

**APPELLATE COURT  
OF THE  
STATE OF CONNECTICUT**

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**A.C. 42276**

**ALEXANDER M. PHILLIPS**

**v.**

**TOWN OF HEBRON, ET AL**

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**BRIEF OF THE DEFENDANTS-APPELLEES  
TOWN OF HEBRON, ET AL**

**APPENDIX BOUND WITH BRIEF**

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TO BE ARGUED BY:

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TOWN OF HEBRON, ET AL

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**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

COUNTER STATEMENT OF ISSUES .....ii

TABLE OF AUTHORITIES .....iii

COUNTER STATEMENT OF FACTS..... 1

LEGAL ARGUMENT ..... 7

    A.    STANDARD OF REVIEW ..... 7

    B.    THE JUDGMENT SHOULD BE AFFIRMED BECAUSE THE TRIAL COURT  
          PROPERLY CONCLUDED THAT THE EXHAUSTION OF ADMINISTRATIVE  
          REMEDIES REQUIREMENT APPLIES TO STATE LAW STATUTORY AND COMMON  
          LAW CLAIMS..... 8

    C.    THE JUDGMENT SHOULD BE AFFIRMED BECAUSE THE TRIAL COURT  
          PROPERLY CONCLUDED THAT THE GRAVAMEN OF THE PLAINTIFF’S LAWSUIT  
          SEEKS REDRESS FOR THE DENIAL OF A FREE APPROPRIATE PUBLIC  
          EDUCATION..... 15

    D.    THE JUDGMENT SHOULD BE AFFIRMED BECAUSE THE TRIAL COURT  
          PROPERLY GRANTED THE DEFENDANTS’ MOTION TO DISMISS FOR LACK OF  
          SUBJECT MATTER JURISDICTION..... 19

CONCLUSION AND RELIEF REQUESTED..... 22

CERTIFICATION ..... 23

## **COUNTER STATEMENT OF ISSUES**

1. Whether the trial court properly concluded that exhaustion of administrative remedies requirement under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et seq, applies to state law statutory and common law claims?

2. Whether the trial court properly concluded that the gravamen of the plaintiff's lawsuit seeks redress for the denial of a free appropriate public education ("FAPE")?

3. Whether the trial court properly granted the defendants' motion to dismiss for lack of subject matter jurisdiction based on the plaintiff's failure to exhaust his rights in a due process hearing before filing a civil lawsuit?

## TABLE OF AUTHORITIES

### **Cases**

|   |               |
|---|---------------|
| <u>Atkins v. Bridgeport Hydraulic Co.</u> , 5 Conn. App. 643, 501 A.2d 1223 (App. Ct. 1985) .....                     | 20            |
| <u>Avoletta v. City of Torrington</u> , No. 3:07-cv-841, 2008 WL 905882 (D. Conn. 2008) .....                         | 11, 12        |
| <u>Bd. of Educ. of Town of Stratford v. City of Bridgeport</u> , --A.3d --, 191 Conn. App. 360 (App. Ct. 2019).....   | 7, 13         |
| <u>Cave v. East Meadow Union Free Sch. Dist.</u> , 514 F.3d 240 (2 <sup>nd</sup> Cir. 2008).....                      | 10            |
| <u>Connecticut Life &amp; Health Insur. Guar. Assn. v. Jackson</u> , 173 Conn. 352, 377 A.2d 1099 (1977).....         | 13            |
| <u>Distiso v. Town of Wolcott</u> , No. 3:05cv01910, 2006 WL 3355174 (D. Conn. 2006) .                                | 11            |
| <u>Farmington-Girard, LLC v. Planning and Zoning Comm’n</u> , -- A.3d --, 190 Conn. App. 743 (App. Ct. 2019).....     | 7, 8, 13      |
| <u>Fry v. Napoleon Cmty. Sch.</u> , 580 U.S. --, 137 S. Ct. 743 (2017).....   | 8, 15, 16, 17 |
| <u>Garro v. State of Conn.</u> 23 F.3d 734 (2 <sup>nd</sup> Cir. 1994) .....  | 10            |
| <u>Graham v. Friedlander</u> , FSTCV116008466S, 2017 WL 3481640 (Conn. Super. Ct. Jul. 10, 2017) .....                | 17            |
| <u>Hartford v. Hartford Mun. Employees Assn.</u> , 259 Conn. 251, 788 A.2d 60 (2002)...                               | 14            |
| <u>Hayes v. Yale-New Haven Hosp.</u> , 82 Conn. App. 58, 842 A.2d 616 (2004) .....                                    | 20            |
| <u>Hope v. Cortines</u> , 69 F.3d 687 (2 <sup>nd</sup> Cir. 1995).....  | 10, 21        |
| <u>Hsing v. Glastonbury Bd. of Educ.</u> , No. CV01-0809804-S, 2003 WL 22962412 (Conn. Super. Ct. Dec. 1, 2003) ..... | 12, 13        |
| <u>Johnson v. Statewide Grievance Comm.</u> , 248 Conn. 87, 726 A.2d 1154 (1999) .....                                | 19            |
| <u>M.A. v. New York Dept. of Educ.</u> , 1 F. Supp.3d 125 (S.D.NY. 2014) .....  | 17            |
| <u>Mendillo v. Bd. of Educ.</u> , 246 Conn. 456, 717 A.2d 1177 (1998) .....   | 13            |
| <u>Miksis v. Evanston Twp.</u> , 235 F. Supp.3d 960 (N.D. Ill. 2017) .....  | 12            |
| <u>Moore v. Kansas City Pub. Sch.</u> , 828 F.3d 687 (8 <sup>th</sup> Cir. 2016) .....                                | 12            |
| <u>Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.</u> , 297 F.3d 195 (2 <sup>nd</sup> Cir. 2002)                   | 10, 11        |
| <u>Muskrat v. Deer Creek Pub. Sch.</u> , 715 F.3d 775 (10 <sup>th</sup> Cir. 2013).....                               | 12            |
| <u>Norwich v. Lebanon</u> , 200 Conn. 697, 513 A.2d 77 (1986) .....   | 13            |
| <u>Polera v. Bd. of Educ. of Newburgh</u> , 288 F.3d 478 (2 <sup>nd</sup> Cir. 2002) .....                            | 10, 21        |
| <u>Republican Party of Connecticut v. Merrill</u> , 307 Conn. 470, 55 A.3d 251 (2012) .....                           | 8             |
| <u>Stepney, LLC v. Town of Fairfield</u> , 263 Conn. 558, 921 A.2d 725 (2003) .....                                   | 13, 14        |
| <u>Sullivan v. Bd. of Police Comm’rs</u> , 196 Conn. 208, 491 A.2d 1096 (1985) .....                                  | 20            |

