 2016, Decided; September 7, 2016, Filed

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Reporter
2016 Conn. Super. LEXIS 2183 *

Connecticut Coalition for Justice in Education, Inc. v. Rell et al.

Notice: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

Core Terms

schools, spending, teachers, special education, districts, teaching, graduation, resources, formula, rationally, verifiable, says, requires, tests, skills, services, courts, elementary, rates, disability, elementary school, educated, grade, school district, nondelegable, communities, guidelines, Statutes, funding, isn't

Judges: [*1] Thomas G. Moukawsher, J.

Opinion by: Thomas G. Moukawsher

Opinion

Memorandum of Decision

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"Learning is not attained by chance . . ."

Abigail Adams

1. Summary: To be constitutional, the state's chief education policies do not have to be richly funded but they must at [*2] least be rational, substantial, and verifiable

In Connecticut's constitution, the state promises to give children a fair opportunity for an elementary and secondary school education. This doesn't mean the courts can tell the General Assembly how much to spend on schools. But the language can't mean that the state can leave learning to chance. It has to mean that the state must do thoughtful, visible things to give them that opportunity. To put it as a legal proposition, beyond a bare minimum, it is for the General Assembly to decide how much to spend on schools, but the state must at least deploy in its school's resources and

standards that are rationally, substantially, and verifiably connected to teaching children. It isn't a lot to ask, but asking it raises doubts about many of our state's key education policies.

Requiring at least a substantially rational plan for education is a problem in this state because many of our most important policies are so befuddled or misdirected as to be irrational. They lack real and visible links to things known to meet children's needs. For instance, the state spends billions of dollars on schools without any binding principle guaranteeing that education [*3] aid goes where it's needed. During the recent budget crisis, this left rich schools robbing millions of dollars from poor schools. State graduation and advancement standards are so loose that in struggling cities the neediest are leaving schools with diplomas but without the education we promise them. State standards are leaving teachers with uselessly perfect evaluations and pay that follows only seniority and degrees instead of reflecting need and good teaching. With the state requiring expensive services but doing nothing to see they're going to the right people in the right way, special education spending is also adrift. All of this happens because the state is torn between the need for communal and objective standards and the apparently irresistible pressure for the idiosyncratic *status quo*. Instead of the state honoring its promise of adequate schools, this paralysis has left rich school districts to flourish and poor school districts to flounder.

To keep its promise of adequate schools for all children, the state must rally more forcefully around troubled schools. It can't possibly help them while standing on the sidelines imposing token statewide standards. And while only the [*4] legislature can decide precisely how much money to spend on public schools, the system cannot work unless the state sticks to an honest formula that delivers state aid according to local need.

Having a special promise of adequate schools in our highest law shouldn't put the courts in charge of schools, but it should at least mean this much: children have a judicially enforceable right to first principles governing our schools that are reasoned, substantial, and verifiably connected to teaching.

2. The state is responsible for the condition of our schools: Its duty to educate is non-delegable

The state is responsible for Connecticut public schools, not local school districts.

The Connecticut constitution, in article eighth, §1, says: "There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation."

There is no misreading article eighth, §1. It says the state—specifically the General Assembly—must fulfill the promise of free public schools. In 2012 in *Pereira v. State Board of Education* the Supreme Court didn't hesitate to underline this, holding: "Obviously, the furnishing of education for the general [*5] public is a state function and duty."[1]

The constitution gives the General Assembly leeway about how to keep this promise, but it isn't endless. Like anyone else with a job in hand, the state can get help—from state employees, local school districts, and others. But, that doesn't mean the state can point the finger of blame at these helpers when things go wrong. As the *Pereira* Court ruled, whatever local boards of education do, they do "on behalf of the state."[2] This means that like other important legal duties the state's responsibility for what happens in schools is non-delegable.

Legal duties can spring from charters, statutes, or the courts, but duties that come from constitutions are the highest duties and sweep the others aside when they conflict. In 2009, in *Machado v. Hartford*, the Connecticut Supreme Court held that, wherever they come from, our most important duties are so important that responsibility for them may not be sloughed off onto others—fulfilling those duties is "nondelegable."[3]

Our courts have made this rule stick in far more mundane contexts than this. For instance, in 2001, in *Gazo v. Stamford*, the Court applied the widely known rule that "the owner or occupier [*6] of premises owes invitees a nondelegable duty to exercise ordinary care for the safety of such persons."[4] As the Court explained it, nondelegable duties create vicarious liability situations, in which "the law has . . . broaden[ed] the liability for that fault by imposing it upon an *additional*, albeit innocent, defendant . . . namely, the party that has the nondelegable duty."[5] In *Ramsdell v. Union Trust Co.*, the Supreme Court held that the core functions of trustees are nondelegable.[6] In 2013, in *State v. Brown*, the Appellate Court held that even judges have constitutionally-mandated nondelegable duties: they may not delegate to the state's attorney or defense counsel the duty to canvas plea bargainers about what it means to break their plea deals.[7]

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[1] 304 Conn. 1, 33, 37 A.3d 625.

[2] *Id.*

[3] 292 Conn. 364, 371-72, 972 A.2d 724.

[4] 255 Conn. 245, 257, 765 A.2d 505.

[5] *Id.*

[6] 202 Conn. 57, 69, 519 A.2d 1185.

[7] 145 Conn.App. 174, 181, 75 A.3d 713.

In 2009, in *Teney v. Oppedisano*, the Superior Court held a plumber with warranty obligations liable for flood damage caused by an independent contractor because the plumber's duty to perform the work to the warranty standard was nondelegable.[8] In *Borovicka v. Oshkosh Corp.*, it confirmed the long-standing rule that liability for inherently dangerous activities is nondelegable.[9] In 2005, in *Cornelius v. Connecticut Dept. of Banking*, the Superior Court **[*7]** held that mortgage brokers must answer for the misdeeds of the appraisers they hire.[10]

And in 2009 in *Mochado v. Hartford*, the Supreme Court enforced the long-standing rule that cities can't pass off liability for public roads by hiring private contractors—the law puts the duty to maintain them on the cities and no one else.[11] The court took as a bedrock assumption that "a vital public duty, once imposed by the state, generally is considered nondelegable."[12]

If the work of plumbers, landlords and even judges is important enough to be non-delegable, the state's constitutional duty to provide free public schools is important enough to be non-delegable too.

The importance of the state's direct duty over education couldn't be clearer. In 1977, in *Horton v. Meskill* our Supreme Court held that because it is specifically enumerated in the constitution, "in Connecticut, elementary and secondary education is a fundamental right . . ."[13] As the court knew, labeling the right "fundamental" raised it to the most important level known to law. In the equal rights context, it said that nobody from the General Assembly down could diminish one person's right compared with another's unless the court strictly **[*8]** scrutinized it and found the difference justified by some compelling state interest.[14] Car dealers, plumbers and landlords take a back seat here. Other constitutionally guaranteed civil rights may rise to this level, but no rights are more important.

Still the state would rather be a little less directly responsible. It points to a tradition of local control that it almost never brings up except to get itself out of a jam. It isn't persuasive here because most of the time in cases like the 1980 Supreme Court case *City Council v. Hall*, the state loudly reminds local governments that they are merely its creatures, and that "the only powers a municipal corporation has are those which are expressly wanted to it by the state."[15]

The state insists the Supreme Court has recognized the importance of local control. But that does not mean it has recognized its primacy. In *Horton v. Meskill*, for example, the court discussed the valuable benefits of local control but saw them as no obstacle to imposing an educational financing plan that sent more money to poor towns than rich ones.[16]

It's obvious that local control can be a good thing: the education commissioner and others testified to its strengths—where **[*9]** it is working. But this requires nothing more than acknowledging that little intervention is needed where little problems reside. Knowing this takes nothing away from insisting that where great problems persist, great efforts may be required. The state may not have to rush to interfere in most schools, but when it needs to interfere, the state should not be able to claim that it's powerless.

It certainly can't say its hands are tied when it tied the knots itself. In describing its limits the state points mostly to restraints It has included in the General Statutes. State witnesses pointed again and again to these laws to say that the bulk of authority over education rests with local boards of education. But if the state isn't giving children a constitutionally required fair chance in school, it may not use its own laws as an excuse.

The standards at issue here are casualties of the state's view that education is by right a local affair. This has left most of the key state standards trying to look like statewide rules while being little more than guidance. Yet any review of the statutes shows that the state is being forced to recognize that it can't simply send money and hope for the **[*10]** best. Almost 15 years ago, following the federal No Child Left Behind Act, the legislature passed General Statutes §10-223e setting up new ways for the state to take over dysfunctional school systems. Over the years, the state has intervened in varying ways in Bridgeport, Hartford, New London, Windham, and Winchester. The state knows it can't keep up the pretense that local schools are local problems, but it seems numb to the logical implications.

The state's direct responsibility is important to deciding this case. The court has to decide if the state is keeping its promise about education. If it isn't, the court has to decide what to do

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[8] 2009 Conn. Super. LEXIS 826, 2009 WL 1055528.

[9] 2013 Conn. Super. LEXIS 1038, 2013 WL 2350516.

[10] 2005 Conn. Super. LEXIS 1636, 2005 WL 1757631, 5.

[11] 292 Conn. 364, 372-73, 972 A.2d 724.

[12] *Id.* at 372.

[13] 172 Conn. 615, 648, 376 A.2d 359.

[14] *Id.* at 640.

[15] 180 Conn. 243, 248, 429 A.2d 481.

[16] 172 Conn. at 638.

about it. This would require the court to weed out any General Statutes holding the effort back. Orders might have to limit state power, but given the state's direct and non-delegable responsibilities, court orders could also increase the power of the State Board of Education and Department of Education over troubled school systems and the agents they use to keep the state's promises to children. Depending on the depths of the problems revealed in some districts, those powers might change considerably.

3. The courts may impose reason in state spending, but they may not dictate **[*11]** precisely how much to spend beyond a bare minimum

The first job is to explore the limits of judicial power and decide if they are broad enough to address the problems pointed out at trial and the solutions mooted.

The basic promise in article eighth, §1, is simple and is simple to repeat: "There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation."

In 2010 in *Connecticut Coalition for Justice in Education Funding, Inc. v. Rell*, four of the seven justices of the Connecticut Supreme Court sent this case here for trial after reading this promise to require that our education system must be minimally adequate.[17] Three justices said the education provision meant that the constitution "guarantees Connecticut's public school students educational standards and resources suitable to participate in democratic institutions, and to prepare them to attain productive employment and otherwise contribute to the state's economy or to progress on to higher education."[18]

Justice Palmer was the fourth and deciding vote for holding that the constitution requires an adequate education. Like concurring Justice Schaller, **[*12]** Justice Palmer saw that some standard of minimum adequacy is required to avoid doing "violence to the meaning of the term 'school'" in the constitution.[19] But to respect the rights of the legislature he defined the adequacy needed to pass constitutional muster more narrowly than the other three justices.[20]

Ultimately, Justice Palmer was more restrained than the three-judge plurality, but he was still at a point on the same continuum with them. The continuum was the legislature's duty to calculate educational resources and standards rationally. The plurality said it would strike down an educational program inadequate to prepare children for college, careers, and democracy. But the plurality said it would "stay its hand" on remedies awaiting legislative action unless the state lacked "a program of instruction rationally calculated to enforce the constitutional right to a minimally adequate education . . ."[21]

Justice Palmer, by contrast, said he would not even find a constitutional adequacy violation unless the irrationality point had been reached, and the state's program "is so lacking as to be unreasonable by any fair or objective standard."[22] He emphasized that the legislature might come **[*13]** up with a variety of solutions, but it must operate "within the limits of rationality."[23] This means that the most the four justices agreed on was that irrational public school resources and standards are unconstitutional.

This doesn't ask that much. Rationality doesn't mean the state must show a "compelling interests" for everything it does or that the education provision subjects its decisions about schools to "strict scrutiny." It just means that irrational standards and programs are unconstitutional. So for a violation to be found, the evidence must show in Justice Palmer's words that "core or essential components"[24] or in the plurality's words that the "resources and standards"[25] are irrational.

