HHD-CV-14-5037565-S

S.C. _____

CONNECTICUT COALITION FOR JUSTICE IN EDUCATION FUNDING INC, ET AL *Plaintiffs*	:	SUPREME COURT
v.	:	
JODI M. RELL, ET AL *Defendants*	:	SEPTEMBER 15, 2016

APPLICATION FOR CERTIFICATION TO
APPEAL PURSUANT TO CONN. GEN. STAT. § 52-265a

Pursuant to Conn. Gen. Stat. § 52-265a and Practice Book § 83-1, the Attorney General, on behalf of the defendants, applies to the Chief Justice for certification to appeal the trial court's judgment by Memorandum of Decision filed September 7, 2016. The principal questions of law upon which the appeal is to be based are as follows:

1) Whether the trial court erred when, after finding that the plaintiffs had failed to prove, either beyond a reasonable doubt or even by a preponderance of the evidence – a) that the State's public schools fail to provide adequate school facilities, including space, heat, light and air; adequate desks, chairs, pencils and reasonably current textbooks; or minimally adequate teachers teaching reasonably up-to-date curricula; or b) that the State's educational system

violated requirements of equity or equal protection – the court nevertheless determined that numerous state educational policies were unconstitutional because they were not "rationally, substantially, and verifiably" linked to teaching children, and ordered the legislature to present plans to the court to remediate those "deficiencies" within 180 days.

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

3) Other issues central to this broad and important litigation as may be identified by the parties and this Court as necessary to full and fair consideration of the appeal.

I. THERE IS STRONG PUBLIC INTEREST IN THIS CASE AND ANY DELAY WILL UNDERMINE PUBLIC CONFIDENCE IN THE JUDICIARY, LEAVE THE LEGISLATURE WITHOUT PROPER GUIDANCE, OR CREATE AN UNNECESSARY CONSTITUTIONAL CONFRONTATION

The substantial public interest involved in this case is the proper construction and application of Article Eighth, § 1, of the Connecticut Constitution, providing for free public elementary and secondary schools, as implemented by the General Assembly by appropriate legislation. Delay in appellate determination of this case would work a substantial injustice because the trial court has ordered extensive, sweeping changes to the public education policies established by statute in this state, which changes could only be enacted by the legislature, within 180 days of its decision. The required changes would alter numerous fundamental issues of education policy in this state. Neither the Attorney General nor other state officers have the legal authority to act or speak for the legislature, *see, e.g., Envirotest Systems Corp. v. Commissioner of Motor Vehicles,* 293 Conn. 382, 397-98 (2009), and so the Attorney General cannot simply offer proposals on the legislature's behalf, nor does the legislature have a procedure to

proffer and negotiate legislative enactments with the trial court. Should the legislature attempt to comply with these broad directives, even if it were to be given time extensions, by enacting new legislation, then it would have made these broad changes based solely on the views of a single Superior Court judge, without review or consideration by higher judicial authority. Should the legislature fail to comply, the trial court would have precipitated an unseemly, unnecessary, and entirely avoidable constitutional confrontation if it made any attempt to enforce its orders. Neither result is appropriate. Instead, this court should determine the law definitively before the legislature is asked to take any action under judicial compulsion.

Because the trial court's orders in this case contemplate further steps, there may be some question about whether this matter is subject to review at this time by direct appeal. *See State v. Curcio,* 191 Conn. 27, 31 (1983). Nevertheless, it is overwhelmingly in the public interest that these issues be resolved by this Court so the citizens of this state can have confidence that if the legislature acts in response to a judicial mandate, it is a mandate of our highest court.

II. BRIEF HISTORY OF THE LITIGATION

This case was brought, under former Docket No. HHD-CV05-4050526-S, in December, 2005, alleging, in essence, that the State was failing to provide a constitutionally adequate and equitable education to plaintiffs. The state asserted that there was no constitutional right to an adequate education and that the claim was not justiciable, and the trial court struck those claims. Docket No. HHD-CV05-4050526-S, Doc. 123. The Plaintiffs applied for certification to appeal pursuant to Conn. Gen. Stat. § 52-265a, which was granted. This Court held, 4-3, with no majority opinion, that the

claim was justiciable, *Connecticut Coalition for Justice in Education Funding v. Rell*, 295 Conn. 240 (2010). Justice Palmer's concurring opinion, 295 Conn. at 320, constituted the holding of the decision, as the narrowest view supported by a majority of the court. *See State v. Ross*, 272 Conn. 577, 604 n.13 (2005). After extensive further discovery, briefing and other pre-trial litigation, the case was tried from January 12 to June 3 of this year.

