Docket No. X09-HHD-CV-05-4019406-S

CONNECTICUT COALITION FOR JUSTICE IN EDUCATION FUNDING, et al.	:	SUPERIOR COURT
Plaintiffs	:	
	:	COMPLEX LITIGATION DOCKET AT HARTFORD
v.		
	:	
M. JODI RELL, et al.	:	MAY 4, 2006
Defendants	:	

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

In accordance with the Court's Scheduling Order of April 10, 2006, the defendants respectfully submit this reply memorandum in further support of their motion to dismiss dated March 3, 2006 and in response to the plaintiff's opposition dated April 10, 2006, augmented on April 12, 2006.

By their failure to object in their opposition filing, plaintiffs concede that the Connecticut Coalition for Justice in Education Funding ("CCJEF") lacks standing to sue in its own right and lacks third party standing. *Compare* defendants' memorandum in support of motion to dismiss at 4-6 ("Def. Mem."). Thus CCJEF asserts only representational standing, under the authority of Connecticut Ass'n of Health Care Facilities, Inc. v. Worrell, 199 Conn. 609, 613 (1986). CCJEF concedes that its membership lacked parents, teachers, and parent-teacher organizations (not to mention students, schools or school districts) at the time of filing suit, and that its current membership now only includes "parents, education advocacy organizations, community groups, and teachers' unions." Plaintiffs' opposition to motion to dismiss at 1 ("Pl. Opp."). In its brief in opposition, CCJEF bases its Worrell-standing on an unspecified number of newly-minted parent members. CCJEF's recruiting efforts are insufficient to establish representational standing and it should be dismissed from the host of named plaintiffs in this action.

Lacking any authority for the proposition that the Governor, Treasurer and Comptroller are proper parties to this action, plaintiffs rely only on the fact that these officials have been named as parties in past cases, even though their status as proper parties was not litigated. Given that the Governor, Treasurer and Comptroller have no meaningful role in the enforcement or administration of the state statutes at issue in this litigation, the three elected officials should be dismissed as improper parties to this action.

The defendants' motion to dismiss should be granted in its entirety.

I. CCJEF Lacks Representational Standing.

Standing implicates the Court's subject matter jurisdiction, and thus the plaintiff ultimately bears the burden of establishing standing. Seymour v. Region One Bd. of Educ., 274 Conn. 92, 104 (2005). CCJEF fails to meet its burden that it has standing to assert the claims presented in this litigation.

With respect to representational standing, the parties agree that the applicable controlling standard is articulated in State Supreme Court's decision in Worrell, 199 Conn. at 609, 613, wherein the Court adopted the U.S. Supreme Court's reasoning set forth in Hunt v. Washington State Apple Commission, 432 U.S. 333 (1977). Not surprisingly, however, the parties disagree as to how Worrell applies in this case. In their attempt to stretch the Worrell ruling to accommodate CCJEF as a plaintiff, plaintiffs ignore the central tenets of Worrell.

In order for an association to have standing to bring suit on behalf of its members, the association must establish that

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

Worrell, 199 Conn. at 616 (emphasis added). See also Connecticut Associated Builders & Contractors, Inc. v. City of Hartford, 251 Conn. 169, 185 (1999). CCJEF cannot satisfy the first and third prongs of the Worrell standard.

As an initial matter, CCJEF implicitly concedes that its members who are "teachers, education advocacy organizations, community groups, [and] teachers' unions" cannot serve as the factual foundation of its representative standing. In their opposition, plaintiffs tellingly only respond to the standing issue by reference to the *parent* members of CCJEF -- who apparently were not even part of the organization until quite recently, and perhaps only then as the result of defendants' motion to dismiss. An association seeking to establish standing must prove that it had standing at the time *when the complaint was filed.* Connecticut Associated Builders & Contractors, Inc. v. City of Hartford, 251 Conn. at 184-185. Thus in Conn. Associated Builders v. Hartford, the association lacked standing where a contractor who might have had standing joined the association the evening before the hearing on the motion to dismiss. 251 Conn. at 186, n.11.

Indeed, CCJEF focuses almost exclusively on the importance of the relationship between parents and their children. Such relationships are no doubt important, and by law recognized as such. However, that cannot change the obvious fact that not a single member of CCJEF holds educational rights under the state constitution, that their equal protection rights are not at issue, and that the parent members of the CCJEF are not suing in this action to protect their *parental* rights.