What does "irrational" mean in this context? It can't mean that the constitution's education provision requires nothing more than traditional equal protection case law that seeks out a "rational" basis for legislative distinctions. That's the lowest standard that could possibly apply. That standard led the Supreme Court in 2004 in *State v. Long* to say that for a distinction to be irrational is to "negate every conceivable basis which might support it . . ."[26]

Applying this lowest **[*14]** possible standard here would contradict *Horton v. Meskill* where the Supreme Court held

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[17] ***295 Conn. 240, 990 A.2d 206***.

[18] ***Id. at 244-45***.

[19] ***Id. at 331***.

[20] ***Id. at 321***.

[21] ***Id. at 317 n.59***.

[22] ***Id. at 321***.

[23] ***Id. at 336***.

[24] ***Id. at 343***.

[25] ***Id. at 320***.

[26] 268 Conn. 508, 534, 847 A.2d 862 cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340.

that education is a fundamental right.[27] As reflected in *Horton*, this usually means in equal rights cases that the laws at issue face some form of strict scrutiny.[28] Strict scrutiny is the highest possible standard that could apply. That standard only applied—the court only said education was a fundamental right—because the constitution's education provision requires specific action from the state about schools.[29] It would hardly make sense to take words that gave birth in one context to the highest duty and use them in another context to impose the lowest duty.

In *Horton*, the Supreme Court suggested that the way to resolve this is to remember that education cases are "in significant aspects *sui generis* and not subject to analysis by accepted conventional tests or the application of mechanical standards."[30] This means that when the majority of the Supreme Court in this case said the state's efforts must be "reasonable" and "rational" the words must reflect education's unique status in the constitution as something the state must do rather than merely something it must not do. A call for action on education **[*15]** in the highest law of the land unavoidably leads Connecticut citizens to expect something more than a token effort. For this reason, the court can't have meant to confine these words to the minimal equal protection analysis that applies to rights that aren't fundamental commands. The court must have expected something more.

So while we have to focus on rationality, we should at least expect that it means some rational thing substantial enough to be seen and verifiable enough to be measured. Anything less would hardly have required a trial. The state could have met it by adopting a budget and spending as much as a dollar or so, and the constitution's promise of free public schools would be empty. But insubstantial efforts can hardly satisfy a specific constitutional command. To keep from frustrating legitimate public expectations, we don't have to demand that the state's efforts be perfect or follow any particular fixed idea, but we can certainly expect that these efforts will be more than illusory; we can expect that they have real worth, solidity, value, meaning—we can expect them to be substantial, and to be seen to be so.

They must be seen to be so because the efforts can't be credible **[*16]** if we have to guess whether they exist. We can't possibly judge the adequacy of the state's work unless that work and its connection to teaching children are verifiable. We should be able to study budget formulas to see if they reasonably account for the differing needs of districts. Standards should be clear enough so we can tell if they reasonably connect what they do with what they are supposed to do. With visible statistical evidence we can measure the effects of these standards in the schools. But the judiciary can hardly play a realistic role in protecting children's educational opportunities if there are no governing principles for the state to follow, and the courts are left counting the desks and supplies in every classroom in Connecticut. This would move the judiciary from policing first principles to being the first principal in every school in the state. The state simply cannot fulfill hopes fairly raised by our constitutional promise by adopting empty, unrecognizable, or non-existent policies: only discernible policies should be credited with being policies at all.

Taking these three points together means that if the court is to conclude that the state is not affording **[*17]** Connecticut children adequate educational opportunities, it must be proved that the state's educational resources or core components are not rationally, substantially, or verifiably connected to creating educational opportunities for children.

This must be proved against a high standard. As the Supreme Court held in *Kerrigan v. Commissioner of Public Health* in 2008, constitutional violations have to be proved beyond a reasonable doubt.[31] The plaintiffs say proof by a preponderance of the evidence should be enough in this unusual case involving an affirmative state obligation concerning education. But the Supreme Court chose to "acknowledge" the higher standard in its analysis of an education claim in 1985 in its second review of *Horton v. Meskill*.[32] More tellingly, the plurality in this case held it up as a check against raids on legislative prerogatives, noting that "deciding that a statute is unconstitutional, either on its face or as applied, is a delicate task in any event, and one that the courts perform only if convinced beyond a reasonable doubt of the statute's invalidity."[33] If the three justices leaning closest to the plaintiffs' position thought a high standard of proof applies, **[*18]** we can assume that the justices firmly against the plaintiffs would rely on it even more heavily. This court will require proof beyond a reasonable doubt.

The Supreme Court never got to consider any proof or apply any standard about what the constitution required. It sent the case here for the standard to be "refined and developed further as it is applied to the facts eventually to be found at trial in

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[27] 172 Conn. at 648-49.

[28] *Id.* at 649.

[29] Id.

[30] 172 Conn. 615, 645, 376 A.2d 359.

[31] 289 Conn. 135, 155, 957 A.2d 407.

[32] 195 Conn. 24, 35, 486 A.2d 1099.

[33] ***295 Conn. 240, 267, 990 A.2d 206***.

this case."[34] All four justices finding a constitutional minimum deemed the "core or essential components"[35] the "resources and standards"[36] subject to review. But the opinion only considered the education provision in the limited context of case law about the resources devoted to schools.

These justices all cited a 1995 standard on minimum resources from the New York Court of Appeals in *Campaign for Fiscal Equity, Inc. v. State.*[37] The plurality seemed to view the New York standard as a starting point because it went on to review later New York case law that expanded on it. But Justice Palmer appeared to view it as enough to consider about resources; he didn't even cite the more expansive decisions. Interpreting constitutional language similar to Connecticut's, the New York court listed **[*19]** what it considered basic enough features from which to discern a school rationally:

> 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.[38]

This is a fairly easy standard for schools to meet, and even on its face it's unlikely to force the state to increase the raw amount of money it spends each year. But if this is the narrowest ground a majority of the upper court can agree on concerning a minimum level of resources, this court has to follow it.

Our Supreme Court approved of this narrowest-grounds of agreement approach in 2005 In *State v. Ross* where it quoted the U.S. Supreme Court saying that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding **[*20]** of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds . . ."[39] The plaintiffs cite the District of Columbia Court of Appeals ruling in 1991 in *King v. Palmer*[40] to argue this is not true if the two sets of opinions are mutually exclusive. The problem for the plaintiffs is that the justices' positions are not mutually exclusive. Justice Palmer merely takes a more restrained view of the same belief that the plurality holds. This means four justices agree that Justice Palmer is right. Three of them simply think he should have gone further.

The narrowest-grounds rule favors Justice Palmer's view on what the constitution requires. But there isn't a lot of law on this point in Connecticut, so it's worth saying that even if the court didn't have to follow the common thread in his opinion, this limited approach would still be right. Beyond a bare minimum, the judiciary is constitutionally unfit to set the total amount of money the state has to spend on schools.

Courts are constitutionally unfit because they can't sort out competing legislative spending priorities or even competing constitutional spending priorities. **[*21]** This is why any constitutional standard the courts set for overall spending levels must be modest. Courts look at the issues and the evidence brought to them in specific cases. Judges see issues under a microscope. As the Connecticut Supreme Court held in *Travelers Ins. Co. v. The Netherlands Ins. Co.* in 2014, courts only consider cases or controversies.[41] A court does not hold sway over the general welfare. The case or controversy requirement means a court doesn't hold public hearings on the entire state budget nor can it launch its own investigations. The legislature's concern by contrast is the entire public welfare.

The plaintiffs hired as an expert witness Henry Levin, a Columbia University professor specializing in educational economics. He recognized that the costs and benefits of education spending must be weighed against other spending priorities before they can be imposed. The plaintiffs know that only the General Assembly does this. The legislature uses no microscope. It faces the full tidal wave of public demand. It considers every public matter and weighs it against the interests that compete with it for funding. In weighing those interests against each other, unlike the **[*22]** courts, the legislature can seek out whatever information it chooses. It is nonsense under such a system for a court to set expansive goals for the schools and direct whatever spending it takes to achieve them when it hasn't even thought about how its orders

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[34] ***Id. at 318***.

[35] ***Id. at 343*** (Justice Palmer).

[36] ***Id. at 320*** (Plurality).

[37] ***Id. at 301, 316*** (citing 86 N.Y.2d 307, 655 N.E.2d 661, 631 N.Y.S.2d 565).

[38] *Id* at 317.

[39] 272 Conn. 577, 604 n.13, 863 A.2d 654, quoting, *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977).

[40] 950 F.2d 771, 292 U.S. App. D.C. 362 (*en banc*).

[41] 312 Conn. 714, 730, 95 A.3d 1031.

might undercut spending on other important rights, including those protected by the constitution.

This court already sits in the shadow of other lawsuits pressing constitutional demands for money. For over 20 years, *Juan F. v. O'Neill* has left a federal judge in the name of the constitution dictating state spending on child protection issues.[42] How can this court decide how much to spend teaching children against another court ordering how much to spend to keep them from abuse or neglect? Following our Supreme Court's 1996 decision in *Sheff v. O'Neill*, billions of dollars have been spent addressing Hartford students' race discrimination claims.[43] Is an integrated education worth more or less money than an adequate education? Should the court drag the *Sheff* and *Juan F.* parties before it to explore the issues? Or should the court blindly pile on top of those mandates whatever else it thinks might be needed and let the chips fall where **[*23]** they may? What about the stipulated settlement in *Shafer v. Bremby* requiring the state to speed up processing Medicaid claims? What about *Briggs v. Bremby* where a federal court ordered the state to speed up processing food stamp claims?[44] What does the court say to prisoners without beds or decent lawyers? To challenges filed on behalf of the mentally ill? Any ruling taking an overly-broad view of judicial discretion over education spending would squeeze the money being spent on those cases and what might be spent on them. It also would take money from causes without cases of their own—all without even considering whether they exist—all without weighing their importance against the claims made here. It can't matter that some courts have already taken expansive views of their constitutional authority over government spending. It doesn't change the good reasons against this view. It only suggests the judiciary should consider that the standard it sets in one matter may adversely affect other matters.

It doesn't help to try to mask the judiciary's role either. Orders that indirectly drain public money still drain it. Just as much **[*24]** damage is done by declaring legislative efforts unconstitutional and deferring action to the legislative branch "subject to judicial review? Nominally deferring to the legislature on a remedy while menacing it with potential action, still chooses the priority of one claim to public fun over others without even identifying and weighing the competing rights.

Arguably, this is what the Connecticut Supreme Court did in 1996 in *Sheff v. O'Neill*[45] and in 1977 in *Horton v. Meskill.*[46] Most notably the *Sheff* Court declared: "the needy schoolchildren of Hartford have waited long enough" and concluded that "[w]e direct the legislature and the executive branch to put the search for appropriate remedial measures at the top of their respective agendas."[47] This approach does not apply here. *Sheff* considered what it called the unique circumstance of race discrimination,[48] and *Horton* was an equal protection case which expressly rejected the notion of considering "adequacy."[49] Perhaps that's why the Supreme Court majority in this case did not apply this thinking.

Only three of seven justices in this case suggested an expansive view of judicial power might be adopted and followed by judicial monitoring of a legislative **[*25]** response. Writing for them in the plurality opinion, Justice Norcott said that the court's job was to "articulate the broad parameters of that constitutional right, and to leave their implementation to . . . the political branches of state and local government . . ."[50] He wrote that so long as the other branches rationally act within those parameters, "the judicial department properly stays its hand . . ."[51]

In adopting his "unreasonable by any fair or objective standard" test, Justice Palmer rejected this approach:

> I take a different view from the plurality with respect to the scope of the right guaranteed by article eighth, §1. In particular, I believe that the executive and legislative branches are entitled to considerable deference with respect to the determination of what it means, in practice, to provide for a minimally adequate, free public education. Thus, it is the prerogative of the legislature to determine, within reasonable limits, what a minimally adequate education entails.[52]

The narrow ground of agreement among four justices in the upper court is that courts should be restrained in finding the violation, not merely in remedying it. The remaining justices thought the courts shouldn't **[*26]** get involved at all.

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[42] 2:89 CV 859 (D.Conn.) (SRU).

