ROGERS, C. J., with whom PALMER, J., joins, concurring. The majority concludes that the trial court lacked jurisdiction over the claim of the petitioner, Matthew F., that he was entitled to an order compelling the department of children and families (department), to provide him with services because he was over the age of eighteen and had failed to allege that he was "in full-time attendance in a secondary school, a technical school, a college or a state-accredited job training program" as required by General Statutes § 46b-129 (j).[1] I would conclude that the petitioner's failure to make such an allegation was not a subject matter jurisdictional defect, but went to the merits of the petitioner's claim. Accordingly, I would reverse the judgment of the trial court on the ground that the petitioner had failed to establish an essential element of § 46b-129.[2]

This court previously has recognized "the recurrent difficulty of distinguishing between two kinds of challenges to a tribunal's exercise of its statutory authority. On the one hand, a challenge may allege that a tribunal's action exceeds its statutory authority. Such a challenge raises a jurisdictional claim. On the other hand, a challenge may allege that a tribunal's action misconstrues its statutory authority. Such a challenge raises a claim of statutory construction that is not jurisdictional." *Cantoni* v. *Xerox Corp.*, 251 Conn. 153, 162, 740 A.2d 796 (1999). Thus, "[a]lthough related, the court's authority to act pursuant to a statute is different from its subject matter jurisdiction. The power of the court to hear and determine, which is implicit in jurisdiction, is not to be confused with the way in which that power must be exercised in order to comply with the terms of the statute." (Internal quotation marks omitted.) *Amodio* v. *Amodio*, 247 Conn. 724, 728, 724 A.2d 1084 (1999).

As this court suggested in *Cantoni*, the distinction between challenges to the trial court's subject matter jurisdiction and challenges to the exercise of its statutory authority is not always clear. As a result, this court's cases addressing the distinction have not always been consistent. In *Amodio*, for example, the parties had entered into a child support agreement that precluded modification unless the defendant earned more than $900 per week. Id., 727. The agreement was approved as an order of the trial court. Id., 726. When the defendant sought a modification order pursuant to General Statutes § 46b-86 (a), the trial court granted the modification even though the defendant's weekly income did not exceed $900. Id. On appeal, the Appellate Court determined, sua sponte, that the trial court did not have jurisdiction to modify the support order because the dissolution decree foreclosed such a modification. Id.,

727. On appeal, this court concluded that "[a] court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it. . . . Once it is determined that a tribunal has authority or competence to decide the class of cases to which the action belongs, the issue of subject matter jurisdiction is resolved in favor of entertaining the action." (Citation omitted; internal quotation marks omitted.) Id., 728. This court noted that § 46b-86 (a) confers jurisdiction on the trial court to modify support orders "[u]nless and to the extent that the decree precludes modification"; (internal quotation marks omitted) id., 730; but concluded that, because support orders can be modified despite such preclusion provisions when they are ambiguous or do not adequately protect the parties, the trial court did not lack subject matter jurisdiction to modify the order. Id., 730–31. This court further concluded that "[s]eparate and distinct from the question of whether a court has jurisdictional power to hear and determine a support matter . . . is the question of whether a trial court *properly* applies § 46b-86 (a), that is, properly exercises its statutory authority to act." (Emphasis in original.) Id., 730. This court remanded the case to the Appellate Court for consideration of that issue. Id., 732; see also *New England Retail Properties, Inc.* v. *Maturo*, 102 Conn. App. 476, 482, 925 A.2d 1151 (under statute prohibiting commencement of action against estate unless legal claim has been rejected by estate, claim that estate had not rejected legal claim did not implicate court's subject matter jurisdiction but was question of statutory authority), cert. denied, 284 Conn. 912, 931 A.2d 932 (2007).

