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CONNECTICUT REPORTS

Vol. 334

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

KIMBERLY H. GRAHAM ET AL. *v.* JANIE R. FRIEDLANDER ET AL.
(SC 20243)

Robinson, C. J., and D'Auria, Mullins, Kahn, Ecker and Vertefeuille, Js.

Syllabus

The plaintiffs, four school-age children diagnosed with autism spectrum disorder and enrolled in the Norwalk public school system, and their parents, brought an action seeking damages from the defendant Board of Education of the City of Norwalk and three of its members in connection with the hiring of the defendants S Co. and L, S Co.'s owner, to provide autism related services to certain children in the Norwalk school district. The plaintiffs alleged, inter alia, that, under state law, the negligent hiring and supervision of L by the board and board members proximately caused them to suffer permanent and ongoing injuries and losses. L represented when she was hired that she had received various master's degrees and was a board certified behavior analyst, but the board and three board members never performed a background check or confirmed her credentials. The board and board members filed a motion to dismiss those counts of the complaint asserted against them on the ground that the plaintiffs sought relief for the board's and board members' alleged failure to provide special education services under the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et seq.), thus triggering an administrative exhaustion requirement contained in that act and in the applicable state statutory (§ 10-76a et seq.) scheme that implements the federal act, thereby depriving the trial court of subject matter jurisdiction. The board and board members specifically contended that, although the plaintiffs did not allege a violation of the federal act, they sought relief for the denial of a free appropriate public education under the federal act and that, regardless of whether the complaint alleged a violation of the federal act or some other common-law claim, the federal act and state law (§ 10-76h) mandated the exhaustion of administrative remedies insofar as the crux of the complaint was the alleged denial of a free appropriate public education. The board and board members alleged, in the alternative, that they were entitled to sovereign immunity because they were acting as agents of the state in providing special education services. The trial court granted the motion to dismiss and rendered judgment for the board and board members, concluding that the plaintiffs were required to exhaust their administrative remedies but had failed to do so. The court denied the motion as to the claim that the plaintiffs' action was barred by sovereign immunity. On appeal, the plaintiffs claimed, inter alia, that they were not required to exhaust their administrative remedies because they did not seek relief for the denial of a free appropriate public education

but, rather, asserted common-law claims under state law that were not subject to the exhaustion requirements. *Held*:

1. The trial court incorrectly concluded that the plaintiffs were required to exhaust their administrative remedies, the plaintiffs having alleged common-law negligence claims that were not subject to an exhaustion requirement, and, accordingly, the judgment was reversed as to the trial court's dismissal on the basis of the plaintiffs' failure to exhaust their administrative remedies, and the case was remanded for further proceedings: although the federal act contains an exhaustion requirement (20 U.S.C. § 1415 (*l*)) that is applicable to civil actions brought under federal laws that protect the rights of disabled children, the plaintiffs' claims were not subject to federal exhaustion requirements because those claims did not allege violations of federal laws protecting the rights of disabled children but, rather, alleged common-law negligence under state law; moreover, although the state legislature implemented the substantive and procedural requirements of the federal act by statute in § 10-76a et seq. and required the exhaustion of administrative remedies under § 10-76h for state law claims seeking relief for the denial of a free appropriate public education, a claim by claim analysis of the plaintiffs' complaint revealed that the plaintiffs, in asserting claims of negligence and loss of parental consortium, did not seek relief for the denial of education services but, rather, for an alleged regression in the children's symptoms of autism spectrum disorder and an inability to communicate effectively resulting from the time that the children spent under the care of unqualified personnel, and, accordingly, the plaintiffs' claims did not trigger the exhaustion requirement of § 10-76h; furthermore, this court relied on the framework set forth in the United States Supreme Court's recent decision in *Fry* v. *Napoleon Community Schools* (137 S. Ct. 743), in determining that, because the plaintiffs' negligence claims could have been brought outside the school setting, and because the history of the proceedings prior to the filing of their complaint demonstrated that the plaintiffs never invoked the formal procedures of filing a due process complaint or requested a hearing, the plaintiffs sought relief for something other than the denial of a free appropriate public education.
2. The board and board members could not prevail on their claim, as an alternative ground for upholding the dismissal of the plaintiffs' action, that they were entitled to sovereign immunity because they were acting as agents of the state in providing special education services, and, accordingly, this court upheld the trial court's denial of the motion to dismiss on the basis of sovereign immunity: although a local board of education acts as an agent of the state when it is fulfilling the statutory duties imposed on it by the legislature pursuant to the state constitutional (art. VIII, § 1) mandate of free public education and, thus, when it is carrying out the educational interests of the state, a local board of education acts as an agent of a municipality in its function of maintaining control over the public schools within the municipality's limits, and

when a board of education acts on behalf of a municipality rather than the state, sovereign immunity is not implicated; in the present case, this court, upon reviewing the statutes (§§ 10-240 and 10-241) delegating control of the public schools to municipalities, concluded that a private lawsuit, such as the plaintiffs' action, alleging a violation of the duties within a municipality's control, does not constitute a serious interference with the performance of the state's functions or its control over its respective instrumentalities, funds and property, and, because the plaintiffs did not allege that the board and board members failed to develop or design a special education program in accordance with state mandates but claimed that their alleged injuries occurred in the execution of such a program, the municipality, rather than the state, was subject to liability, and, accordingly, sovereign immunity was not implicated.

Argued September 16, 2019—officially released February 4, 2020

Procedural History

Action to recover damages for, inter alia, personal injuries sustained by the plaintiffs' minor children, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant Spectrum Kids, LLC, was defaulted for failure to appear; thereafter, the trial court, *Povodator*, *J.*, granted the motion to dismiss filed by the named defendant et al.; subsequently, the court granted the motions for reargument filed by the plaintiffs and the defendant city of Norwalk and rendered judgment for the named defendant et al., from which the plaintiffs appealed. *Reversed in part*; *further proceedings.*

Angelo A. Ziotas, with whom was *Jennifer B. Goldstein*, for the appellants (plaintiffs).

Tadhg Dooley, with whom was *Aaron S. Bayer*, for the appellees (named defendant et al.).

Opinion

D'AURIA, J. The plaintiffs,[1] the parents of four school-age children, individually and on behalf of their children, brought this action against the Board of Education

[1] The plaintiff parents are Kimberly H. Graham, Erik J. Graham, Krishna Thiruvengadachari, Supraja Rajagopalan, Margaret A. Kozlark, Michael W. Bustell, Maria Murphy, and Patrick Murphy. The plaintiff children are Nathan T. Graham, Vasisht Krishna, Henry J. Bustell, and Brooke Murphy.

of the City of Norwalk (board) and three of its members,[2] in their official capacities (board defendants), the city of Norwalk (city), and Spectrum Kids, LLC, and its owner, Stacy Lore.[3] On appeal, we are asked to determine whether the claims alleged in the plaintiffs' complaint seek relief for a failure to provide special education services under the Individuals with Disabilities Education Act (act), 20 U.S.C. § 1400 et seq., thus triggering an administrative exhaustion requirement contained in that act and within General Statutes § 10-76h, or whether the plaintiffs' action seeks relief for something other than the provision of a free appropriate public education (FAPE), thereby relieving the plaintiffs of the exhaustion requirement. To decide this issue at this stage in the litigation—on review of the trial court's decision to grant the board defendants' motion to dismiss for lack of subject matter jurisdiction on the basis of a failure to exhaust administrative remedies—we must confine our inquiry to the allegations in the plaintiffs' complaint.[4] On the basis of those allegations,

[2] The defendant board members are Janie R. Friedlander, Beatrice Krawiecki, and Salvatore Corda.

[3] In the underlying action, Spectrum Kids, LLC, was defaulted for failure to appear. Before the trial court's dismissal of the plaintiffs' action, Lore had filed an appearance but had not filed an answer or other responsive pleading and had not been defaulted for failure to plead. In its memorandum of decision granting the board defendants' motion to dismiss, the trial court thus referred to both Spectrum Kids, LLC, and Lore as "nonparticipating defendants."

The plaintiffs did not direct any claims in their complaint specifically toward the city, although the first count of the complaint, which is incorporated into all of the subsequent counts, alleged that the city is liable for indemnification as a result of the acts and omissions of its employees that occurred within the scope of their employment, pursuant to General Statutes § 7-465. The trial court dismissed the claim against the city, stating that it was "premised on mootness and lack of a justiciable issue, coupled with untimeliness of the commencement of the action against the city."

In this appeal, the plaintiffs do not challenge the trial court's dismissal of the indemnification claim against the city. Consequently, we address only the claims against the board defendants—counts one through sixty of the complaint.

[4] Because the trial court granted the motion to dismiss as to all of the claims against the city and the board defendants; see footnote 3 of this opinion; this court has jurisdiction to consider the plaintiffs' claims on appeal under Practice Book § 61-3.

we conclude that the plaintiffs seek relief for something other than the denial of a FAPE and were, therefore, not obligated to exhaust their administrative remedies. Accordingly, we agree with the plaintiffs that the trial court improperly dismissed their action on the ground that the plaintiffs had not exhausted their administrative remedies. As an alternative ground for upholding the granting of the motion to dismiss, the defendants ask us to determine that the board defendants acted as agents of the state in providing special education services, therefore entitling them to sovereign immunity. We agree with the trial court that the board defendants were acting under the control of, and as an agent of, the municipality rather than the state, and were not entitled to sovereign immunity. Accordingly, we uphold the trial court's denial of the board defendants' motion to dismiss on the sovereign immunity ground.

I

The following facts, as alleged in the plaintiffs' complaint, and procedural history are relevant to our review of these claims. The board and the city hired Lore and Spectrum Kids, LLC, "to provide autism related services to children in the school district with an autism or related diagnosis." Lore represented at the time she was hired that she had received various master's degrees and was a board certified behavior analyst. None of the defendants ever performed a background check on Lore or confirmed her alleged credentials. We note that, in a criminal action, Lore was charged with larceny, to which she pleaded guilty and was sentenced to three years in prison and five years of probation. See *State* v. *Lore*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CR-10-0125486-T (September 2, 2010).

The four minor plaintiffs were pupils enrolled in the Norwalk public schools and had been diagnosed with autism spectrum disorder. The plaintiffs alleged that

between November, 2007, and May, 2008, Lore and Spectrum Kids, LLC, were retained to provide the minor plaintiffs with autism related services within the Norwalk public schools. The plaintiffs brought state law claims against the board defendants, the city, Lore, and Spectrum Kids, LLC, in connection with the hiring of Lore and Spectrum Kids, LLC, and the services, or lack thereof, that were provided. The complaint consists of eighty-four counts. As to the board defendants, in counts one through sixty, the plaintiff parents allege that the board defendants' negligent and careless hiring and supervision of Lore proximately caused permanent and ongoing injuries and losses to their four children and to them individually as parents.[5]

The board defendants moved to dismiss counts one through sixty of the plaintiffs' complaint on the ground that the plaintiffs' failure to exhaust their administra-

[5] Count one of the complaint asserts a claim against the board defendant Janie R. Friedlander on behalf of the minor plaintiff, Nathan T. Graham, alleging negligent hiring and supervision that resulted in injuries, including a regression of the progress made to alleviate the symptoms of autism spectrum disorder, lack of progress in the symptoms of autism spectrum disorder, and an inability to communicate effectively.

Counts two through five incorporate the allegations in count one and assert individual claims by the parents of Nathan Graham as against Friedlander for loss of consortium and negligent infliction of emotional distress.

Counts six through ten repeat the allegations in the first five counts but allege claims against the board defendant Beatrice Krawiecki.

Counts eleven through fifteen repeat the allegations in the first five counts but allege claims against the board defendant Salvatore Corda.

Counts sixteen through thirty, brought by the parents of the minor plaintiff, Vasisht Krishna, individually and on behalf of their child, repeat the allegations and causes of action contained in the first fifteen counts as against each of the three individual board defendants.

Counts thirty-one through forty-five, brought by the parents of the minor plaintiff, Henry J. Bustell, individually and on behalf of their child, repeat the allegations and causes of action in the first fifteen counts as against each of the three board defendants.

Counts forty-six through sixty, brought by the parents of the minor plaintiff, Brooke Murphy, individually and on behalf of their child, repeat the allegations and causes of action in the first fifteen counts as against each of the three board defendants.

tive remedies deprived the trial court of subject matter jurisdiction. In the alternative, the board defendants claimed that the doctrine of sovereign immunity mandated the dismissal of the claims. The trial court granted the motion to dismiss on the ground that the plaintiffs had failed to exhaust their administrative remedies. The trial court denied the board defendants' motion to dismiss as to their claim that sovereign immunity barred the plaintiffs' action. The plaintiffs and the city filed motions to reargue. The trial court allowed the parties to present additional arguments and held a hearing but denied the parties relief in the form of a modification of the court's previous decision. The plaintiffs then timely appealed to the Appellate Court. The appeal was transferred to this court. See General Statutes § 51-199 (c); Practice Book § 65-1.

On appeal, the plaintiffs claim that they did not have to exhaust administrative remedies because their complaint advances a state law claim that does not allege a violation of the act. They further allege that they do not seek relief for the denial of a FAPE but, rather, assert common-law claims of negligent hiring and supervision, loss of consortium and negligent infliction of emotional distress—all falling outside the exhaustion requirements contained in the act. The board defendants contend that, although, on the face of the complaint, the plaintiffs do not allege a violation of the act, the complaint in fact seeks relief for the denial of a FAPE. They further contend that, regardless of whether the plaintiffs' complaint alleges a violation of the act or some other common-law claim, the act *and* state law mandate the exhaustion of administrative remedies prior to the filing of a complaint, as long as the crux of the complaint is the denial of a FAPE. Alternatively, they contend that this court should affirm the trial court's judgment on the ground that the board defendants are entitled to sovereign immunity as agents of the state.

Applicable to both the exhaustion analysis and the sovereign immunity analysis is our standard of review for a court's decision on a motion to dismiss and principles of statutory interpretation. Our review of the trial court's determination of a jurisdictional question raised by a pretrial motion to dismiss is de novo. *State* v. *Samuel M.*, 323 Conn. 785, 794–95, 151 A.3d 815 (2016). "In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *Metcalf* v. *Fitzgerald*, 333 Conn. 1, 7, 214 A.3d 361 (2019), cert. denied, 88 U.S.L.W. 3222 (U.S. January 13, 2020) (No. 19-490). To the extent that we are called upon to engage in statutory interpretation, our review is plenary and guided by General Statutes § 1-2z. See, e.g., *Gonzalez* v. *O & G Industries*, *Inc.*, 322 Conn. 291, 302–303, 140 A.3d 950 (2016).[6]

II

To reach the question of whether the plaintiffs were required to exhaust their administrative remedies, we first must determine whether the act's exhaustion requirement applies to state law claims, not brought under the act, that allege a violation of a FAPE. In the event that the act's exhaustion requirement does not

[6] "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. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *Gonzalez* v. *O & G Industries*, *Inc.*, supra, 322 Conn. 302–303.

apply to state law claims, we must then determine whether state law, like the act, mandates exhaustion prior to filing a claim in Superior Court seeking relief for the denial of a FAPE. Finally, if the state statutory scheme does require exhaustion, we must examine the plaintiffs' complaint to determine whether the complaint in fact alleges the denial of a FAPE, which is subject to exhaustion, or some other claim that is not subject to exhaustion.

The act is a federal statute that "ensures that children with disabilities receive needed special education services." *Fry* v. *Napoleon Community Schools*, U.S. , 137 S. Ct. 743, 748, 197 L. Ed. 2d 46 (2017); see also 20 U.S.C. § 1400 (d) (2012). "The [act] offers federal funds to [s]tates in exchange for a commitment: to furnish a 'free appropriate public education' [FAPE] . . . to all children with certain physical or intellectual disabilities." *Fry* v. *Napoleon Community Schools*, supra, 748. Once a state accepts the act's financial assistance, eligible children acquire a " 'substantive right' " to a FAPE. Id., 749. The primary vehicle for providing each eligible child with a FAPE takes the form of an individualized special education plan. 20 U.S.C. § 1414 (d) (2012); *Fry* v. *Napoleon Community Schools*, supra, 749.

Disputes often arise over whether the special education services provided to children with physical or intellectual disabilities are sufficient to satisfy a child's individual education plan. To resolve these disputes, the act requires state or local agencies to establish and maintain procedures to "ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies." 20 U.S.C. § 1415 (a) (2012); see *Fry* v. *Napoleon Community Schools*, supra, 137 S. Ct. 748. "[A] dissatisfied parent may file a complaint as to any matter concerning the provision of a FAPE with the local or state education

agency (as state law provides)." *Fry* v. *Napoleon Community Schools*, supra, 749; see 20 U.S.C. § 1415 (b) (6) (2012).

The act also contains an exhaustion requirement pursuant to which individuals cannot file a civil action under the act until they have satisfied the procedural dispute resolution mechanism established by the relevant state agency. See 20 U.S.C. § 1415 (*l*) (2012). In relevant part, the statute provides: "Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 . . . title V of the Rehabilitation Act of 1973 . . . or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures . . . shall be exhausted to the same extent as would be required had the action been brought under this subchapter." 20 U.S.C. § 1415 (*l*) (2012).

