Docket No. X09-HHD-CV-05-4019406-S (CLD)

NEKITA CARROLL-HALL et al.	:	SUPERIOR COURT
Plaintiffs	:	
	:	COMPLEX LITIGATION DOCKET
v.	:	AT HARTFORD
	:	
M. JODI RELL, et al.	:	OCTOBER 19, 2006
Defendants	:	

REPLY MEMORANDUM IN SUPPORT OF MOTION TO STRIKE

The defendants in the above matter respectfully submit this reply memorandum in further support of their motion to strike dated September 13, 2006.

I. Plaintiffs' Claims

Stated succinctly, as reflected in their memorandum in opposition to the motion to strike, plaintiffs are now either disavowing their own allegations in the First Amended Complaint, or arguing two wholly inconsistent positions -- or both.

Asserting that the defendants have mischaracterized their claims as alleging a purported state constitutional right to certain educational outcomes, plaintiffs argue that "[t]he defendants … ask the court to accept the fiction that in pleading 'opportunities,' the plaintiffs actually mean 'results,'" that "plaintiffs' Complaint never makes such a claim," and that the First Amended Complaint's references to educational outcomes or results is "simply one form of evidence (among many possible forms) of the State's failure to provide 'suitable and substantially equal educational opportunities' - not a component of the constitutional duty itself." Plaintiffs' Memorandum at 2, 3. This last assertion is nothing short of tautologous, since, by claiming a right to a "*suitable* and substantially equal educational opportunity," in conjunction with their definition of "suitable," plaintiffs are claiming a right to specific educational outcomes.

The First Amended Complaint's definition of a "suitable education" posits that a suitable education "provides more than minimal skills, and "must prepare children who will, as adults, function as responsible citizens, compete in obtaining productive employment, and advance through higher education." First Amended Complaint, para. 2 (Emphasis added). Plaintiffs' current disavowals notwithstanding, such allegations, which plainly refer to *results*, assert a judicially enforceable state constitutional right to certain educational outcomes. This is not a "fiction" -- it is the content of plaintiffs' allegations. Indeed, if paragraphs 50-112 of the First Amended Complaint, which contain detailed allegations regarding the alleged inadequacy of educational results, were solely *evidence* (as plaintiffs now claim), and not allegations of a newly claimed (if unsupported) state constitutional right, the First Amended Complaint would, in wholesale fashion, fail to comply with Connecticut Practice Book §10-1, which mandates that "[e]ach pleading shall contain a plain and concise statement of the material facts on which the pleader relies, *but not the evidence by which they are to be proved....*" (Emphasis added).

Adding further confusion to this stark incongruity between their allegations and their arguments in opposition to the motion to strike, plaintiffs add yet another value-laden, and similarly results-oriented adjective to this dreadful *mélange*, positing that the "fundamental right to education is not devoid of substance, but includes the guarantee of *proper*, or 'suitable,' educational opportunities for all Connecticut children." Plaintiffs' Memorandum at 4 (Emphasis added). Lest the Court feel squeamish about venturing into the thickets of "proper" educational policy, plaintiffs blithely assert that "[a]t most, the plaintiffs' constitutional claims require further explication of the firmly established and fundamental right to education." Id. One might query why such "further explication" would be required of such a "firmly established" right to "proper" or "suitable" educational attainment by Connecticut's public school students.

Plaintiffs find themselves lost in this self-imposed semantic wilderness for the same reason that the Constitution Convention of 1965, in adopting Article VIII, §1, after guaranteeing that "[t]here shall always be free public elementary and secondary schools in this state," wisely determined that "*[t]he general assembly* shall implement this principle by appropriate legislation." (Emphasis added). Thus, while the right to free public schools was guaranteed, the content and contours of that education, including determining appropriate educational outcomes, was expressly left to the coordinate, representative and co-equal branch of government. Indeed, it is one thing for the courts to determine, as they did in Horton v. Meskill, 172 Conn. 615 (1977) ("Horton I") that this education clause, when read in conjunction with the State's *equal* protection and *equality* of rights provisions guarantees substantially equal educational funding by ruling that legislation that perpetuates inequitable funding is not "appropriate" within the meaning of the education clause, or to conclude, as they did in Sheff v. O'Neill, 238 Conn. 1 (1996), that, when "informed" by the equal rights provisions, the education clause mandates that schools should not be racially isolated. It is quite another to leap to the unwarranted conclusion that courts, may, under the authority of this clause, determine the content and outcomes of the didactic processes that occur in the public schools. In essence, the second sentence of Article VIII, §1 was the constitutional delegates' shorthand for what the Court, some 30 years later in Nielsen v. State, 236 Conn. 1, 10-11 (1996), would describe as nonjusticiable by virtue of the lack of "judicially cognizable and manageable standards." The better-reasoned decisions of other jurisdictions, notably including our neighbors in Massachusetts, Rhode Island and Vermont, discussed in defendants' original memorandum at pages 12 through 15, have recognized the wisdom of judicial restraint in the face of such unmanageable claims.[1]