In *Kennedy* v. *Kennedy*, 177 Conn. 47, 49, 411 A.2d 25 (1979), this court reached a different result. The issue in that case was whether "the Superior Court has the authority to make and enforce support orders pertaining to children over the age of eighteen." Id. The court concluded that, because the statutes relating to support orders applied only to minor children, and because the legislature had lowered the age of majority from twenty-one years of age to eighteen years of age, the trial court lacked jurisdiction to enter such orders.[3] Id., 52–53. In *Kennedy*, the court did not discuss the distinction between the trial court's subject matter jurisdiction and its statutory authority. In a later case, however, Justice Peters, who was on the panel that decided *Kennedy*, stated that she was "not persuaded that we should invariably characterize as an absence of subject matter jurisdiction every failure of a trial court to observe every statutory limitation on its authority to act; but it is clear that in this instance I am bound by our holding to the contrary" in *Kennedy*. *Broaca* v. *Broaca*, 181 Conn. 463, 471, 435 A.2d 1016 (1980) (*Peters, J.*, dissenting).

This court's cases addressing the distinction between motions to dismiss and motions to strike are also

instructive on the distinction between claims implicating the trial court's subject matter jurisdiction and claims implicating the proper exercise of its authority. In *Gurliacci* v. *Mayer*, 218 Conn. 531, 541–42, 590 A.2d 914 (1991), this court considered whether the trial court had subject matter jurisdiction over the plaintiff's claim that she had been injured as the result of a fellow employee's negligence. The named defendant in that case argued that the trial court lacked subject matter jurisdiction over the action because, under the fellow employee immunity rule of General Statutes (Rev. to 1983) § 7-465 and the Workers Compensation Act, General Statutes § 31-275 et seq., the workers' compensation commission has exclusive jurisdiction over intra-workplace claims unless they fall into one of two statutory exceptions. Id., 543–44. Because the plaintiff had not alleged either exception in her complaint, the defendant filed a motion to dismiss the complaint for lack of subject matter jurisdiction, which the trial court denied. Id., 541–42. On appeal, this court noted that it previously had held that "if a pleading . . . on its face is legally insufficient, although facts may indeed exist which, if properly pleaded, would establish a cause of action upon which relief could be granted, a motion to strike is required." (Internal quotation marks omitted.) Id., 544. In contrast, "[a] motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court." (Internal quotation marks omitted.) Id. This court concluded that "the fact that the plaintiff's complaint failed to allege facts that would have removed it from the operation of the fellow employee immunity rule merely reflects that the complaint failed to state a legally sufficient cause of action." Id. Accordingly, this court concluded that the complaint properly was subject to a motion to strike, not a motion to dismiss. Id.

This court reasoned in *Gurliacci* that "[i]nterpreting the [statutory] language . . . [setting forth the exceptions to the fellow employee immunity rule] as subject matter jurisdictional, taken to its logical conclusion, would require a trial court, after trial, to dismiss for lack of subject matter jurisdiction a complaint that at the outset properly alleged an exception to the fellow employee immunity rule" if the fact finder ultimately concluded that neither exception applied. Id. "Thus, the court would be compelled to conclude that it had no subject matter jurisdiction over the case that it had tried solely because the plaintiff failed to establish an essential element of his cause of action." Id., 545. This court declined "to adopt such a bizarre interpretation of [the statute]." Id.; see also *Egri* v. *Foisie*, 83 Conn. App. 243, 246–51, 848 A.2d 1266 (trial court improperly granted motion to dismiss complaint under doctrine of sovereign immunity when plaintiff failed to allege

negligent operation of state owned and insured motor vehicle as required by statute waiving sovereign immunity; because plaintiff could potentially state claim under statute, motion to strike was proper procedural vehicle for challenging legal sufficiency of complaint), cert. denied, 271 Conn. 931, 859 A.2d 930 (2004).[4]