[43] 3:12 CV 0035 (D.Conn.) (AWT).

[44] 792 F.3d 239.

[45] 238 Conn. 1, 678 A.2d 1267.

[46] 172 Conn. 615, 376 A.2d 359.

[47] 238 Conn. at 3, 46.

[48] *Id.* at 25.

[49] 172 Conn at 645-46.

[50] ***295 Conn. at 317, n.59***.

[51] ***295 Conn. at 282***.

[52] ***Id. at 321***.

That leaves only one way to set a high constitutional threshold without blindly mandating more spending. It would be to find the constitution breached but say the court won't do anything about it. But this can't be done either. That approach was rejected in 1984 in *Pellegrino v. O'Neill* when our Supreme Court said the judiciary will not give advisory opinions.[53] The *Pellegrino* Court barred them in the face of constitutional claims about the underfunding of the judiciary. The court recognized its unfitness to decide how much to spend on the courts, and it approved of *Horton* only because that unusual case covered matters on which the court assumed it could act directly.[54]

Thus, if the court weren't limited by the minimal elements listed in the New York case, it would still reject an expansive view of its power to set overall state educational spending levels. Beyond a bare minimum, it is for the legislature to decide how much to spend on schools.

4. This state spends more than the bare minimum on schools

While the legislature has the job of setting overall school spending, this doesn't mean it can spend less than the modest constitutional minimum. The legislature must **[*27]** spend at least enough to create things recognizable under contemporary standards as schools. Because it has done so—because 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.

Connecticut schools already go far beyond the New York minimum. The state spends a billion dollars a year on just that case's concern about school buildings. In recently completed or underway projects in Bridgeport alone, the state has committed $378 million to new buildings. While statewide enrollment has been declining for over a decade, spending on buildings has increased. And according to Michele Dixon, an educational consultant with the state office overseeing school construction grants, the state basically never turns down a project. The state shapes them, but especially in poor districts, it ultimately approves them and then pays most of the bill. With the billions of dollars spent in recent years on magnet schools aimed at desegregation, it has paid even more, particularly with Hartford-area magnet schools built in the wake of *Sheff v. O'Neill*, where it **[*28]** has paid 100% of the bill.

There is anecdotal evidence of physical deficiencies in some schools—a leaky roof here, a unreliable boiler there—but 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 as in Windham or New London 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, at the state's schools lack enough light, space, heat, and air to permit children to learn.

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 and some teachers buy supplies. 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 **[*29]** 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.

Connecticut children have minimally adequate teachers teaching, reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies. Connecticut uses a nationally recognized test called Praxis to certify teachers. Both sides of this lawsuit commended it. The Department of Education maintains an array of teacher training materials online and in the field to support teachers, including help with curriculum initiatives. In impoverished districts with troubled schools, it provides very direct help, including extra money for interventionists, teacher coaches, and technical support. No one suggests that teaching in Connecticut is broadly incompetent. The claim is that opportunities for good teaching are not being rationally marshaled in favor of needy kids. Judged against a low minimum and judged as a system, the plaintiffs have plainly not met their burden to show beyond a reasonable doubt **[*30]** that Connecticut lacks minimally adequate teaching and curricula nor have they proved it by a preponderance of the evidence.

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 under the state's Alliance Districts program. Its Commissioner's Network of schools currently focuses additional resources and interventions on 14

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[53] 193 Conn. 670, 683, 480 A.2d 476.

[54] Id.

individual failing schools. In 2015, it yielded for them some $13 million in additional financial support. On top of this, the state currently allots roughly $4 million a year for school improvement grants to around 30 high needs schools. 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. Most of what the state has done financially has been combined with additional non-financial resources.

State and federal programs also beef up needy schools districts by providing students breakfast, lunch, and many times food to take home. Schools in some districts **[*31]** feed students even in the summer. After-school programs instruct and care for kids. Parents are invited into schools to share in learning. Homeless children are sought out and their needs tended. There are programs to prevent sexually transmitted diseases, young parents programs, pregnant student supports, and mental health programs. The plaintiffs claim that all of these programs are under-effective because they are under-funded. But the 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.

All of this extra spending benefits poor districts but not wealthier districts. It is on top of basic education aid that has a history of strongly favoring poor districts over wealthier ones. This heavy tilt in state education **[*32]** 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.

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. The Connecticut constitution provides in article first, sections 1 and 20 that all citizens enjoy "equal rights" to state benefits and "equal protection of the law." In 1985, in *Horton v. Meskill*, 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."[55] 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.[56] Equal protection analysis is comparative; it does not provide **[*33]** a basis to dictate the absolute amount of money the state has to spend on schools.

5. Whatever the state spends on education it must at least spend rationally

The state's latitude to decide how much overall money to spend on schools doesn't mean the state can have a constitutionally adequate school program while spending its money whimsically. As already explained, rationality was the test the Supreme Court set up for the education provision, and to give this standard any weight it has to require the state's spending plan to be rationally, substantially, and verifiably connected to creating educational opportunities for children.

A rational education plan has a substantial and verifiable link between educating children and the means used to do it. Following *Horton*, the state said it adopted one that evolved into what is now the Educational Cost Sharing formula in General Statutes §10-262f-i. That formula starts with a foundation amount of aid per pupil. Nothing in the formula explains how it was chosen, and the most the parties suggest is that the basic number may reflect typical per pupil spending back when it was adopted. The formula then calls for that number to be adjusted for a variety of factors which **[*34]** include, among other things, the relative wealth of the town, student population and educational need. The formula includes producing a dollar amount defined in the statutes as a "fully funded" amount. The parties wrangle over just how aspirational this "fully funded" amount is. But whatever it means to be "fully funded," the state has never gotten near it. And whatever the formula's virtues and vices, they don't matter anymore because the state stopped using the formula in 2013-14. The state says this is okay because it's free to repeal the ECS formula entirely and work without any discernable plan at all.

It's nearly doing that now. In place of the formula, since 2013-14, the legislature has simply adopted set dollar amounts of aid for each town. It did the same thing for several years before 2013-14 by overriding the formula and simply adopting the same numbers year after year. The state says it can do this because while you can't tell why districts get what they get the state has still been giving much more money to property-poor towns than to property-rich towns.

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[55] 195 Conn. at 38.

[56] Id.

But a plan that spends a lot of money and is not entirely irrational is still not a rational plan. Without consciously [*35] and logically marshaling education aid—if the legislature can adopt principles and then ignore them—the state cannot be said to have a formula at all, not to mention one that takes seriously the Supreme Court's insistence on "a program of instruction rationally calculated to enforce the constitutional right to a minimally adequate education." The General Assembly may have the power to decide how much to spend on education, but the state cannot afford to misallocate it or hide its spending priorities from scrutiny. Without a defensible and discernible plan, no one can be sure what the state is delivering and what lines it may not cross.

Yet the state claims the legislature doesn't have to allocate education aid rationally. It says it can spend education aid capriciously, taking money from those in need and giving it without explanation to those without need, so long as in general more aid goes to poor towns than rich towns. This is because the state says that any review of educational adequacy has to be episodic instead of systemic. Under this view, for each year, without explanation or plan, the General Assembly can adopt budgets. To consider an adequacy challenge under the constitution, [*36] you would have to look each year in each town to see if it met the New York minimum standard. Under this approach, presumably New Haven might get more money than Hartford without any reason so long as both cities got the bare minimum, and it wouldn't matter how much money Darien got as long the bare minimum Hartford got was a few dollars more. Educational spending priorities under this approach could be concealed in a black box of secrecy free from all but the most perfunctory review.

But this still isn't enough for the state. Another part of its argument says that the only people who would have standing to sue for a constitutional violation are individual children who can prove harm to them personally by some specific act of bad teaching, lack of supplies, etc. The state even agreed this would mean that any relief would have to be individual too. The state retreated only slightly when the court started describing this kind of claim as one for "educational malpractice."

Whatever we name it, the state's approach would be a disaster. The courts have no business running the schools, not to mention second-guessing every child's education. If there is a meaningful role for the courts in enforcing [*37] the constitutional promise of an adequate education, it has to be at a very high level: the courts can set a minimum base for overall resources and then ensure that the major policies carrying them into action are rationally, substantially, and verifiably calculated to achieve educational opportunities.

This constitutional principle is important regardless whether an individual school system is flush with resources or not. But it adds to the urgency of ensuring a rational scheme to know how hard it is for poor cities in this state to fill in any gaps. Against the harsh realities of our poorest communities, it is inconceivable that we adopted a constitutional guarantee blind to the effort required to deliver adequate public schools across a broad spectrum of need.

The limited means of the state's largest city shows how bad the situation is. According to the state's most recent municipal fiscal indicators, with 147,000 people Bridgeport has enormous needs that it struggles to meet. The people of the city are so poor that the federal government makes no distinctions but gives free lunch to all of its 21,500 students. Its unemployment rate in recent years has hovered near 12%. The per capita [*38] income in that town was recently measured at $20,000 in a county where some towns' per capita income exceeds $95,000. Its median household income is $41,050 in a county where some towns' median household income exceeds $200,000. While it spends less on education per pupil than the statewide median, Bridgeport's per capita debt is more than three times the state median. It has the third worst rate of collecting outstanding taxes in the state. Connecticut municipalities get 70% of their revenue from property taxes and spend most of that revenue on schools, so a property poor town is a town that has less for its schools. While Bridgeport has almost eight times as many people, the taxable property in the nearby town of New Canaan is worth over $1 billion more than all of the taxable property in crowded Bridgeport. The taxable property in nearby Greenwich is worth more than four times that in Bridgeport though it has less than half the population.

Bridgeport has a very hard time coming up with money when the state shortchanges it. The burden of Bridgeport's debt as a percentage of the value of its taxable property is already the worst in the state, 7.5 times the state median. Having little [*39] valuable property to tax, its mill rate—the tax burden per dollar of assessed value of property—is double that of most nearby towns. And while those towns have some of the highest and best bond ratings in the country, even with the state behind it, Bridgeport's bond rating is significantly impaired, making it even more expensive for the city to borrow.

Gaps in school resources are grappled to gaps in school results. While reason is needed for an important constitutional action regardless of results, achievement gaps in Connecticut certainly can explain the stakes. The distance between the rich and poor students in this state is great enough to remove any doubt about the importance of being careful to send money where it is most needed.

On average, Connecticut students do exceptionally well on standardized tests. This shows up in the Nation Assessment of Educational Progress, the federal government sponsored "nation's report card":

> Based on NAEP 2013 Grade 4 reading results, no state earned an average scale score higher than Connecticut.
>
> Based on NAEP 2013 Grade 8 reading results, no state earned an average scale score higher than Connecticut.
>
> Connecticut high school seniors from the Class **[*40]** of 2013 outperformed students from all other states in the 12th grade NAEP reading assessment.

The Programme for International Student Assessment sponsored by the intergovernmental Organization for Economic Co-operation and Development similarly ranks Connecticut at the top in several categories:

> Only four education systems in the world outperformed Connecticut in reading on the 2012 PISA assessment.
>
> Only seven education systems in the world earned scores higher than Connecticut in science on the 2012 PISA assessment.
>
> In mathematics, only 12 education systems in the world scored higher than Connecticut on the 2012 PISA assessment.

Connecticut is the home of some of the world's best students. But the NAEP and PISA measures both suffer from what Stanford University Professor Sam Savage calls, the "flaw of averages."[57] The flaw of averages is easy to see. Averages mislead when they cut across wide extremes. Let's say the average Windham household income were $30,000. If Bill Gates moved in, Windham's average household income would soar. Windham would look rich, but typical income in the town wouldn't have changed at all.

So it is with Connecticut's schools. Many soar, but some sink. Schools serving the poorest in Connecticut are concentrated in just 30 out of its 169 municipalities. The children in most Connecticut towns do well on tests and some do extremely well, pulling up the average to impressive heights. But viewed individually, the state of education in some towns is alarming.

Until recently, Connecticut's statewide tests were home grown. The state tested elementary school students with the Connecticut Mastery Test. It tested secondary school students with the Connecticut Academic Performance Test.