The plain language of the act provides that exhaustion is required when a civil action is brought "*under such laws* . . . ." (Emphasis added.) 20 U.S.C. § 1415 (*l*) (2012). "[S]uch laws" plainly encompass the federal protections of the rights of children with disabilities embodied in the United States "Constitution, the Americans with Disabilities Act of 1990 . . . title V of the Rehabilitation Act of 1973," and the act itself. 20 U.S.C. § 1415 (*l*) (2012); accord *Moore* v. *Kansas City Public Schools*, 828 F.3d 687, 693 (8th Cir. 2016). The plaintiffs, however, did not bring a civil action "under such laws." Nowhere in their complaint do they allege violations of the constitution or the act or any other federal statute that protects the rights of children with disabilities. The complaint alleges state common-law negligence claims. We agree with the plaintiffs that their claims, on their face, are not subject to the federal exhaustion require-

ments because their claims do not allege violations of federal laws protecting the rights of children with disabilities—the claims do not fall "under such laws."

Despite the language of 20 U.S.C. § 1415 (*l*), the board defendants, in their motion to dismiss before the trial court, argued that, because states are required under the act to establish their own procedural mechanism to resolve disputes, the exhaustion requirement is triggered for *state* law claims that seek relief for the denial of a FAPE, even when the claims do not purport to be brought under the act. The trial court's memorandum of decision does not address whether state law claims trigger an exhaustion requirement under state law. On appeal, the board defendants do not argue, as they did before the trial court, that the claims triggered an exhaustion requirement under state statutes. Rather, they cite exclusively to the federal administrative exhaustion section under the act. See 20 U.S.C. § 1415 (*l*) (2012). We, however, find it necessary to determine whether state law mandates exhaustion of administrative remedies when the claim seeks relief for the denial of a FAPE. To answer this question, we look to the procedural mechanisms established by our state legislature to provide special education services to children. Doing so, we conclude that our state legislature created an exhaustion requirement for state law claims that seek relief for the denial of a FAPE. See General Statutes § 10-76a et seq.

Connecticut implements the substantive and procedural requirements of the act through § 10-76a et seq. The specific procedures for resolving disputes are set forth in § 10-76h. Under § 10-76h (a) (1), a parent of a child requiring special education and related services "may request a hearing of the local or regional board of education or the unified school district responsible for providing such services whenever such board or district proposes or refuses to initiate or change the identification, evaluation or educational placement of

or provision of a free appropriate public education to such child or pupil." The request must be made in writing, contain a statement of the specific issues in dispute, and be requested within two years of the board's proposal or refusal to initiate a change in the child's education plan. General Statutes § 10-76h (a) (1) through (4).

Upon receipt of the written request, "the Department of Education shall appoint an impartial hearing officer who shall schedule a hearing . . . pursuant to the Individuals with Disabilities Education Act . . . ." General Statutes § 10-76h (b). Section 10-76h requires the Department of Education to provide training to hearing officers, delineates who may act as hearing officers and members of hearing boards, identifies the parties that shall participate in a prehearing conference to attempt to resolve the dispute, and describes the authority that the hearing officer or board of education shall have. See General Statutes § 10-76h (c) and (d). Section 10-76h also establishes the processes for appealing from decisions of the hearing officer or the board of education. Section 10-76h (d) (4) provides in relevant part: "Appeals from the decision of the hearing officer or board shall be taken in the manner set forth in section 4-183 . . . ."[7] A plain reading of General Statutes § 4-183 of the Uniform Administrative Procedure Act, General Statutes § 4-166 et seq., informs us that, prior to bringing a claim in Superior Court, individuals must exhaust all administrative remedies available within the relevant agency.

Additionally, the extensive administrative scheme established by the legislature supports our conclusion that parties asserting a state law claim and seeking relief for the denial of a FAPE must first exhaust admin-

[7] General Statutes § 4-183 (a) provides in relevant part: "A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court . . . ."

istrative remedies pursuant to § 10-76h. "It is a settled principle of administrative law that if an adequate administrative remedy exists, it must be exhausted before the Superior Court will obtain jurisdiction to act in the matter." (Internal quotation marks omitted.) *Financial Consulting, LLC* v. *Commissioner of Ins.*, 315 Conn. 196, 208, 105 A.3d 210 (2014). The exhaustion requirement "serves dual functions: it protects the courts from becoming unnecessarily burdened with administrative appeals and it ensures the integrity of the agency's role in administering its statutory responsibilities. . . . There are two ways to determine whether an administrative remedy has been exhausted. [When] a statute has established a procedure to redress a particular wrong a person must follow the specified remedy and may not institute a proceeding that might have been permissible in the absence of such a statutory procedure. . . . When, however, a statutory requirement of exhaustion is not explicit, courts are guided by [legislative] intent in determining whether application of the doctrine would be consistent with the statutory scheme. . . . Consequently, [t]he requirement of exhaustion may arise from explicit statutory language or from an administrative scheme providing for agency relief." (Internal quotation marks omitted.) Id. On the basis of the statute's clear and unambiguous language, as well as the established and extensive administrative scheme, we conclude that the plaintiffs must exhaust administrative remedies before filing a claim for the denial of a FAPE under state law.

In reaching this conclusion, we arrive at the final inquiry—whether the plaintiffs in this case in fact seek relief for the denial of a FAPE, thereby triggering the state law exhaustion requirement, or whether they were not required to exhaust administrative remedies because they seek relief for some other kind of action. The board defendants contend that the crux of the

plaintiffs' complaint is the denial of a FAPE and that exhaustion is, therefore, required. The plaintiffs contend that they do not claim the denial of a FAPE. They characterize the complaint as a "common-law claim for negligent hiring, not a claim that 'charges, and seeks relief for,' the denial of a FAPE under the [act]."

We agree with other courts that have addressed this issue that the analysis should proceed claim by claim. We must look to the essence, or the crux, of each of the plaintiffs' claims within the complaint to evaluate whether each claim seeks relief for the denial of a FAPE. See, e.g., *Fry* v. *Napoleon Community Schools*, supra, 137 S. Ct. 755; *Doucette* v. *Georgetown Public Schools*, 936 F.3d 16, 24 (1st Cir. 2019); *Wellman* v. *Butler Area School District*, 877 F.3d 125, 132–33 (3d Cir. 2017). Performing this claim by claim analysis helps ensure that claims that involve the same parties or events as a dispute over the denial of a FAPE, but do not actually involve the denial of a FAPE, do not get "swept up and forced into administrative proceedings with claims that are seeking redress for a school's failure to provide a FAPE . . . ." *Doucette* v. *Georgetown Public Schools*, supra, 26.

Our claim by claim analysis begins with our review of the allegations in the plaintiffs' complaint.[8] Count

[8] Count one of the plaintiffs' complaint alleges in relevant part: "14. [The defendants] hired . . . Lore to provide autism related services to individuals in need of those services within the [Norwalk public schools].

"15. None of the defendants ever performed a background check on the defendant . . . Lore, nor did they ever confirm the alleged credentials of . . . Lore.

"16. The injuries and losses suffered by the [plaintiffs] . . . were proximately caused by the negligence and carelessness of the [defendants] . . . in one or more of the following ways, in that:

"a. [The defendants] failed to confirm the credentials of . . . Lore;

"b. [The defendants] failed to perform a background check on . . . Lore and/or any of the employees of Spectrum Kids, LLC, as required by [General Statutes] § 10-221d;

"c. [The defendants] failed to adequately supervise the services provide[d] by . . . Lore and/or any of the employees of Spectrum Kids, LLC;

one of the complaint sets forth a negligence claim brought on behalf of the minor plaintiff, Nathan T. Graham, against a board employee, the defendant Janie R. Friedlander. It alleges that Friedlander never performed a background check on Lore, never confirmed Lore's credentials, should have known of Lore's inability to provide adequate services, and failed to follow protocol in confirming Lore's background and credentials but nevertheless hired Lore. Lore then provided inadequate autism related services to Nathan Graham. The complaint alleges that, by failing to confirm Lore's credentials and failing to adequately supervise the services provided, Friedlander allowed Nathan Graham to be put in "harm's way . . . ." Count one further alleges that, "[a]s a direct and proximate result of the negligence and carelessness of" Friedlander, Nathan Graham suffered injuries. Those injuries include a "regression of the progress made to alleviate the symptoms of [autism spectrum disorder] . . . [l]ack of progress in the symptoms of [autism spectrum disorder, and an] [i]nability to communicate effectively."

Counts two and four incorporate the same facts and allege a claim for loss of parental consortium on behalf

"d. [The defendants] allowed [the plaintiffs] to be put in harm's way;

"e. [The defendants] knew or should have known of . . . Lore's inability to provide adequate services at the time of her hire;

"f. [The defendants] knew or should have known of . . . Lore's inability to provide adequate services at some point shortly after hiring her;

"g. [The defendants] failed to follow standard protocol in confirming . . . Lore's background and credentials.

"17. As a direct and proximate result of the negligence and carelessness of the [defendants], [the plaintiffs] suffered the following injuries:

"a. A regression of the progress made to alleviate the symptoms of [autistic spectrum disorder].

"b. Lack of progress in the symptoms of [autism spectrum disorder].

"c. Inability to communicate effectively.

"18. As a further result of the negligence and carelessness of the [defendants], [the plaintiffs'] injuries are permanent in nature and may require additional care in the future.

"19. As a further result of the negligence and carelessness of the defendant[s], [the plaintiffs] [were] required to spend various sums of money for additional treatment and services."

of Kimberly H. Graham and Erik J. Graham, the parents of Nathan Graham, claiming injuries in the form of loss of affection, care, and companionship of their son. Counts three and five incorporate the same facts and allege a claim for negligent infliction of emotional distress, also on behalf of Kimberly Graham and Erik Graham, claiming injury in the form of anxiety and emotional distress. Counts six through sixty repeat the same facts, claims, and injuries as to each of the other minor plaintiffs and their parents as against each of the three board defendants.

The counts brought on behalf of the children are the operative claims of this dispute. If the claims on their behalf for negligent hiring and negligent supervision are dismissed, the claims by the parents for loss of consortium and emotional distress must necessarily fall as well because they are derivative of the injured parties' causes of action. See, e.g., *Jacoby* v. *Brinckerhoff*, 250 Conn. 86, 91–92, 735 A.2d 347 (1999); id. ("an action for loss of consortium, although independent in form, is derivative of the injured spouse's cause of action" (internal quotation marks omitted)); see also *Galgano* v. *Metropolitan Property & Casualty Ins. Co.*, 267 Conn. 512, 520, 838 A.2d 993 (2004) ("bystander emotional distress, like loss of consortium, is a [third-party] cause of action . . . [and] [t]herefore . . . a form of [third-party] liability" (internal quotation marks omitted)). Without a viable claim of injury to the children, the parents will be unable to establish the foundation for their claims, which are premised on the injuries suffered by their children. To decide whether the counts brought by the plaintiff parents on behalf of the plaintiff children against each of the board defendants survive a motion to dismiss for failure to exhaust administrative remedies, we must determine whether they are claims that

seek relief for the denial of a FAPE, or whether they seek relief for a claim that does not trigger an exhaustion requirement.

To make this determination, we look to the recent decision of the United States Supreme Court in *Fry* v. *Napoleon Community Schools*, supra, 137 S. Ct. 743, for guidance in determining what types of allegations should be construed as claims for the denial of a FAPE, even if the plaintiff, through artful pleading, does not allege the denial of a FAPE in the complaint. In *Fry*, the plaintiff parents alleged that their daughter's school district discriminated against her in violation of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq., and the Rehabilitation Act of 1973, 29 U.S.C. § 794 et seq., when it refused to permit her to bring her service dog to school. *Fry* v. *Napoleon Community Schools*, supra, 751–52. The plaintiffs filed suit in United States District Court, and the defendant school district moved to dismiss the action. Id., 746. The District Court granted the motion to dismiss, and the United States Court of Appeals for the Sixth Circuit affirmed, holding that § 1415 (*l*) of the act "required the [plaintiffs] to first exhaust the [act's] administrative procedures." Id., 752.

The Supreme Court vacated the judgment of the Sixth Circuit and remanded the case to that court to determine whether the gravamen of the action was the denial of a FAPE, "even though that does not appear on the face of [the] complaint." Id., 758. The Supreme Court specifically stated that it had granted certiorari in *Fry* to "address confusion in the courts of appeals as to the scope of § 1415 (*l*)'s exhaustion requirement." Id., 752. To determine whether the gravamen of the complaint concerns the denial of a FAPE, the court established a framework for analyzing claims involving special education services. Id., 756–57. Justice Kagan, writing for the majority, directed courts to consider two factors. Id. The first factor requires consideration of whether the

claim could have been brought outside the school setting. Id., 756. The second factor requires consideration of the history of the proceedings prior to the filing of the complaint. Id., 757.

The first factor—whether the claim could have been brought outside the school setting—can be evaluated in the form of two hypothetical questions: "First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school—say, a public theater or library? And second, could an *adult* at the school—say, an employee or visitor—have pressed essentially the same grievance?" (Emphasis in original.) Id., 756. If the answer to both questions is yes, then it is unlikely that the complaint is about the denial of a FAPE. Id.

The court provided one illustrative example: "[S]uppose that a teacher, acting out of animus or frustration, strikes a student with a disability, who then sues the school under a statute other than the [act]." Id., 756 n.9. The plaintiff's claim under this hypothetical would be unlikely to require exhaustion; id., 756–57 n.9; even though "the suit could be said to relate, in both genesis and effect, to the child's education." Id., 756. The crux of the complaint would not "concern the appropriateness of an educational program." Id., 757 n.9. Rather, a child could file the same action against an official at another public facility for abuse, and an adult could file a similar action for abuse by a school official. Id.

An exercise in hypotheticals relevant to the facts of this case yields not so unusual scenarios in which a child or an adult with special needs could bring a negligent hiring claim. First, the plaintiffs could have brought essentially the same claim if they attended a municipal summer camp that touted a unique special needs program focused on speech, social skills, occupational therapy, and physical therapy, yet that was run by uncertified and unqualified staff. If the children suffered a

regression in development and an inability to communicate—the injuries alleged in the present case—they could claim that the negligent hiring of the camp staff proximately caused those injuries. Second, an adult participating in a municipally funded behavioral therapy treatment program offered in the evenings at a school could also bring the same claim for regression resulting from services provided by an uncertified and unqualified behavior therapist. A negligent hiring action could follow, which would not require as a precondition the exhaustion of administrative remedies.

These hypotheticals help to illustrate that the crux of the plaintiffs' complaint is not the denial of educational services as in a case in which, for example, a teacher failed to provide the proscribed daily thirty minutes of mathematics instruction. The crux of the complaint is an alleged regression regarding the symptoms of autism spectrum disorder and an inability to communicate effectively caused by the time the children spent under the care of an uncertified and unqualified behavior analyst. The distinction is subtle and requires our acceptance of the allegation that an uncertified behavior therapist can cause injury to individuals diagnosed with autism spectrum disorder in the form of regression. We do not hesitate to construe the allegations in the light most favorable to the plaintiffs and accept those allegations, given that our task in this appeal is to review the trial court's granting of the board defendants' motion to dismiss.

The board defendants disagree and contend that the plaintiffs could not have brought essentially the same claim at another public facility, ''seeking to hold a library or theater responsible for their lack of educational progress due to negligent hiring and supervision of a librarian or a theater director.'' In our view, the board defendants read the hypothetical questions posed in *Fry* too narrowly. The court instructed us to inquire

whether the same claim could have been brought if the "alleged conduct had occurred at *a public facility* that was *not* a school—say, a public theater or library . . . ." (Emphasis altered.) *Fry* v. *Napoleon Community Schools*, supra, 137 S. Ct. 756. We do not read *Fry* to confine our examination of the first factor to *exclusively* public theaters and libraries. The court, by stating, "say, a public theater or library," plainly intended to offer examples of public facilities, not to propose an exclusive list. Additionally, the complaint, viewed in the light most favorable to the pleader, alleges negligent hiring, not lack of educational progress. We answer yes to both of the hypothetical questions —a plaintiff could have brought a negligent hiring claim outside the school setting, and an adult at a school could have pressed essentially the same grievance. We view the allegations in the complaint similar to the abuse example in *Fry*. Rather than alleging a claim for abuse, the plaintiffs here have alleged negligent hiring resulting in injury. That claim falls much closer to an abuse claim than the contrasting example in *Fry* of a failure to provide remedial tutoring in mathematics—a clear example of a claim seeking relief for the denial of a FAPE. See id., 757.

Our research confirms that appellate courts acknowledge that state law claims for assault or battery are clear examples of claims seeking relief for something other than the denial of a FAPE. See, e.g., id., 756–57 n.9; *Wellman* v. *Butler Area School District*, supra, 877 F.3d 132. For example, the United States Court of Appeals for the Third Circuit has described a possible scenario in which a student brings a claim challenging the sufficiency of her individualized education plan but who also happened to be physically assaulted on the bus to school. See *Wellman* v. *Butler Area School District*, supra, 132–33. Although the plaintiff may choose to bring her claims in a single complaint, the claim for relief for

physical injuries "has nothing to do with her access to a FAPE and relief [under the act]." Id., 133. "Surely the [*Fry*] [c]ourt would not have envisioned that such a claim would be subject to the [act's] procedural requirements, nor would subjecting such a claim to these procedural requirements necessarily result in any benefit to either the parties or court reviewing the matter at a later date." Id.

This case presents a more difficult scenario than the clear demarcation that an assault claim is generally quite distinct from a claim seeking relief for the denial of a FAPE. The plaintiffs liken their claims to the assault example in *Fry*, alleging that the thrust of the claims is that the negligent hiring of Lore resulted in injuries to the children and their parents. The board defendants, on the other hand, urge us to focus on the nature of the injury alleged by the plaintiffs. The board defendants state that "the crux of [the] plaintiffs' complaint is that they received inadequate special education services as a result of [the] defendants' negligence in hiring an unqualified individual who was [unable] to provide adequate services . . . and that, as a result, they failed to make education progress." (Citation omitted; internal quotation marks omitted.) By focusing on the phrase, "received inadequate special education services," the board defendants view the complaint as one seeking relief for inadequate education—the denial of a FAPE.