III. THE TRIAL COURT IMPROPERLY CREATED AND APPLIED A SWEEPING NEW LEGAL STANDARD TO ASSERT JUDICIAL CONTROL OVER EDUCATIONAL POLICY

The trial court issued a lengthy Memorandum of Decision, Doc. 359 ("MOD"), accompanied by over a thousand findings of fact, on September 7, 2016. Appendix A. The court determined that Justice Palmer's concurring opinion established the constitutional standard for adequate education, MOD 17, 21-22, and that the plaintiffs had failed to prove, either beyond a reasonable doubt, as required for constitutional claims, or even by a preponderance of the evidence, that the state's schools do not meet any aspect of this standard. MOD 24-25. The court further determined that plaintiffs had also failed to prove their claims that the state was not offering equitable educational opportunities, MOD 27, and that there was no basis to enter any orders regarding plaintiffs' claims about preschool. MOD 87. The court also found that one of the state's experts testified "convincingly" that there is "no direct correlation between merely adding more money to failing districts and getting better results." MOD 37. The court also noted that from 2012 through the current school year, the State has spent over $400 million in new money solely upon the 30 lowest performing school districts. MOD 25, MOD Appx.One, Findings of Fact 39-42.

Once it had made these findings, the court had effectively resolved all issues before it. It had determined that the plaintiffs had failed to prove their claims about the claimed inadequacy of educational opportunities provided as required by the Constitution, and that they had also failed to prove that educational opportunities as supported by state funding were inequitable or in violation of equal protection requirements, as the state provides far greater funding to the neediest districts than it does to the wealthiest. As Justice Palmer explained, "unless the plaintiffs can demonstrate that the actions that the state has taken to satisfy the particular requirement in dispute cannot reasonably be defended as minimally adequate, the court must defer to the judgment of the political branches in the matter." 295 Conn. at 343. Rather than concluding its opinion and entering judgment for the defendants, however, the court took an uncharted and legally unsupported path.

It said that the state's education spending and various education policies are *also* required to be "rationally, substantially, and verifiably" connected with educational need. This standard is entirely made up and has the effect of giving the judiciary broad control over educational policy. It does not come from this Court's jurisprudence, nor does the court cite any other source for the idea. By applying this new concept, as further explained below, the court effectively appointed itself as the ultimate arbiter not only of the Constitution, but also of the State's educational policy.

The court finds that the State has failed to meet its new standard in regard to the following areas, which the State must remedy as described:

1) The State must create a new school spending plan that rationally, substantially and verifiably connects education spending with educational need and must

follow it every year. MOD 41, 43-44. This same requirement appears to apply to school construction funding. MOD 43. The court states no basis for imposing this requirement after determining that the state's spending and provision of educational services have not been proven inadequate. Because only the General Assembly can decide how to appropriate funds and then do so, this requirement can only be read to apply directly to that body and to require it to cede part of its appropriations authority permanently to the court. This requirement appears to contravene the constitutional provision that "[t]he General Assembly shall implement this principle [of free public elementary and secondary schools] by appropriate legislation." Constitution, Article Eighth, § 1. Further, the General Assembly is not party to this litigation.

2) The State must submit for court review an objective and mandatory statewide graduation standard that rationally, substantially and verifiably connects secondary school learning with secondary school degrees. MOD 53-55. As current procedures and requirements for graduation standards are set by state law, *e.g.,* Conn. Gen. Stat. §§ 10-221a, 10-223a, and 10-14n(e), only the General Assembly could establish a new standard.

3) The State must propose a standard that creates a rational, substantial and verifiable definition of elementary school (and what students must learn to complete elementary school). MOD 60-62. As no state official or agency presently has the authority to create such a thing, only the General Assembly would have the legal authority to do so.

4) The State must submit plans to replace its irrational systems for evaluation and compensation of educational professionals that deny students constitutionally adequate opportunities to learn with a plan that connects evaluation and compensation to student education in a rational, substantial and verifiable way. MOD 71. The court does not explain what it means by students' constitutional "opportunities to learn," but only the General Assembly could dictate such standards or systems, which would also, of necessity, interfere with and upend current negotiated collective bargaining standards.