These tests reveal alarming statistics about reading skills among the poor that suggest there are no resources the General Assembly can afford to spare them in favor of indiscriminate impulse or political routine. The state points to a few improvements in recent years, but the testing gap is still so great that any gains the state points to can't mean the gap will heal itself if the state merely sits on its hands.

Every expert at the trial agreed that acquiring reading skills by the end of third grade is essential. Without the skill to read, **[*42]** the rest of the material the schools present later is often lost. But while well over 70% of the students in the state's richest communities met their third grade reading goals in recent CMT tests, on average nearly 70% of the least affluent students in the towns this case has focused on did not. While less than 1 in 10 students in many of the state's richest communities are below the most basic reading levels under CMT, nearly 1 in 3 students in many of the state's poorest communities can't read even at basic levels.

Third grade readers rated as "advanced" are approaching a majority in rich towns, but there is no appreciable percentage of advanced readers in the poor cities. Likewise, while around 90% of the students in the state's richest places made their third grade math goals, most students in the poorest places did not.

The contrast is equally stark in high school. Under CAPT in the last few years, most of the children in Darien, New Canaan, Ridgefield, Weston, Westport and Wilton scored as "advanced" in math and approached the same status in reading. Meanwhile, one out of three children in Bridgeport, Windham, New Britain, and similar communities didn't even reach the most basic **[*43]** levels in math and only did modestly better at reading. Not reaching the most basic level means they don't have even limited ability to read and respond to grade level material. There can be no serious talk of these children having reached the goals set for them. Only a tiny number of them did. In Bridgeport, New Britain and similar communities only 10-15% made it that high. Therefore, 85-90% of them missed their goals.

Things only get worse when we look at what happened when the state adopted new tests it deemed more appropriate—the tests developed by the Smarter Balance Assessment Consortium, a group of states led in part by Connecticut. The state first used the SBAC test for the School Year 2014-15. The tests showed that while nearly 70% of the poor missed the minimum standards for English, over 80% of the richest towns exceeded them. While around half of the students in poor focus towns didn't even meet the lowest requirements,

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[57] See, Sam L. Savage and Jeff Danzier, *The Flaw of Averages*: *Why We Underestimate **[*41]** Risk in the Face of Uncertainty*. (John Wiley & Sons, Inc. 2012).

only insignificant numbers of the students in the richest towns missed them.

There is no place to hide this bad news. The achievement gap between the rich and poor in Connecticut is not just because our rich do so well. If it were, our poor would consistently **[*44]** outpace the poor in poorer states. But they don't. According to 2013 NAEP tests, Connecticut's poor children are no better readers than the poor anywhere else in the country and do worse at math. In fact, 2015 NAEP results show that poor children in 40 other states did better in math than Connecticut's poor—including children in places like Arkansas Mississippi, and Louisiana—10 did about the same, and nobody did worse. The numbers for eighth graders were not much better.

The state says more money will not necessarily fix this problem. Its expert witness Michael Podgursky, an economics professor at the University of Missouri, testified convincingly that there is no direct correlation between merely adding more money to failing districts and getting better results. This is hard to argue with, and the plaintiffs concede that only well-spent extra money could help. But if the egregious gaps between rich and poor school districts in this state don't require more overall state spending, they at least cry out for coherently calibrated state spending.

There is no room for a slack system to support cities like Bridgeport. If education spending could be set by something other than educational **[*45]** need, it could even empower the legislature to make the balance worse. It might lead to desperately needed funds moving away from starving cities to rich suburbs for no good reason. This would be a big problem in a system supposed to be guided by need and reason. Yet while the plaintiffs were in court complaining of the lack of a principled system, the legislature started moving money from poor towns to rich ones.

Throughout 2016, the state has faced a bone-crushing fiscal crisis. Thousands of state employees have been laid off. Resources are scarce and being carefully rationed. The state knows there couldn't be a worse time to move education money from struggling poor districts to rich districts. But the state did it anyway in May 2016 when, in the name of austerity, it amended the 2016-17 fiscal year budget.

Under the changes adopted, education aid to the state's poorest districts—with the exception of Danbury and Stamford—was cut by over $5.3 million:

Go to table1

In the same bill, while significantly cutting funds for some wealthy districts—without formula or explanation—the state also protected education aid *increases* for other comparatively wealthy towns in the state amounting to over $5.1 million in extra money:

Go to table2

The plaintiffs certainly think this is wrong, but the state says that $5 million isn't much money. But there are two problems with the claim that we shouldn't worry about the diversion of only $5 million dollars. First, in desperate times in desperate towns $5 million is a lot of money. At $85,000 a head that represents around 59 full-time teaching positions at a time when poor cities without substantial tax bases are struggling with some of the nation's neediest students. Second, it broadcasts that the legislature does not feel bound to a principled division of education aid. **[*47]** If this view of the state's constitution won out, the legislature would be free to make today's $5 million tomorrow's $50 million and the next day's $500 million.

There are no millions to be diverted in the face of financial circumstances that are choking poor Connecticut towns to death. Based on prior budgets, Bridgeport had been expecting an extra $8 million for 2016-17. Without the extra funding, the school district was facing a $15 million funding gap just to maintain current services when the state took nearly a million dollars more away from it and gave it to wealthier towns. This followed a deficit of $5.8 million from the prior year. Administrators, clerks, guidance counselors and technicians are being shed. Kindergarten and special education paraprofessionals are being let go.

Some schools have no extras like music and athletics left to cut. The school year is to be shortened. Class sizes are increasing in many places to 29 children per room—rooms where teachers might have a class with one-third requiring special education, many of them speaking limited English, and almost all of them working considerably below grade level. Many of these children get their only meals at school. **[*48]** They don't have two parents at home. Sometimes they have no homes at all, They bounce from place-to-place and from school-to-school as the system struggles to find some way to teach them.

For almost all students, there will be no high school buses in Bridgeport. Children will get tokens for the public transit system and some youngsters will have to figure out how to switch multiple transit buses just to make it to school in the morning. City efforts to raise taxes to make up the difference have resulted in reported threats of secession by the city's wealthiest neighborhood and angry meetings jammed with

hundreds of residents.[58] At the board of education, the interim superintendent reports that she routinely faces four to five hours of harassment from disgruntled board members. Real board business in Bridgeport usually doesn't even get started until around 11 p.m.

It's the same in other poor towns. Too little money is chasing too many needs. Wasteful spending cannot be blamed for it all. Incompetent leadership is not the real answer. The interim superintendent in Bridgeport is a former education department official. **[*49]** She a top candidate for commissioner. Another top candidate runs the cash-strapped East Hartford public schools.

These schools might be recognizable as schools for constitutional purposes, but they face systemic problems that require consistent and rational solutions. Against this backdrop, considering the fundamental right of a child to an education in Connecticut, the state cannot meet its educational duties under the constitution without adhering to a reasoned and discernible formula for distributing state education aid. That formula must apply educationally-based principles to allocate funds in light of the special circumstances of the state's poorest communities. An approach that allows rich towns to raid money desperately needed by poor towns makes a mockery of the state's constitutional duty to provide adequate educational opportunities to all students.

So does a system that spends money on school construction without rhyme or reason. The state devotes $1 billion to school construction every year when the rest of its basic education aid totals roughly $2 billion. This happens while experts for both sides in this case rated physical facilities at the bottom of their lists of things **[*50]** that help students learn. A recent international study says the same thing, rating buildings' impact on education of "very low or no impact."[59]

Still Connecticut keeps on spending and does so without following any rational criteria for what should be built or renovated and what shouldn't. As Michele Dixon from the office of school construction testified, there is no practical limit on spending beyond the raw dollar amount the state borrows each year and local appetite for building and sharing some of the cost, which for some projects has been zero. While the state has project criteria that create nominal priorities, Dixon reported that virtually all projects find their way into the two highest priority categories because the criteria are fluid enough to encourage it.

This building boom has happened while the state's student population has been shrinking considerably. It also goes on amidst a legislative free-for-all where, as Dixon testified, every year legislators with enough clout swoop in and change school construction spending priorities or reimbursement rates to favor projects in their districts without any consideration of relative needs across the state. In the absence of a constitutional **[*51]** mandate this approach might be permissible, but decisions rationally related to children's needs are an irreducible minimum in education spending. To form a logical part of an organized school system for this state, school construction spending must be connected substantially, intelligently, and verifiably to school construction needs aimed at helping students learn. To pass muster there must be a legitimate goal and a rational, substantial, and verifiable plan to achieve it.

Beyond a reasonable doubt, Connecticut is defaulting on its constitutional duty to provide adequate public school opportunities because it has no rational, substantial and verifiable plan to distribute money for education aid and school construction. This doesn't mean the court should draft the state's education spending plan, but it does mean the state has to draft a rational one and follow it as a matter of law. Without a court order, a plan adopted today can be ignored tomorrow. That's what happened with the Educational Cost Sharing formula. Instead, the court will begin its review of the state's proposed remedy 180 days from the entry of judgment on this ruling.

Many rational approaches are possible. A formula **[*52]** can be designed that distributes money in proportion to need regardless of the overall amount the General Assembly decides to spend. Depending on what is proposed, the review and approval might be of key principles only, leaving the legislature the flexibility to change parts of it as circumstances warrant. While its starting point is unclear, the ECS formula contained some sensible elements for designing a state budget formula. The important thing is that whatever rational formula the state proposes must be approved and followed. If the legislature can skip around changing formulas every year, it invites a new lawsuit every year.

The court will only review the formula to be sure that it rationally, substantially, and verifiably connects education spending with educational need. The plan should include a timetable for carrying it out if the state believes the system would be harmed by any immediate changes. The plaintiffs will have 60 days to respond to the state's plan and then a hearing will be scheduled.

6. The state must define an elementary and secondary education reasonably

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[58] www.ctpost.com/local/article/Bad-day-at-Black-Rock-over-taxes-Tuesday-833515 .

[59] https://educationendowmentfoundation.org.uk/evidence/teaching-learning-toolkit/physical-environment.

Any spending plan rationally, substantially, and verifiably linked to teaching children must not only be deliberate, [*53] it must be aimed at what the constitution promises: a free elementary and secondary education. A spending scheme really can't be said to be aimed at elementary and secondary school education when the state doesn't even enforce a coherent idea of what these words mean.

For its secondary schools, the state has allowed the form of high school graduation to overwhelm its substance. High school graduation rates in Connecticut are going up. But, as Henry Levin, an economics and education professor at Columbia University testified, increasing high school graduation rates is a worthy goal, but it loses its desired effect if the state hasn't set a meaningful standard level of achievement meriting graduation.

In Connecticut there isn't one. The state's definition of what it means to have a secondary education is like a sugar-cube boat. It dissolves before it's half-launched. It was sunk by a highly-soluble statutory scheme.

The state's central high school graduation requirement is in General Statutes §10-221a(b). It requires high school students to complete 20 "credits" to graduate: four in English, three in math, three in social studies, two in science, one in the arts or vocations, one in physical education and a half-credit [*54] in civics and American government. For the class of 2020 the credits needed are supposed to go up by five.

Whatever the number of credits required, the state undercuts the requirement with §10-221a(f) defining a credit as the "equivalent" of a 45-minute class every school day for a year. If using the word "equivalent" weren't enough to keep a student from having to actually go to class to get credit later language removes any doubt by directly letting students do online work as a substitute for showing up. The online work must be "equivalent," "rigorous," "systematic" and "engag[ing] but the law doesn't make these words actually mean anything. Still, General Statutes §10-223g says that school districts with high dropout rates must have these online credit programs.

Computers are unseen culprits in this murky business. Online credit recovery is credit-earning work where students sit in front of computers reviewing material instead of in classrooms. It's unregulated. It's ill-defined, but the legislature demands it. Superintendent Rabinowitz, Superintendent Garcia and two high school principals agreed that whatever it was it was less demanding than classroom work. Rabinowitz admitted the system was an open invitation for abuse and [*55] that the invitation had been accepted.