We decline to read the plaintiffs' complaint against the board defendants so narrowly or to focus exclusively on the alleged inadequate services. The plaintiffs alleged several ways in which the negligence and carelessness of the board defendants "proximately caused" injuries to the parents and their children. Rather than parsing out a specific phrase, we quote the entire paragraph of the complaint that alleges the plaintiffs' injuries and losses:

"16. The injuries and losses suffered by the [plaintiffs] . . . were proximately caused by the negligence and carelessness of the [defendants] . . . in one or more of the following ways, in that:

"a. [The defendants] failed to confirm the credentials of . . . Lore;

"b. [The defendants] failed to perform a background check on . . . Lore and/or any of the employees of Spectrum Kids, LLC, as required by [General Statutes] § 10-221d;

"c. [The defendants] failed to adequately supervise the services provide[d] by . . . Lore and/or any of the employees of Spectrum Kids, LLC;

"d. [The defendants] allowed [the plaintiffs] to be put in harm's way;

"e. [The defendants] knew or should have known of . . . Lore's inability to provide adequate services at the time of her hire;

"f. [The defendants] knew or should have known of . . . Lore's inability to provide adequate services at some point shortly after hiring her; [and]

"g. [The defendants] failed to follow standard protocol in confirming . . . Lore's background and credentials."

We read this paragraph to set forth the causation elements for negligent hiring and negligent supervision claims. The plaintiffs did not allege an injury in the form of inadequate education services. Rather, they alleged negligence against the board defendants because the board defendants *should have known* of Lore's inability to provide adequate services.

The paragraph that follows directly sets forth the injuries that the plaintiffs allegedly suffered:

"17. As a direct and proximate result of the negligence and carelessness of the [defendants], [the plaintiffs] suffered the following injuries:

"a. A regression of the progress made to alleviate the symptoms of [autistic spectrum disorder].

"b. Lack of progress in the symptoms of [autism spectrum disorder].

"c. Inability to communicate effectively."

Viewing the complaint in the light most favorable to the plaintiffs, we read the complaint to allege that the board defendants negligently hired Lore, that the board defendants should have known of Lore's inability to provide services, and that Lore's failure to provide services directly and proximately caused injury to the children in the form of a regression unique to children suffering from autism spectrum disorder and an inability to communicate effectively. Viewed in this most favorable light, the claim sets forth an allegation for negligent hiring, not the denial of a FAPE, and thus is not subject to dismissal for failure to exhaust administrative remedies. The fact that the plaintiffs used the words, "inability to provide adequate services," does not automatically transform the claim into one alleging the denial of a FAPE or automatically subject the claim to an exhaustion requirement. The court in *Fry* warned against this kind of " 'magic words' " approach. *Fry* v. *Napoleon Community Schools*, supra, 137 S. Ct. 755. "The use (or [nonuse]) of particular labels and terms is not what matters." Id. What matters is the substance of the complaint. See id.

Moreover, the fact that the one kind of harm caused may also be the kind of harm caused in a case involving the denial of a FAPE does not mean that this kind of harm cannot be caused by other actions. If a teacher hits a special education student over the head and the

student misses school for two weeks due to a concussion, the child could still bring an assault claim against the teacher even though one of the harms alleged in the complaint could be that the child did not receive special education services for two weeks while recovering from the injury. The mere acknowledgement that the child received inadequate services for two weeks would not make the claim one for the denial of a FAPE. The claim would remain one for assault. Likewise, in the present case, the plaintiffs allege in their complaint that the children suffered injuries similar to the kind of injuries a child would suffer from an assault. They allege that, because Lore had no credentials to provide special education services, the children under her instruction, suffering from autism spectrum disorder, were injured in permanent and unique ways—specific to children suffering from the disorder. The fact that the children also missed some hours of educational instruction does not supersede the injuries allegedly suffered and make the claim one for the denial of a FAPE.

We are further persuaded that the complaint does not seek *relief* for the denial of a FAPE on the basis of the absence of any mention of the act, other laws protecting children with disabilities, or the children's education plans. The board defendants, in their memorandum of law in support of their motion to dismiss before the trial court, admitted as much in the section that contends that they enjoy sovereign immunity, stating that "this court lacks subject matter jurisdiction to entertain the plaintiffs' *common-law claims* against them." (Emphasis added.) Similarly, in the sovereign immunity section of their brief to this court, the board defendants conceded that, "in addition to [implicating the duty to provide a FAPE] . . . this case concerns alleged breaches of specific *state mandated duties concerning hiring*." (Emphasis added.) The board defendants ask us to cast the complaint as one seeking

relief for the denial of a FAPE for the purpose of an exhaustion requirement but then to view the complaint as alleging a violation of common-law and state mandated duties—not the denial of a FAPE—for the purposes of sovereign immunity. We decline to do so.

Finally, we look to the second *Fry* factor—the history of the proceedings—to determine whether the plaintiffs' complaint alleges the denial of a FAPE. See *Fry* v. *Napoleon Community Schools*, supra, 137 S. Ct. 757. A plaintiff who previously has invoked the act's formal procedures to handle the dispute could suggest that relief is indeed being sought for the denial of a FAPE. Id. This inquiry "depends on the facts" because "a court may conclude, for example, that the move to a courtroom came from a [late acquired] awareness that the school had fulfilled its FAPE obligation and that the grievance involves something else entirely." Id.

In the present case, the plaintiffs became dissatisfied with Lore's services and learned that Lore in fact did not possess the degrees or certifications she claimed to have. Then, they participated in multiple planning and placement team meetings to determine whether remedial services were appropriate as well as to receive the hours of service that were not delivered by Lore. The defendants admit that the "[p]laintiffs did not file a due process complaint or otherwise pursue administrative remedies under the [act]." Instead, they filed this lawsuit. The history of these proceedings, specifically, the fact that the plaintiffs never invoked the formal procedures of filing a due process complaint or requesting a hearing, supports our conclusion that the plaintiffs seek relief for something other than the denial of a FAPE.

Considering the factors outlined in *Fry*, we conclude that the plaintiffs allege common-law negligence claims that are not subject to an exhaustion requirement. At

this early stage in the litigation, we are not required to determine whether, ultimately, a claim for negligent hiring lies against the defendants. All we hold today is that, for jurisdictional purposes, the plaintiffs do not need to exhaust administrative remedies as to the claims they allege for a determination of whether they state a claim on which relief can be granted. We reverse the judgment of the trial court on that ground.[9]

III

The board defendants contend alternatively that, even if the plaintiffs were not required to exhaust their administrative remedies prior to filing their state law claims, this court should uphold the dismissal of the complaint on the ground that the board defendants are entitled to sovereign immunity. In their motion to dismiss, the board defendants claimed that their actions fell within the doctrine of sovereign immunity because they acted as agents of the state in carrying out a state mandated function. The trial court denied the motion to dismiss as to the claim of sovereign immunity. We agree with the trial court that, on the basis of the board members' actions as alleged in the plaintiffs' complaint, the board defendants are not entitled to sovereign immunity.[10]

"Sovereign immunity relates to a court's subject matter jurisdiction over a case, and therefore presents a question of law over which we exercise de novo

[9] Because we conclude that, when the crux of the complaint is not the denial of a FAPE and the exhaustion requirement is not triggered, we need not reach the question of whether exhaustion would have been excused under the doctrine of futility.

[10] Of course, in certain circumstances, municipalities may enjoy governmental immunity from liability, but that is entirely different from sovereign immunity. See, e.g., *Vejseli* v. *Pasha*, 282 Conn. 561, 573, 923 A.2d 688 (2007). The difference is that sovereign immunity prevents the state from being sued in the first instance, whereas governmental immunity does not protect against suit but could protect against liability. Id. The board has not asserted a governmental immunity defense, and we do not decide that issue.

review." (Internal quotation marks omitted.) *Columbia Air Services, Inc.* v. *Dept. of Transportation*, 293 Conn. 342, 349, 977 A.2d 636 (2009). "The principle that the state cannot be sued without its consent, sovereign immunity, is well established under our case law." (Internal quotation marks omitted.) *Housatonic Railroad Co.* v. *Commissioner of Revenue Services*, 301 Conn. 268, 274, 21 A.3d 759 (2011). Not as well established are the circumstances under which a municipality, cloaked with the state's sovereign immunity, is "protect[ed] against suit as well as liability—in effect, against having to litigate at all." (Internal quotation marks omitted.) *Sena* v. *American Medical Response of Connecticut, Inc.*, 333 Conn. 30, 42, 213 A.3d 1110 (2019).

The modern rationale for sovereign immunity rests on the practical ground that subjecting "the state and federal governments to private litigation might constitute a serious interference with the performance of their functions and with their control over their respective instrumentalities, funds and property." (Internal quotation marks omitted.) Id. The legislature has the power to limit or extend the scope of the state's immunity from suit. The legislature can *waive* immunity and consent to suit, thereby limiting the state's immunity. Compare *C. R. Klewin Northeast, LLC* v. *State*, 299 Conn. 167, 176, 9 A.3d 326 (2010) (discussing statutory waiver of sovereign immunity under General Statutes § 4-61), with *Hicks* v. *State*, 297 Conn. 798, 805, 1 A.3d 39 (2010) (concluding that General Statutes § 52-556 does not waive sovereign immunity with regard to postjudgment interest pursuant to General Statutes § 37-3b). Alternatively, the legislature can *extend* sovereign immunity to local agents or actors functioning on behalf of the state. See, e.g., *Sena* v. *American Medical Response of Connecticut, Inc.*, supra, 333 Conn. 51 (concluding that legislature extended sovereign immunity state enjoys to

local actors of political subdivisions under General Statutes § 28-13). The present case concerns the *extension* of sovereign immunity. Specifically, this case addresses whether the legislature extended the state's immunity from suit to the board defendants for the kind of relief that the plaintiffs seek.

The state's deeply rooted interest in its public schools stems from article eighth, § 1, of the Connecticut constitution, which provides: "There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation." To provide the children of Connecticut with public education, the legislature balances two important tasks, a dichotomy of interests. On the one hand, the state must enable agents to act on its behalf to perform state functions. On the other hand, the state must delegate important duties to the control of the municipalities so that private litigation does not interfere with the running of the state's affairs.

"There is no question but that local boards of education act as agencies of the state when they are fulfilling the statutory duties imposed upon them pursuant to the constitutional mandate of article eighth, § 1." *Cheshire* v. *McKenney*, 182 Conn. 253, 258, 438 A.2d 88 (1980). "In discharging its state constitutional mandate to provide free public primary and secondary education . . . the state has delegated the duty to educate a municipality's children to local boards of education." (Citation omitted; footnote omitted.) *Board of Education* v. *New Haven*, 237 Conn. 169, 174–75, 676 A.2d 375 (1996); see id. (citing General Statutes § 10-220). We previously have described local boards of education as "agenc[ies] of the state in charge of education in the town" with "broad powers" granted to them by the legislature. *Fowler* v. *Enfield*, 138 Conn. 521, 530, 86 A.2d 662 (1952).

For example, in *Board of Education* v. *Ellington*, 151 Conn. 1, 9–10, 193 A.2d 466 (1963), we explained that

the legislature granted boards of education the power to expend money to meet the requirements of state law pursuant to § 10-220. In *Cheney* v. *Strasburger*, 168 Conn. 135, 140–41, 357 A.2d 905 (1975), we determined that boards of education have the power of eminent domain when acting as agents of the state to carry out the state's educational interests. "It is basic that a town board of education is an agent of the state when carrying out the educational interests of the state." Id., 141.

On the other hand, "the state has delegated to the *municipalities* other duties related to its educational obligation." (Emphasis added.) *Board of Education* v. *New Haven*, supra, 237 Conn. 175; see id. (citing General Statutes § 10-241). "Local boards of education act on behalf of the municipality, then, in their function of maintaining control over the public schools within the municipality's limits." *Cheshire* v. *McKenney*, supra, 182 Conn. 258–59.

This dichotomy—boards of education acting as agents of the state at some times but acting as agents of the municipality at others—has resulted in the often quoted language: "Town boards of education, although . . . agents of the state responsible for education in the towns, are also agents of the towns and subject to the laws governing municipalities." *Cahill* v. *Board of Education*, 187 Conn. 94, 101, 444 A.2d 907 (1982). The question of whether the board is acting as an agent of the state or of the town becomes determinative of whether the board is entitled to sovereign immunity because a suit against an agent of the state acting on behalf of the state is, in effect, a suit against the sovereign state. See *Horton* v. *Meskill*, 172 Conn. 615, 623, 376 A.2d 359 (1977). When a board of education acts on behalf of a municipality, however, the suit is one against an agent of the municipality, implicating perhaps governmental immunity, but not sovereign immunity.

The test to determine whether a board of education is acting as an agent of the state and, thus, is entitled to sovereign immunity was first expressly stated in *Cahill* v. *Board of Education*, supra, 187 Conn. 102. In *Cahill*, we reasoned that, if the "action would operate to control the activities of the state or subject it to liability," then the board would be entitled to sovereign immunity. Id. We concluded in *Cahill* that "[a] breach of contract between a local board of education and its employees does not give rise to a conclusion that such an action would operate to control the activities of the state or subject it to liability." Id. We premised that conclusion on the notion that the local community primarily maintains oversight of employment contracts and that any damages resulting from a breach of those contracts would be paid by the community, not the state. Id.

Since *Cahill*, our courts consistently have described the test for whether a board of education is entitled to sovereign immunity as whether the "action would operate to control or interfere with the activities of the state . . . ." (Internal quotation marks omitted.) *Purzycki* v. *Fairfield*, 244 Conn. 101, 112, 708 A.2d 937 (1998), overruled in part on other grounds by *Haynes* v. *Middletown*, 314 Conn. 303, 323, 101 A.3d 249 (2014); accord *Palosz* v. *Greenwich*, 184 Conn. App. 201, 207–208, 194 A.3d 885, cert. denied, 330 Conn. 930, 194 A.3d 778 (2018); *Doe* v. *Board of Education*, Docket No. 3:05-CV-482 (WWE), 2009 WL 369918, *3 (D. Conn. February 11, 2009). In other contexts, we have established different tests that, within that particular field, guide us in determining whether an entity is acting as an agent of the state.[11] Irrespective of the particular test label,

[11] For example, in determining whether a corporate entity is an " 'arm of the state,' " we have evaluated eight factors, namely, the creation of the entity, the purpose of the entity, its financial dependency on the state, whether its officers are state functionaries, whether the entity is operated by state employees, whether the state has the right to control the entity, whether the entity's budget, expenditures and appropriations are closely monitored by the state, and whether a judgment against the entity would

we begin by examining the relevant statutes to evaluate whether the legislature intended that the entity would act as an agent of the state. See, e.g., *Sena* v. *American Medical Response of Connecticut, Inc.*, supra, 333 Conn. 45.

General Statutes § 10-240 provides: "Each town shall through its board of education maintain the control of all the public schools within its limits and for this purpose shall be a school district and shall have all the powers and duties of school districts, except so far as such powers and duties are inconsistent with the provisions of this chapter." Under this section, the state has delegated control of the public schools to the municipalities. The municipalities, in turn, must carry out those duties through their boards of education. See *Palosz* v. *Greenwich*, supra, 184 Conn. App. 212 (concluding that § 10-240 explicitly delegates control over public schools to local board of education through municipality). "Local boards of education act on behalf of the municipality, then, in their function of maintaining control over the public schools within the municipality's limits." *Cheshire* v. *McKenney*, supra, 182 Conn. 258–59. The members of local boards of education are vested with the powers of their office by municipal action pursuant to municipal elections, the town charter, or appointment by an elected officer or body of the municipality. Id., 259.

This delegation of control to the municipalities is further enforced by § 10-241.[12] Section 10-241 sets forth

have the same effect as a judgment against the state. *Rocky Hill* v. *SecureCare Realty, LLC*, 315 Conn. 265, 280, 105 A.3d 857 (2015); *Gordon* v. *H.N.S. Management Co.*, 272 Conn. 81, 98–100, 861 A.2d 1160 (2004). We have not been asked by the parties in this case to alter, and see no reason to disturb, the " 'control or interfere' " test for determining whether boards of education enjoy sovereign immunity. *Purzycki* v. *Fairfield*, supra, 244 Conn. 112.

[12] General Statutes § 10-241 provides: "Each school district shall be a body corporate and shall have power to sue and be sued; to purchase, receive, hold and convey real and personal property for school purposes; to build, equip, purchase and rent schoolhouses and make major repairs thereto and

the powers that the municipalities maintain to carry out their statutory responsibilities regarding school districts. These powers include the authority to purchase and convey real and personal property for school purposes, to build and repair schoolhouses, and to collect taxes, borrow money, employ teachers, and pay their salaries. Importantly, § 10-241 also expressly empowers school districts to sue and permits them to be sued.

Reading these statutes in conjunction, in which the municipality, not the board of education, is directly delegated authority by the state, we are persuaded that a private lawsuit alleging a violation of the duties within the municipality's control would subject the municipality, not the state, to liability. Such a lawsuit would not constitute a serious interference with the performance of the state's functions or with its control over its respective instrumentalities, funds, and property. Rather, the municipality would be responsible for defending against the lawsuit, procuring insurance to cover any damages resulting from the lawsuit, and addressing injunctive relief sought by aggrieved parties—in short, liability.