Moreover, unlike the ten parents and guardians named as plaintiffs in the suit, the parent members of CCJEF cannot, by mere membership, sue "on behalf of" their children through the

association.[1] Like the facts presented in Connecticut Associated Builders & Contractors, Inc. v. Anson, 251 Conn. 202, 209-215 (1999) and Connecticut Business & Industry Ass'n. v. Connecticut Commission on Healthcare & Hospitals, 218 Conn. 335, 348 (1991), the interests of and risk of injury to the parent members are simply too attenuated to support the organization's standing. In its opposition, CCJEF fails to acknowledge, much less address, the overly derivative nature of the association, relying instead upon an unspecified number of parents for associational standing to represent student interests that already are represented by putative class representatives. Compare Def. Mem. at 8. Adding parents to the association's rolls does not transform CCJEF into an association with students as members, and thus its effort to piggyback its standing claims upon its new parent members must fail.

The fact remains that the first prong of Worrell is not met here, because any parent members of CCJEF simply are not suing *"in their own right."* Worrell, 199 Conn. at 616 (emphasis added). Indeed, many persons and organizations throughout society have deep concern over the important questions and issues that arise in public education, but they do not have sufficient standing to "set the machinery of the courts in operation." Bassett v. Desmond, 140 Conn. 426, 430 (1953). Again, an ardent wish or a deep concern over a particular topic, however genuinely held, is insufficient to confer standing. Worrell, 199 Conn. at 614.[2]

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[1] Indeed, unlike the ten named parents, it is unknown whether the parent members of CCJEF even have children who attend Connecticut public schools.

[2] As to the other members of CCJEF -- "teachers, education advocacy organizations, community groups, teachers' unions and parent-teacher organizations" (Amended Complaint at para. 31) -- wholly detached as they are from the educational and equal protection rights asserted, surely can be categorized as only "ardent wishers." CCJEF is not a school, school district or municipality, nor does it even include such entities in its membership rolls, and thus its reliance upon the "school" standing cases is unavailing. Cf. Pl. Opp. At 6-7. CCJEF is, pure and simple, an advocacy organization, created solely for the purposes of this litigation, pursuing in Connecticut what is part of a national agenda of educational "adequacy" suits.

Plaintiffs posit that because minor students can only sue through parents as "next friends," to deny CCJEF standing would somehow shut these students out of court. This is of course hyperbole, and in the context of this case, untrue. This case is brought as a putative class action. See First Amendment Complaint ¶39. These minor students can and have, elsewhere in the lawsuit, asserted their own claims, and their status as minors will in no way impede the adjudication of those claims.[3]

Plaintiffs blithely assert that the third prong of Worrell is met because neither the claims asserted nor the relief requested will require the individual participation of students or their parents. (Pl. Opp. at 2, 12). This too is untrue. In discovery and at trial the evidence will *not* be limited to aggregated student and financial data. Rather, plaintiffs have alleged that these students, in their individual situations and circumstances, including those of their respective schools and districts, are being denied their educational and equal protection rights. In their complaint the claims have been couched in terms of both financial and educational "inputs" and "outputs," and it is alleged that these students' circumstances are representative or emblematic of larger, statewide phenomena. Assessment of each individual student's inputs, outputs and educational attainment will necessarily be required, both for the named plaintiff students themselves and as representatives of a putative class of allegedly similarly situated students.

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[3] Plaintiffs further claim that to deny CCJEF standing would impose a "de facto rule that students cannot act associationally." (Pl. Opp. at 2, 5). Students acting "associationally" is not even at issue here. While there are student associations in many contexts, CCJEF is not one of them, for CCJEF does not include student members, and has no student associations as members. (First Amended Complaint at para. 31). Moreover, even if there *were* such a rule restricting minors' associational standing in this limited context, it would not necessarily be illegal. The law recognizes in many contexts that minor students' rights and privileges are more restricted than those of adults, by very reason of the students' minority. See, e.g., Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (Students' First Amendment rights not coextensive with adults); New Jersey v. T.L.O., 469 U.S. 325 (1985) (Students' Fourth Amendment rights not coextensive with adults).