General Statutes §10-223a(b) includes equally insubstantial guidance. It requires local school districts to "specify the basic skills necessary for graduation . . . and include a process to assess a student's level of competency in such skills." The law requires an undefined role for a mastery examination, leaving that role to be great, small, or indifferent. It accompanies this loose arrangement with one of its few inescapable mandates. The basic law decisively forbids school districts from using minimum test scores as the sole basis for promotion or graduation. If this point is not clear enough in §10-223a(b), it is repeated in §10-14n(e).

The only other thing directly addressing graduation standards is a 15-year-old letter from the education commissioner to superintendents. It attached a copy of the Milford public school graduation standards and encouraged superintendents to read it.

The state says that even if it doesn't have a strong graduation standard it still has new statewide academic standards that outline what high school students should learn. The "common core" and the tests created by the smarter balance academic consortium set significant goals. The standards say what students should [*56] learn at each grade level, but they can't do much good where they're needed most because they don't stop students from graduating when they fall miles below the standard. The new standards might affect school ratings under state and federal measures. They might draw attention to failing schools and students. But the schools and students at issue here were utterly failing under the old system too. It's too late for a court to accept as constitutional a system for troubled schools that does little more than call attention to problems.

In the end, the state admits it needs new graduation standards. But on this and other subjects it says it's working on the problem and should be free to keep trying. Unfortunately, the "work" the state cites on graduation standards only highlights its paralysis, not its progress.

In 2015, the General Assembly launched a task force to study aligning high school graduation requirements with the state's new common core standards. The task force decided that high school graduation standards needed an "urgent overhaul." It called for the new standards to have "rigor," "alignment," and reflect "21st Century skills." But it spoke mostly in generalities, and while [*57] it said "mastery" is more important than "seat time," the only thing it suggested doing about mastery was *weakening* year-end mastery tests expected to acquire force in 2020. In fact, on the various graduation pathways it envisioned, the task force never suggested any way students would have to show they have mastered high school material. In the wake of this wobbly logic the report made the puzzling disclaimer that "the task force wishes to make it very clear that it is not denigrating the importance of

acquiring academic knowledge and skills . . ."

This seems obvious grounds for relief. And the task force even saw fit to add that, not only were they good, but knowledge and skills should be pursued "rigorously." Still the whole thing suggests the report was some kind of spoof. The task force certainly took nothing away from that impression when its biggest thought on how to fix the problem turned out to be another task force. But the state couldn't even get that job done. In 2016, any prospect for another task force along with hope for improved graduation requirements died in a legislative committee—without even a vote.[60]

Reading the task force report and the statutes **[*58]** after hearing and watching school officials struggle to talk about graduation standards forces the conclusion that the state is paralyzed about high school graduation. The state sings the praises of a high school degree as a door opener. It hears clamoring from the community to get them into students' hands. But in the end it only leaves districts free to meet these demands in the easiest possible way—by supplying students with unearned diplomas.

The lack of a substantial and rational high-school-graduation standard has resulted in unready children being sent along to high school, handed degrees, and left—if they can scrape together the money—to buy basic skills at a community college. Those who can't immediately buy the education they were supposed to get for free must hope for a higher-education degree someday or simply accept drastically reduced prospects every day.

The facts are incontestable. Test scores show that high schools in impoverished cities are graduating high percentages of their students without the basic literacy and numeracy skills the schools promise. Recent CAPT test results show that one out of three high school children in Bridgeport, Windham, New Britain and similar **[*59]** communities did not reach even the most basic levels in math and only did modestly better at reading. Not reaching the most basic levels means these children can't even demonstrate a limited ability to read and respond to grade level material. An East Hartford high school science teacher testified that 80% of her students do not test at grade level. Many of them, she said required explanations of common words like "faucet" and "sink." In Bridgeport, New Britain, and similar communities, around 90% of the students missed their high school achievement goals. SBAC tests revealed that across the state 80 to 90% of the poor failed to reach the *minimum* standards for high school reading. Recent PSAT scores in Bridgeport show that just 1.9% of students were on track to be college and career ready. SAT scores showed 90% of Bridgeport students were not college and career ready.

Yet Bridgeport has a high school graduation rate of over 70%. Only 2% of Windham high school students were on track under the PSAT for college and career ready but that town's superintendent reports that it now has a graduation rate of more than 80%. No wonder the school superintendent of Bridgeport painfully but readily **[*60]** confessed that a functionally illiterate person could get a Bridgeport high school degree. No wonder the superintendent of Windham likewise conceded that her system was producing graduates who were ready for neither college nor a career. Contrasts between very low SAT college-and-career ready scores and very high graduation rates are stark in poor communities across the state:

Go to table3

This isn't the SAT's fault. While there is a gap in most communities, the number of unready graduates is pretty small in Connecticut's wealthiest towns:

Go to table4

You can't overlook the failure of our graduation standards in poor towns when a solid majority of their students are graduating unready and a solid **[*61]** majority of students in rich towns aren't having any trouble at all. But if test scores aren't enough, higher education realities remove any doubt that the state is failing poor students by giving them unearned degrees.

According to the state's statistics, more than 70% of impoverished students across the state's public higher education system and 70% of all Connecticut community college students don't have basic literacy and numeracy skills and have to get special instruction. Now higher education is under pressure too with Public Act 14-217, §209(b) deflecting attention from the problem by requiting state colleges to embed remedial work in credit-bearing courses rather than in stand-alone remedial courses. It's almost as though the inevitable end will be to keep pushing these students along and giving them more unearned degrees—this time while charging them for the privilege. But the origin of the problem isn't so easily buried. The higher education figures led even the state's chief education performance officer, Ajit Gopalakrishnan, to agree that the statistics force the conclusion that the state's high schools are graduating students unprepared for higher education.

Without a reasonable **[*62]** and substantial state standard,

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[60] https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&which_year=201 6&bill_num=378 .

these unready graduates are an inevitable product of demands for higher graduation rates. The federal and state government rate schools higher the higher their graduation rates. Aid amounts and remedial requirements are sensitive to these numbers too. While the state says this factor is weighed less than others that doesn't change the message: high school graduation rates should rise. And so they do. While the state points to one high school principal who testified that higher rates at his school meant more educated graduates, this testimony can't overcome the overwhelming statewide statistics and their consistency with credible testimony from other educators. The state is letting graduation rates rise without them meaning that there are more educated people among us.

Without any reasonable doubt, this breaks the state's constitutional promise of a free secondary education by making it for the neediest students meaningless. Among the poorest, most of the students are being let down by patronizing and illusory degrees. It's a safe bet that doing away with them will put enormous pressure on schools, but perhaps when it comes to focusing attention above **[*63]** all on basic literacy and numeracy skills, enormous pressure is just what they need.

A new system is constitutionally required to rationally, substantially, and verifiably connect an education degree with an education. The superficial, subjective, and easily circumvented systems some schools use are the root of the problem. The obvious way to replace them is to use a readily available means to show that students have been educated—that is, that students have learned something useful by going to school. Every school system on earth knows how to do this. Some form of objective test is given. The form of it is always fought over, but the state has already proved it knows how to create and impose one and believes it's an appropriate tool. Right now, to get a high school degree outside of secondary school—to get a "graduate equivalent degree"—General Statutes §10-5 requires in most cases passing "an examination approved by the commissioner." The state can hardly say that an objective graduation requirement is too much to ask when it's already using one.

Others have them too. According to the state's witness, Stanford University professor of education and economics Edward Hanushek, they work. He particularly likes **[*64]** Massachusetts's objective mastery requirement. Hanushek was impressed that our neighbor state radically changed things in the 1990s, and he said these changes made Massachusetts a national education leader. In 1993, Massachusetts passed Mass. Gen. Laws c. 69, §1D. It requires students to pass a statewide standard test or, in a few cases, another objective test tailored for an individual student under an "educational proficiency plan." Either way Massachusetts made what children learn matter most, not how much time they sit in a classroom or how long they stare at a computerized lesson. Fourteen states including Massachusetts, New York, and New Jersey now require their students to pass a test to get a degree.[61] The state has plenty of examples to consider.

It will have 180 days to consider them. Then it must submit for court review an objective and mandatory statewide-graduation standard. We can hope the state picks one that will become the preeminent standard in the United States. But it doesn't have to be that good to pass constitutional muster. All the definition has to do is rationally, substantially, and verifiably connect secondary-school learning with secondary-school degrees. If they aren't shams Connecticut **[*65]** can follow the Massachusetts example and adopt multiple tests. But the tests mustn't fall prey to the kind of evasions in place now. As in some states, the test could lead to different kinds of degrees—"class one," "class two," "honors," "certificate of completion," etc.

Presenting a policy in six months doesn't mean that the state has to apply it to all students immediately. The state should propose a way to introduce the new requirement as quickly as possible but as fairly as possible. It should address the problem of requiring students to meet a new standard we haven't prepared some of them to face. The schedule may connect that problem with granting varying diploma degrees temporarily or otherwise. If it is reasonable, it will be approved. Once the court has the state's plan, the plaintiff may have 60 days to comment on it.

The only way a mastery-based high school graduation requirement can work constitutionally and practically is to join it with a rational, substantial, and verifiable definition of an elementary school education. Experts like Rutgers University Professor Stephen Barnett for the plaintiffs and Hanushek for the defendants are sure that the basic problem for those **[*66]** having trouble in secondary school starts from them not learning to read, write and do basic math in elementary school. Again, Connecticut has no state standard with any teeth for students to pass from elementary to secondary school.

Elementary school is the heart of the problem for students in struggling Connecticut districts. Secondary school students can't succeed without elementary school skills, and children just aren't picking them up in this state's poorest communities.

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[61] http://www.edweek.org/ew/section/multimedia/state-testing-an-interactive-breakdown-of-2015-16.html .

Gregory Furlong, a teacher at Bridgeport's Byrant Elementary School, says that fifth graders at his school are often reading at kindergarten "See Spot run" levels. They still get promoted. Elizabeth Carpasso, a Bridgeport middle school teacher, deals with these children three grades later in eighth grade. She has put her textbooks aside because the children can't read them. She looks for other ways of teaching her class and passes the students on. Elsa Saavedra-Rodriguez, principal of New Britain's Smalley Elementary School, tells the same story. Virtually none of her students have the basic skills they should have before moving up and not one exceeds them. Ruth Stewart-Curley teaches English language learners **[*67]** at New London's Benny Dover Jackson Middle School. Sixth through eighth graders are lumped together in her class. Some are entirely illiterate. Some can't even hold a pencil. They range from those who speak no English to those bordering on the mainstream. Mixed in are special education students. She is supposed to teach these students English and science. But she can't find a text to use with a diverse and troubled group like this. She struggles along, but her work sounded frustrating at least and maybe even fruitless at worst. But the kids move on. Patricia Garcia, Windham superintendent, sees her students at every level missing what they are supposed to be doing in their grade and sadly watches them moving up the grades anyway.

These aren't isolated stories. The test scores described earlier and detailed in this opinion's factfinding appendix show how for thousands of Connecticut students there is no elementary education, and without an elementary education there is no secondary education. Beyond a reasonable doubt the state's failure to define elementary education rationally violates its constitutional duty to provide a meaningful opportunity to get one.

Several experts testified **[*68]** about the importance of good elementary schools and preschools and their connection to success in secondary school. They included:

Eric Hanushek from Stanford.

Henry Levin from Columbia.

Robert Villanova director of LEAD CT and former superintendent of the Farmington Public Schools.

Early Childhood Commissioner Myra Jones Taylor.

Bridgeport Superintendent Frances Rabinowitz.

East Hartford Superintendent Nathan Quesnel.

Education Commissioner Dianna Wentzell.

Deputy Commissioner Ellen Cohn.

All of them and every teacher, administrator, and professor who testified agreed that if children are going to have a chance they must learn to read, write, and do basic math in elementary school. Many pointed directly at the end of third grade. A child lost then is hard to recover. According to a 2012 study by the Annie B. Casey Foundation, more than a quarter of children illiterate at the end of third grade never even graduate from high school—and in Connecticut we know just how easy that is to do.

While both sides of the case agree on the priority, they want to do different things about it. The plaintiffs lean too hard on more money as the answer. Some of their witnesses suggested that basic literacy work **[*69]** meant an army of reading interventionists simply layered on top of what is already being done.