### **Statutes**

|                        |                      |
|------------------------|----------------------|
| 20 U.S.C. § 1400 ..... | ii, 8, 14            |
| 20 U.S.C. § 1401 ..... | 8                    |
| 20 U.S.C. § 1412 ..... | 4, 5                 |
| 20 U.S.C. § 1414 ..... | 8                    |
| 20 U.S.C. § 1415 ..... | 8, 9, 10, 11, 15, 16 |

|  |                    |
|--|--------------------|
| Connecticut General Statute § 10-76.....   | 10, 11, 13, 14, 22 |
| Connecticut General Statute § 4-176.....   | 13                 |
| Connecticut General Statute § 46a-100..... | 20                 |
| Connecticut General Statute § 46a-60.....  | 20                 |
| Connecticut General Statute § 46a-86.....  | 21                 |

**Regulations**

|                                     |        |
|-------------------------------------|--------|
| 34 C.F.R. § 300.114.....            | 2      |
| 34 C.F.R. § 300.516.....            | 10     |
| Conn. Agencies Regs. § 10-76h ..... | 11, 14 |

## COUNTER STATEMENT OF FACTS

The minor plaintiff, Alexander M. Phillips (“Alex”), is a student with Down Syndrome who is without functional speech. **(A11)** During the 2015-16 school year, Alex attended Kindergarten at the Gilead Elementary School in Hebron, Connecticut. **(A11-A12)** Alex had an Individualized Education Program (“IEP”). **(A12)**

On February 25, 2015, Alex’s Father visited Alex’s classroom to observe him in some of his therapy sessions and activities. **(A12)** The Father was invited into the coatroom to observe Alex work with his assigned paraprofessional. **(A12)** The Father saw that there was a desk and chair for Alex in the coatroom. **(A12)**

At a Planning and Placement Team (“PPT”) meeting on March 25, 2015, the Father learned that Alex napped for approximately 2½ hours per day in the coatroom, and that Alex worked on class work or projects for approximately 40 minutes a day in the coatroom. **(A12-A13)** At that time, Alex’s IEP indicated that he “will spend 26.33 hours per week with children/students who do not have disabilities.” **(A13)** Alex, however, was spending only 9 hours per week with children/students who do not have disabilities. **(A13)** Margaret Ellsworth, Alex’s special education teacher, explained that “Alex works in the coatroom because his projects require a lot of space and there isn’t enough out in the classroom. He can be distracting to other children; they can be distracting to him.” **(A13)**

The Father had never before been notified by the school that Alex’s desk and chair had been moved into a coatroom, nor had he given his consent to such. **(A14)**

On July 27, 2015, the Father, through his attorney, filed both a Special Education Complaint form (“State Complaint”) and a Request for Due Process Hearing with the Connecticut Department of Education Bureau of Special Education. **(A100, A103-A112, A154, A230-A240)** They were supported by a detailed complaint wherein the Father explicitly alleged that “the Hebron School District violated the Individuals with Disabilities Education Act.” **(A105, A232)** The Father elaborated as follows:

The District changed the placement of Alex, his desk and his chair from the regular education classroom to a coatroom without prior notice, discussion or consent of the Father and in violation of the Least Restrictive Environment policy and Seclusion and Restraint policies as well as 34 C.F.R. § 300.114(a)(2)(i and ii)....