Our case law supports this interpretation of these statutes. We have stated that "[a] [local] board of education acts as an agent of its respective *municipality* when it performs those functions originally entrusted by the state to the municipality that the municipality has subsequently delegated to the board of education . . . ." (Emphasis added.) *Board of Education* v. *New*

to supply them with fuel, furniture and other appendages and accommodations; to establish and maintain schools of different grades; to establish and maintain a school library; to lay taxes and to borrow money for the purposes herein set forth; to make agreements and regulations for the establishing and conducting of schools not inconsistent with the regulations of the town having jurisdiction of the schools in such district; and to employ teachers, in accordance with the provisions of § 10-151, and pay their salaries. When such board appoints a superintendent, such superintendent may, with the approval of such board, employ the teachers."

Haven, supra, 237 Conn. 181; see also *Purzycki* v. *Fairfield*, supra, 244 Conn. 112 (concluding that board of education was not vested with sovereign immunity because its duty to supervise students is performed for benefit of municipality); *Sansone* v. *Bechtel*, 180 Conn. 96, 100, 429 A.2d 820 (1980) (concluding that members of board of education are agents of state only when carrying out interests of state but its members are town officers).

Most recently, in *Palosz* v. *Greenwich*, supra, 184 Conn. App. 212, the Appellate Court concluded that the defendant board of education acted as an agent of the municipality, not the state, when its employees allegedly failed to comply with an antibullying policy that the board had adopted, resulting in a tragic suicide. Id., 203–204, 214–15. The Appellate Court stated that a board of education "acts as an agent of the municipality when it enforces and complies with . . . [policies] pursuant to its general powers of control over public schools, which is explicitly delegated to a local board of education through the municipality pursuant to § 10-240." Id., 212. The Appellate Court addressed whether holding the board liable for the allegedly tortious conduct of an employee would operate to control or interfere with the activities of the state. Id. To that question, it answered no. Id. A lawsuit alleging tortious conduct would not operate to control the activities of the state or interfere with its functions because the suit would subject the municipality—not the state—to liability. The trial court in the present case asked a similar question: "The critical/essential claim is that the defendants were negligent in verifying the credentials of someone who was hired to provide special education services—where is the control over state functions when the issue really is a human resource/contract administration type issue?" We are persuaded by the practical reasoning of these courts.

The board defendants try to distinguish *Palosz* by claiming that the plaintiffs in that case alleged a failure to comply with a policy that the defendant board of education itself developed. They claim that, by enacting its own policy, the board in *Palosz* was no longer acting as an agent of the state and, therefore, was not entitled to sovereign immunity, whereas, in the present case, the board defendants were following a state mandate. We disagree. Irrespective of whether a board establishes its own policy, it operates under the control of the municipality. The Appellate Court determined in *Palosz* that the board acts as an agent of the municipality when it enforces and complies with the policy "pursuant to its general powers of control over public schools, which is explicitly delegated to a local board of education through the municipality pursuant to § 10-240." *Palosz* v. *Greenwich*, supra, 184 Conn. App. 212. The key factor is the board's execution of duties under the control of the municipality, not the state. Certainly, the determination of whether a board is entitled to sovereign immunity does not turn on whether the board established its own policy.

The argument that the board defendants make does raise a broader issue worth addressing briefly: whether *any* action that the board takes could be construed as operating to control the activities of the state or to interfere with its functions, thereby entitling the board to assert the state's sovereign immunity.

Even if we assume, without deciding, that certain enumerated board actions, such as the development or design of a policy pursuant to state statute, could operate to control and interfere with the activities of the state, that issue is not before us because nothing in the plaintiffs' complaint alleges violations of the development or design of an education program. See id., 211 (discussing possibility that board's development, implementation, submission, and assessment of policy man-

dated by state statute could be entitled to sovereign immunity because board would be acting as agent of state but not deciding issue because plaintiffs did not claim that defendant failed to comply with those requirements).

The parties disagree about exactly what is the main allegation—the crux—of the plaintiffs' complaint. The board defendants claim that the crux of the complaint is inadequate education. The plaintiffs claim instead that it is the negligent hiring and supervision of Lore. Under either interpretation, the complaint clearly does not allege that the board defendants failed to set up, design, or establish a special education program in accordance with the state mandate. The alleged injury occurred in the execution of the program. A failure in execution subjects the party in control to liability, in this case the municipality, not the state.

The board defendants would have us reach a different conclusion. They contend that the actions of the board members in the present case are unique because they were acting as agents of the state in fulfilling their state and federally mandated duty to provide special education services to students with disabilities pursuant to § 10-76a et seq. Section 10-76a et seq. establishes state procedures to implement the federally funded act. The board defendants argue that the state delegated the authority to hire special education teachers directly to the local board under General Statutes § 10-76d, rather than to the municipality, and thus they acted as agents of the state when hiring teachers. As agents of the state, they contend, they are entitled to sovereign immunity. The board defendants rely on Superior Court cases and a United States District Court case for the proposition that tort claims, including negligent hiring and supervision of special education teachers, "would interfere with [the state mandated] duty to provide special education services." *Doe* v. *Board of Education*,

supra, 2009 WL 369918, *3 (concluding that local school board was entitled to sovereign immunity as to claims of negligent hiring and supervision of employees); see also *Milhomme* v. *Levola*, Superior Court, judicial district of Windham at Putnam, Docket No. CV-94-0048326-S (July 14, 1995) (14 Conn. L. Rptr. 517, 518, 521) (school board that provided minor child with transportation to school under state mandated individualized education program was entitled to sovereign immunity in negligence action).

We disagree. Reading the statutes as a harmonious and consistent body of law; see, e.g., *Board of Education* v. *State Board of Education*, 278 Conn. 326, 333, 898 A.2d 170 (2006) (because "legislature is presumed to have created a harmonious and consistent body of law . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction" (internal quotation marks omitted)); leads us to conclude that, although the legislature enacted laws mandating that boards provide special education, that mandate does not "encroach upon the general powers of control delegated to the towns by § 10-240." *Palosz* v. *Greenwich*, supra, 184 Conn. App. 212. Section 10-76d (b) provides in relevant part: "[E]ach local or regional board of education shall . . . (1) [p]rovide special education for school-age children requiring special education . . . ." Nothing in that statute diminishes or rescinds the power that the state has delegated to the towns, through local boards of education, to control the public schools. Under the special education delegation, the legislature merely supplemented the duties of the local boards to include providing special education programs and services.

With the delegation of control of public education to the municipalities and boards comes significant funding to carry out this obligation along with, we conclude,

liability for actions that would not operate to interfere with or control the activities of the state.[13] We see no reason to depart from this construct and create an exception by which human resource actions relating to special education somehow operate to interfere with or control the activities of the state. The legislature did not expressly extend sovereign immunity to boards of education for special education services. The legislature also did not render the general delegation of control to municipalities inapplicable in the case of special education. Without such a directive from the legislature, we decline to conclude that sovereign immunity extends as the board defendants claim. We therefore conclude that the board defendants are not entitled to sovereign immunity. We affirm the judgment of the trial court on that ground.

The judgment is reversed only as to the granting of the board defendants' motion to dismiss on the ground that the plaintiffs failed to exhaust their administrative remedies and the case is remanded with direction to deny the board defendants' motion to dismiss as to the exhaustion claim and for further proceedings according to law; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.

[13] Expenditures allocated by the state to the Department of Education for the 2019–2020 fiscal year totaled $3,018,224,700. Public Acts 2019, No. 19-117, § 1. That funding then filters to the school districts to, among many other things, provide students with special education services. For example, the Hartford school district spent $120,864,053 on special education services in 2016–2017, comprised of federal, state, and district money. Connecticut State Department of Education, Special Education Expenditures; Percentage of Total Expenditures Used for Special Education, 2016–17 Hartford School District, available at http://edsight.ct.gov/SASStoredProcess/guest?_rpttype=listing&_year=2016-17&_district=Hartford+School+District&_program=%2FCTDOE%2FEdSight%2FRelease%2FReporting%2FPublic%2FReports%2FStoredProcesses%2FSpecialEducationReport&_select=Submit (last visited January 30, 2020).

ORDERS

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STATE OF CONNECTICUT *v.* RASHAD MOON

The defendant's petition for certification to appeal from the Appellate Court, 192 Conn. App. 68 (AC 42130), is denied.

Pamela S. Nagy, assigned counsel, in support of the petition.

Laurie N. Feldman, special deputy assistant state's attorney, in opposition.

Decided January 21, 2020

RICHARD TATOIAN, TRUSTEE *v.*
BRUCE D. TYLER ET AL.

The named defendant's petition for certification to appeal from the Appellate Court, 194 Conn. App. 1 (AC 40736), is denied.

Bruce D. Tyler, self-represented, in support of the petition.

Decided January 21, 2020

JOHN B. *v.* COMMISSIONER OF CORRECTION

The petitioner John B.'s petition for certification to appeal from the Appellate Court, 194 Conn. App. 767 (AC 41640), is denied.

MULLINS, J., did not participate in the consideration of or decision on this petition.

James E. Mortimer, assigned counsel, in support of the petition.

Timothy F. Costello, assistant state's attorney, in opposition.

Decided January 21, 2020

CHAUNCEY WATTS *v.* COMMISSIONER
OF CORRECTION

The petitioner Chauncey Watts' petition for certification to appeal from the Appellate Court, 194 Conn. App. 558 (AC 42049), is denied.

ECKER, J., did not participate in the consideration of or decision on this petition.

Darcy McGraw, assigned counsel, in support of the petition.

Matthew A. Weiner, assistant state's attorney, in opposition.

Decided January 21, 2020

JAMES CUNNINGHAM, SR. *v.* COMMISSIONER OF CORRECTION

The petitioner James Cunningham, Sr.'s petition for certification to appeal from the Appellate Court, 195 Conn. App. 63 (AC 42058), is denied.

KAHN, J., did not participate in the consideration of or the decision on this petition.

James E. Mortimer, assigned counsel, in support of the petition.

Laurie N. Feldman, special deputy assistant state's attorney, in opposition.

Decided January 21, 2020

WELLS FARGO BANK, N.A., AS TRUSTEE *v.* SAUNDRA MAGANA ET AL.

The named defendant's petition for certification to appeal from the Appellate Court (AC 43732) is dismissed.

Saundra Magana, self-represented, in support of the petition.

Decided January 21, 2020

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Vol. 195

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

JOHN LENTI *v.* COMMISSIONER OF CORRECTION
(AC 41647)

DiPentima, C. J., and Lavine and Eveleigh, Js.

Syllabus

The petitioner, who previously had pleaded guilty to burglary in the first degree and had admitted to five violations of probation as part of a plea agreement, filed an amended petition for a writ of habeas corpus, claiming, inter alia, that his guilty plea was not knowingly, intelligently and voluntarily given because the petitioner was under the influence of several heavy narcotics administered by Department of Correction personnel, rendering him unable to understand the plea agreement, and that his trial counsel was ineffective for failing to determine that the

petitioner was so heavily medicated that he was unable to understand and voluntarily enter a guilty plea. The habeas court rendered judgment denying the habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. Held:

1. This court declined to review the petitioner's claim that the habeas court erred in determining that his guilty plea was made knowingly, intelligently and voluntarily because the petitioner failed to address the threshold issue of whether the habeas court abused its discretion in denying his petition for certification to appeal on this issue and addressed only the habeas court's purported error in concluding that his due process rights had not been violated; generally, a petitioner is not afforded appellate review of the habeas court's decision if he has failed to establish that the habeas court abused its discretion in denying the petition for certification.
2. The habeas court did not abuse its discretion in denying the petition for certification to appeal regarding the petitioner's ineffective assistance of counsel claim: although the habeas court did not make an explicit finding regarding the petitioner's claim of ineffective assistance of counsel, in light of the findings supported by the record, including findings that the petitioner was not impaired by the prescribed medications to the extent that he could not understand the proceedings or the terms of the plea agreement, that his decision to accept that offer was made cogently and voluntarily, that the petitioner responded appropriately to the trial court's questions during the plea canvass, and its determination that the petitioner's testimony was not credible, the habeas court did not err in concluding that the petitioner was not impaired by his prescribed medications to the extent that he could not understand the plea agreement and the plea proceedings; accordingly, the petitioner's ineffective assistance of counsel claim must fail.

Argued October 24, 2019—officially released February 4, 2020

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Sferrazza*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Douglas H. Butler, assigned counsel, for the appellant (petitioner).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Tamara Grosso*, senior assistant state's attorney, for the appellee (respondent).

Opinion

DiPENTIMA, C. J. The petitioner, John Lenti, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court (1) improperly concluded that he had failed to establish that his plea was not made knowingly, intelligently, and voluntarily, and (2) abused its discretion in denying his petition for certification to appeal from the court's determination that he had received the effective assistance of counsel. Both of these claims rest on the petitioner's assertion that he was impaired at the time of his plea by the ingestion of medications prescribed by Department of Correction personnel. We disagree with this assertion and the petitioner's claims and, accordingly, dismiss the appeal.

The habeas court's memorandum of decision sets forth the following relevant facts and procedural history: "On August 12, 2013, the petitioner was on probation for five burglary offenses for which he had received a total, effective sentence of twenty years imprisonment, execution suspended after the service of two years, and five years of probation. On that day, the police arrested the petitioner for having unlawfully entered an elderly woman's home by damaging a garage door; displayed a handgun upon encountering the woman; and demanded that she give him money and her car keys or he would shoot her. The woman refused to comply, and the petitioner stole her cordless phone, as he fled the scene on foot.

"When the police apprehended him a short while later, the police retrieved a pellet gun nearby. The petitioner confessed to breaking into the victim's home while armed with the pellet gun. The petitioner faced charges of home invasion, attempted robbery first degree, and numerous misdemeanors." As a result of

this arrest, the petitioner also was charged with five counts of violation of probation in relation to the five prior burglary convictions for which he was then on probation. The petitioner owed a total of eighteen years for those convictions.

In exchange for pleading guilty to burglary in the first degree and admitting to five violations of probation, the state offered to recommend to the court a sentence of between ten and eighteen years of imprisonment. On March 27, 2014, the petitioner pleaded guilty in accordance with the state's offer. The petitioner responded appropriately to the court's canvass. Prior to sentencing, trial counsel asked Kenneth Selig, a board certified forensic psychologist, to analyze and assess the petitioner's mental status. On June 19, 2014, the court sentenced the petitioner to sixteen years of imprisonment followed by two years of special parole. The petitioner did not file a direct appeal.

On December 24, 2014, the petitioner commenced the present habeas action. On May 30, 2017, the petitioner filed an amended petition seeking to have his guilty pleas vacated. In his amended petition, the petitioner alleged that: (1) his guilty plea was not knowingly, intelligently, or voluntarily given because the petitioner was under the influence of heavy narcotics administered by Department of Correction personnel, rendering him unable to understand the plea agreement, and (2) his trial counsel was ineffective for failing to determine that the petitioner was so heavily medicated that he was unable to knowingly and voluntarily enter a plea. The respondent, the Commissioner of Correction, filed a return, alleging that the petitioner's due process claim was procedurally defaulted.[1] The habeas court conducted a trial on November 21, 2017, during which the petitioner, trial counsel and Robert H. Powers, a forensic toxicologist, testified. No witnesses were called by the respondent.

[1] The habeas court did not rule on the respondent's defense of procedural default.

On April 13, 2018, the habeas court issued a memorandum of decision denying the petition for a writ of habeas corpus. The habeas court found that the petitioner failed to prove that his prescribed medications diminished his ability to understand the plea agreement or the proceedings. Further, the court found that, at the time he pleaded guilty, the petitioner understood the terms of the agreement and that his decision to plead was knowing and voluntary.

Thereafter, the petitioner filed a petition for certification to appeal, which the habeas court denied. The petitioner subsequently appealed, claiming that the habeas court had abused its discretion in denying his request for certification to appeal, solely with respect to the ineffective assistance of counsel claim.

We begin by setting forth the applicable standard of review. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, [the petitioner] must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits." (Internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 821, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017). As to the first prong, the "standard requires the petitioner to demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . In determining whether the habeas court abused its discretion in denying the petitioner's request

for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." (Emphasis omitted; internal quotation marks omitted.) *Grover* v. *Commissioner of Correction*, 183 Conn. App. 804, 812, 194 A.3d 316, cert. denied, 330 Conn. 933, 194 A.3d 1196 (2018).

On appeal, the petitioner claims that the habeas court erred in determining that his guilty plea was made knowingly, intelligently, and voluntarily.[2] The petitioner fails to address the threshold issue of whether the habeas court abused its discretion in denying the petition for certification to appeal on this issue but only addresses the habeas court's purported error in concluding that his due process rights had not been violated. See *Sanders* v. *Commissioner of Correction*, supra, 169 Conn. App. 821. Generally, a petitioner is not afforded appellate review of the habeas court's decision if he has failed to establish that the habeas court abused its discretion in denying the petition for certification. See *Reddick* v. *Commissioner of Correction*, 51 Conn. App. 474, 477, 722 A.2d 286 (1999).