The state leaned too hard on leadership as the solution. The education commissioner and others rigidly suggested that none of the state's schools were short of money and that all would be well if the school day were reorganized, curriculum martialed, and teachers collaborated. Given the magnitude of the problem this seemed doubtful. More air went out of it when rebuttal witnesses Superintendent Rabinowitz and East Hartford Superintendent Quesnel credibly explained that most of these tactics are painfully familiar and mostly being used already.

Deputy Education Commissioner Ellen Cohn was a breath of fresh air. Cohn wrote a 2014-15 report on early reading strategies. This former Navy nurse said the task is like a medical triage. To her, early literacy was important enough to mean stripping resources from wherever necessary to prevent another wave of children passing through elementary school set up to fail. It would require giving her department the power to mandate the basic literacy techniques in a state reading pilot called CK3LI. She said the merit of these techniques is now beyond debate, **[*70]** and no witness quarreled with her. To Cohn, the job could be done. It would mean painful realignments but the state could break the cycle of failure in its poor communities.

Cohn wanted strong elementary school standards but opposed just keeping children back and doing the same thing over again. She believed children who stay back too often become children who later drop out. More important she believed doing the same thing over again would get the same result.

Whatever the right answer is, Cohn must be right that the state can't continue down the same path with troubled elementary schools. The failure is just too big and the response to it is just too small. Therefore, the state must propose a definition of what it means to have an elementary school education that is rationally and primarily related to developing the basic

literacy and numeracy skills needed for secondary school. No definition without force behind it can be rational, especially since the state would already say that it has amply laid out what elementary school should achieve by adopting its common core standards. Here the difference between a definition and a constitutionally adequate definition is that the former may [*71] have no real consequence while the latter requires substantial consequences. In other words, the definition of an elementary education must be rational and substantial and its effectiveness verifiable.

The state will have 180 days from this decision to propose a remedy that creates a rational, substantial, and verifiable definition of elementary school. There are many possibilities. Many of the elements that need to be given life and weight are in Cohn's report. They might gain some heft, for example, if the rest of school stopped for students who leave third grade without basic literacy skills. School for them might be focused solely on acquiring those skills. Eighth grade testing would have to show they have acquired those skills before they move on to secondary school. This would give the schools four school years to fix the problem for most children. The work could start as early as high-quality preschool. But it's up to the state to decide that not the court.

Whatever the state does, the effort in troubled districts would likely focus on whole classes of children. In many city schools virtually none of the students have the skills they need to leave third grade, so it's not as if [*72] a new approach would mean that a small number of children would be left socially isolated. Whatever the state comes up with will have to allow for the special challenges poor districts face, including the reality that many poor children move from school to school as they more frequently than most children move from home to home.

The state must tell the court what powers over local districts it needs to get the job done. But it must also marshal its financial resources. The state could do this several ways. It could simply provide the money. It could cut spending on unfocused and inconsequential school construction, and spend the savings on communities that need drastic interventions. The state could take money from elsewhere in the state education budget or from elsewhere in the school budgets of troubled districts. Cohn's triage analogy may prove painfully apt. But the education commissioner and the deputy commissioner emphasized that money for needed interventions can be found if courage is used in reprioritizing district spending to focus money on the key problem. Everyone in this litigation agrees on what that key problem is, so the state should have a chance and the power in troubled [*73] districts to test its claim that the resources can be found to give meaning to the constitution's promise of a free elementary school education.

As with the other orders, the parties should propose for the remedies stage a plan to roll out the changes. One aspect of triage that won support from experts like Hanushek is that the state would be better off trying to succeed with a full blown effort in a small number of districts rather than sapping its strength by trying to succeed in too many districts at once. Starting efforts with some group of districts with fewer members than the state's 30-member Alliance District group might work—the lowest to which it labels "Reform Districts" in particular might make sense. Spreading the standards from the greatest to the least troubled districts also might work. The only thing that would make neither progress on the ground nor with the court would be a plan that is more of a dodge than a to-do list.

7. Connecticut's teacher evaluation and compensation systems are impermissibly disconnected from student learning

Most of the state's education money is spent on teachers. Both sides agree this is where the money belongs. It is also undisputed that [*74] good teachers are the key to a good school system. The problem is that in Connecticut there is no way to know who the best teachers are and no rational and substantial connection between their compensation and their effect on teaching children.

The first problem is a dysfunctional evaluation system. Despite a lot of talk, teacher evaluation is still almost entirely local and the state standards are almost entirely illusory. This has left virtually every teacher in the state—98%—being marked as proficient or even exemplary while nothing in the system and no one in the case indicated these results are useful or accurate. The state insists that many schools across the country suffer from this problem, but—as we all learned in school—others doing something wrong is hardly an excuse.

An inflated teacher evaluation system, like a graduation or grading system where everyone succeeds, is virtually useless. A virtually useless evaluation system is constitutionally inadequate to undergird the state's largest financial commitment to education. As with the other key points, students can't receive a constitutionally adequate educational opportunity when something of this importance to schools has [*75] no rational, substantial, and verifiable connection to effective teaching.

General Statutes §10-151b misses that connection by missing any real requirement entirely. It says that schools must have evaluations "consistent with the guidelines for a model teacher evaluation and support program adopted by the State Board of Education." But while requiring the guidelines, the statute didn't even allow the board to adopt the guidelines by

itself. The law gave the board until 2012 to adopt the guidelines through a typical task force approach required by §10-151d under which they must be adopted "in consultation with" something called the Performance Evaluation Advisory Council or "PEAC." PEAC members included teachers, principals, school boards, superintendents—everyone in education most likely to disagree about what to do—people whose views are vital but whose votes are most likely to stifle a meaningful result.

PEAC did not disappoint. Although it faced a federal mandate to include a connection between teacher evaluations and student learning, PEAC did everything it could to weaken this requirement and then reconvened a year later to weaken it some more.

An earlier federal mandate, the No Child Left Behind Act, was roundly [*76] criticized for linking teacher evaluations to student test results. Some of the thinking behind this criticism shows up in the 2010 decision in this case, reflecting legitimate concerns that teachers are not responsible for the condition students are in when they walk into the schoolhouse. In the schools at the center of this case in particular, everyone agrees that crushing socio-economic circumstances handicap many of the students and make it wrong to expect them to get the same test scores as other Connecticut students. But those old cries of foul persisted at PEAC even when the new Every Child Succeeds Act replaced measuring absolute student performance with measuring evidence of growth. It hardly seems unreasonable to evaluate teachers partly based on how much their students have learned from them. The state's own expert Eric Hanushek insisted this was a vital element, saying that these so-called "measures of student learning" should make up around 35% of teacher evaluations.

Yet PEAC seems to have buckled under the load of criticism about tests. In the end, the State Board of Education set its teacher evaluation standards in capitulation to PEAC rather than in consultation with [*77] it. The instrument of surrender was a series of guidelines and a sample called the System for Educator Evaluation and Development or "SEED." The first article of the surrender is that schools don't have to use SEED at all. They can come up with their own system and use it so long as the Department of Education approves it as meeting the guidelines.

The main surrender is in the guidelines. Perhaps its authors thought people would assume the guidelines were serious simply because they are so complex. They certainly are complex, but they are not serious.

Under the guidelines, half of the evaluation is supposed to be on teacher practices and skills. This half is subjective and is like the traditional system where ultimately a principal watches a teacher in action and files a review. The remaining 10% of the first half is an equally subjective but highly limited role for parent or peer evaluation surveys.

The evaluation's second half is supposed to meet federal requirements about connecting how teachers do with how students learn. It says its focus is "student outcome indicators." But it quickly turns to slush. Measures of student achievement were supposed to make up 22.5% of a teacher's evaluation. [*78] One-half of this—a mere 11.25% of a teacher's evaluation—was supposed to be linked to growth rates in the state's carfully wrought system of student testing.

The other 11.25% addressing "outcome indicators" is illusory. First, the state allows schools to use any "standard indicator" or any "non-standardized indicator" of how much students learn. Second, the teacher has to agree to use it at all and then the teacher and evaluator have to agree what weight to give a standardized indicator and what weight to give the "non-standardized indicator." The goals can be changed mid-year. The only guidance about it is that it's supposed to be "fair, reliable valid and useful" or at least be so "to the greatest extent possible." In short, this part of the evaluation doesn't really *require* anything at all.

If this wasn't weak enough, the department then granted some two dozen waivers to school systems which didn't want to follow the guidelines and, in 2014, it gave up all pretenses, vaporizing the 11.25% that was supposed to be based on the state's official test scores, using the new SBAC testing system as an excuse. PEAC suggests that it will be imposed later, and the state has managed to hold off [*79] federal sanctions with these blandishments. The remainder of the student outcome indicators—5%—can optionally he student input or something called "whole-school student learning indicators." In a gutted system, what these indicators are hardly seems to matter.

The state's teacher evaluation system is little more than cotton candy in a rainstorm. Everything about it suggests it was designed to give only the appearance of imposing a significant statewide evaluation standard. These empty evaluation guidelines mean good teachers can't be recognized and bad teachers reformed or removed. As Superintendent Rabinowitz testified, these failures are integral to the daunting task she faces in trying to weed out teachers holding her system back. They run counter to the spirit if not the letter of the Every Child Succeeds Act. And they make a mockery of years of work the state has put in perfecting goals for students and the yardsticks to measure them against. Why bother measuring how students are doing if it never has any direct connection to how they're being taught?

Beyond a reasonable doubt the state's teacher evaluation system creates no rational, substantial, and verifiable link between teacher **[*80]** evaluations and student learning. It's not merely a matter of the standard being weak. The standard fails the constitutional test because it doesn't even honestly do what it says its doing.

It could. The state's chief performance officer, Ajit Gopalakrishnan, said the state has student test growth data for all of the state's teachers. He agreed the department could use the information in whatever intelligent way it might want to judge whether teachers are teaching. But it doesn't use or distribute the information for this purpose at all.

Better teachers aren't made by teachers earning better degrees or by long years on the job. Plaintiffs' expert Jennifer King Rice, professor and associate dean at the University of Maryland, agreed with state expert Eric Hanushek of Stanford about this. So did Superintendent Rabinowitz. So did Commissioner Wentzell. According to this undisputed view, teachers make significant gains in the early years of teaching but plateau after about five years.[62] No one defended the idea that having a master's degree makes a better teacher and an extensive study by Jennifer King Rice shows it has nothing to do with how well a teacher teaches. Although state officials, **[*81]** local board members, superintendents, principals, and teachers testified, no one said long years on the job and advanced degrees always meant good teaching.

Yet in Connecticut these two factors, which may have almost no role in good teaching, play virtually the entire role in deciding how much a teacher makes. The only exceptions are some loan programs and tuition forgiveness plans designed to attract teachers in shortage areas. Otherwise, the billions that flow to increased teacher pay in this state have nothing to do with either how much teachers are needed or some recognized measure of how well they teach.

Connecticut pays teachers well. It ranked third in the country in terms of teacher salary in 2012-13, but Professor Rice's study showed that doesn't matter so much to teachers. Money isn't the biggest reason why teachers teach or where they teach. But if the way money is spent—especially on raises—means nothing, it's still being wasted. Professor Hanushek in particular saw this as a lost opportunity. He thinks paying more while influencing nothing merely locks in inefficiencies. He and the commissioner of education testified that pay differentials based on things **[*82]** like shortages make more sense. As Superintendent Quesnel testified, East Hartford gets six times as many applications for elementary teacher jobs than for high school science instructors, yet there is no distinction in pay that reflects the difficulty of attracting and keeping one group of teachers over another. The same shortage problems with only minimal shortage solutions hold true in many districts for math teachers, bilingual instructors, special education teachers, and, in general in poor districts where the working conditions make the jobs less attractive.

The state sees itself as powerless here. It set up a system of local control in which school districts must agree on these things with teachers. But if the system was set up by the state then the state is responsible for the system. Any obstacle to a rational system the state has set up, the state can take down. The state is not powerless.