The District has failed to provide Alex with a Free and Appropriate Public Education, in violation of 34 C.F.R. §§ 300.17, 300.101(a), 300.0320 and 300.324.

**(A105-A106, A232-A233)** Section 300.114(a)(2) states that “Each public agency must ensure that -

(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. § 300.114(a)(2).

On September 16, 2015, the Father, thorough his attorney, filed an amendment to his complaint to identify the specific remedies he was seeking.

**(A124-A126)** On September 24, 2015, the Father, through his attorney, added that

he was also seeking monetary damages of \$180,000. **(A127)**

The Bureau of Special Education (“BSE”) held the State Complaint in abeyance to allow the Due Process Hearing to proceed, as required by regulation. **(A154, A240)**

On October 6, 2015, the District moved to dismiss some of the remedies that the Father was seeking in the Due Process request, including the claim for money damages. **(A113-A123)** In response, on November 10, 2015, the Father, through his attorney, withdrew the request for a Due Process Hearing. **(A154)**

On November 23, 2015, the BSE wrote the Father’s attorney to inquire about the status of the State Complaint. **(A154)** On December 10, 2015, the Father, through his attorney, reported that the claims remained unresolved and requested that the BSE proceed with the investigation of the State Complaint. **(A154)** The BSE investigated the State Complaint, and on March 14, 2016, issued a report on its Findings and Conclusions. **(A154)** The BSE concluded that neither the use of the coatroom space, nor the District’s failure to communicate with the Father regarding the use of the space, nor the miscalculation of the time that Alex spent with nondisabled peers, resulted in a denial of FAPE. **(A154)** At the end of the report, the BSE specifically advised the parties that they could “seek mediation and/or request a due process hearing on these same issues” if they disagreed with the conclusions reached in the investigation. **(A157)**

On September 29, 2016, Alex commenced this action, through his Father, Ralph E. Phillips, against the Town of Hebron, the Hebron Board of Education (“Board”), and various Board employees. **(A6)** The case was removed to the

United States District Court, but the District Court remanded the case back to the Superior Court because it found that the claims did not present a substantial question of federal law. **(A6, A196-A204)** On December 4, 2017, the plaintiff filed the operative thirty-two count Revised Complaint for discrimination, negligence, and civil assault.<sup>1</sup> **(A6, A11-A54)**

In support of his discrimination claims, the plaintiff alleges that the Board, by and through its employees, (i) segregated Alex from other children/students without disabilities on the basis of Alex's disabilities, (ii) deprived Alex of his rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States on account of his disabilities, and (iii) deprived Alex of his right to be educated in the least restrictive environment as provide by law. **(A14-A15)** The plaintiff expressly incorporates the Individuals with Disabilities Education Act ("IDEA"), alleging that United States Code, Title 20, Section 1412(C)(5), titled "Least Restrict Environment," provides, in pertinent part, that:

"Each public agency must ensure that –

- (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
- (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

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<sup>1</sup> Counts One, Three, Five, Seven, and Nine, are identified as discrimination claims. **(A11-A24)** Counts Eleven, Thirteen, Fifteen, Seventeen, and Nineteen, are identified as negligent per se claims. **(A25-A34)** The even counts are claims for indemnification against the Town. **(A11-A34)** The defendants did not move to dismiss the civil assault or negligence claims arising from a photographing incident **(A56)**, and as such, those claims are not part of this appeal.

**(A15)**

As to the individual defendants, the plaintiff adds that: Joshua Martin was the Director of Special Education, and he “failed to act after being questioned by the Father as to why and how long the minor plaintiff had been in the coatroom.” **(A16)** Barbara Wilson, the Head Teacher, ran the PPT meetings and prepared Alex’s IEPs, and represented to the Father that Alex was being educated in a regular, general education classroom. **(A19)** Margaret Ellsworth, Alex’s Special Education Teacher, created the daily and weekly schedule for Alex and met with the Father monthly for progress meetings and never informed the Father that Alex had been segregated from non-disabled students. **(A21)** Sheryl Poulin, Alex’s Classroom Teacher, knew or should have known that moving Alex from her classroom into the coatroom “violated the provisions of his IEP.” **(A23)**