5) The State must submit new standards concerning special education which rationally, substantially and verifiably link special education spending with elementary and secondary education. MOD 86. Apparently these standards should include denial of special education services for students who are too disabled to benefit educationally. MOD 77, 80. While only the General Assembly could set such standards, as defendants pointed out at trial and in post-trial briefs, any such standards would almost certainly violate federal law. *Defendants' Post Trial Brief*, (7/15/16), Doc. 333, pp. 70-72.

6) In various discussions, the court says that the State bears ultimate responsibility for compliance with constitutional requirements and the court may "weed out any General Statutes holding the effort back." MOD 8-9, 89; *see also* MOD 61. The state is also required to identify any authority it needs, presumably beyond current statutory authority, in order to comply with the court's orders, apparently so that the court can provide its own substitute for that authority. MOD 61, 89.

The court cites no legal authority for any of its breathtakingly sweeping orders requiring the State to, in effect, change numerous key educational policies so that they will be, in the trial court's judgment, "rationally, substantially, and verifiably" connected with educational need. In addition, except, to some extent, for 1) above, neither side sought any of these "remedies" at trial.

Further, as is obvious upon even the briefest reflection, none of the issues raised by the trial court is an issue of constitutional law; rather, each one is a critical issue of policy upon which reasonable minds can and do differ. Should (and can) the General Assembly be compelled to create and stick to a particular school funding formula, even though it is already providing adequate educational opportunities? Should the state set standardized requirements for completion of elementary school and high school graduation, at the risk of holding behind disproportionate numbers of poor students? Should the state impose more rigorous teacher evaluation standards, perhaps outside of collective bargaining, and should those standards be based substantially on students' standardized test scores? Should the state require that teachers' pay be tied to measurable success, and should teachers in areas of greater need or difficulty be paid more? Should the state attempt to dictate the workings of local special education programs?

Each of these issues is important. Each is obviously controversial, worthy of extensive discussion, and susceptible of cogent arguments to support divergent views. Each one is also quintessentially a matter of educational policy, rather than constitutional law, and therefore a matter for elected officials to determine through the democratic process. There is no reason to believe that any judge is better qualified to

make these decisions than are elected officials. The fact that the decisions are difficult and controversial, as they surely are, does not provide such a reason. The fact that a judge may believe he can be above politics, which is to say, above the democratic process, does not provide license for a court to go beyond constitutional requirements to impose its vision of best practices in educational policy upon the State. As Justice Palmer noted in his concurrence in this case, "[t]he judicial branch must accord the legislative branch great deference in this area because, among other reasons, courts are ill-equipped to deal with issues of educational policy." 295 Conn. at 335.

The effects of the court's orders are particularly dismaying in light of the fact that only the legislature can change the policies about which the court expresses concern. Of course, no one else, either in the Executive Branch or more specifically in the Attorney General's Office, has the authority to speak or act for the General Assembly in matters of such moment. If the legislature, out of deference to the court, enacts extensive changes in state law in an attempt to comply with the court's orders, then it will have acted at the direction of a single Superior Court judge, with no idea whether that judge's view of the Constitution is correct. If the legislature fails to act, and the court seeks to enforce its orders, it can only precipitate a constitutional confrontation.

IV. ACTION REQUESTED OF THIS COURT

The public importance of this case is apparent, and it is already over ten years old, and has already been to this Court once. Accordingly, should the Court grant this Application, it is in the public interest to use the occasion to, insofar as possible, decide all necessary issues in this proceeding. In order to achieve that goal, counsel requests that the court set a reasonable schedule for further proceedings that recognizes the

importance of the proceedings, the substantial public interest at stake and the massive nature of the record to be presented on appeal.

In addition, a stay is necessary to protect the status quo should this Application be granted. It appears, in accordance with *Office of Governor v. Select Committee of Inquiry*, 271 Conn. 540, 546 (2004), that this Court may issue such a stay, *see also* Practice Book §§ 60-1, 60-2, 60-3, and the undersigned hereby requests entry of that stay.

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CERTIFICATION

I hereby certify that a copy of the foregoing was either delivered electronically or mailed, first class postage prepaid, as indicated, this 15th day of September, 2016 in accordance with Connecticut Practice Book §§ 62-7 and 83-1, to:

via first class mail, postage paid only

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