There are ways the state could link compensation to effective teaching, but it's nothing to do lightly. Studies show that some financial incentives have little worth.[63] Bluntly tying pay to test results for example makes no sense. It would give teachers in rich districts more money just because **[*83]** their kids always do better on tests while stripping money from teachers in poor districts where teaching skill is most needed. Professor Rice agreed that some financial incentives work and others don't. Extra money for shortage areas and in troubled districts seem to get the strongest support from full-time experts like Hanushek and Rice, professionals like Quesnel, and scholarly sources too.[64] But that didn't mean other approaches linking compensation and performance should be ruled out.

It also doesn't mean that there is no role to play for seniority beyond 5 years and advanced degrees. It's not as though any conceivable role these things might play would be irrational; the problem is that it's irrational for these two factors to play the only role. The court isn't going to decide how to pay teachers. The only thing the court concludes is that beyond a reasonable doubt the teacher pay system we have lacks a rational, substantial, and verifiable connection between teaching need and teaching pay.

The parties agree that paying and **[*84]** evaluating principals and superintendents is handled even more loosely and locally. Yet the state insists that leadership is the biggest thing troubled schools need to succeed, with the commissioner practically pounding the table about the importance of principals who know what's wrong in their schools and have

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[62] See also, http://tntp.org/publicatons/view/the-mirage-confronting-the-truth-about-our-quest-for-teacher-development at 15 .

[63] See, e.g., Roland G. Fyer, Jr., "The Production of Human Capital in Developed Countries: Evidence from 196 Randomized Field Experiments" (March 2016) at 47; http://scholar.harvard.edu/files/fryer/files/handbook_fryer_03.25.2016.pdf .

[64] *Id.* at 52.

the courage to set it right. Former Farmington superintendent Robert Villanova, a respected authority on school leaders, highlighted this too. For him, the political chaos that often overwhelms the basin of paying and reviewing superintendents is hurting our schools, including the arcane contractual relationships that push superintendents out of most districts with unnatural regularity.

The court finds beyond a reasonable doubt that the state is using an irrational statewide system of evaluation and compensation for educational professionals and therefore denies students constitutionally adequate opportunities to learn. The state will submit plans to replace them no later than 180 days from the date of this decision. The plans can include appropriate rational elements of the current system but should include proposals for hiring, evaluating, promoting, removing, and compensating **[*85]** educational professionals including teachers, principals, and superintendents. The plaintiffs may then have 60 days to respond to the proposals. The parties should include proposed implementation schedules. If the state proposes a rational plan the court will approve it.

8. The state's program of special education spending is irrational

Not every dollar the state spends on schools is fair game for constitutional scrutiny. But like teacher salaries, special education spending is so large that whatever happens to it has an outsized influence on the state's chance of keeping its promise of adequate opportunities in our schools.

Congress and the General Assembly have ordered school districts to bear immense financial burdens in the name of special education without giving them much help shouldering them. Special education mandates come chiefly from the federal Individuals with Disabilities Act (IDEA) at 20 U.S.C. §1400 *et seq.* and General Statutes §10-76a *et seq.* IDEA's purpose under 20 U.S.C. §1400(d)(1)(A) is "to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services to meet their unique needs and prepare them for further education, employment, and independent **[*86]** living." The law also requires that students learn in the least restricted environment (LRE) possible with the goal of keeping them in the classroom with the other children. As experts for both sides explained, the IDEA mandates an "Individual Education Program" (IEP) be prepared following a "Planning and Placement Team" (PPT) meeting which includes school psychologists or counselors, working with parents and teachers. These PPT meetings and the resulting evaluations decide whether a child is eligible for special education with the IEP essentially telling the school system what it has to do and consequently what it has to spend.

The state has a pretty broad view of the program. It says special education requires extensive services ranging from tutoring services for students with mild dyslexia to immensely expensive transportation and therapy for profoundly, multiply-disabled children. The state's vision is well-reflected in a case it cited. In 1989, the First Circuit Court of Appeals interpreted IDEA in *Timothy W. v. Rochester, New Hampshire School District.*[65] Timothy W. had almost no cerebral cortex and could respond to light and other things just enough to let people know he was experiencing **[*87]** them.[66] The First Circuit said the act covered all disabled children and required that all of them receive an "appropriate."[67] The *Timothy W.* case has contributed to this and other states telling school districts to transport, care for and provide extensive services for multiply-disabled children regardless whether the state can do anything that would look to most people like education. It is a phenomenon that costs immense sums, but conventional education thinking seems resigned to it.

The cost of special education is staggering. In many places over 20% of the money spent on schools is spent on special education, and more than 66,000 students are enrolled. In 2013-14 federal, state, and local spending on special education in Connecticut reached $1.82 billion when annual basic state school aid was roughly $2 billion. Almost all of that $1.82 billion comes from local government; federal and state aid amounts to just 15-20%.

The state does insist it pays more. It says that for federal purposes it uses an old post-*Horton* formula to claim 19%-22% of its general local education aid is special education aid. But this really isn't credible anymore since the evidence shows it is largely an **[*88]** arbitrary percentage, it was abandoned from the formula decades ago, and the state has now entirely given up any pretense of having a formula. Around 10% of special education spending—around $200 million—is spent every year on students with multiple disabilities.

Bridgeport Superintendent Rabinowitz said her district spent around $75 million on special education in 2014-15 and got just $1.5 million of it from the federal government and $4.8 million from the state. Because the law makes her spend whatever the IEPs require for special education children, she has less to spend on other children. At great expense—a single student's care can cost $100,000 or even $200,000—Bridgeport cares outside of the district schools for roughly

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[65] 875 F.2d 954.

[66] Id.

[67] *Id.* at 959-60.

300 children that might be called multiply-disabled and incapable of being educated within the system. According to East Hartford Superintendent Quesnel, the only children he's spending more money on each year are children in special education. For years zero-increase budgets for his school system have left him constantly stripping resources from the student population as a whole to meet those things like special education over which he is powerless.

There are **[*89]** two problems with special education serious enough to warrant constitutional concern. First is the problem of spending education money on those in special education who cannot receive any form of elementary or secondary education. Second is the evidence that shows that getting picked for special education in this state is mostly arbitrary and depends not on rational criteria but on where children live and what pressures the system faces in their name.

Daniel J. Reschly is a professor of educational psychology at Vanderbilt University. He was the state's special education expert at trial. Reschly said that special education spending is crowding out spending on general education in Connecticut and across the country. Margaret McLaughlin, a professor of special education at the University of Maryland, was the plaintiffs' expert. She agreed with Reschly. A 2013 state study of education funding said the same thing and said schools should change the way they pay for special education and how it's done.

Reschly said a lot about how schools identify special education students. Schools are supposed to make a call about whether a student needs services and what services if any are "appropriate." **[*90]** A school might grant or deny services to a child with a reading problem depending on why the child can't read and whether the system can give the child an "appropriate education." Schools have to use judgment.

But Reschly also considered cases like *Timothy W.* About these difficult cases, he said the schools never make a judgment call at all. He, other witnesses, and scholarly sources say circumstances like Timothy W.'s and worse can costs school districts amounts approaching and exceeding $200,000 a year per child.[68] Yet school officials never consider the possibility that the education appropriate for some students may be extremely limited because they are too profoundly disabled to get any benefit from an elementary or secondary school education. Reschly struggled to say why hundreds of thousands of dollars might be spent on someone profoundly disabled without even considering whether it's a good idea while for other disabled children the schools have to shape programs to fit their prospects and circumstances. After a lot of back and forth, he settled on saying that schools provide extensive services for the multiply-disabled without inquiring into their circumstances to avoid the "degree **[*91]** of pushback" they would get by saying limited or no services were appropriate.

Part of the problem may be unfounded fear of cases like *Timothy W.* That case turn on whether IDEA covered a child who could not be educated in any traditional sense.[69] Framed that way, the First Circuit could only answer that the act covers all disabled children, and it requires them to be given an education appropriate for their circumstances. But that ignores the real judgment call that Reschly says schools run away from. The call is not about whether certain profoundly disabled children are entitled to a "free appropriate public education." It is about whether schools can decide in an education plan for a covered child that the child has a minimal or no chance for education, and therefore the school should not make expensive, extensive, and ultimately pro-forma efforts. For a child in a coma, the judgment call may be painful, but it is simple: the "appropriate" education service for a child in a coma is likely little **[*92]** more than evaluating the child's condition and following the proper procedure to recognize that no educational service is appropriate because the child cannot benefit from it. No case holds otherwise, and this means that extensive services are not *always* required.

A description of the IDEA "appropriate education" duty came from the highest authority nearly 35 years ago in the U.S. Supreme Court's opinion in *Board of Education v. Rowley.*[70] Rowley was mostly deaf. She was certainly capable of getting an education and was getting one. The question was whether she should have a sign language interpreter with her in class as opposed to less expensive assistance.[71]

The Supreme Court held that the act aimed, not at an equal education, but a "basic floor of opportunity" that "consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."[72] It also recognized that "[t]he educational opportunities provided by our public school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a

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[68] See, Note, "Special Education, Equal Protection and Education Finance: Does the Individuals with Disabilities Education Act Violate a General Education Student's Fundamental Right to Education?" 40 B.C. L. Rev. 633 at 634 (March 1999).

[69] 875 F.2d 954 (1989).

[70] 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

[71] *Id.* at 184.

[72] *Id.* at 201.

particular student's ability to assimilate information presented in the classroom." [*93] [73] The Court rejected the idea of a one-size-fits-all analysis of what effort maybe enough:

> The determination of when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act presents a more difficult problem. The Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied. It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with nonhandicapped children, while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. *We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.*[74]

The Supreme Court overturned the lower court rulings requiring the sign language interpreter, saying only local experts control how far any effort must go: "The primary responsibility for formulating [*94] the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child."[75]

Out of this kind of modest statement, urban legends about IDEA seem to have grown, and they have led many to think the law requires unthinking, expensive, and futile efforts in the name of education. Media reports reflect a wide public perception that herculean efforts are required even to achieve virtually nothing.[76] But as Justice Ruth Bader Ginsberg, sitting on the D.C. Circuit Court of Appeals in 1984, wrote in *Lunceford v. District of Columbia Board of Education*: public "resources are not infinite," and federal law "does not secure the best education money can buy; it calls upon government, more modestly, to provide an appropriate education for each (disabled] child."[77] Reschly was reluctant but clear enough: the reason so much is spent is because someone has to take responsibility for saying that it shouldn't be, and no one is willing to do it.

If, as Reschly and others said, roughly 10% of the special education population fits this description and we assume the unlikely scenario that they command just 10% of total special education spending then this is costing our state schools nearly $200 million a year. This doesn't mean none of the money should be spent or even decide how much should be spent. An appropriate education for some severely-disabled multiple-handicapped children doubtless requires this kind of spending to get results, but we don't know who these children are because no judgment on the question is made at all—schools wrongly think they aren't supposed to think, but must do something no matter the degree or character of the benefit.

Neither federal law nor educational logic says that schools have to spend fruitlessly on some at the expense of others in need. Medical services including physical and occupational therapy may help some multiply-disabled children and may be an important social service. When they are "related services" to educating children under 20 U.S.C. §1401(17), IDEA says schools must supply them. But [*96] when they have no substantial connection to education no one says they have to be paid for out of education budgets.

This kind of spending is hard to square with seeing the constitution as requiring a substantial, rational, and verifiable connection between things schools do and things that teach kids. That thinking must at least require schools to spend education money on education. It means schools shouldn't be forced to spend their education budgets on other social needs—however laudable—at the expense of special education children who can learn and all the other children who can learn along with them. The first step is for schools to identify and focus their efforts on those disabled students who can profit from some form of elementary and secondary education. This will require state standards to address this issue and require school districts to make the necessary judgments.

Doubtless the state can choose to continue to serve multiply-disabled children in any way it sees fit. It may simply have to rethink forcing local school districts to pay for it with local school money.

Spending education money on education is certainly needed to marshal resources for thousands of children in [*97] inner city schools whom we already know can be educated but

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[73] *Id.*, at 198.

[74] *Id.*, at 202 (emphasis added).

[75] *Id.*, at 207.

[76] [*95] See, e.g., "A Struggle to Educate the Severely Disabled," www.nytimes.com/2010/06/20/education/20donovan.html; "Special Needs, Painful Costs," articles.courant.com/2001-02-09/news/0102092823_1_special-education-severely .