In support of the negligence per se claims, the plaintiff incorporates all of the above allegations against the Board, and adds that each of the defendants “had a duty under 20 U.S.C. § 1412 (C)(5) to educate [Alex] in the least restrictive environment.” **(A25, A27, A29, A31, A33)** The Board, through its employees, analyzed Alex’s daily and weekly schedules to calculate and determine the maximum amount of time wherein he would be educated with non-disabled children/students and set forth in Alex’s IEP that he would spend at least 26 hours per week with non-disabled children. **(A25)**

The plaintiff further alleges the following: The Board “breached its duty under 20 U.S.C. § 1412 (C)(5)” by moving Alex into a coatroom and leaving him to sleep throughout the afternoon while non-disabled children were educated in the

classroom. **(A25)** The Board “failed to act in accordance with 20 U.S.C. § 1412(C)(5).” **(A25-A26)** Joshua Martin “breached his duty under 20 U.S.C. § 1412(C)(5) as he knew or should have known that [Alex] was not spending time with non-disabled children/students to the maximum extent possible.” **(A27)** Barbara Wilson ran the PPTs and prepared Alex’s IEPs, and she “breached her duty under 20 U.S.C. § 1412(C)(5) as she knew or should have known that [Alex] was not spending time with non-disabled children/students to the maximum extent possible.” **(A29)** Margaret Ellsworth created the daily and weekly schedule for Alex and attended weekly team meetings regarding Alex’s progress and compliance with his IEP, and she “breached her duty under 20 U.S.C. § 1412(C)(5) as she knew or should have known that [Alex] was not spending time with non-disabled children/students to the maximum extent possible.” **(A31)** Sheryl Poulin likewise “breached her duty under 20 U.S.C. § 1412(C)(5) as she knew or should have known that [Alex] was not spending time with non-disabled children/students to the maximum extent possible.” **(A33)**

On January 17, 2018, the defendants filed a motion to dismiss the discrimination and negligence per se counts, along with the corresponding indemnification claims (Counts One through Twenty). **(A7, A56)** Plaintiff filed his opposition brief on March 23, 2018. **(A7, A73)** On October 5, 2018, the trial court (Farley, J.) granted the defendants’ motion. **(A8, A245)**

The court concluded that state law claims seeking relief available under the IDEA are subject to the same exhaustion requirements under the IDEA, as claims under the ADA, the Rehabilitation Act, and other such laws. **(A257)** The court

further concluded that the exhaustion requirement applied to the plaintiff's state law claims because the gravamen of the claims is the denial of a FAPE. **(A263-A265)**

On October 23, 2018, the plaintiff filed a motion for reconsideration. **(A8, A268)** On October 29, 2018, the trial court (Farley, J.) denied the motion for reconsideration. **(A8)**

On November 13, 2018, the plaintiff filed this appeal. **(A8, A391)**

## **LEGAL ARGUMENT**

### **A. STANDARD OF REVIEW**

The doctrine of exhaustion of administrative remedies implicates subject matter jurisdiction. Farmington-Girard, LLC v. Planning and Zoning Comm'n, -- A.3d --, 190 Conn. App. 743, 750 (App. Ct. 2019). "In an appeal from the granting of a motion to dismiss on the ground of subject matter jurisdiction, [the appellate] court's review is plenary." Bd. of Educ. of Town of Stratford v. City of Bridgeport, -- A.3d --, 191 Conn. App. 360, 366 (App. Ct. 2019). "This court must decide whether the trial court's 'conclusions are legally and logically correct and find support in the facts that appear in the record.'" Id., at 367. The court may consider all well pleaded facts, "including those facts necessarily implied from the allegations," as well as "any record that accompanies the motion including supporting affidavits that contain undisputed facts." Id.

The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law.... Under that doctrine, a trial court lacks subject matter jurisdiction over an action that seeks a remedy that could be provided through an administrative proceeding, unless and until that remedy has been sought in the administrative forum.... In the absence of exhaustion of that remedy, the action must be dismissed.

Farmington-Girard, LLC, 190 Conn. App. at 751, citing Republican Party of Connecticut v. Merrill, 307 Conn. 470, 477, 55 A.3d 251 (2012).

**B. THE JUDGMENT SHOULD BE AFFIRMED BECAUSE THE TRIAL COURT PROPERLY CONCLUDED THAT THE EXHAUSTION OF ADMINISTRATIVE REMEDIES REQUIREMENT APPLIES TO STATE LAW STATUTORY AND COMMON LAW CLAIMS**

The Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400 *et seq.*, was enacted to ensure that all children with disabilities have available a free appropriate public education (“FAPE”). 20 U.S.C. § 1400(d)(1)(A). A FAPE includes specially designed instruction and related services, at public expense, that are provided in conformity with a student’s individualized education program (“IEP”) and designed to meet the unique needs of the child. 20 U.S.C. § 1401(9), (29); see Fry v. Napoleon Cmty. Sch., 580 U.S. --, 137 S. Ct. 743, 748 (2017). The IDEA sets forth requirements for initial evaluations and reevaluations, and for the development and review of IEPs. 20 U.S.C. § 1414. For instance, parents must be informed about and consent to any evaluation of their child. Id. Educators and parents must jointly develop an IEP, at least annually, for each child with a disability. 20 U.S.C. § 1414(d). Parents are permitted to examine any and all records regarding their child, and they must be given prior written notice to any changes being made to an IEP. 20 U.S.C. § 1415(b).