This court reached a different conclusion in *Amore* v. *Frankel*, 228 Conn. 358, 362, 636 A.2d 786 (1994), in which the plaintiffs sought to recover from the defendant, the commissioner of transportation, for injuries that one of the plaintiffs had sustained in a fall on a driveway on the campus of the University of Connecticut. The plaintiffs alleged that their claims came within a statutory exception to the doctrine of sovereign immunity for injuries that are caused by the commissioner's negligence in carrying out his legal duty to maintain a road. Id., 363–64. The commissioner filed a motion to dismiss the complaint in which he argued that the claim did not fall within the exception because he did not have the legal duty to maintain the roads on the university campus. Id., 362. In support of his motion, he submitted two supporting affidavits. Id., 362–63. The trial court granted the motion to dismiss. Id., 363. On appeal, the Appellate Court reversed the judgment. Id. On appeal to this court, this court concluded that "[t]he factual underpinnings of the allegations in the affidavits were sufficient to defeat any presumption of truth in the plaintiff's assertion of a legal obligation on the part of the commissioner to maintain the driveway." Id., 368. It further concluded that, because the plaintiff had not disputed the facts contained in the affidavit, the trial court lacked jurisdiction and had properly dismissed the plaintiff's complaint. Id., 369.

This court in *Amore* distinguished *Gurliacci*, on the ground that the motion to dismiss in that case had not been "accompanied by supporting affidavits that demonstrated by uncontroverted facts that the plaintiff could not as a matter of law and fact state a cause of action that should be heard by the court." Id., 367 n.8.[5] In his dissenting opinion in *Amore*, Justice Berdon disagreed with the majority's conclusion that *Gurliacci* was distinguishable and stated that "[t]he question here is not whether the commissioner had the responsibility to maintain the drive that would make him liable for defects, but whether the trial court has the power to hear and determine an action brought against him pursuant to [General Statutes] § 13a-144. And, of course, the answer is yes." Id., 373. Justice Berdon argued that, because the failure to allege that the commissioner had a legal duty to maintain the road at issue merely affected the legal sufficiency of the complaint, the validity of the complaint should have been tested by way of a motion to strike. Id., 372–73.

As I have indicated, there does not seem to be any consistent general principle underlying these cases. For

the following reasons, I believe that, to the extent that these cases are inconstant, the better rule is set forth in *Gurliacci*. First, the holding of *Gurliacci* that the failure to allege an essential fact does not deprive the trial court of subject matter jurisdiction is consistent with the rule that "every presumption is to be indulged in favor of jurisdiction." (Internal quotation marks omitted.) *Gurliacci* v. *Mayer*, supra, 218 Conn. 543; see also *Amodio* v. *Amodio*, supra, 247 Conn. 728 ("A court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it. . . . Once it is determined that a tribunal has authority or competence to decide the class of cases to which the action belongs, the issue of subject matter jurisdiction is resolved in favor of entertaining the action." [Citation omitted; internal quotation marks omitted.]); *Carten* v. *Carten*, 153 Conn. 603, 612–13, 219 A.2d 711 (1966) ("The Superior Court is a court of general jurisdiction. It has jurisdiction of all matters expressly committed to it and of all other matters cognizable by any law court of which the exclusive jurisdiction is not given to some other court. The fact that no other court has exclusive jurisdiction in any matter is sufficient to give the Superior Court jurisdiction of that matter. . . . [T]he general rule of jurisdiction . . . is that nothing shall be intended to be out of the jurisdiction of a Superior Court but that which specially appears to be so; and on the contrary nothing shall be intended to be within the jurisdiction of an inferior court but that which is expressly so alleged. . . . [N]o court is to be ousted of its jurisdiction by implication." [Citations omitted; internal quotation marks omitted.]).

Gurliacci is also consistent with "the judicial policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court." (Internal quotation marks omitted.) *Pietraroia* v. *Northeast Utilities*, 254 Conn. 60, 74, 756 A.2d 845 (2000). If the failure to allege an essential fact is treated as subject matter jurisdictional, potentially meritorious claims will be subject to dismissal without affording the plaintiff the opportunity to amend the complaint to correct the defect. See *Fort Trumbull Conservancy, LLC* v. *Alves*, 262 Conn. 480, 501, 815 A.2d 1188 (2003) ("the primary difference between the granting of a motion to dismiss for lack of subject matter jurisdiction and the granting of a motion to strike is that only in the latter case does the plaintiff have the opportunity to amend its complaint" [internal quotation marks omitted]).