[1] Plaintiffs claim justiciability was not properly raised in the motion to strike. Defendants believe

Moreover, Connecticut's General Assembly has dutifully fulfilled its constitutional role under Article VIII, §1. The Connecticut General Statutes are replete with state laws governing the duration, scope and content of public elementary and secondary education in this state. Striking a careful balance between local control and input and state direction and regulation, Connecticut statutes mandate universal availability and attendance through local or regional boards of education (Conn. Gen. Stat. §§10-15, 10-15c, 10-184), a minimum length of school year (Conn. Gen. Stat. §10-16), mandatory attendance in a school program or home schooling (Conn. Gen. Stat. §10-184), prescribed courses of study (*e.g.*, Conn. Gen. Stat. §§ 10-16b, 10-18, 10-18a, 10-18b, 10-19, 10-27), school readiness programs (Conn.. Gen. Stat. §10-16o ff.), English as the language of instruction, along with bilingual programs (Conn. Gen. Stat. §§10-17 ff.), mandated mastery testing (Conn. Gen. Stat. §§10-14n ff., 10-239i), ethnic and racial diversity (Conn. Gen. Stat. §§10-65a, 10-226h), textbooks (Conn. Gen. Stat. §§10-229), special education services (Conn. Gen. Stat. §§10-76 ff.), school discipline (Conn. Gen. Stat. §§10-10-233 ff), qualifications of teachers and administrators (Chapter 116), transportation to schools (Conn. Gen. Stat. §10-186), truancy and drop out prevention (Conn. Gen. Stat. §§10-198a ff.), as well as laws governing the myriad details of school structure and governance (Conn. Gen. Stat. §§10-218 ff.). This of course is only a partial list.

In fact, it is plaintiffs who have mischaracterized *defendants'* position. Defendants do not assert that Article VIII, §1's guarantee of free public education in devoid of content. Rather, defendants assert that the education clause reflects a "textually demonstrable commitment" of the "content" of public education -- the nature, scope and desired outcomes of public education -- to

---

it has been, as reflected in their original memorandum. However, if need be, defendants will file another motion to dismiss, since subject matter cannot be waived. Broadnax v. City of New Haven, 270 Conn. 133, 153 (2004).

another branch of government, and that the legislature's constitutional authority over this subject matter is frankly superior to that of the courts. Nielsen, 236 Conn. at 7; Pellegrino v. O'Neill, 193 Conn. 670, 683, cert. den. 469 U.S. 875 (1984). For this court to attempt to adjudicate such issues -- which involve greater complexity, subtlety and specialty in the areas of educational efficacy (as opposed to assessing the more straightforward issues of *equality* of resources or racial isolation), in the face of such undeniable textual commitment, would indeed reflect a "lack of respect due a coordinate branch of government...." Nielsen, 236 Conn. at 7. What else must a constitutional convention do to enshrine such a "textually demonstrable commitment" to a coordinate branch of government? If the constitutional jurisprudence of Pellegrino and Nielsen, and the judicial restraint it portends, means anything at all, and applies in *any* case, it is this case.[2]

In arguing that plaintiffs' "suitable" education claims ought not be stricken, plaintiffs contend that the Horton I Court's ruling was not the "final judgment" on the scope of the constitutional obligation under the education clause, and that by striking these claims, this court would be foreclosing "further explication of the fundamental right to education," and "judicial inquiry into the contours of the state's obligation." Plaintiffs' Memorandum at 6, 11. Not only is this not necessarily true -- in granting the motion to strike the court could clearly articulate the

---

[2] While it is true that the Court in Sheff noted that it was "persuaded that the phrase 'appropriate legislation ' in article eighth, Section 1, does not deprive the courts of the authority to determine what is 'appropriate,'" because the plaintiffs could not, with straight faces, argue that racial and ethnic diversity was a part of a minimally adequate education, the Court further concluded that the plaintiffs' third count, which "invoked article first, sections 1 and 20, and article eighth, Section 1 .... [to] alleg[e] that the defendants ha[d] failed to provide the schoolchildren in the Hartford public school system with the educational resources necessary to obtain a minimally adequate education .... does not implicate the right to a substantially equal educational opportunity...." Sheff, 238 Conn. at 36. Thus, the Sheff decision provides this court with little if any guidance on the issue before it.

scope and applicability of Article VIII, §1 -- it ignores the substantial interest these defendants have in carrying out their constitutional and statutory obligations and duties free from the burden of unwarranted litigation, with its concomitant expenses to both the public fisc and the limited temporal resources of defendants' officials and employees.[3] No less than private defendants, public defendants are entitled to the legal protections afforded by jurisprudence limiting cases to those that assert viable causes of action.[4] Waters v. Autori, 236 Conn. 820, 825 (1996) (Motion to strike challenges whether a claim is alleged upon which relief can be granted); Mingachos v. CBS, Inc., 196 Conn. 91, 108 (1985). Further, plaintiffs' claim that the Horton I Court evaluated such things as class sizes, teacher quality, textbooks, test scores and the like, and that thus this court should do so too, ignores that in Horton I the issue was substantially equal educational opportunity, *not* the "suitability" or propriety of educational outcomes. Plaintiffs' Memorandum at 13.[5]

---

[3] Plaintiffs go so far as to assert that "even if this court were to find that none of the judicial pronouncements on the right to education support plaintiffs' claims, those claims should still be allowed to proceed." Plaintiffs' Memorandum at 12. Defendants respectfully submit this court has a legal duty to strike those claims which fail to state viable causes of action. Waters, 236 Conn. at 825.