Federal funding for States is conditioned upon the State’s compliance with the IDEA’s extensive substantive and procedural safeguards. See 20 U.S.C. § 1412; 20 U.S.C. § 1415(a). Included within the IDEA’s substantive safeguards is a requirement that, to the maximum extent appropriate, children with disabilities be educated with children who are not disabled. 20 U.S.C. § 1412(a)(5)(B).

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A). **(Defs. Appx. at A1)**

Included within the IDEA's procedural safeguards are opportunities for children with disabilities and their parents to present a complaint, and to have an impartial due process hearing conducted by the State educational agency or by the local educational agency. 20 U.S.C. § 1415(b)(6); 20 U.S.C. § 1415(f). If the hearing required is conducted by a local educational agency, an aggrieved party may appeal to the State educational agency. 20 U.S.C. § 1415(g). If the hearing is conducted by the State educational agency, an aggrieved party can seek judicial review by bringing a civil action. 20 U.S.C. § 1415(i)(2). The complaint provision is broad and affords the opportunity to present complaints "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6).

The IDEA, and the federal regulations, explicitly state that the administrative procedures set forth in the Act must be pursued before a redress to the courts is allowed. 20 U.S.C. § 1415(l). The IDEA states that:

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 [42 U.S.C. §12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. §790 et seq.], or other Federal laws protecting 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 under subsections (f) and (g) of this section 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) (underlined added) **(A1)**; 34 C.F.R. § 300.516(e).

“The IDEA’s exhaustion requirement was intended to channel disputes related to the education of disabled children into an administrative process that could apply administrators’ expertise in the area and promptly resolve grievances.” See Polera v. Bd. of Educ. of Newburgh, 288 F.3d 478 (2<sup>nd</sup> Cir. 2002). If the plaintiff seeks relief that is *available* under the IDEA, then the plaintiff must exhaust the administrative remedies available under the IDEA before filing a civil action. Cave v. East Meadow Union Free Sch. Dist., 514 F.3d 240, 245-46 (2<sup>nd</sup> Cir. 2008). A plaintiff's failure to exhaust the administrative remedies available under the IDEA deprives a court of subject matter jurisdiction. Polera, 288 F.3d at 483; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 199 (2<sup>nd</sup> Cir. 2002); Hope v. Cortines, 69 F.3d 687, 688 (2<sup>nd</sup> Cir. 1995); Garro v. State of Conn. 23 F.3d 734 (2<sup>nd</sup> Cir. 1994).

To comply with the IDEA, Connecticut has adopted statutes and regulations governing the provision of a FAPE to children who require special education and related services and the administrative process that must be followed. See Connecticut General Statute § 10-76, at seq.. **(Defs. Appx. at A5)** General Statute § 10-76h addresses the special education hearing and review procedures, and specifically allows for an impartial due process hearing before a hearing officer appointed by the State Department of Education. The regulations provide that the hearing officer’s decision “shall be final, except that any aggrieved party may appeal

such decision under the provisions of the 20 U.S.C. Section 1415(2)(A) and the regulations adopted thereunder, as amended from time to time, section 10-76h(d)(4) of the Connecticut General Statutes.” Conn. Agencies Regs. § 10-76h-16.

In this case, the plaintiff argues that the IDEA’s exhaustion requirement does not apply to common law or state statutory claims, as opposed to claims arising under federal laws. The District Court of Connecticut has come to the opposition conclusion, holding that the IDEA’s exhaustion requirement does in fact apply to both state statutory and common law claims. See *Murphy v. Town of Wallingford*, No. 3:10-cv-278, 2011 WL 1106234, at \* 6 (D. Conn. 2011) (granting motion to dismiss common law claims of intentional infliction of emotional distress and negligent supervision for failing to exhaust the IDEA’s administrative remedies) **(A486)**; *Avoletta v. City of Torrington*, No. 3:07-cv-841, 2008 WL 905882, at \*6, 10 (D. Conn. 2008) (dismissing claims under the Connecticut Constitution, state statutes and regulations, and a common law negligent infliction of emotional distress claim, because the plaintiffs did not exhaust the IDEA’s administrative procedures) **(A450)**; *Distiso v. Town of Wolcott*, No. 3:05cv01910, 2006 WL 3355174, at \*1, 3-4 (D. Conn. 2006) (dismissing common law claims of negligent supervision and intentional infliction of emotional distress for failure to exhaust the IDEA’s administrative procedures) **(Defs. Appx. at A10)**. “[T]he plain language of the IDEA and Second Circuit case law dictate that IDEA exhaustion is required whenever a plaintiff seeks relief under any federal or state law if the relief sought is

the same as the relief that would be available under the IDEA.” Avoletta, 2008 WL 905882, at \*6.

