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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Ansonia-Milford.

David TOMASCO ppa et al.
v.
MILFORD BOARD OF EDUCATION.

No. CV074008593.
|
Aug. 31, 2007.

Attorneys and Law Firms

Lynch Trembicki & Boynton, Milford, for David Tomasco ppa et al.

Karsten Dorman & Tallberg LLC, West Hartford, for Milford Board of Education.

Opinion

RICHARD A. ROBINSON, J.

***1** The plaintiffs, Elizabeth Tomasco ppa David Tomasco, Katie Dicine ppa Carysue Arnold, Amanda Tiernan ppa Dawn Blanchard, Margery Gerace ppa Vincent Gerace, and Adam Enes ppa Andrew Enes, [1] bring this action for temporary injunctive relief against the defendant, the Milford Board of Education, to compel the defendant to pay for their enrollment at the Trumbull Regional Agriscience and Biotechnology Center (Center) for the upcoming 2007-2008 school year . [2] The summons, application and verified complaint were filed August 13, 2007, and this conducted a hearing on the matter on August 27, 2007. Both parties submitted briefs on August 28, 2007. While the defendant had filed a motion to strike on August 24, 2007, in light of the extremely time-sensitive nature of the proceedings, this court will not directly address said motion, in any event, the issues raised in said motion concerning the legal sufficiency of the complaint will be addressed by the this court's decision on the merits of the Application for prejudgment remedy.

Facts

For the purposes of deciding the request for an injunction, the court finds the following facts. The Center, a regional program culling students from nine member towns interested in biotechnology, animal science, agricultural mechanics and related fields, is one of nineteen like it in the state, although it is unique in many respects and offers courses and facilities more advanced than others. The minor plaintiffs all applied for positions at the Center for the 2007-2008 year and were notified of their acceptance into the program. On March 9, however, they were each sent a letter from Frank Cicero, director of the Center, informing them that the defendant had recently withdrawn its designation of the Center as its primary vocational agriculture program in favor of the Bridgeport Aquaculture School (Bridgeport program) a part-time vocational program focusing on marine biology and similar fields.

Of the nineteen regions in Connecticut offering agriscience programs, only two, Bridgeport and New Haven, offer aquaculture programs in addition. The court notes that Section 10-64(c) C.G.S. provides that: "For the purpose of this section and sections 10-65 and 10-66, the term 'vocational agriculture' includes vocational aquaculture and marine-related employment."

The board states that it based its decision on the comparatively lower cost of the Bridgeport program, including the significantly lower transportation costs engendered by the part-time nature of the program, as only one bus would be required as opposed to two for the Center. The board took into account "long term cost containment," projecting ever-increasing costs for students at the center, which charged by the student, while the Bridgeport program was available for a flat rate regardless of the number of participants. This decision, however, effectively precluded the plaintiffs from attending the Center, since the Center refused to accept tuition directly from the students as it is "public education." Furthermore, since they were not notified until March, other alternative educational opportunities were foreclosed to them because the deadlines had passed. [3]

***2** After repeated and exhaustive communications and entreaties to the defendant, the Center, the state board

of education and state legislators, the plaintiffs succeeded in getting § 10-65[4] C.G.S, amended in the hopes that it would force the defendant's hand concerning the minor plaintiffs attending the Center; however, the defendant maintained its position and refused to fund any new students to the Center for the 2007-2008 year; although it would continue to pay tuition for nongraduating students having attended the Center the previous year.

In light of the foregoing, the minor plaintiffs, absent a court order, will be unable to attend the Center in the present year and will be forced to attend one of the two public high schools in Milford. Only two percent (2%) of students enter as sophomores, so the minor plaintiffs are faced with three undesirable options: (1) they may not be accepted into the program next year; (2) they may be accepted as sophomores and be at a disadvantage relative to other sophomores having the benefit of the first year of specialized study; (3) they may reapply as freshman and, in effect, have to repeat an entire year of school.

To prevent undesirable consequents of the defendant's decision, the plaintiffs seek an injunction forcing the defendant to pay for their tuition at the Center, at least until the legislature, amends § 10-65 C.G.S., so that it compels the board to cover their expenses for the upcoming school year.