"In *Petaway* v. *Commissioner of Correction*, 49 Conn. App. 75, 77–78, 712 A.2d 992 (1998), and, subsequently, in *Reddick* v. *Commissioner of Correction*, supra, 51 Conn. App. 477, this court refused to review the petitioners' ineffective assistance of counsel claims. In each of those cases, the petitioner raised the claim of ineffective assistance of counsel but failed to brief

[2] On appeal, the petitioner also claims that the habeas court erred in finding that he had failed to establish that his due process rights were violated when he involuntarily pleaded guilty because he was incompetent at the time he pleaded due to his "pervasive, persistent and debilitating" mental health issues. We do not consider this claim as it was not raised in the petitioner's operative petition for a writ of habeas corpus. See *Greene* v. *Commissioner of Correction*, 131 Conn. App. 820, 822, 29 A.3d 171 (2011) ("[h]aving not raised this issue before the habeas court, the petitioner is barred from raising it on appeal"), cert. denied, 303 Conn. 936, 36 A.3d 695 (2012).

the threshold issue . . . of how the court had abused its discretion in failing to grant certification to appeal as to that underlying claim." *Mitchell* v. *Commissioner of Correction*, 68 Conn. App. 1, 7–8, 790 A.2d 463, cert. denied, 260 Conn. 903, 793 A.2d 1089 (2002). Accordingly, we do not review the petitioner's first claim.

In addressing the petitioner's claim of ineffective assistance, we first note that it is well established that "[t]he habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed [on appeal] unless they are clearly erroneous. . . . Thus, [t]his court does not retry the case or evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. . . . The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony." (Internal quotation marks omitted.) *Orcutt* v. *Commissioner of Correction*, 284 Conn. 724, 741, 937 A.2d 656 (2007).

The habeas court found that "the petitioner has failed to prove, by a preponderance of the evidence, that the prescribed drugs used by the petitioner in the days preceding his decision to plea[d] guilty, during the taking of his pleas, and between plea and sentencing impaired his ability to comprehend the information and advice given to him by defense counsel, the plea canvass conducted by the trial judge, or the interviews conducted between plea and sentencing." The court further found that "the petitioner understood the legal situation in which he was enmeshed, the terms of the plea agreement, and that his decision to accept that offer was made cogently and voluntarily."

During his habeas trial, the petitioner testified that he did not remember being sentenced and would

never have pleaded guilty had it not been for his overmedicated state. The habeas court found the petitioner's testimony not to be credible, specifically stating that his testimony was "inaccurate, self-serving, and contradicted by other, more credible evidence." As stated previously, we do not disturb the court's credibility determination on appeal. See *Orcutt* v. *Commissioner of Correction*, supra, 284 Conn. 741.

The habeas court noted that, although trial counsel testified that the petitioner complained that the medication he was taking had "unpleasant side effects" and that he wanted to discontinue that course of treatment, trial counsel also stated that the medication seemed to have no "detrimental influence on the petitioner's comprehension or judgment." Further, between plea and sentencing, Selig examined the petitioner over multiple sessions and produced a report[3] for the sentencing court that did not contain any complaints from the petitioner about his ability to make a knowing decision to plead guilty due to the medications. In his report, as the habeas court notes, Selig determined that the "combination of [medications] has been very helpful for [the petitioner] as has abstaining from addictive drugs." (Internal quotation marks omitted.) The habeas court also found that the petitioner responded appropriately to all of the court's questions during the plea canvass, including direct questions about whether the petitioner had taken any medications that affected his ability to understand the court.[4] Thus, the habeas court's finding that the petitioner was not negatively affected by his medications is not clearly erroneous.

Although the habeas court did not make an explicit finding regarding his claim of ineffective assistance of

[3] The petitioner's presentence investigation report and Selig's report were admitted into evidence under seal at the habeas trial.

[4] During the sentencing, the petitioner spoke on his own behalf and stated to the court, "I'm on the right medication now; I've been doing great."

counsel, it did find that the petitioner was not impaired by the prescribed medications to the extent that he could not understand the proceedings or that "his ability to comprehend the information and advice given to him by defense counsel" was impaired at the time he pleaded guilty. In light of the findings supported by the record, and the habeas court's credibility determinations, we do not disturb its implicit finding that trial counsel was not ineffective for failing to determine that the petitioner was impaired. Because the habeas court did not err in concluding that the petitioner was not impaired by his prescribed medications to the extent that he could not understand the plea agreement and the plea proceedings, the ineffective assistance of counsel claim must fail. Therefore, we conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

MICHAEL J. DUNKLING *v.* LAWRENCE BRUNOLI, INC., ET AL.
(AC 41634)

DiPentima, C. J., and Lavine and Beach, Js.

Syllabus

The defendants B Co. and its insurer appealed to this court from the decision of the Compensation Review Board affirming the decision of the Workers' Compensation Commissioner, which determined that B Co., a general contractor, was the principal employer of the plaintiff D, when he suffered a compensable injury while working for an uninsured subcontractor, M Co. B Co. had contracted with the state on a construction project, and B Co. then subcontracted work to M Co. and C Co. D was an employee of C Co. and worked on the construction project installing siding and gutters until he was laid off in November, 2014. B Co. warranted all the work performed against failures of workmanship and materials for one year after it left the worksite in September, 2014. In November, 2014, the state contacted B Co. about repairing a leaking

gutter. Thereafter, B Co. contacted M Co. and indicated that it was refusing final payment until the repairs were made. Subsequently, the president of M Co., R, hired D directly to repair the leaking gutter. On December 4, 2014, D and R traveled to the worksite to make the repairs, during which D fell from a ladder and sustained injuries. After a formal hearing, the commissioner found, inter alia, that D was an employee of M Co. and sustained a compensable injury, and ordered M Co. to accept compensability for D's injuries. Thereafter, the commissioner made a subsequent finding that B Co. was a principal employer pursuant to statute (§ 31-291) and, thus, also was liable for compensation benefits due to D, on the basis that B Co. initially subcontracted with M. Co. and that D's injuries were sustained as the result of B Co.'s direct communication and directive to M Co. to repair the gutters. On appeal, the board, inter alia, affirmed the commissioner's decision, finding that more than one entity may be deemed a claimant's principal employer. On the defendants' appeal to this court, *held*:

1. The defendants could not prevail on their claim that the board committed error in affirming the commissioner's finding that B Co. was a principal employer pursuant to § 31-291, because B Co. was not in control of the worksite when D was injured: although B Co. was not present to oversee the repair, B Co. was in control of the worksite, as the state directed B Co. to repair the gutter and, thereafter, B Co. directed M. Co. to send a representative to the worksite, B Co. was obligated, pursuant to the contract, to complete the worksite project to the state's satisfaction, and B Co. was aware of the risks and dangers worksites presented but did not elect to supervise the gutter repair and did not repair the gutters itself; furthermore, B Co. could not prevail on its claim that the board's decision was unreasonable because a general contractor has no legal right to require a subcontractor to maintain workers' compensation insurance indefinitely; workers' compensation law provides benefits for workers who sustain injuries arising out of and in the course of employment, and the facts of the present case did not concern a future claim, as D was injured while he made repairs pursuant to B Co.'s direction to M Co., B Co. was in control of who made the repairs, and B Co. had the ability to supervise the repair or make the repair itself, if M Co.'s workers' compensation coverage was in doubt.
2. The board did not err in affirming the commissioner's ruling denying the defendants' motion to correct regarding communication between B Co. and the state concerning a warranty, as this claim was not relevant to employees or workers' compensation benefits in the present case; instead, the issue of warranty was relevant to B Co.'s relationship with the state, and any error the commissioner made in finding that B Co. warranted the construction at the worksite was harmless, as B Co. controlled the worksite by directing M Co. to send a representative to the worksite to repair the leaking gutter.

Argued November 21, 2019—officially released February 4, 2020

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Fifth District determining, inter alia, that the named defendant was the principal employer of the plaintiff, brought to the Compensation Review Board, which affirmed the commissioner's decision and the named defendant et al. appealed to this court. *Affirmed.*

Christopher J. Powderly, for the appellants (named defendant et al.).

Donna H. Summers, assistant attorney general, for the appellee (defendant Second Injury Fund).

Opinion

LAVINE, J. The defendants Lawrence Brunoli, Inc. (Brunoli) and its insurer, Liberty Mutual Insurance Company, appeal from the decision of the Compensation Review Board (board) affirming in part the supplemental findings and award of the Workers' Compensation Commissioner for the Fifth District (commissioner).[1] The defendants' central claim on appeal is that the board erred as a matter of law when it affirmed the commissioner's determination that, on the date that the plaintiff, Michael J. Dunkling, sustained a compensable injury, Brunoli was a principal employer pursuant to General Statutes § 31-291.[2] We affirm the decision of the board.

[1] All references to the defendants are to Brunoli and its insurer. Other parties named as defendants in the action are addressed by name subsequently in this opinion.

[2] The defendants claim that (1) the board's decision that Brunoli is a principal employer violates the rules of statutory construction, (2) the board committed legal error by affirming the commissioner's finding that Brunoli was a principal employer, (3) the board's reliance on *Hebert* v. *RWA, Inc.*, 48 Conn. App. 449, 709 A.2d 1149, cert. denied, 246 Conn. 901, 717 A.2d 239 (1998), was misplaced, (4) the board and the trial commissioner erred as a matter of law by incorporating warranty considerations in reaching their conclusions as to the applicability of § 31-291, (5) alternatively, if warranty considerations are relevant to the § 31-291 issues, the board erred as a matter of law by affirming the commissioner's denial of the defendants'

The record reveals the following procedural history and relevant facts. On December 4, 2014, Dunkling was repairing gutters at Brunoli's request when he fell from a ladder and suffered injuries. On December 23, 2014, he filed a form 30C,[3] seeking compensation benefits against Brunoli, which in turn filed a form 43,[4] denying that Dunkling's injuries arose out of and in the course of employment. Brunoli's subcontractors, Connecticut Metal Structures, LLC (Connecticut Metal), and Mid-State Metal Building Company, LLC (Mid-State),[5] were made parties to the action as well as the Second Injury Fund (fund).[6] Following a number of informal and pre-formal hearings, the case was tried before the commissioner on September 10, 2015, October 28, 2015, and January 5, 2016. The parties jointly stipulated that Brunoli had workers' compensation insurance on December 4, 2014, but neither Mid-State nor Connecticut Metal

motion to correct, which itself was legal error, (6) the board and the commissioner erred as a matter of law by including communications between Brunoli and the Department of Transportation as to leaking gutters in reaching their conclusions with respect to § 31-291, (7) alternatively, if communications among Brunoli, the state, and Mid-State Metal Buildings Company, LLC are relevant to the § 31-291 issues, the board erred as a matter of law by affirming the commissioner's denial of the motion to correct filed by Brunoli and its insurer, which itself was legal error.

[3] "A form 30C is the document prescribed by the . . . commission to be used when filing a notice of claim pursuant to the [Workers' Compensation Act]." (Internal quotation marks omitted.) *Lamar* v. *Boehringer Ingelheim Corp.*, 138 Conn. App. 826, 828 n.3, 54 A.3d 1040, cert. denied, 307 Conn. 943, 56 A.3d 951 (2012).

[4] "A form 43 is a disclaimer that notifies a claimant who seeks workers' compensation benefits that the employer intends to contest liability to pay compensation." (Internal quotation marks omitted.) *Lamar* v. *Boehringer Ingelheim Corp.*, 138 Conn. App. 826, 828 n.2, 54 A.3d 1040, cert. denied, 307 Conn. 943, 56 A.3d 951 (2012).

[5] Connecticut Metal and Mid-State are not parties to the present appeal.

[6] The fund assumed responsibility for Dunkling's injuries pursuant to General Statutes § 31-355 (b), which provides in relevant part that "[w]hen an award of compensation has been made under the provisions of this chapter against an employer who failed, neglected, refused or is unable to pay any type of benefit coming due as a consequence of such award or any adjustment in compensation required by this chapter, and whose insurer failed, neglected, refused or is unable to pay the compensation, such compensation shall be paid from the Second Injury Fund. . . ."

had such insurance on that date. Following the formal hearing, the commissioner issued his finding and award on June 20, 2016. The commissioner framed the issue as whether Dunkling was employed by Brunoli, Connecticut Metal, or Mid-State at the time of his injury on December 4, 2014.

In his original finding and award, the commissioner found that on July 19, 2012, the Department of Transportation (state) entered into a contract with Brunoli to act as the general contractor for a construction project in Colchester (worksite). The contract permitted Brunoli to subcontract work with Mid-State and Connecticut Metal. Brunoli warranted all work performed under the contract for a period of one year from September 16, 2014, when it left the worksite, against failures of workmanship and materials.

Connecticut Metal employed Dunkling as an hourly employee in 2013. Dunkling began installing siding and gutters at the worksite in January, 2014, and was paid at or above the prevailing wage. He continued to perform services at the worksite until June, 2014, and was employed by Connecticut Metal until November, 2014, when he was laid off.

In November, 2014, the state contacted Brunoli about a leaking gutter. On December 3, 2014, Bertrand Rompre, president of Mid-State, contacted Dunkling and requested that he return to the worksite with him to repair a leaking gutter. Rompre indicated to Dunkling that Brunoli refused final payment to Mid-State until the leak was repaired. Rompre agreed to pay Dunkling at his usual wage for repairing the gutter on December 4, 2014.

On December 4, 2014, Dunkling met Rompre at Mid-State's offices, and Rompre took him to the worksite and directed him to the location of the leak. Rompre provided Dunkling with materials, including a ladder, to repair the leak. Dunkling had been working for

approximately four hours[7] when the ladder Rompre provided retracted, causing him to fall and sustain multiple injuries. He has not worked since December 4, 2014. His medical bills totaled $16,675.26.

On the basis of the evidence, the commissioner found that Dunkling was a credible witness, who had sustained compensable injuries in the course and scope of his employment with Mid-State on December 4, 2014. The employer-employee relationship was the result of conduct between Dunkling and Rompre. The commissioner ordered Mid-State to accept compensability for Dunkling's reasonable and necessary treatment of the injuries he sustained, along with all related present and future medical treatment, including, but not limited to, permanent partial impairment to be determined at a future hearing.

On June 23, 2016, the fund filed a motion for articulation, stating that, at the September 10, 2015 hearing, the issue of principal employer under § 31-291 was identified. Brunoli and the fund had addressed the issue in their posttrial briefs, but the commissioner failed to address it in his finding and award. The fund asked the commissioner to reconsider his decision and to issue findings relevant to the issue of principal employer.

The commissioner held an additional formal hearing on July 22, 2016, and issued a supplemental finding and award on October 28, 2016, making the following additional findings. Brunoli had contracted with the state and subcontractors to build a structure at the

[7] The record discloses that while Rompre and Dunkling were present at the worksite, a state employee pointed out six or seven additional leaks, which Rompre directed Dunkling to repair so they would not have to return. On appeal, Brunoli argues that it asked Mid-State to repair just one leak and, therefore, it should not be responsible for the injuries Dunkling sustained when he was fixing the other leaks, if at all. The defendants' argument regarding the number of leaks Dunkling repaired is meritless. Brunoli was withholding payment from Mid-State due to gutter leaks, and Mid-State wanted to be paid. Rompre decided to have Dunkling fix all of the leaks while they were present.

worksite as part of its trade or business. Dunkling was injured within the specified area of the worksite. Although it is undisputed that Brunoli initially subcontracted with Mid-State, the injuries that Dunkling had sustained on December 4, 2014, came about in response to Brunoli's communication and directive to Mid-State that it summon a representative to the worksite for gutter repair, even though no Brunoli representative remained on the worksite.[8] The commissioner reached the additional conclusion that Brunoli was a principal employer pursuant to § 31-291 on December 4, 2014.

The defendants filed a petition for review of the commissioner's supplemental finding and award, stating that the commissioner erroneously found that Brunoli "satisfied the requirements necessary to be deemed a principal employer, contrary to the underlying facts and applicable law." On December 9, 2016, the fund filed a motion to correct that contained sixteen items.[9] On December 11, 2016, the defendants filed a motion to correct that contained nineteen items.[10] The commissioner denied each of the motions to correct in its entirety.

The defendants' petition for review was heard by the board on September 29, 2017. The board issued its opinion on April 25, 2018. The board noted that, on appeal, Brunoli took the position that the worksite where Dunkling was injured was substantially complete on December 4, 2014; see footnote 7 of this opinion; and that,

[8] The record demonstrates that construction at the worksite was substantially complete on September 16, 2014, and that Brunoli withdrew from the worksite on September 24, 2014. The state took occupancy of the building beginning on September 29, 2014.

[9] The board summarized the corrections sought by the fund, to wit: "corrections clarifying the nature of the business relationship between Brunoli and its subcontractors, as well as corrections to the 'Order' language in the Supplemental Finding regarding the obligations owed to [Dunkling] by both Mid-State and Brunoli."

[10] The board summarized the corrections sought by the defendants, to wit: Brunoli "sought to substitute findings that [it] was no longer in control of the premises on the date of [Dunkling's] injury and the party controlling the premises was the [state]."

because Brunoli did not exercise control over the worksite, § 31-291 does not apply to the facts of the case. The fund, however, contended that the facts before the commissioner supported his finding that Brunoli had sufficient control over the worksite to apply § 31-291. The board agreed with the fund and affirmed the commissioner's supplemental finding that Brunoli is liable to Dunkling as a principal employer.