[4] Foreshadowing strategies as yet unseen, plaintiffs attempt to frame the debate by asserting that "[w]hether greater spending will improve educational opportunities is a factual one, which the parties must proceed to trial to fairly resolve." Plaintiffs' memorandum at 5. Once again eschewing their own allegations regarding outcomes or results, plaintiffs pose the question in a way that can only be answered in the affirmative. Of course pouring untold further billions into public education will likely increase *opportunities*. With enough money, every public school student could be provided with one-on-one tutoring by a Ph.D. in Education. This is of no moment for purposes of the motion to strike, however. The legal question at this juncture is whether the Connecticut constitution enshrines a judicially enforceable right to certain educational results. If plaintiffs are not pursuing such claims, then they should have no compunction in dropping all their allegations referring or alluding to "suitable" or "proper" education, as they define it, or educational outcomes, and forego any evidence on such issues.

[5] Plaintiffs' argument that these claims should not be stricken is cobbled together from Justice Berdon's concurrence in Sheff, 238 Conn. at 50, Justice Borden's dissent in Sheff, 238 Conn. at

II. Decisions from Other Jurisdictions

In addressing the jurisprudence of other states, Plaintiffs' Memorandum contains a confusing and at times contradictory series of assertions. First we are told courts outside Connecticut have "uniformly" held that the education clauses in their state constitutions include a substantive component (whatever such a phrase means), and that for the court to adopt defendants' position "would place Connecticut at variance with *every* other state court that has addressed the issue." Then plaintiffs claim to be "unaware" of any state supreme court that has not found a substantive component. Plaintiffs' Memorandum at 9, 10 (Emphasis added). Later we are told, however, only the "vast majority" of state courts have so ruled. Plaintiffs' Memorandum at 11. Finally, plaintiffs are at least willing to concede that five states have ruled constitutional adequacy challenges nonjusticiable. Plaintiffs' Memorandum at 17.

The defendants believe they have accurately characterized the cases cited in their memorandum.[6] Obviously the court can evaluate the out of state decisions for itself, and for whatever value they offer.[7] However, the issue is not solely whether Connecticut's education

---

137, and Justice Loiselle's dissent in Horton I, 172 Conn. at 378-379. Plaintiffs' Memorandum at 8. As intellectually interesting and informative as these sources may be, they are neither viable precedent nor even *obiter dicta.* Notably, in such writings Justices are often less restrained and more voluble about their individual views.

[6] Defendants do not believe they have mischaracterized the pertinent holding in McDaniel v. Thomas, 248 Ga. 632, 644 (1981) ("[T]his court has recently noted the inherent difficulty in establishing a judicially manageable standard for determining whether or not pupils are being provided an adequate education.... It is primarily the legislative branch of government which must give content to the term 'adequate.'") (Internal quotations and citations omitted).

[7] In their memorandum, and the footnotes therein, plaintiffs cite to many cases that reflect judicial willingness to address educational funding generally. That is not the issue here. School funding is reviewable in this state on the basis of substantially equal educational opportunity. Horton, 172 Conn. at 615. The issue here is whether the courts can legitimately and effectively adjudicate whether their respective state constitutions have been violated based on allegedly insufficient educational outcomes.

clause embodies an ill-defined "substantive component," but whether claims asserting insufficient educational outcomes brought under the education clause are justiciable, or in fact lack judicially cognizable and manageable standards. In this regard, the defendants respectfully urge the court to decline plaintiffs' invitation to decide these issues based on purported "national trends" (Plaintiffs' Memorandum at 17), and to decide the issues based on Connecticut jurisprudence and the sound reasoning reflected in those decisions which embody a realistic understanding of the limitations of judicial efficacy, and respect for the coordinate branches of state government in our system of laws.

III. Conclusion

The defendants again respectfully urge the Court to grant their motion to strike the first, second and third counts of plaintiffs' First Amended Complaint.

DEFENDANTS

RICHARD BLUMENTHAL
ATTORNEY GENERAL

BY: _____

Ralph E. Urban
Assistant Attorney General
Juris No. 085178
Clare E. Kindall
Assistant Attorney General
Juris No. 415004
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120

CERTIFICATION

I hereby certify that a true and accurate copy of the foregoing memorandum was mailed, first class postage prepaid, this 19th day of October, 2006 to:

Robert A. Solomon
Jerome N. Frank Legal Services Org.
P.O. Box 209090
New Haven, CT 06520-9090

Ralph E. Urban
Assistant Attorney General