The plaintiff’s reliance on the cited federal court cases from other jurisdictions is misplaced. (Pl.’s Br. at 8-9.) First, the cases are all vastly distinguishable. The court in Miksis v. Evanston Twp., 235 F. Supp.3d 960 (N.D. Ill. 2017), held that the plaintiff was not required to exhaust the IDEA’s administrative procedures before bringing a breach of contract claim based on an alleged breach of a settlement agreement where there was no need to evaluate the IEP and no expertise was required. In Muskrat v. Deer Creek Pub. Sch., 715 F.3d 775 (10<sup>th</sup> Cir. 2013), the court held that claims of physical abuse arising from frustration, and unrelated to the IEP, did not require exhaustion. Similarly, the court in Moore v. Kansas City Pub. Sch., 828 F.3d 687, 693 (8<sup>th</sup> Cir. 2016), concluded that claims involving harassment and rape by another student were not subject to the IDEA’s exhaustion requirement. None of these cases involved a claim that the school district had violated the child’s IEP, as is alleged in this case. Second, none of these cases addressed whether their state statutes provided an administrative remedy that needed to be exhausted in accordance with the IDEA.

In Hsing v. Glastonbury Bd. of Educ., No. CV01-0809804-S, 2003 WL 22962412, at \*3 (Conn. Super. Ct. Dec. 1, 2003), the Connecticut Superior Court aptly pointed out that, in addition to the IDEA’s exhaustion requirement, Connecticut has also adopted exhaustion requirements. **(A482)**

Congress left the details of how a parent makes a complaint regarding a special education student’s education and related services to the states. As a result, Connecticut has adopted statutes and regulations, including exhaustion requirements, that must be met pursuant to the IDEA.

Hsing, 2003 WL 22962412, at \*3, citing Conn. Gen. Stat. § 10-76h. Recognizing the benefits of the doctrine of exhaustion, the superior court dismissed all of the plaintiff's state law claims for failing to exhaust the administrative remedies available. Hsing, 2003 WL 22962412, at \*4-5.

In dismissing the plaintiff's state law claims in this case, the trial court correctly concluded that, at a minimum, "an exhaustion requirement could be inferred 'from an administrative scheme providing for agency relief.'" **(A255-A256)**

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.... We have frequently held that where 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.

Stepney, LLC v. Town of Fairfield, 263 Conn. 558, 563, 921 A.2d 725 (2003) (citations omitted); Bd. of Educ. of Town of Stratford, 191 Conn. App. at 368, quoting Norwich v. Lebanon, 200 Conn. 697, 708, 513 A.2d 77 (1986) (affirming dismissal of the plaintiffs' challenge to tuition authorization for failing to exhaust administrative remedies contained in Conn. Gen. Stat. § 4-176).

"The doctrine of exhaustion is grounded in a policy of fostering an orderly process of administrative adjudication and judicial review in which a reviewing court will have the benefit of the agency's findings and conclusions." Mendillo v. Bd. of Educ., 246 Conn. 456, 466, 717 A.2d 1177 (1998); Connecticut Life & Health Insur. Guar. Assn. v. Jackson, 173 Conn. 352, 358-59, 377 A.2d 1099 (1977); see also Farmington-Girard, LLC, 190 Conn. App. at 752 (affirming dismissal of four consolidated appeals for failing to appeal to the city's zoning board of appeals, and

thus failing to exhaust administrative remedies. The exhaustion doctrine recognizes “that agencies, not the courts, ought to have primary responsibility for the programs that [the legislature] has charged them to administer.” Stepney, 263 Conn. at 564, quoting Hartford v. Hartford Mun. Employees Assn., 259 Conn. 251, 281-82, 788 A.2d 60 (2002).

Where 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.

Stepney, 263 Conn. at 564 (holding that the plaintiff was required to exhaust his appellate administrative remedies under Conn. Gen. Stat. § 19a-229).