The fund also argued to the board that the case should be remanded for resolution of various issues related to the relief to which Dunkling is entitled, but were not addressed in the commissioner's supplemental finding. The fund noted that more than one entity may be deemed a claimant's principal employer and that each entity in the chain between the general contractor and the claimant's immediate employer may be found liable for the claimant's injuries. See *Samaoya* v. *Gallagher*, 102 Conn. App. 670, 678, 926 A.2d 1052 (2007), citing to *Palumbo* v. *Fuller Co.*, 99 Conn. 353, 365, 122 A. 63 (1923). The fund had raised the multiple employer issue in its motion to correct, which the commissioner denied. The board determined that it was error for the commissioner to have denied that portion of the fund's motion to correct. Moreover, the board stated that the commissioner's supplemental finding did not establish a wage rate for Dunkling or the duration of his disability so that the amount of his compensation could be calculated. The board, therefore, remanded the case to the commissioner for additional proceedings.

The defendants thereafter appealed to this court, essentially claiming that the board erred as a matter of law in affirming the commissioner's finding that Brunoli was a principal employer within the meaning of § 31-291 on December 4, 2014.[11]

[11] Although the board remanded the case to the commissioner for additional findings, this court has jurisdiction to hear the appeal pursuant to General Statutes § 31-301b, which provides: "[A]ny party aggrieved by the decision of the Compensation Review Board upon any question or questions of law arising in the proceedings may appeal the decision of the Compensa-

The standard of review in workers' compensation matters is well established. The board's "hearing of an appeal from the commissioner is not a de novo hearing of the facts. . . . [I]t is oblig[ated] to hear the appeal on the record and not retry the facts." (Internal quotation marks omitted.) *Sellers* v. *Sellers Garage, Inc.*, 92 Conn. App. 650, 651, 887 A.2d 382 (2005). "[T]he power and duty of determining the facts [rest] on the commissioner, the trier of facts. . . . It matters not that the basic facts from which the [commissioner] draws this inference are undisputed rather than controverted. . . . It is likewise immaterial that the facts permit the drawing of diverse inferences. The [commissioner] alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court.

"[The] scope of review of actions of the [board] is . . . limited. . . . The decision of the [board] must be correct in law, and it must not include facts found without evidence or fail to include material facts which are admitted or undisputed." (Citation omitted; internal quotation marks omitted.) *Hebert* v. *RWA, Inc.*, 48 Conn. App. 449, 452–53, 709 A.2d 1149, cert. denied, 246 Conn. 901, 717 A.2d 239 (1998).

I

The defendants claim that the board erred by affirming the commissioner's finding that Brunoli was a principal employer under § 31-291, arguing that Brunoli was not in control of the premises when Dunkling was injured. The essence of Brunoli's claim is that because it substantially had completed construction at the worksite and had withdrawn in September, 2014, it was no longer in control of the worksite on December 4, 2014. We disagree.

tion Review Board to the Appellate Court, whether or not the decision is a final decision within the meaning of section 4-183 or a final judgment within the meaning of section 52-263."

Resolution of this claim is a matter of statutory construction. "The principles that govern our standard of review in workers' compensation appeals are well established. The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . It is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and [the] board. . . . A state agency is not entitled, however, to special deference when its determination of a question of law has not previously been subject to judicial scrutiny . . . or when its construction of a statute has not been time-tested." (Citation omitted; internal quotation marks omitted.) *Gill* v. *Brescome Barton, Inc.*, 317 Conn. 33, 42, 114 A.3d 1210 (2015).

"[I]t is well established that, in resolving issues of statutory construction under the [Workers' Compensation Act (act), General Statutes § 31-275 et seq.] act . . . the act indisputably is a remedial statute that should be construed generously to accomplish its purpose. . . . The humanitarian and remedial purposes of the act counsel against an overly narrow construction that unduly limits eligibility for workers' compensation." (Internal quotation marks omitted.) *Wiblyi* v. *McDonald's Corp.*, 168 Conn. App. 77, 85, 144 A.3d 1075 (2016).

"The purpose of § 31-291 is to protect employees of minor contractors against the possible irresponsibility of their immediate employers, by making the principal employer who has general control of the business in hand liable as if he had directly employed all who work upon any part of the business which he has undertaken to carry on. . . . Any reasonable reading of § 31-291 makes it clear that the principal employer is ultimately liable for payment of a [workers'] compensation claim for an injury received while at work." (Citation omitted;

internal quotation marks omitted.) *Hebert* v. *RWA, Inc.*, supra, 48 Conn. App. 455–56.

Our Supreme Court has stated that, "[i]n construing workers' compensation law, we must resolve statutory ambiguities or lacunae in a manner that will further the remedial purpose of the act. . . . [T]he purposes of the act itself are best served by allowing the remedial legislation a reasonable sphere of operation considering those purposes." (Citation omitted; internal quotation marks omitted.) *Hart* v. *Federal Express Corp.*, 321 Conn. 1, 19, 135 A.3d 38 (2016); see also Regs., Conn. State Agencies § 31-301-8.

General Statutes § 31-291 provides in relevant part: "When any principal employer procures any work to be done wholly or in part for him by a contractor, or through him by a subcontractor, and the work so procured to be done is part or process in the trade or business of such principal employer, and *is performed in, on or about premises under his control*, such principal employer shall be liable to pay all compensation under this chapter to the same extent as if the work were done without the intervention of such contractor or subcontractor. . . ." (Emphasis added.) Our appellate courts previously have construed § 31-291 and, in particular, the element of control of the premises.

There are three primary elements of § 31-291. See *Alpha Crane Service, Inc.* v. *Capitol Crane Co.*, 6 Conn. App. 60, 72, 504 A.2d 1376, cert. denied, 199 Conn. 808, 508 A.2d 769 (1986). "One, the relation of the principal employer and contractor must exist in work wholly or in part for the former. Two, the work must be in, on or about the premises controlled by the principal employer; and three, the work must be a part or process in the trade or business of the principal employer." (Internal quotation marks omitted.) *Mancini* v. *Bureau of Public Works*, 167 Conn. 189, 193, 355 A.2d 32 (1974). The parties agree that the first and third elements of the statute are met in the present

case. They disagree as to whether Brunoli was in control of the worksite.

"The term control in [the context of § 31-291] has a specific meaning. It is merely descriptive of the work area and is used instead of such words as owned by him or in his possession in order to describe the area in a more inclusive fashion. The emphasis is upon limitation of the area within which the accident must happen rather than upon actual control of the implements which caused the accident." (Internal quotation marks omitted.) *Alpha Crane Service, Inc.* v. *Capitol Crane Co.*, supra, 6 Conn. App. 72–73.

The board affirmed the commissioner's finding that Brunoli had a contract with the state to construct a building at the worksite. It also found that Brunoli initially subcontracted with Mid-State to perform siding and gutter work at the worksite. After the state informed Brunoli that there was a problem due to a leaky gutter over a pass door, Brunoli contacted Rompre at Mid-State, one of its original subcontractors, and informed him that it was withholding payment due to the leak. Brunoli directed Mid-State to summon a representative to the worksite to repair the leak.[12] Rompre contacted Dunkling and asked him to fix the leaking gutter. Dunkling met Rompre at Mid-State and went to the worksite with him to repair the gutter. A state employee at the worksite pointed out additional leaks to Rompre. It was while Dunkling was repairing one of the other leaks; see footnote 6 of this opinion; that he fell from the ladder. The commissioner concluded that Brunoli was a principal employer. Brunoli took an

[12] Dunkling initially was employed by Connecticut Metal to perform siding and gutter work at the worksite. The record discloses that on November 14, 2014, Andrew Milovitsch, a state employee, contacted Peter Gavin, Brunoli's vice president, to inform him of a gutter leak over a pass door. Gavin communicated with Rompre and asked him to have the leak fixed. Rompre was unable to reach Robert Pelletier, a principal of Connecticut Metal, and therefore, contacted Dunkling directly.

appeal to the board claiming that it was not a principal employer because it was not in control of the worksite. The board affirmed the commissioner's finding that Brunoli was a principal employer on the basis of this court's decision in *Hebert* v. *RWA, Inc.*, supra, 48 Conn. App. 449.

In *Hebert*, the claimant was injured while he was employed by a subcontractor to install a rubber roof on a restaurant on behalf of the general contractor. Id., 451. The claimant filed a workers' compensation claim against both the subcontractor and the general contractor, who both failed to carry workers' compensation insurance. Id. The commissioner found that the claimant sustained a compensable injury and that the general contractor was a principal employer. Id., 452. The general contractor appealed to the board, claiming that the commissioner improperly had found that he was in control of the premises where the claimant was injured. Id., 454. He alleged that "he did not control the premises because he did not own them, have a trailer or office on them or have the ability to control the [claimant's] activities. The evidence shows, however, that [the general contractor] visited the job site daily, inspected the ongoing work and asked the [claimant] to address certain problem areas on the roof before proceeding. [The general contractor] alone dealt with the owners of the premises and he was ultimately responsible to them for the satisfactory completion of the work." Id. He also claimed that the nature of his business was residential remodeling, not roof installation. Id.

This court affirmed the board's decision and adopted its reasoning that the general contractor "obtained the contract for installation of the roof by dealing directly with the restaurant and that he then hired [the subcontractor] to install the roof. [The general contractor] negotiated the contract price with the restaurant and with [the subcontractor], reserving a fee for himself.

The case law is settled that as long as the subcontractor's operations entered directly into the successful performance of the commercial function of the principal employer . . . those operations are a part of the process of the trade or business of the principal employer." (Citation omitted; internal quotation marks omitted.) Id., 454–55. *Hebert* is on point with the facts before us.

In the present case, Brunoli negotiated a contract with the state to construct a building at the worksite. It also subcontracted with Mid-State and Connecticut Metal to perform services at the worksite. Brunoli was obligated to complete the worksite project to the satisfaction of the state. Brunoli informed Rompre that it was withholding payment because of a leak and directed Rompre to send a representative to the worksite to fix it. The fact that the state not only permitted, but also directed Brunoli to go to the state owned worksite to repair the leak is evidence that Brunoli was in control of the worksite where the leak occurred. Brunoli argues that, unlike the general contractor in *Hebert*, it did not go to the worksite to oversee the gutter repair. That is a distinction without a difference in the present case. Brunoli was required to fix the leak and had control over who repaired the gutter. It directed Mid-State to send a representative to the worksite to fix the gutter. Brunoli, as a general contractor, surely is aware of the risks and the dangers present at a worksite and it could have gone to supervise the gutter repair if it had concerns and had elected to do so. Instead, it delegated the responsibility to its subcontractor, Mid-State.

Brunoli claims that the board's decision is unreasonable and bad policy for several reasons because a general contractor has no legal right to require a subcontractor to maintain workers' compensation insurance indefinitely. Our decision, however, does not stand for the proposition that a general contractor must require a subcontractor to maintain workers' compensation insurance indefinitely. Our workers' compensation law

provides benefits for workers who sustain injuries arising out of and in the course of employment. See, e.g., *Spatafore* v. *Yale University*, 239 Conn. 408, 417–18, 684 A.2d 1155 (1996). The issue in the present appeal is limited to its facts. After Brunoli and its subcontractors substantially had completed construction at the worksite, Brunoli directed one of its subcontractors to return to the worksite to repair a leaking gutter. Brunoli controlled whom it directed to repair the leak. Brunoli asked Mid-State to repair the gutters. Unfortunately, Dunkling was injured while he was repairing the gutter at Brunoli's direction. This case is about what happened on December 4, 2014, not in the future. If Brunoli had questions about Mid-State's workers' compensation coverage, it could have inquired. It also could have gone to the worksite to supervise the repair or it could have repaired the gutters itself if Mid-State's compensation coverage was in doubt.

For the foregoing reasons, we conclude that the board properly affirmed the commissioner's finding that Brunoli is a principal employer.

II

The defendants also claim that the board improperly affirmed the commissioner's ruling denying their motion to correct with respect to communication between Brunoli and the state concerning a warranty. The issue of a warranty in the present case is a red herring, as it is relevant to Brunoli's relationship with the state, and is not relevant to its employees and workers' compensation benefits. To the extent that the commissioner erred in finding that Brunoli warranted the construction at the worksite, it is harmless error, if any. As we stated in part I of this opinion, Brunoli controlled the worksite by directing Mid-State to send a representative to the worksite to repair the leaking gutter. Brunoli may have been obligated to the state to fix the leak, but workers' compensation coverage in the present case is a separate issue.

The decision of the Compensation Review Board is affirmed.

In this opinion the other judges concurred.

GIFTON G. BAGALLOO *v.* COMMISSIONER OF CORRECTION (AC 41765)

DiPentima, C. J., and Keller and Bright, Js.

Syllabus

The petitioner sought a writ of habeas corpus, claiming, inter alia, that his trial counsel, W, rendered ineffective assistance by failing to inform him adequately about his ineligibility for presentence confinement credit and by failing to request that the trial judge award him that confinement credit. On March 31, 2009, the petitioner, while serving a sentence for a narcotics offense and a violation of probation, was arrested for conspiracy to commit murder. The petitioner pleaded guilty to the conspiracy charge and, on December 10, 2013, received a sixteen year sentence. Although the petitioner was held in custody on the homicide case, in lieu of bond, since March 31, 2009, pursuant to statute (§ 18-98d [a] [1] [B]), he did not receive credit for the time he spent in confinement from that date to September 9, 2011, the date his sentence for the narcotics offense and violation of probation terminated. The petitioner only received presentence confinement credit toward the sixteen year sentence from September 10, 2011, to December 10, 2013. The habeas court conducted a trial, during which the petitioner and W testified. The court rendered judgment denying the habeas petition, concluding, inter alia, that W had not rendered ineffective assistance of counsel and that he informed the petitioner adequately about the length of his sentence. Thereafter, the habeas court denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The petitioner's claim that W rendered ineffective assistance because he failed to properly inform the petitioner that he would not receive credit for the time he spent in presentence confinement from March 31, 2009, to September 9, 2011, before the petitioner pleaded guilty to conspiracy to commit murder, was unavailing; the habeas court found that W had specifically informed the petitioner that the petitioner's resolution of the narcotics and violation of probation case created a dead time scenario whereby the petitioner would receive no confinement credit against any prison sentence for the homicide case that preceded the completion of that earlier sentence, and, thus, because the habeas court found that W's testimony was credible as to his communications with the petitioner regarding the dead time he would be serving, it did not abuse its discretion in denying the petition for certification to appeal with regard to that claim.

2. The petitioner could not prevail on his claim that W provided ineffective assistance by failing to ask the trial judge to order the Department of Correction to award presentence confinement credit, despite the fact that the petitioner was ineligible for such credit under § 18-98d (a) (1) (B), which was based on the petitioner's claim that because the Department of Correction has a policy of honoring court awarded confinement credit, even if the petitioner did not qualify for it under § 18-98d, and requesting the credit would not have harmed the petitioner, W rendered deficient performance by not making such a request; contrary to the petitioner's claim, our Supreme Court previously has made clear that awarding credit for presentence confinement is permissible only for defendants who qualify under § 18-98d, and, therefore, W could not have rendered deficient performance for failing to request confinement credit for which the petitioner was not eligible under the applicable statute.

Argued October 23, 2019—officially released February 4, 2020

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Sferrazza*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Judie Marshall, for the appellant (petitioner).

Nancy L. Walker, assistant state's attorney, with whom, on the brief, were *John C. Smriga* and *Matthew C. Gedansky*, state's attorneys, and *Tamara Grosso*, assistant state's attorney, for the appellee (respondent).

Opinion

DiPENTIMA, C. J. The petitioner, Gifton G. Bagalloo, appeals after the denial of his petition for certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court (1) abused its discretion in denying his petition for certification to appeal and (2) improperly denied his petition for a writ of habeas corpus in which he alleged, inter alia, that his trial counsel provided ineffective assistance when

the petitioner entered into a plea agreement. Because the petitioner has failed to demonstrate that the habeas court abused its discretion in denying the petition for certification to appeal, we dismiss the appeal.

In its memorandum of decision, the habeas court set forth the following relevant facts and procedural history. "On November 10, 2008, the [trial] court sentenced the petitioner to seven years [of] imprisonment, execution suspended after three years, and three years [of] probation for a narcotics offense and a violation of probation. While serving that sentence, the police, on March 31, 2009, arrested the petitioner for conspiracy to commit murder . . . [to which he pleaded guilty], and [he] received a sixteen year sentence on December 10, 2013.

* * *

"The three year sentence terminated on September [9], 2011. Under General Statutes § 18-98d (a) (1) (B),[1] the petitioner only received pretrial jail credit toward

[1] General Statutes § 18-98d (a) (1) provides: "Any person who is confined to a community correctional center or a correctional institution for an offense committed on or after July 1, 1981, under a mittimus or because such person is unable to obtain bail or is denied bail shall, if subsequently imprisoned, earn a reduction of such person's sentence equal to the number of days which such person spent in such facility from the time such person was placed in presentence confinement to the time such person began serving the term of imprisonment imposed; provided (A) each day of presentence confinement shall be counted only once for the purpose of reducing all sentences imposed after such presentence confinement; and (B) the provisions of this section shall only apply to a person for whom the existence of a mittimus, an inability to obtain bail or the denial of bail is the sole reason for such person's presentence confinement, except that if a person is serving a term of imprisonment at the same time such person is in presentence confinement on another charge and the conviction for such imprisonment is reversed on appeal, such person shall be entitled, in any sentence subsequently imposed, to a reduction based on such presentence confinement in accordance with the provisions of this section. In the case of a fine, each day spent in such confinement prior to sentencing shall be credited against the sentence at a per diem rate equal to the average daily cost of incarceration as determined by the Commissioner of Correction."

the sixteen year sentence beginning *after* that date. This was so because previous to that date he was confined as a *sentenced* prisoner. *Lee* v. *Commissioner of Correction*, 173 Conn. App. 379, 385–86, [163 A.3d 702, cert. denied, 326 Conn. 924, 169 A.3d 233] (2017). In short, although held in custody on the homicide case, in lieu of bond, since March 31, 2009, the calculation set forth in § 18-98d (a) (1) (B) disallowed jail credit as long as the earlier, three year sentence continued to run. The petitioner has received pretrial jail credit for confinement from September 10, 2011, to December 10, 2013." (Citations omitted; emphasis in original; footnote added.)