Discussion

"A party seeking injunctive relief has the burden of alleging and proving irreparable harm and lack of an adequate remedy at law ... A prayer for injunctive relief is addressed to the sound discretion of the court." (Internal quotation marks omitted.) *Lydall v. Ruschmeyer,* 282 Conn. 209, 237, 919 A.2d 421 (2007). "A mandatory injunction ... is a court order commanding a party to perform an act ... Relief by way of mandatory injunction is an extraordinary remedy granted in the sound discretion of the court and only under compelling circumstances ... Ordinarily, an injunction will not lie where there is an adequate remedy at law ... In sum, [m]andatory injunctions are ... disfavored as a harsh remedy and are used only with caution and in compelling circumstances." (Citations omitted; internal quotation marks omitted.) *Cheryl Terry Enterprises, Ltd. v. Hartford,* 270 Conn. 619, 650, 854 A.2d 1066 (2004). "Generally, where an alleged violation of a constitutional right is alleged, no further showing of irreparable harm is necessary." *South Lyme Property Owners Ass'n., Inc. v. Old Lyme,* 121 F.Sup.2d 195, 204 (D.Conn.2000).[5] "In order for the court to issue a temporary injunction, the applicant must establish (1) a reasonable probability of success on the merits at a final hearing; (2) irreparable injury unless the injunction is granted; and (3) no adequate remedy at law." *Danso v. University of Connecticut,* 50 Conn.Supp. 256, 919 A.2d 1100 (2007); see also *Griffin Hospital v. Commission on Hospitals,* 196 Conn. 451, 457, 493 A.2d 229 (1985).

***3** The plaintiffs seek to enjoin the defendant from preventing them from attending the Center for the 2007-2008 school year. They argue, first, that the defendant has violated their right to education as secured by the constitution of Connecticut. Secondly, they argue that the defendant's decision to not send any students to the Center for the upcoming school year violates their right to equal protection under the constitution of Connecticut by denying them the same educational opportunities as similarly situated students. Finally, the plaintiffs claim that the defendants violated § 10-65 by failing to send them to the Center.

The defendant counters that the plaintiffs have no "fundamental right" to education. Consequently, no suspect class is implicated, so strict scrutiny should not apply; rather, the board's decision need only bear a rational relationship to a legitimate public purpose to avoid violating the equal protection clause. Since the board's decision was based on financial considerations of a limited budget, the defendant claims that the decision was legitimate and did not infringe the plaintiffs' rights. The defendant also contends that its decision was in full compliance with the requirements of § 10-65.

I. Constitutional Right to Education

The basis of the plaintiffs' claim of violation of their rights to a "free and appropriate public education" as provided by the constitution of Connecticut is not entirely clear.[6] The complaint invokes Article first, §§ 8 and 20, and article eighth, § 1, of the constitution of Connecticut. Article first, § 8, "Rights of accused in criminal prosecutions," is not conceivably relevant to the present case. Article first, § 20 deals with equal protection and is the subject of the next

section. Presumably, therefore, the plaintiffs base their first count on Article eighth, § 1.

Article eighth, § 1, of the constitution of Connecticut provides: "There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation." Although *Horton v. Meskill,* 172 Conn. 615, 646, 376 A.2d 359 (1977), held that "the right to education is so basic and fundamental that any infringement of that right must be strictly scrutinized"; this was merely in the context of the state's obligation to provide "substantially equal" free public education in terms of state funding to towns which, under the statutory taxation scheme, could not raise sufficient funds on their own; *id.,* at 647-49, 376 A.2d 359; not any specific sort of education.

"The right to a free public elementary and secondary education is guaranteed by the Connecticut Constitution, Article VIII, § 1. But that provision does not guarantee the right of a student to participate in any or all courses or extra-curricular activities for which he may be eligible. Absent a legislative mandate such as that in Conn. Gen.Stat. § 10-76a that requires a special education curriculum for children with disabilities, *a student has no constitutional right to any particular program of instruction.* See, e.g. *Broadley v. Board of Education,* 229 Conn. 1, 9, 639 A.2d 502 (1994) [("gifted" child not entitled to special classes)]." (Emphasis added.) *Wajnowski v. Connecticut Ass'n. of Schools,* Superior Court, judicial district of New Haven, Docket No. CV 00 0432727 (December 17, 1999, Pittman, J.) [26 Conn. L. Rptr. 126]; see also *Plyler v. Doe,* 457 U.S. 202, 223, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) ("Nor is education a fundamental right; a[s]tate need not justify by compelling necessity every variation in the manner in which education is provided to its population"). [7]

***4** The plaintiffs in the present case have the opportunity to attend either of two public high schools run by the defendant. While these schools do not offer specialized curricula such as the one offered by the Center, the plaintiffs have no constitutional right to the education of their choice; they merely have a right to a "free public secondary" education. Conn. Const., art. VIII, § 1. Although § 10-65, as amended by Public Acts, Spec. Sess., June 2007, No. 07-3, provides that local boards of education must "provide opportunities for its students to enroll in such a [vocational agricultural] center in a number that is at least equal to ... the average number of its students that the board of education enrolled in a vocational agricultural center during the previous three school years"; General Statutes § 10-65(b); this does not afford every student an unqualified right to attend a vocational agricultural program like the Center's. Therefore, the plaintiffs have failed to demonstrate a likelihood of success on their claim under Article eighth, § 1 of the constitution of Connecticut.