In this case, General Statute § 10-76h and Conn. Agencies Regs. § 10-76h-16, afforded the plaintiff an adequate administrative procedure to address his state law claims. Specifically, the statutes and regulations authorize parents to file a complaint concerning their child’s identification, evaluation, educational placement, or provision of a free appropriate public education, and to have a due process hearing conducted by an impartial hearing officer pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. 1400 et seq.. Conn. Gen. Stat. § 10-76h. In lieu of proceeding directly to a hearing, the parents can request mediation, and then if unsuccessful, proceed with a hearing. Conn. Gen. Stat. § 10-76(h)(f). Finally, if dissatisfied with the hearing officer’s decision, the parents have a right to an appeal. Conn. Gen. Stat. § 10-76(h)(d)(4).

Whereas an adequate administrative procedure existed, and whereas the plaintiff did not exhaust these administrative remedies before filing the subject civil

action, the trial court properly dismissed Counts One through Twenty of the plaintiff's complaint for lack of subject matter jurisdiction.

**C. THE JUDGMENT SHOULD BE AFFIRMED BECAUSE THE TRIAL COURT PROPERLY CONCLUDED THAT THE GRAVAMEN OF THE PLAINTIFF'S LAWSUIT SEEKS REDRESS FOR THE DENIAL OF A FREE APPROPRIATE PUBLIC EDUCATION**

In Fry, 137 S. Ct. at 754, the United States Supreme Court considered the applicability of the IDEA's exhaustion requirement where, as here, the plaintiff did not allege a direct claim under the IDEA. The Court held that a reviewing court must look to the gravamen of the complaint, and that the exhaustion requirement applies anytime the complaint seeks relief for the denial of a free appropriate public education regardless of the statute relied upon in the pleadings. Id.

The Court did not define the term "relief" in regards to the remedies identified in a party's prayer for relief, as the plaintiff suggests. Instead, the Court focused on the right at issue, and concluded that "§ 1415(l)'s exhaustion rule hinges on whether a lawsuit seeks relief for the denial of a free appropriate public education." Fry, 137 S. Ct. at 754. The Court explained that under the IDEA, an individualized education program "serves as the primary vehicle for providing each child with the promised FAPE." Id., at 749.

In determining whether a plaintiff is seeking relief for the denial of a FAPE, the Court posed two hypothetical questions: (1) could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school; and (2) could an adult at the school have pressed essentially

the same grievance? Fry, 137 S. Ct. at 755-56.<sup>2</sup> The Court explained that if the answer to those questions is yes, and a denial of FAPE is not expressly alleged in the complaint, then the complaint is not likely to be about a denial of a FAPE and there is no exhaustion requirement. Id. Conversely, if the answer to those questions is no, “then the complaint probably does concern a FAPE, even if it does not explicitly say so.” Id.

The Court then posed a hypothetical factual scenario that is illustrative to the case here.

[S]uppose next that a student with a learning disability sues his school under Title II for failing to provide remedial tutoring in mathematics. That suit ... might be cast as one for disability-based discrimination, grounded on the school’s refusal to make a reasonable accommodation; the complaint might make no reference at all to a FAPE or an IEP. But can anyone imagine the student making the same claim against a public theater or library? Or, similarly, imagine an adult visitor or employee suing the school to obtain a math tutorial? The difficulty of transplanting the complaint to those other contexts suggest that its essence – even though not its wording – is the provision of a FAPE, thus bringing § 1415(l) into play.

Fry, 137 S. Ct. at 756-57.

Applying the two hypothetical questions to this case reveals that the plaintiff is seeking relief for a denial of a FAPE. The plaintiff is challenging the provision of educational services to the minor plaintiff, Alex, in regards to his IEP, and specifically in regards to the IDEA’s requirements that students with disabilities be educated in the least restrictive environment, and that parents be notified of any progress and/or changes to their child’s IEP. As in Fry, such a challenge could not

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<sup>2</sup> It’s unclear where the plaintiff derived the four question “flow chart” articulated in his brief, but the Fry Court did not set forth any such analytic framework. (Pl.’s Br. at 14-21.)

be brought against a public facility other than a school, nor could it be brought by an adult visitor or employee in the school. The plaintiff could not, for instance, sue a library for failing to educate his son in a least restrictive environment or for failing to report on his academic progress because a library is not charged with the responsibility of educating his son at all. Similarly, an adult could not bring such a claim against a school. See e.g. Graham v. Friedlander, FSTCV116008466S, 2017 WL 3481640 (Conn. Super. Ct. Jul. 10, 2017) (applying exhaustion requirement based on Fry analysis where the plaintiffs alleged that the defendant hired a service provider who was unqualified, uncertified, and unable to provide the required remedial services needed by the students as part of their special educational programs) (**Defs. Appx. at A17**); M.A. v. New York Dept. of Educ., 1 F. Supp.3d 125, 131-32 (S.D.N.Y. 2014) (applying exhaustion requirement to claim that disabled student was removed from classroom to the hallway for separate instruction).