On or about April 21, 2014, the petitioner filed a motion to withdraw his guilty plea. In the motion, the self-represented petitioner argued that his plea was not knowing and voluntary because he was not advised adequately by his trial counsel, John Walkley, about the length of his sentence and the amount of jail credit he would receive from his pretrial confinement. On June 23, 2014, the trial court denied the motion. In denying the motion, the court found that because the presentence jail credit was never part of the plea agreement, the court did not have to ensure that the petitioner was aware of the impact of § 18-98d (a) (1) (B) on the plea agreement or that he would be serving "dead time."[2] The petitioner did not appeal from the denial of this motion.

On December 19, 2014, the self-represented petitioner filed a petition for a writ of habeas corpus. On May 1, 2017, the petitioner, represented by counsel, filed an amended petition. In his amended petition, the petitioner alleged that (1) Walkley rendered ineffective

[2] "[D]ead time is prison parlance for presentence confinement time that cannot be credited because the inmate is a sentenced prisoner serving time on another sentence." (Internal quotation marks omitted.) *Smith* v. *Commissioner of Correction*, 179 Conn. App. 160, 163 n.2, 178 A.3d 1079 (2018).

assistance by failing to inform him adequately about his ineligibility for jail credit and by failing to request that the sentencing judge award him jail credit, and (2) his guilty plea was not knowingly, intelligently and voluntarily given because he was not informed properly about the length of his sentence. On August 10, 2017, the respondent, the Commissioner of Correction, filed a return in response, claiming that the petitioner's petition was procedurally defaulted because he failed to appeal the trial court's denial of his motion to withdraw his guilty plea. See Practice Book § 23-30 (b). The habeas court conducted a trial, during which the petitioner and Walkley testified.

On April 30, 2018, the habeas court issued a memorandum of decision in which it denied the petition for habeas corpus relief. The habeas court found that the petitioner failed to satisfy the "good cause and prejudice" standard to overcome the procedural default for failing to appeal from the trial court's denial of his motion to withdraw his guilty plea. The habeas court also determined that the petitioner's trial counsel had not rendered ineffective assistance and that he informed the petitioner adequately about the length of his sentence.

Thereafter, the petitioner filed a petition for certification to appeal from the habeas court's judgment. The petitioner sought to raise two issues on appeal: (1) whether the court erred in finding that the petitioner failed to show cause sufficient to overcome procedural default for his claim that his guilty plea was not knowing, intelligent and voluntary,[3] and (2) whether the court erred in finding that the petitioner failed to prove ineffective assistance of counsel. The habeas court denied the petition. This appeal followed.

[3] The petitioner included this issue on his petition for certification to appeal; however, this issue was not briefed and the petitioner does not challenge this determination by the habeas court on appeal.

On appeal, the petitioner argues that the habeas court (1) abused its discretion in denying the petitioner's request for certification to appeal, and (2) erred in denying the petitioner's claim that his trial counsel rendered ineffective assistance. We disagree.

We first set forth the standard of review relevant to our resolution of this appeal. "Faced with the habeas court's denial of certification to appeal, a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [the] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be made on the basis of the record before the habeas court and applicable legal principles. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by this court for determining the propriety of the habeas court's denial of the petition for certification. Absent such a showing by the petitioner, the judgment of the habeas court must be affirmed. . . .

"We examine the petitioner's underlying claim[s] of ineffective assistance of counsel in order to determine whether the habeas court abused its discretion in denying the petition for certification to appeal. Our standard of review of a habeas court's judgment on ineffective

assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . .

"In *Strickland* v. *Washington* [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction . . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong. . . .

"To satisfy the performance prong [of the *Strickland* test] the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Citations omitted; internal quotation marks omitted.) *Coward* v. *Commissioner of Correction*, 143 Conn. App. 789, 794–96, 70 A.3d 1152, cert. denied, 310 Conn. 905, 75 A.3d 32 (2013).

Accordingly, in order to determine whether the habeas court abused its discretion in denying the petition for certification to appeal, we must consider the merits of the petitioner's underlying claims that trial counsel provided ineffective assistance. With the foregoing principles in mind, we now address the petitioner's claims.

I

The petitioner first claims that his trial counsel was ineffective because he failed to inform the petitioner about the length of his sentence before entering into the plea agreement. Specifically, the petitioner argues that Walkley did not communicate that the petitioner would not receive credit for the time he spent in presentence confinement from March 31, 2009, to September 9, 2011. The petitioner further argues that had he known that he would not receive credit for the 893 days he spent in presentence confinement, he would have rejected the plea and elected to go to trial instead.

The following additional facts are necessary for the disposition of this claim. At the habeas trial, the court found that Walkley had "specifically informed the petitioner that the petitioner's resolution of the other case . . . created a 'dead time' scenario whereby the petitioner would receive no jail credit against any prison sentence for the homicide case that preceded the completion of that earlier sentence." The court further determined that Walkley's testimony was "very credible" about his communications with the petitioner regarding the unavailability of presentence jail credit and that he would be serving " 'dead time.' "[4] Therefore,

[4] The petitioner argues that Walkley's testimony that he did not recall the specific conversations he had with the petitioner regarding the unavailability of jail credit demonstrates that Walkley did not provide effective assistance of counsel. In response the respondent cites *Budziszewski* v. *Commissioner of Correction*, 322 Conn. 504, 517 n.2, 142 A.3d 243 (2016) (expressing concern with trial court's finding fault with counsel for his failure to recall "all of the advice he gave the petitioner" by noting that "the habeas court

the petitioner's claim that Walkley did not inform him about his ineligibility for jail credit fails because "[a]s an appellate court, we do not reevaluate the credibility of testimony, nor will we do so in this case. The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . This court does not retry the case or evaluate the credibility of witnesses. Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude." (Citation omitted; internal quotation marks omitted.) *Corbett* v. *Commissioner of Correction*, 133 Conn. App. 310, 316–17, 34 A.3d 1046 (2012). Because the habeas court found Walkley's testimony credible as to informing the petitioner of the "dead time" he would be serving, we do not disturb the court's finding that Walkley's performance was not deficient. See *Corbett* v. *Commissioner of Correction*, supra, 316–17. Accordingly, the habeas court did not abuse its discretion in denying the petition for certification to appeal with regard to this claim.

II

The petitioner's second claim is that Walkley provided ineffective assistance by failing to ask the sentencing judge to order the Department of Correction to award presentence confinement credit, despite the fact that the petitioner was ineligible for such jail credit under § 18-98d (a) (1) (B). The petitioner argues that because the Department of Correction has a policy of honoring court awarded jail credit, even if the petitioner does not qualify for it under § 18-98d, and requesting the credit would not have harmed the petitioner, Walkley

must presume that counsel acted competently and the burden lies with the petitioner, as the party asserting ineffectiveness, to overcome this presumption and prove that [counsel] failed to give the required warning"). This binding precedent disposes of the petitioner's argument.

rendered deficient performance by not making such a request.

During testimony before the habeas court, the petitioner sought to demonstrate that because it is a common practice in Connecticut for attorneys to request jail credit at sentencing, Walkley acted deficiently by failing to request it. The habeas court, however, disagreed and held: "In *Washington* v. *Commissioner of Correction*, 287 Conn. 792, 950 A.2d 1220 (2008), our Supreme Court disabused trial courts, attorneys, and the [Department of Correction] from the delusion that judges could recoup [presentence] jail credit and circumvent the disqualification posed by the text of § 18-98d (a) (1) by judicial fiat. Id., 802–803. This court has held that defense counsel cannot be faulted for declining to make such an unlawful request. *Palmenta* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-13-4005461-S (May 21, 2014), aff'd sub nom. *Palmenta* v. *Commissioner of Correction*, 161 Conn. App. 901, 125 A.3d 302, cert. denied, 320 Conn. 909, 128 A.3d 507 (2015)." See also *Gooden* v. *Commissioner of Correction*, 169 Conn. App. 333, 338, 339–40 and n.3, 150 A.3d 738 (2016). In addition, the habeas court noted, and the record demonstrates, that Walkley testified that he attempted to ask the prosecutor to include in the recommended sentence the " 'dead time' " that the petitioner had served before trial.

On appeal, the petitioner argues that § 18-98d "strongly indicates that a sentencing court has no discretion to deny a valid request for jail credit." The petitioner's reliance on our Supreme Court's decision in *Washington* in support of this proposition is misplaced because, although that court did discuss how § 18-98d mandates that presentence confinement credit be granted to a defendant who qualifies for it under the statute, the petitioner here could not make a "valid request" for jail credit because he did not qualify for

presentence confinement credit under § 18-98d. Indeed, contrary to the petitioner's argument, our Supreme Court in *Washington* made clear that awarding jail credit for presentence confinement is permissible only for defendants who qualify under § 18-98d. See *Washington* v. *Commissioner of Correction*, supra, 287 Conn. 802–803. Consequently, we agree with the habeas court that Walkley cannot be considered to have rendered deficient performance for failing to request jail credit for which the petitioner was not eligible under the statute. See *Weathers* v. *Commissioner of Correction*, 133 Conn. App. 440, 444, 35 A.3d 385 (holding that "[t]he petitioner has not demonstrated that effective representation requires that an attorney, at the time of sentencing, ask for every conceivable type of sentencing consideration, including credit to which he lacks any entitlement by operation of law"), cert. denied, 304 Conn. 918, 41 A.3d 305 (2012). Accordingly, the habeas court properly determined that the petitioner's trial counsel did not render deficient performance by not requesting unauthorized jail credit from the trial court.

On the basis of the foregoing, we conclude that the habeas court properly determined that Walkley did not render ineffective assistance of counsel by failing to request presentence confinement credit for which the petitioner was ineligible under § 18-98d. The petitioner has failed to prove any of the three criteria that constitutes an abuse of discretion. Accordingly, the petitioner has not demonstrated that the habeas court abused its discretion in denying the petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* AVERY CORPREW
(AC 41112)
(AC 41154)

Elgo, Bright and Devlin, Js.

Syllabus

The defendant, who, in two separate cases, previously had been convicted on guilty pleas of two counts of the sale of a narcotic substance, appealed to this court from the judgments of the trial court denying his motions to correct an illegal sentence. The trial court sentenced the defendant in each case to five years of incarceration followed by seven years of special parole, to be served concurrently. Thereafter, the defendant filed motions to correct an illegal sentence, alleging that his sentences were illegal because they included a period of special parole, which is not a definite sentence. The trial court denied his motions and the defendant filed separate appeals to this court, which, sua sponte, consolidated the appeals. On appeal, the defendant claimed that his sentences were prohibited because special parole is not a definite sentence. *Held* that the trial court properly denied the defendant's motions to correct an illegal sentence: the combination of the defendant's period of incarceration of five years followed by a period of seven years of special parole totaled twelve years, which did not exceed the maximum sentence of incarceration of twenty years for each conviction of the sale of a narcotic substance pursuant to statute ([Rev. to 2013] § 21a-278 [b]), and, accordingly, the defendant's sentences were explicitly authorized by statute and were not illegal.

Argued October 25, 2019—officially released February 4, 2020

Procedural History

Information, in the first case, charging the defendant with the crimes of sale of a narcotic substance and possession of narcotics, and information, in the second case, charging the defendant with the crimes of sale of a narcotic substance and possession of narcotics, brought to the Superior Court in the judicial district of New Britain, geographical area number fifteen, where the defendant was presented to the court, *Alexander*, *J.*, on a plea of guilty in each case to sale of a narcotic substance; thereafter, the state entered a nolle prosequi in each case as to the count of possession of narcotics

and the court rendered judgments in accordance with the pleas; subsequently, the court denied the defendant's motions to correct an illegal sentence, and the defendant filed separate appeals with this court, which consolidated the appeals. *Affirmed.*

Avery Corprew, self-represented, the appellant (defendant).

Melissa Patterson, assistant state's attorney, with whom, on the brief, were *Brian W. Preleski*, state's attorney, *Christian Watson*, supervisory assistant state's attorney, and *Mary Rose Palmese*, supervisory assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Avery Corprew, appeals from the judgments of the trial court denying his motions to correct an illegal sentence.[1] On appeal, the defendant claims that the trial court improperly concluded that the sentences imposed on him for a term of incarceration followed by a period of special parole were authorized by statute and, thus, were not illegal. We affirm the judgments of the trial court.

The following procedural history is relevant to the defendant's claim on appeal. On September 16, 2015, the defendant pleaded guilty in each of two separate cases to a single count of sale of a narcotic substance in violation of General Statutes (Rev. to 2013) § 21a-278 (b). He was sentenced on each count to five years of incarceration, followed by seven years of special parole, to be served concurrently.

On June 15, 2017, the defendant, in each case, filed a motion to correct an illegal sentence pursuant to

[1] Although the defendant filed two appeals in this matter, they were consolidated for briefing purposes.

Practice Book § 43-22, in which he argued that his sentence was illegal because it included a period of special parole, which is not a definite sentence, as required by statute. The court held a hearing on the defendant's motions on October 2, 2017. In a memorandum of decision issued on October 17, 2017, the court denied the defendant's motions, concluding that the imposition of special parole was statutorily authorized, and, therefore, that the defendant's sentences were not illegal. These appeals, which have been consolidated, followed.

On appeal, the defendant asserts the same argument that he raised in his motions to correct an illegal sentence—that his sentences of five years of incarceration followed by seven years of special parole are prohibited by statute because special parole is not a definite term of imprisonment, as required under General Statutes § 53a-35a.[2] This court's decision in *State* v. *Farrar*, 186 Conn. App. 220, 199 A.3d 97 (2018), is dispositive of the defendant's claim on appeal. In rejecting Farrar's claim that the term of special parole imposed on him was illegal because it is not a definite term of imprisonment as required under § 53a-35a, this court concluded that "special parole is a status duly authorized by General Statutes [Rev. to 2013] § 53a-28 (b).[3] . . . [General

[2] General Statutes § 53a-35a provides in relevant part: "For any felony committed on or after July 1, 1981, the sentence of imprisonment shall be a definite sentence and, unless the section of the general statutes that defines or provides the penalty for the crime specifically provides otherwise, the term shall be fixed by the court . . . ."

[3] General Statutes (Rev. to 2013) § 53a-28 (b) provides in relevant part: "Except as provided in section 53a-46a, when a person is convicted of an offense, the court shall impose one of the following sentences . . . (9) a term of imprisonment and a period of special parole as provided in section 54-125e."

Pursuant to General Statutes § 54-128 (c), "[t]he total length of the term of incarceration and term of special parole combined shall not exceed the maximum sentence of incarceration authorized for the offense for which the person was convicted." See also General Statutes (Rev. to 2013) § 54-125e.

Statutes (Rev. to 2013) §] 53a-28 (b) (9) and [General Statutes §] 54-128 (c) explicitly authorize a defendant to be sentenced to a term of imprisonment followed by a period of special parole, provided that the combined term of the period of imprisonment and special parole do not exceed the statutory maximum for the crime for which the defendant was convicted." (Footnote added and omitted.) Id., 223. Because the combined terms of imprisonment and special parole imposed on Farrar did not exceed the maximum sentence of incarceration for the crime of which he was convicted, this court concluded that his sentence was explicitly authorized by statute and did not constitute an illegal sentence. Id., 222, 223–24.

Here, in each case, the defendant received a definite period of incarceration of five years followed by a period of seven years of special parole. Because the combination of those terms, twelve years, does not exceed the maximum sentence of incarceration of twenty years for the defendant's conviction of sale of a narcotic substance in each case pursuant to General Statutes (Rev. to 2013) § 21a-278 (b),[4] the defendant's sentences were explicitly authorized by statute and therefore were not illegal. Accordingly, the trial court properly denied the defendant's motions to correct an illegal sentence.

The judgments are affirmed.

[4] General Statutes (Rev. to 2013) § 21a-278 (b) provides in relevant part: "Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person any narcotic substance, hallucinogenic substance other than marijuana, amphetamine-type substance, or one kilogram or more of a cannabis-type substance, except as authorized in this chapter, and who is not, at the time of such action, a drug-dependent person, for a first offense shall be imprisoned not less than five years or more than twenty years; and for each subsequent offense shall be imprisoned not less than ten years or more than twenty-five years. . . ."

MEMORANDUM DECISIONS

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FEMI OLOWOSOYO *v.* CITY
OF BRIDGEPORT ET AL.
(AC 42652)

DiPentima, C. J., and Moll and Bear, Js.

Argued January 9—officially released February 4, 2020

Plaintiff's appeal from the Superior Court in the judicial district of Fairfield, *Radcliffe*, *J.*

Per Curiam. The judgment is affirmed.

STATE OF CONNECTICUT *v.* MAURICE EARLEY
(AC 41932)

Prescott, Elgo and Flynn, Js.

Argued January 8—officially released February 4, 2020

Defendant's appeal from the Superior Court in the judicial district of Fairfield, *Pavia*, *J.*

Per Curiam. The judgment is affirmed.

JASON B. *v.* COMMISSIONER OF CORRECTION
(AC 42214)

Prescott, Bright and Harper, Js.