II. Equal Protection

The plaintiffs next argue that the board's decision violates their equal protection rights because it creates a "subclass" of pre-high school students every four years who will be precluded from attending the Center, in contrast to the Milford students from other years who will have such an opportunity. Since the Connecticut Constitution affords them a fundamental right to secondary education, they contend, the court must apply strict scrutiny to their claim that this right was violated. Moreover, they argue that there is no policy reason behind the defendant's decision, and, therefore, the unequal treatment is unlawful and in violation of their rights.

Article first, § 20 of the constitution of Connecticut provides: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his civil or political rights because of religion, race, color, ancestry or national origin." "Article first, § 20, of the constitution of Connecticut contains similar language [to the fourteenth amendment to the United States constitution] and has been determined to have a like meaning and to impose similar limitations." *Tuchman v. State,* 89 Conn.App. 745, 759, 878 A.2d 384 (2005). The first step in any equal protection analysis is to determine the appropriate standard of review. As outlined above, the plaintiffs have no constitutional right to the education of their choice. Therefore, the plaintiffs' claims do not implicate a fundamental right, and the defendant's actions need only be "rationally related to a legitimate government interest" in order to be constitutionally valid. *Neuhaus v. Decholnoky,* 83 Conn.App. 576, 590, 850 A.2d 1106 (2004).

The plaintiffs have alleged that the board's action created a "subclass" of students, comprised of those in every fourth

year who wish to attend the center. This action, however, is much more reasonably seen as a "class of one" claim in the vein of *Willowbrook v. Olech,* 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000). [8] *Olech,* rather than modifying the previous jurisprudence regarding equal protection claims brought by non-suspect classes, merely couched it in different terms, while still retaining the two-pronged "similarly situated" and "rational basis" test for evaluating alleged violations. See *Cobb v. Pozzi,* 363 F.3d 89, 111 (2nd Cir.2004). The Connecticut Supreme Court applied the *Olech* standard in *City Recycling Inc. v. State,* 257 Conn. 429, 445-46, 778 A.2d 77 (2001); and again in *Kelo v. New London,* 268 Conn. 1, 106-07, 843 A.2d 500 (2004). "Equal protection claims that are not based on discrimination due to membership in a protected class are commonly referred to as class of one claims ... [Under the *Olech* standard] ... a plaintiff must show that he was: (1) intentionally treated differently from others similarly situated; and (2) there was no rational basis for the difference in treatment." *Singhaviroj v. Board of Education,* Superior Court, judicial district of Fairfield, Docket No. CV05 40065 24S (July 5, 2007, Gilardi, J.); see also *Clubside, Inc. v. Valentin,* 468 F.3d 144, 159 (2d Cir.2006) ([P]laintiffs state an equal protection claim where they allege that they were intentionally treated differently from other similarly-situated individuals without any rational basis").

***5** "[T]he analytical predicate [of consideration of an equal protection claim] is a determination of who are the persons similarly situated." (Internal quotation marks omitted.) *Batte-Holmgren v. Commissioner of Public Health,* 281 Conn. 277, 295, 914 A.2d 996 2007. The plaintiffs argue that they are "similarly situated" to previous and future students graduating middle school who wish to take classes at the Center. Without deciding whether these circumstances are sufficiently similar for the purposes of equal protection, the court will address only the "rational basis" standard, as it is dispositive of the equal protection issue. [9]

"Rational basis review is satisfied so long as there is a plausible policy reason for the classification ... [I]t is irrelevant whether the conceivable basis for the challenged distinction actually motivated the legislature ... To succeed, the party challenging the legislation must negative every conceivable basis which might support it." (Citation omitted; internal quotation marks omitted.) *Batte-Holmgren v. Commissioner of Public Health, supra,* 281 Conn. at 296, 914 A.2d 996. In a "class of one" claim, the government action must not be supported by any conceivable rationale; even a basis that is unwise or mistaken is sufficient to avoid violation of equal protection. In *Bizzarro v. Miranda,* 394 F.3d 82 (2nd Cir.2005), for example, the court held that no cause of action for an equal protection violation would lie where plaintiffs simply alleged that supervisors erroneously filed disciplinary action against them. The court reasoned that even if the supervisors misapprehended the facts or that the filing of charges was not an effective means of accomplishing their goals, no jury could find that the act of filing disciplinary charges for suspected conduct was not rationally related to preventing that sort of conduct in the workplace. *Id.,* at 88-89.