Additionally, as this court observed in *Gurliacci*, if the failure to allege an essential fact under a particular statute deprives the trial court of subject matter jurisdiction, then the failure to prove that fact at trial also must deprive the court of subject matter jurisdiction, requiring the court to dismiss the case.[6] *Gurliacci* v. *Mayer*, supra, 218 Conn. 544–45. This would be a bizarre

result. Id.

Accordingly, I believe that, if a claim is within "the class of cases to which the action belongs"; *Amodio* v. *Amodio*, supra, 728; the failure to allege an essential fact under a particular statute goes to the legal sufficiency of the complaint, not to the subject matter jurisdiction of the trial court.[7] I would therefore conclude that, in the present case, because the petitioner raised the *type* of claim contemplated by § 46b-129, his failure to allege that he attended an educational facility as required by the statute did not deprive the trial court of subject matter jurisdiction, but went to the merits of his claim. Consequently, I would reverse the judgment of the trial court on the ground that the petitioner did not establish that he met the requirements of § 46b-129 (j).

[1] General Statutes § 46b-129 provides in relevant part: "(a) . . . [A] child or such child's representative or attorney or a foster parent of a child, having information that a child or youth is neglected, uncared-for or dependent, may file with the Superior Court that has venue over such matter a verified petition plainly stating such facts as bring the child or youth within the jurisdiction of the court as neglected, uncared-for or dependent, within the meaning of section 46b-120, the name, date of birth, sex and residence of the child or youth, the name and residence of such child's parents or guardian, and praying for appropriate action by the court in conformity with the provisions of this chapter. . . .

"(j) Upon finding and adjudging that any child or youth is uncared-for, neglected or dependent, the court may commit such child or youth to the Commissioner of Children and Families. Such commitment shall remain in effect until further order of the court, except that such commitment may be revoked or parental rights terminated at any time by the court, or the court may vest such child's or youth's care and personal custody in any private or public agency that is permitted by law to care for neglected, uncared-for or dependent children or youths or with any other person or persons found to be suitable and worthy of such responsibility by the court. . . . The commissioner shall be the guardian of such child or youth for the duration of the commitment, provided the child or youth has not reached the age of eighteen years or, in the case of a child or youth in full-time attendance in a secondary school, a technical school, a college or a state-accredited job training program, provided such child or youth has not reached the age of twenty-one years, by consent of such youth, or until another guardian has been legally appointed. . . ."

[2] I concur with the majority's conclusions that: (1) the trial court was not deprived of jurisdiction over this matter merely because the petitioner reached the age of eighteen; and (2) General Statutes § 17a-11 (g) does not apply to this case because the petitioner was never committed to the care of the department through the voluntary services program.

[3] See also *State* v. *Welwood*, 258 Conn. 425, 435, 780 A.2d 924 (2001) (relying on *Kennedy* to support conclusion that trial court lacked jurisdiction to require defendant to enter into agreement that he would have no contact with victims until they reached age of twenty-one when period of agreement extended beyond maximum period of probation allowed by statute).

[4] The court in *Egri* v. *Foisie*, supra, 83 Conn. App. 247, stated that "[t]here is a significant difference between asserting that a plaintiff cannot state a cause of action and asserting that a plaintiff has not stated a cause of action, and therein lies the distinction between the motion to dismiss and the motion to strike." (Emphasis in original.)

[5] The court in *Amore* did not address the reasoning of the court in *Gurliacci* that treating the failure to allege an element of a claim as subject matter jurisdictional leads to the bizarre result that the trial courts would be required to dismiss claims after trial when they find that an element of the claim had not been proven.

[6] Moreover, if the failure to allege or prove an essential fact deprives the trial court of subject matter jurisdiction, then any judgment rendered by the court will be not merely voidable, but void, leading to the instability of judgments. See *Angiolillo* v. *Buckmiller*, 102 Conn. App. 697, 713, 927 A.2d 312 ("[i]f a court has never acquired jurisdiction over a defendant or the

subject matter . . . any judgment ultimately entered is void and subject to vacation or collateral attack" [internal quotation marks omitted]), cert. denied, 284 Conn. 927, 934 A.2d 243 (2007).

[7] A motion to strike early in the proceedings will not cause additional delay or expense if the party cannot allege an essential fact in good faith.