Argued January 14—officially released February 4, 2020

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SUPREME COURT PENDING CASES

STATE *v.* MICHAEL J. MARSALA, SC 20249
Judicial District of Milford at G.A. 22

Criminal; Lesser Included Offenses; Whether Appellate Court Properly Concluded that Defendant not Entitled to Instruction on Infraction of Simple Trespass as a Lesser Included Offense of Criminal Trespass in the First Degree. Mall security banned the defendant from the Connecticut Post Mall's property in Milford after receiving many calls reporting that a man carrying a red gas can was in one of the mall's parking lots. The defendant was told that panhandling was not allowed on mall property. On November 27, 2015, a mall security officer saw the defendant in a mall parking lot holding a gas can. She told the defendant that he had been banned from the property and warned him that he would be arrested if he was found on the property again. The next day, the officer again found the defendant in a mall parking lot. The defendant was arrested and charged with one count of criminal trespass in the first degree in violation of General Statutes § 53a-107 (a) (1). A person is guilty under that statute when, knowing that he is not privileged or licensed to do so, he enters or remains on any premises "after an order to leave or not to enter [has been] personally communicated to [him] by the owner of the premises or other authorized person . . . ." After the close of evidence, the defendant submitted a request that the jury be charged on the infraction of simple trespass under General Statutes § 53a-110a as a lesser included offense of criminal trespass. A person is guilty of simple trespass in violation of § 53a-11oa when, knowing that he is not licensed or privileged to do so, he enters or remains on any premises without intent to harm any property. The trial court denied the request to charge, and the jury found the defendant guilty of criminal trespass in the first degree. The defendant appealed, claiming that the trial court improperly declined to instruct the jury on the infraction of simple trespass as a lesser included offense of criminal trespass in the first degree. The Appellate Court (186 Conn. App. 1) rejected that claim and affirmed the defendant's conviction, ruling that the defendant was not entitled to an instruction on a lesser offense under the four-prong test of *State* v. *Whistnant*. *Whistnant* holds that a defendant is entitled to an instruction on a lesser offense only if, among other things, (1) there is some evidence which justifies conviction of the lesser offense, and (2) the proof on the element or elements which differentiate the lesser offense from the offense charged is sufficiently in dispute to permit the jury consistently to find the defendant innocent of the greater offense but guilty of the lesser. The Appellate Court

found that, here, the evidence presented to the jury excluded the possibility that the defendant could be found not guilty of criminal trespass in the first degree, but then found guilty of the infraction of simple trespass and accordingly that the defendant was not entitled under *Whistnant* to a jury instruction on the infraction of simple trespass. In this certified appeal, the Supreme Court will decide whether the Appellate Court properly concluded that the defendant was not entitled to an instruction on the infraction of simple trespass as a lesser included offense of criminal trespass in the first degree. For its part, the state argues that the Appellate Court's judgment can be affirmed on the alternative ground that an infraction can never constitute a lesser included offense of a criminal offense.

STATE *v.* ELVIN G. RIVERA, SC 20277
Judicial District of Hartford

Criminal; Whether Defendant Properly Precluded from Cross-Examining State's Key Witness About Specific Facts Underlying Witness' Prior Misdemeanor Convictions. The defendant was convicted of breach of the peace in the second degree, criminal mischief in the third degree and threatening in the second degree. The defendant's conviction stemmed from a dispute he had with Stephen Chase, a tow truck operator. Chase secured the defendant's car for towing after observing it parked at a condominium complex in an area marked as a fire lane. Chase informed the defendant when he exited a nearby garage that he was towing the car because it was parked in a fire lane. The defendant became agitated, moved toward the tow truck where Chase was standing and struck the tow truck with a pipe. Chase grabbed a can of pepper spray from his tow truck and sprayed the defendant in the face. The defendant dropped the pipe and pulled a knife out from his pocket. Chase entered his tow truck, drove a safe distance away from the defendant and called the police. The defendant claimed on appeal that the trial court violated his constitutional rights to confrontation and to present a defense by precluding him from cross-examining Chase as to the specific acts underlying several misdemeanor convictions rendered against Chase, including convictions on three separate counts of larceny in the sixth degree and a conviction of a single count of breach of the peace in the second degree. The Appellate Court (187 Conn. App. 813) affirmed the defendant's conviction, concluding that the trial court did not abuse its discretion in prohibiting the defendant from cross-examining Chase as to the specific acts underlying his 2014 larceny convictions and his 2013 breach

of the peace conviction. It found that the trial court reasonably determined that statements made by Chase in police reports relating to the larceny convictions in which he admitted to stealing cell phones to exchange for drugs were too remote in time to have probative value as to the incident underlying the present case, which occurred in March, 2015. The Appellate Court further found that those statements did not tend to prove that Chase had a motive to steal the defendant's car in order to support a drug habit, where there was no indication in the record that Chase was under the influence of substances at the time of the incident here. The Appellate Court also found that Chase's plea of guilty to the breach of the peace charge did not impugn his statement in a 2012 police report relating to the charge that he had used pepper spray in self-defense, such that the specific acts underlying that conviction were not probative of Chase engaging in a pattern of making false self-defense claims. Furthermore, the Appellate Court found that the altercation underlying Chase's breach of the peace conviction, which occurred more than two years before the incident that gave rise to the defendant's conviction, was too remote in time and bore minimal probative value on Chase's credibility. The defendant was granted certification to appeal, and the Supreme Court will consider whether the Appellate Court correctly determined that the trial court properly precluded the defendant from cross-examining Chase about the specific facts underlying his prior misdemeanor convictions.

MARGARET E. DAY, COCONSERVATOR (ESTATE OF SUSAN D. ELIA) *v.* RENEE F. SEBLATNIGG et al., SC 20280
Judicial District of Stamford-Norwalk at Stamford

Probate; Conservatorship; Whether Irrevocable Trust Created by Voluntarily Conserved Person is Void Ab Initio under General Statutes § 45a-655 (e) Regardless of Conserved Person's Testamentary Capacity. In 2011, Susan D. Elia applied to the Greenwich Probate Court for the voluntary appointment of a conservator of her estate. The Probate Court granted her application and appointed Renee Seblatnigg as the conservator of her estate. After her appointment, Seblatnigg consulted with First State Fiduciaries regarding the creation of a self-settled irrevocable Delaware asset protection trust for Elia. Seblatnigg then entered into an asset protection services agreement on Elia's behalf with an affiliate of First State Fiduciaries. She also met with Elia on the same day and supervised Elia's execution of a trust instrument that created a Delaware irrevocable trust. Seblatnigg did not seek or obtain the approval of the Probate Court to establish the Delaware irrevocable trust or to supervise Elia's

execution of the trust document. Seblatnigg resigned as the conservator of Elia's estate in 2013, and the plaintiff, Margaret Day, was appointed coconservator of Elia's estate for the limited purpose of attending to matters related to Elia's interest in the Delaware irrevocable trust. The plaintiff brought this action against Seblatnigg and First State Fiduciaries seeking a judgment declaring that the irrevocable trust was void and unenforceable and ordering that any assets transferred from Elia's estate into the trust be returned to the estate. The trial court granted summary judgment in favor of the plaintiff, determining that Elia lacked the ability to execute the trust while under a voluntary conservatorship. First State Fiduciaries appealed, and the Appellate Court (186 Conn. App. 482) affirmed the trial court's judgment, finding that the trial court rightly determined that Elia, as a voluntarily conserved person, did not retain control over her estate. The Appellate Court noted that the clear language of General Statutes § 45a-655 gives control over a conserved person's estate to the conservator, and it rejected First State Fiduciaries' claim that a 2007 revision of the conservatorship statutes was intended to suggest that a voluntarily conserved person retains control over her estate. The Appellate Court further noted that a voluntarily conserved person may seek to be released from a voluntary conservatorship if they wish to regain control of their estate. First State Fiduciaries was granted certification to appeal, and the Supreme Court will decide whether the Appellate Court properly upheld the trial court's conclusion that an irrevocable trust created by a voluntarily conserved person was void ab initio under § 45a-655 (e), regardless of whether the conserved person at the time of transfer had unimpaired testamentary capacity.

GREGG FISK *v.* TOWN OF REDDING et al., SC 20333
Judicial District of Fairfield

Public Nuisance; Inconsistent Verdicts; Interrogatories; Whether Jury Verdict in Nuisance Action Should Be Set Aside Because Jury's Finding that Condition was Inherently Dangerous was Inconsistent with Jury's Finding that Condition did not Constitute an Unreasonable Use of Land. The plaintiff was injured when he fell from a retaining wall constructed by the town or Redding. He brought this action claiming that the town was liable for absolute public nuisance, contending that the town had created a nuisance by constructing the retaining wall without a fence on top of it. Following a trial, the jury returned a verdict in favor of the town, and the trial court accepted the verdict. The plaintiff then filed a motion to set aside the verdict, claiming that the jury's responses to interrogatories

were inconsistent. The plaintiff argued that the interrogatory responses were inconsistent in that, while the jury indicated that the wall constituted an inherently dangerous condition, it nonetheless found that the wall did not constitute an unreasonable or unlawful use of the land by the town. The trial court denied the motion and rendered judgment in accordance of the verdict. The plaintiff appealed, and the Appellate Court (190 Conn. App. 99) reversed the judgment and remanded the case for a new trial, finding that the jury's answers to the interrogatories were "fatally inconsistent" and could not be harmonized. The Appellate Court found that the jury could not have determined that the alleged inherently dangerous condition—the retaining wall without a fence—was both inherently dangerous and not an unreasonable use of the land. The defendant has been granted certification to appeal. The Supreme Court will decide whether the Appellate Court properly determined that the jury's verdict should be set aside because the jury's response to the first special interrogatory, that the condition of an unfenced retaining wall was inherently dangerous, was fatally inconsistent with its response to the third special interrogatory, that the defendant's use of the land nevertheless was not unreasonable.

JOHN DOE #2 et al. *v.* ROBERT RACKLIFFE et al., SC 20420
Judicial District of New Britain

Negligence; Sexual Abuse of Minors; Statutes of Limitation; Whether Timeliness of Negligence Claims Brought Against Defendant Doctor Governed by Negligence Statute of Limitations or by Statute of Limitations for Civil Claims Alleging Sexual Abuse of Minors. This appeal stems from six consolidated tort actions brought between 2014 and 2015 by seven plaintiffs who were minor patients of the defendant pediatrician Robert Rackliffe between 1972 and 1988. The plaintiffs pleaded claims of medical malpractice and negligent infliction of emotional distress (the negligence claims), sexual abuse of a minor and intentional infliction of emotional distress. The plaintiffs claimed that they were harmed as a result of the defendant's practice of performing digital rectal examinations during their annual physical checkups. The defendant moved for summary judgment on the negligence claims, arguing that they were time barred under the three year statute of limitations for negligence actions contained in General Statutes § 52-584. In objecting to summary judgment, the plaintiffs argued that their claims were governed by General Statutes § 52-577d, which provides that "no action to recover damages for personal injury to a person under twenty-one years of age, including emotional distress, caused by sexual abuse, sexual exploitation or

sexual assault may be brought by such person later than thirty years from the date such person attains the age of twenty-one." The plaintiffs argued that their negligence claims were inextricably intertwined with their sexual abuse claims and therefore that the negligence claims were timely under § 52-577d. The trial court rendered summary judgment for the defendant on the negligence claims, ruling that they were time-barred under § 52-584. The court determined that those claims sounded in negligence and did not allege "sexual abuse, sexual exploitation or sexual assault" as contemplated by § 52-577d. The court acknowledged that the statute of limitations under § 52-577d had previously been applied to negligence claims, but it noted that those claims had been brought against third parties who had various relationships to the alleged perpetrator of prohibited sexual conduct. The trial court distinguished the plaintiffs' claims by observing that they had been brought directly against the alleged perpetrator. The plaintiffs subsequently withdrew their sexual abuse and intentional infliction of emotional distress claims, and they appeal, challenging the judgments for the defendant on their negligence claims. The Supreme Court will decide whether the trial court erred in declining to apply the statute of limitations contained § 52-577d to the negligence claims.

STATE *v.* RICHARD ROLON, SC 20423
Judicial District of Hartford

Criminal; Search and Seizure; Whether Police Authorized to Detain Person Who Parked in an Apartment Building's Parking Lot as Police Were Executing a Search Warrant for an Apartment in the Building. After conducting an investigation into suspected drug trafficking by Richard Rivera, the police obtained a warrant to search Rivera's apartment at 12-14 South Street in Hartford and warrants for his arrest. The police planned to execute the warrants on January 31, 2017, and throughout that day they engaged in street camera surveillance of the building's parking lot. During the surveillance, the police observed Rivera drive into the lot, get out of his car and speak with the defendant, who had exited the apartment building and approached Rivera's car. After a brief exchange, both men got into their cars and drove out of the lot. Later that day, Rivera was arrested on Franklin Avenue and, on learning of his arrest, a team of police convened near 12-14 South Street and prepared to execute the search warrant for Rivera's apartment. Just before the police arrived at 12-14 South Street, the defendant returned to the lot and parked his car. Before the defendant or his passenger could get exit the car, the police drove their vehicles into the driveway of 12-14 South Street, and four or five police

officers exited their vehicles and approached the defendant's car. The police detected the smell of marijuana as they reached the car and they observed a marijuana cigarette and what appeared to be bags of heroin in plain view in the vehicle. The defendant and the passenger—the defendant's girlfriend, Yashira Espino—were taken into custody, and the police learned that Espino was the tenant of an apartment in 12-14 South Street and that the defendant often resided with her there. The police obtained a warrant to search Espino's apartment, and the search yielded evidence of illegal drug activity. The defendant and Espino were arrested and charged with multiple drug crimes. The defendant filed a motion to suppress the drug evidence, claiming that his initial detention by the police violated his fourth amendment rights because the police did not have a reasonable and articulable suspicion that he was engaged in criminal activity under *Terry* v. *Ohio*, 392 U.S. 1 (1968). The trial court denied the motion to suppress, concluding that, while the police did not have a reasonable and articulable suspicion that the defendant was engaged in criminal activity, his initial detention was nonetheless constitutional under *Michigan* v. *Summers*, 452 U.S. 692 (1981), which held that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." The trial court determined (1) that the parking lot was in the "immediate vicinity" of the premises to be searched; (2) that the defendant was a "person in the immediate vicinity of [the] search whom the police ha[d] an articulable basis to connect to the premises to be searched, or to the residents of those premises"; and (3) that the defendant's initial detention had been "limited, in both time and manner, to the minimum intrusion necessary for officers to reasonably ensure their safety." The defendant appeals after entering a conditional plea of nolo contendere. The Supreme Court will decide whether the trial court properly denied the defendant's motion to suppress on the ground that his detention was legal under *Michigan* v. *Summers* where he argues that he was neither in the "immediate vicinity" of the premises to be searched nor an "occupant" of the premises as contemplated by *Summers*.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

John DeMeo
Chief Staff Attorney

NOTICES

Superior Court Operations

Small Claims/Motor Vehicle Magistrate Appointments

The Judicial Branch is now accepting applications for Small Claims/ Motor Vehicle Magistrate appointments pursuant to C.G.S. § 51-193*l*. Attorneys interested in being considered for appointment for the term beginning July 1, 2020 should complete and email an application and supporting materials to magistrate matters at Magistrate.Matters@jud.ct.gov. Fillable PDF versions of the forms are available at www.jud.ct.gov. Applications will be considered on a rolling basis.

Notice of Suspension of Attorney

MMX-CV-19-6026704-S. OFFICE OF CHIEF DICIPLINARY COUNSEL V. BUHL, PAUL D. SUPERIOR COURT, JUDICIAL DISTRICT OF MIDDLESEX AT MIDDLETOWN, 1 /7/2020.

Pursuant to Practice Book § 2-54, notice is hereby given that on January 7, 2020 in docket number (MMX-CV-19-6026704-S), Paul D. Buhl, juris number (307121) of Moodus, CT is suspended from the practice of law in Connecticut.

By the Court, /Suarez, J./

Notice of Attorney Suspension and Appointment of Trustee

DOCKET NO. CV16-6060188-S. CHIEF DISCIPLINARY COUNSEL VS. FRANK CANNATELLI. SUPERIOR COURT, JUDCIAL DISTRICT OF NEW HAVEN, JANUARY 28, 2020.

MEMORANDUM OF DECISION

The parties in this matter have stipulated that the court, when entering judgment, may find the facts set forth in the reviewing committee's November 20, 2015 decision by clear and convincing evidence, as well as the Respondent's violations of the Rules of Professional Conduct and the Practice Book.

In entering the following orders, the court takes into account the Respondent's significant history of discipline and the fact that the issues raised in this grievance proceedings, particularly the Respondent's use of his IOLTA account to pay personal expenses, involved behavior for which the Respondent had been previously sanctioned:

1). The Respondent is hereby suspended from the practice of law for a period of one year, effective February 15, 2020.

2). Pursuant to Practice Book 2-64, Attorney Andrew Marchant-Shapiro, Juris No. 435318, whose address is 40 Putnam Avenue, PO Box 612, Hamden, CT 06517 is appointed Trustee to take such steps as are necessary to protect the interests of the Respondent's clients, to inventory his files, and to take control of all of his clients' funds, IOLTA and fiduciary bank accounts. The Respondent is hereby ordered to fully cooperate with the Trustee in this regard.

3). The Respondent shall comply with the requirements contained in Practice Book 2-47B entitled ''Restrictions on the Activities of Deactivated Attorneys''.

4). At the conclusion of his suspension, the Respondent may apply for reinstatement pursuant to the requirements contained in Practice Book 2-53.

By the Court
James W. Abrams, Judge