[77] 745 F.2d 1577, 1583, 241 U.S. App. D.C. 1.

aren't being educated. This includes special education students. Reschly's research shows that while there are very few children like Timothy W. there is a bigger problem with special education money and it affects all the disabled children in our schools.

Reschly closely studied which students were getting tapped for special education in Connecticut. He did it to prove that impoverished students are not being identified for special education much more than wealthier students. But he discovered something more ominous along the way. He drew some scatter graphs comparing school districts and considering the identification rates for various kinds of special education. Figure 4 in his report shows total prevalence patterns for special education identification:

Figure 4. Relationship of Total SWD Prevalence and District Poverty in 2010-2011

[Graphic image incapable of being typeset] Source CCJEF_2011-Supp.xls (Tbl39); CCJEF_2012-Supp.xls (Tbl39)

Each dot on his graph is a school district. The horizontal axis shows relative poverty based on the percentage of students who receive free and reduced price lunches under federal law. The **[*98]** vertical axis shows students with disability (SWD) identification prevalence—the total percentage of the student population found eligible for special education. Overall, the scatter graphs show that children aren't significantly more likely to get special education just because they live in a poor town.

But the graphs also show that the disability identification rates vary so widely between districts that Reschly was left scratching his head trying to find a pattern. Similar districts were identifying completely dissimilar percentages of special education students. He didn't think this could mean one town had many intellectually disabled children while another town with the same characteristics had scarcely a single one. Instead, Reschly was left believing that the variations meant some districts were ignoring problems, some districts were over-identifying problems, and some districts just refused to use certain labels. For example, some districts he knows avoid saying kids are intellectually disabled—those formerly called mentally retarded—preferring instead to call them autistic.

His experience with Connecticut's system and others revealed chaos. Poor districts call some children **[*99]** emotionally disturbed while wealthy districts call the same kind of children ADHD sufferers—with consequent variations in services and expenses. In many districts there is no limit to special education when it comes to bad behavior. Bad behavior in these places always comes from some kind of disability like emotional disturbance no matter where it comes from, how bad it is, or how often it happens.

Deputy Commissioner Cohn supported this sense that things were out of control. She explained that children in Hartford were under-identified for special education, but she said "you just need a hang nail to get identified for special education in Glastonbury." Reschly thought "it always has been remarkable . . . that schools could have markedly different rates of disability identification using the same state definitions and classification criteria." He ultimately agreed that the inexplicable and in his word "enormous" differences between districts can only be because the state standards allow serious over-inclusion or under-inclusion in special education.

This unstable reality is because Connecticut hardly has any state standards for identifying specific disabilities and a method of dealing **[*100]** with them. Doubtless, some categories of disability are harder to recognize than others and, yes, everyone knows that what needs to be done is highly individual. Does a child slow to read have dyslexia? Is a behavior problem ADHD or emotional disturbance? Plainly these depend on the child. But Reschly doesn't agree that all speech and language difficulties are subjective and many other disabilities can obviously be identified with more or less objectivity (blindness, etc.) and so can the typical services schools should provide.

Reschly said the problem can be brought far closer to reason by standard procedures and methods of ensuring compliance with them. He says that without them too many judgments are open to outside pressure to supply unneeded special education services or supply the wrong ones. Reschly said the system is warped by pressure from parents, by pressure from individual schools for more outside resources, and by pressure from central school district leaders to use in-house services and save money. Reschly and others saw these pressures as a "significant" problem. They hurt schools, but more important they hurt the children the schools are supposed to educate by ignoring **[*101]** their actual needs.

Even with government spending $1.8 billion every year on special education in Connecticut the state requires little or nothing of districts in how they go about spending it. The state did publish a 2010 book of guidelines. The guidelines focus on federal law and walk through generalities, discussing the relationship between general and special education and making some general suggestions about accuracy. The guidelines include nothing that local PPT can use to know how to ensure uniformity, to accurately label, to set reasonable goals and to use reasonable means to carry them out. The state also pointed to a document called "Guidelines for the Practice of School Psychology." These guidelines are

even less helpful. They say nothing about how to identify disabled students, virtually nothing about special education, and psychologists aren't even required PPT members. More helpfully, the department website publishes informational papers on a variety of topics, including specific information on subjects like intellectual disability, autism and ADHD. Fleshed out and made part of required protocols, documents like these might be useful, but the only evidence is that these **[*102]** resources are there if anyone wants them and nothing more.

There isn't any reasonable monitoring of over-identification or under-identification either. IDEA compliance is the focus of a lot of work and some regular samples across the state, but its focus has been on ensuring paperwork compliance and monitoring compliance with the individual education plans that get created without examining their appropriateness. This process does not significantly address under-identification or over-identification.

Special education identification and intervention is unquestionably individualized, but that doesn't mean it has to be chaotic. Without a rational basis, neither the state's command to local school districts nor its means of identifying and educating disabled students can stand under the constitution's education provision. Here again, it is not a question of whether the state has chosen the most effective course. The problem rises to a constitutional level because, with respect to one of the largest components of its funding scheme, the state beyond a reasonable doubt lacks a rational, substantial, and verifiable connection between its educational mandate and a means of carrying it out.

[*103] Within 180 days, the state will submit new standards concerning special education which rationally, substantially, and verifiably link special education spending with elementary and secondary education. The plaintiffs will have 60 days to respond.

9. The difference between rational policy and the best policy

The connection between the constitution's education mandate and the means of carrying it out doesn't have to be ideal to avoid judicial scrutiny. Not everything has to be perfectly equal either. If these things were true, this decision could say a lot about several topics.

It might discuss class size. There was a spirited debate at trial about class size that challenged the preconception that a smaller class was a better class. That discussion highlighted the importance of good teachers over smaller class sizes. There was also a robust discussion about the role of interventionists and classroom teachers as well as the role of classroom teachers and paraprofessionals. The role of a good principal was discussed. The most effective way to create an education budget was mooted. The relative importance of racial integration and effective education was discussed, with several witnesses debating **[*104]** the role of the state's magnet schools. The struggles of English language learners were reviewed with many suggestions for how to ease their lot.

But if there was any one thing in the trial that stood out as good—as opposed to constitutional—policy it was the need for universal high-quality preschool. Witnesses for both sides agreed that high-quality preschool would be the best weapon to get ahead of the literacy and numeracy problems plaguing schools in impoverished cities. Eric Hanushek, the state expert from Stanford, believed the state would gain a lot from targeting free public preschool to a small number of cities and offering it to every child in them rather than spreading the effort thinly to some children throughout the state. Early Childhood Commissioner Jones-Taylor agreed. More work in this area cries out for attention-but not from this court.

All this is just to show that there is a difference in a constitutional case between a court pushing good education policy and a court barring irrational education policy. The legislature makes policy. The only reason for any of the court's legal conclusions is that the fundamental right to an adequate educational opportunity won't **[*105]** mean much unless the state's major policies have good links to teaching Connecticut children. The remedies that will be considered in this case are required because in several senses these links are missing.

10. The next job is to craft remedies

To get rid of an irrational policy, adopt a rational one. It's the court's job to require the state to have one. It's the state's job to develop one. The court will judge the state's solutions, and if they meet the standards described in this decision, uphold them. The state will submit proposed reforms consistent with this opinion within 180 days. The state will propose changes consistent with this opinion on the following subjects:

> the relationship between the state and local government in education;
>
> an educational aid formula;
>
> a definition of elementary and secondary education;
>
> standards for hiring, firing, evaluating, and paying education professionals; funding, identification, and educational services standards for special education.

Once the state submits its proposed remedies, the plaintiffs will have 60 days to comment on them and propose

alternatives. A hearing will then be scheduled.

All proposals will include a timetable and any other proposed **[*106]** variables related to carrying them out along with a thorough justification. Both parties should list any statutes they claim are invalidated by the court's rulings.

11. Conclusion: Schools are for kids

This case has been fought over for more than 11 years. It started in Superior Court in 2005 and the Supreme Court sent it here for a trial nearly seven years ago. After the parties spent countless hours gathering evidence and the court heard many motions, it has had 60 days of trial stretching over a six-month period. Over 5,000 exhibits were marked and thanks to nearly 2,000 fact admissions they were whittled down to 826 full exhibits. Over 50 witnesses testified, including nearly 20 education and financial experts. Thousands of pages of briefing have been filed and studied. The court has made 1,060 individual findings of fact in an appendix to this decision.

So nothing here was done lightly or blindly. The court knows what its ruling means for many deeply ingrained practices, but it also has a marrow-deep understanding that if they are to succeed where they are most strained schools have to be about teaching children and nothing else. If they are to succeed rather than be overwhelmed **[*107]** by demands for alternative schools, public schools must keep their promises. So change must come. The state has to accept that the schools are its blessing and its burden, and if it cannot be wise, it must at least be sensible. The implications here are plain:

> The state's responsibility for education is direct and non-delegable: it must assume unconditional authority to intervene in troubled school districts.
>
> The court can't dictate the amount of education spending, but spending including school construction spending must follow a formula influenced only by school needs and good practices.
>
> The state must define elementary and secondary education objectively, ending the abuses that in some places have nearly destroyed the meaning of high school graduation and have left children rising from elementary school to high school without knowing how to read, write, and do math well enough to move up.
>
> The state must link the terms of educators' jobs with things known to promote better schools: it cannot churn out uselessly perfect teacher evaluations nor can teacher pay consider solely what degrees teachers have and how long they have been on the job.
>
> The state must end arbitrary spending on special **[*108]** education that has delivered too little help to some and educationally useless services to others; it must set sensible rules for schools to follow in identifying and helping disabled children.

The clerk will enter judgment partially favoring the plaintiffs, and the court will schedule a hearing on remedies after reviewing the proposals the parties begin submitting 180 days from now. The court will retain jurisdiction to enforce the equitable constitutional decrees in this ruling.

BY THE COURT

Moukawsher, J.

Table1 (Return to related document text)

Ansonia	**$82,361**
Bridgeport	$905,293
Derby	$39,412
East Hartford	$245,381
Hartford	$1,003,800
New Britain	$230,590
New Haven	$770,653
New London	$129,072
Meriden	$301,307
Norwalk	$57,755
Norwich	$181,023
Waterbury	$668,272
West Haven	$603,559
Windham	$133,117
	$5,351,595 [*46]

Table1 (Return to related document text)

Table2 (Return to related document text)

Berlin	**$59,301**
Branford	$304,456
Canton	$10,050
Chester	$7,858
Cromwell	$68,585
East Granby	$40,618
Glastonbury	$263,457
Haddam	$99,496
Hamden	$67,521
Middlebury	$103,096
New Fairfield	$3,812
Newtown	$322,147
Orange	$266,396
Rocky Hill	$430,201
Seymour	$181
Shelton	$686,007
Simsbury	$288,579
Trumbull	$331,250
West Hartford	$1,494,623
Wethersfield	$480,424
Woodbridge	$32,760
Woodbury	$289,888
	$5,170,282

Table2 (Return to related document text)

Table3 (Return to related document text)

Municipality	**Most recent** graduation rate %	**SAT college &** career ready %	**Graduating but** not ready %

	Most recent	SAT college &	Graduating but
Bridgeport	71.5%	10%	61.5%
Danbury	78.1%	34%	44.1%
East Hartford	78.3%	20%	58.3%
Hartford	71.5%	8%	63.5%
New Britain	63.6%	25%	38.6%
New Haven	75.5%	11%	64.5%
New London	71.1%	16%	55.1%
Waterbury	67.9%	15%	52.9%
Windham	81.7%	34%	47.7%

Table3 (Return to related document text)

Table4 (Return to related document text)

Municipality	Most recent graduation rate %	SAT college & career ready %	Graduating but not ready %
Darien	96.7%	86%	10.7%
New Canaan	98.4%	83%	15.4%
Ridgefield	97.6%	78%	19.6%
Weston	97.2%	83%	14.2%
Westport	97.8%	84%	13.8%
Wilton	97%	81%	16%
Greenwich	95.1%	69%	26.1%

Table4 (Return to related document text)

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