In the present case, the defendant presented evidence that in the face of increasing tuition costs it made the decision to stop sending students to the Center unless funds were available instead designating the Bridgeport program as its primary vocational agricultural program. As will be addressed later in this opinion, the board acted within the confines of § 10-65 in doing so. Irrespective of whether the board could have produced a balanced budget while maintaining its previous relationship with the Center, or the fact that the cost of sending students to the Center may have been small (approximately .1% of the approximately $80 million budget), this court is not in a position to judge the soundness of the defendant's fiscal decisions, and the court cannot say that it was irrational or arbitrary for it to decide to sever ties with the Center in the interests of reducing overall long term costs. Therefore, the plaintiffs have failed to demonstrate the likelihood of establishing an equal protection violation.

III. General Statutes § 10-65

***6** The plaintiffs final claim is that the defendant violates the purpose of § 10-65(b), as amended, which was enacted to compel school boards to send students to an agricultural school of their choice. The defendant responds that it has complied with the clear language of the statute by sending seventeen students to the Center for the upcoming year.

"When construing a statute, [the court's] fundamental objective is to ascertain and give effect to the apparent intent of the legislature ... In other words, we seek to

determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." *Pritchard v. Pritchard,* 103 Conn.App. 276, 283, 928 A.2d 566 (2007). "If the language of a statute is plain and unambiguous, we need look no further than the words themselves because we assume that the language expresses the legislature's intent." *Officer of Consumer Counsel v. Dept. of Public Utility Control,* 246 Conn. 18, 29, 716 A.2d 78 (1998). "A statute does not become ambiguous solely because the parties disagree as to its meaning." *Nichols v. Warren,* 209 Conn. 191, 198 n. 5, 550 A.2d 309 (1988).

Section 10-65(d) C.G.S. provides that: "Any local or regional board of education which does not furnish vocational agricultural training approved by the State Board of Education shall designate a school or schools having such a course approved by the State Board of Education as the school which any person may attend who has completed an elementary school course through the eighth grade. The board of education shall pay the tuition and reasonable and necessary cost of transportation of any person under twenty-one years of age who is not a graduate of a high school or vocational school and who attends the designated school, provided transportation services may be suspended in accordance with the provisions of section 10-233c ..." General Statutes § 10-64. As previously mentioned, § 10-65, as amended by Spec. Sess. P.A. 07-3, provides in relevant part: "Each local or regional board of education not maintaining a vocational agricultural center shall provide opportunities for its students to enroll in such a center ... in a number that is at least equal to the average number of its students that the board of education enrolled in a vocational agricultural center during the previous three school years ..."

Section 10-64, therefore, unambiguously requires any board of education to designate one of the nineteen regional vocational agriculture centers or, pursuant to subsection (c), one of the two aquaculture centers as the school to which it will subsidize the tuition of the students it sends there. The statute does not, however, require a board to do so for more than one school, although it allows a board to designate more than one. General Statutes § 10-64(d). The defendant, for the 2007-2008 year, designated the Bridgeport program, a "vocational aquaculture" program, as the school it would subsidize for its students. Under § 10-64, the defendant had no further responsibilities to send students to the Center.

***7** Section 10-65, however, as amended, adds the additional requirement that a board provide for students to attend any vocational agricultural program it had previously sent students to in the amount of the average number of students sent annually over the past three years. The language is unambiguous; it does not require anything more than that a certain number of students from any given school district, determined by the yearly average of the past three years, receive funding and transportation from the board to attend such school. In the present case, the defendant has met that requirement by seventeen students already enrolled at the Center and not having graduated back to the Center for the coming year; the evidence demonstrates that the average number of students over the past three years is approximately fifteen and two-thirds. [10]

Although the plaintiffs assert that is not "in the spirit of the legislation," the language of the statute is unambiguous, and this court may not presume to enforce what the legislature did not expressly enact. *Officer of Consumer Counsel v. Dept. of Public Utility Control, supra,* 246 Conn. at 29, 716 A.2d 78.

For the foregoing reasons, this court concludes that the plaintiffs have failed to demonstrate a likelihood of success on their claim of violation of § 10-65 C.G.S.

Conclusion

Since the plaintiffs have not demonstrated that they are likely to succeed on the merits, they are not entitled to injunctive relief on their claims, and their request for a temporary injunction is denied. So ordered.