Moreover, to the extent that plaintiffs maintain, as they do in their memorandum, that parents have made up purported deficiencies in public education funding from their own pockets, such individual parental circumstances will be examined. (Pl. Opp. at 11).[4]

Finally, in response to the defendants' assertion that the central tenet of Worrell's recognition of associational standing in limited circumstances -- that associational standing furthers judicial economy -- would not be served by concluding CCJEF has standing, plaintiffs, ignoring the allegations in their own lawsuit, maintain that allowing CCJEF to proceed as a plaintiff *will* promote judicial economy. As discussed in Worrell, the *reason* associational standing has been recognized is that in those cases where the criteria are met, associational standing eliminates the need for participation by many similarly situated individuals, and avoids a multiplicity of similar suits. In this case, these salutary purposes are *already* served by the fact that the lawsuit has been brought as a class action, wherein, we are told, the named plaintiff students will serve as adequate class representatives for a class of similarly situated students. As with associational standing, any beneficial results that may accrue will thus inure to the putative class, and, absent individuals seeking and successfully "opting out" of the class, any decisions will be binding upon them as members of the class. Thus, in light of the class action nature of the claims, recognizing CCJEF as a plaintiff will not promote judicial economy beyond what will be

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[4] Plaintiffs cite Campaign for Fiscal Equity v. State, 187 Misc. 2d 1, 18 (2001) and Consortium for Adequate School Funding in Georgia v. State, No. 04-91004, slip op. at 6 (Ga. Super. Oct. 28, 2005), both trial court decisions. In Campaign for Fiscal Equity, the issue of standing was raised "almost as an afterthought." 187 Misc. 2d at 18. In the Georgia case, the association, unlike here, was comprised of school districts, the direct recipients of the state aid at issue.

attained through class action status.[5] Thus, the Worell Court's central purpose for recognizing an association's standing is not met here.

II. The Governor, Treasurer and Comptroller Are Not Proper Defendants.

In responding to defendants' argument that the Governor, Treasurer and Comptroller are not appropriate defendants in this action (as opposed to the Commissioner of Education and the members of the State Board of Education, who have also been named), plaintiffs primarily rely on court decisions in which such officials are listed as named defendants but which contain no discussion of whether such officials *should* be defendants. These cases offer almost nothing on the issue, except to reflect that the question was not raised or litigated. The string cites to cases from other jurisdictions are decidedly uninstructive in this regard (Pl. Opp. at 18-19, 22).[6]

Similarly, of the Connecticut cases plaintiffs rely upon, Motor Vehicle Manufacturers' Ass'n. v. O'Neill, 212 Conn. 83 (1989), is silent as to whether the Governor is a proper defendant, and it appears it was not litigated. In Rivera v. Rowland, 1996 Conn. Super. LEXIS 2800, while a motion to dismiss was filed, it does not appear that defendants claimed the Governor was not a proper defendant, but rather that the claims were nonjusticiable. Thus while the Rivera Court in *dicta* observes that governors are often defendants in such cases, once again the issue was not litigated.[7] Scatena v. Rowland, 2000 Conn. Super. LEXIS 24, also cited by

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[5] The putative plaintiff class is represented by the Jerome N. Frank Legal Services Clinic at Yale University, and dismissal of CCJEF as a party will not deprive the plaintiffs of counsel.

[6] While plaintiffs attempt to blur over the distinction, rejecting a sovereign immunity defense is obviously not necessarily the same as determining whether a particular official is a proper party defendant in a challenge to the constitutionality of a statute. (Pl. Opp. at 14).

[7] Although the Court in Rivera makes reference to the Governor's duty to see that the laws are faithfully executed, notably, the federal decision from the Southern District of New York, Gras v. Stevens, 415 F.Supp 1148, 1152 (S.D.N.Y.1976), relied upon by plaintiffs, is openly critical of such a rationale for making the governor a defendant in such cases. The Sixth Circuit decision

plaintiffs, does not address the issue at all. While it is true that the Court in Horton v. Meskill, 195 Conn. 24, 33 (1985), notes that the trial court below entered orders against the Comptroller and the Treasurer, this obviously does not establish that the issue of whether those officials *should* have been defendants was litigated.[8]

Finally, in response to defendants' assertion that the Comptroller and Treasurer have only ministerial and not discretionary responsibilities with regard to public education funding and hence are not proper defendants, plaintiffs argue that Connecticut law makes no such distinction, and criticize defendants for citing only cases from other jurisdictions in support of the proposition. (Pl. Opp. at 23). Plaintiffs, however, cite no Connecticut cases for the proposition that the out-of-state precedents should be ignored due to a different rule in Connecticut.

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plaintiffs cite, Allied Artists Picture Corp. v. Rhodes, 679 F.2d 656, 665, n. 5 (6th Cir.1982), analyzed the issue in terms of Eleventh Amendment immunity, which is obviously not at issue here, but notably concluded that in that case, unlike here, the Governor had significant connections with the *enforcement* of the statute at issue.

[8] Plaintiffs' reliance on the Governor's powers to appoint certain individuals, who in turn have certain duties with respect to public education, is a thin reed indeed upon which to implicate the Governor as a defendant in this action -- as is her practice of recommending a budget to the General Assembly, which may or not ultimately become law.