All Citations

Not Reported in A.2d, 2007 WL 2755888

Footnotes

1 The court notes that the correct procedure to bring a claim on behalf of a minor requires the summons and complaint to include the name of the minor followed by the parent's name. However, the pleadings in this case list the plaintiffs simply as "[individual parent or guardian] PPA." "PPA" is an acronym for "per proxima amici," meaning "by or through the next friend," and is employed when an adult brings suit on behalf of a minor, who was unable to maintain an action on his own behalf at common law. See *Ryan v. Depamphilis,* Superior Court, judicial district of Hartford, Docket No. CV 04 4002606 (April 28, 2005, Hale, J.) (39 Conn. L. Rptr. 293, 294). In *Ryan,* the summons listed "[the minor child] PPA" without a referent for the "PPA"; furthermore, the complaint had the names listed correctly in several counts but others read "[the parent] PPA [the minor child]," a result the *Ryan* court recognized as nonsensical since it indicates that the child is bringing suit on behalf of the adult. The court in *Ryan* also recognized, however, that "a modern trend which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically ... Although essential allegations may not be supplied by conjecture or remote implication ... the complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded and do substantial justice between the parties." *Id.,* quoting *Venedetto v. Wamat,* 79 Conn.App. 139, 148, 829 A.2d 901 (2003). Since it is clear that the present plaintiffs intended that the parents bring suit as next friend of their respective children, and since the defendants have not objected on these grounds, this court determines that the plaintiffs in this case are the minor children through their next friends, as outlined above.

2 The injunction simply requests that the defendant "desist and refrain from taking any action and/or preventing the plaintiffs from attending the [Center,] as more particularly described in the attached verified complaint." The verified complaint, however, does not include a prayer for relief. At the August 27 hearing, however, it was revealed that in order for the plaintiffs to attend the Center the defendant would have to fund their tuition, and that the plaintiffs were essentially seeking a mandatory injunction.

3 Interestingly, it appears the defendant was unequivocally told by the acting superintendent, Larry Schaefer, that the students would not be able to attend the Center well beforehand, on December 28, 2006; moreover, it was suggested in the same letter that the board "send a letter to all potential incoming students of the [Center] explaining the Board's action (Exh. D).

4 Section 10-65, governing state funding to regional vocational agricultural programs, was amended by Public Acts, Spec. Sess., June 2007, No. 07-3 to include the following language: "Each local or regional board of education not maintaining a vocational agricultural center shall provide opportunities for its students to enroll in such a center in a number that is ... at least equal to the average number of its students that the board of education enrolled in a vocational agricultural center during the previous three school years."

5 While the principle that alleged constitutional violations require no showing of irreparable harm is not without qualification, the plaintiffs presented evidence that, if prevented from doing so this year, they would not likely be able to enroll at the Center at all, or would at best have only the options of repeating their freshman year at the Center next year, or be at a disadvantage relative to other students if they entered as sophomores. This court believes that this is sufficient to demonstrate irreparable injury for the purposes of the issue before the court.

6 The court notes that this language, "free and appropriate public education," is that used in the context of special education for children with disabilities; see General Statutes § 10-76a et seq .; which is not relevant to the present case.

7 Similarly, in *Campbell v. Board of Education,* 193 Conn. 93, 475 A.2d 289 (1984), the plaintiff challenged a school policy of waiving grade reductions for missed classes for those students whose work was "outstanding." The court reasoned that, "[t]he plaintiff argues that *Horton v. Meskill* implies that strict scrutiny must be the test for any and all governmental regulations affecting public school education. We disagree. The underlying issue in *Horton v. Meskill* was the provision of "a substantially equal educational opportunity" for Connecticut students in the state's free public elementary and secondary schools ... This school board policy, which is neither disciplinary; nor an infringement of equal educational opportunity, does not jeopardize any fundamental rights under our state constitution."

8 The Supreme Court expressly noted that "[w]hether the complaint alleges a class of one or of five is of no consequence because we conclude that the number of individuals in a class is immaterial for equal protection analysis." *Willowbrook v. Olech, supra,* at 528 U.S. 564 n. 1.

9 Courts have often done so: "We assume, without deciding, that restaurants and cafes are situated similarly to casinos and private clubs with respect to the statutory scheme in order to proceed with the equal protection analysis. See *State v. Wright,* 246 Conn. 132, 143, 716 A.2d 870 (1998) (court frequently has assumed, for purpose of proceeding with

equal protection analysis, that categories of defendants are similarly situated with respect to challenged statute)." *Batte-Holmgren v. Commissioner of Public Health, supra,* 281 Conn. at 296, 914 A.2d 996.

10 Nineteen students attended during the past year, and fourteen students attended in the two previous years.