In Fry, the Supreme Court also identified the history of the proceedings as a “further sign that the gravamen of a suit is the denial of a FAPE.” Fry, 137 S. Ct. at 757. Although not dispositive, a prior attempt by the plaintiff to invoke the IDEA’s administrative remedies is “strong evidence” that the substance of the plaintiff’s claim concerns the denial of a FAPE. The Court explained:

In particular, a court may consider that a plaintiff has previously invoked the IDEA’S formal procedures to handle the dispute--thus starting to exhaust the Act’s remedies before switching midstream. ... A plaintiff’s initial choice to pursue that process may suggest that she is indeed seeking relief for the denial of a FAPE--with the shift to judicial proceedings prior to full exhaustion reflecting only strategic calculations about how to maximize the prospects of such a remedy....

Fry, 137 S. Ct. at 757.

The history of the proceedings in this case underscores the conclusion that Counts One through Twenty seek relief for the denial of a FAPE. The plaintiff previously filed both a State Complaint and a request for a Due Process Hearing with the BSE asserting substantially the same allegations as presented in Counts One through Twenty of this lawsuit. The plaintiff explicitly alleged that “the Hebron School District violated the Individuals with Disabilities Education Act,” and that “[t]he District changed the placement of Alex, his desk and his chair from the regular education classroom to a coatroom without prior notice, discussion or consent of the Father and in violation of the Least Restrictive Environment policy...” **(A105-A106, A232-A233)** The plaintiff subsequently withdrew the request for a Due Process Hearing, but not because he suddenly believed that the District had fulfilled its FAPE obligation. **(A154)** On the contrary, the plaintiff requested that the SBE continue with its investigation of the State Complaint, including the claim that the district failed to educate Alex in the least restrictive environment. **(A154)** The trial court properly found that this history confirms that the plaintiff’s claims seek relief for the denial of a FAPE. **(A264-A265)**

The plaintiff’s reliance on the district court’s ruling remanding this case back to the superior court is misguided. (Pl.’s Br. at 18.) The district court merely decided that the original complaint did not raise a substantial question of federal law; it did not opine on the IDEA’s exhaustion requirement. In declining jurisdiction, the court explained that a resolution of the plaintiff’s claims was not predicated on a substantial question of federal law, but rather on fact-bound and situation specific questions regarding the need for and effect of placing Alex in the coatroom for

supplemental instruction, the resolution of which would not govern other similar cases asserting a breach of duty under the IDEA to educate children in the least restrictive environment. **(A202)**

Whereas the plaintiff's claims seek relief for the denial of a FAPE, the trial court properly dismissed Counts One through Twenty of the plaintiff's complaint for failure to exhaust the available administrative remedies.

**D. THE JUDGMENT SHOULD BE AFFIRMED BECAUSE THE TRIAL COURT PROPERLY GRANTED THE DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

Having properly concluded that the exhaustion requirement contained both in the IDEA and in Connecticut's implementing statutes and regulations applies to state law claims, and that the plaintiff's claims seek relief for the denial of a FAPE, the trial court properly granted the defendants' motion to dismiss because none of the exceptions to the exhaustion requirement are applicable to this case.

Despite the important public policy considerations underlying the exhaustion requirement, the Connecticut Supreme Court has grudgingly recognized three narrow exceptions where: "recourse to the administrative remedy would be futile or inadequate; the procedures followed by the administrative agency are constitutionally infirm; or injunctive relief from an agency decision is necessary to prevent immediate and irreparable harm." Johnson v. Statewide Grievance Comm., 248 Conn. 87, 103, 726 A.2d 1154 (1999). None of these exceptions apply to the facts of this case.

While the plaintiff argues that he should not be beholden to the exhaustion requirement because he is seeking money damages, his claim for money damages

does not make recourse to the IDEA's administrative remedies futile. While a parent is required to pursue a Due Process Hearing, that process does not foreclose a parent from subsequently obtaining monetary relief in the courts for non-IDEA claims, nor does it obviate the tremendous benefit of having a complete factual record and administrative expertise to facilitate judicial review.

An analogy can be drawn to our state's employment discrimination statutes. The Connecticut Fair Employment Practices Act, General Statutes § 46a-60, *et seq.*, allows an individual to file a civil action for an alleged discriminatory practice, but only *after* the individual first files an administrative charge with the Connecticut Commission on Human Rights and Opportunities "CHRO" challenging that conduct. See Conn. Gen. Stat. § 46a-100. The CHRO is charged "with the initial responsibility for the investigation and adjudication of claims of employment discrimination." Atkins v. Bridgeport Hydraulic Co., 5 Conn. App. 643, 501 A.2d 1223 (App. Ct. 1985), quoting Sullivan v. Bd. of Police Comm'rs, 196 Conn. 208, 216, 491 A.2d 1096 (1985). The plaintiff who "[f]ails to follow the administrative route that the legislature has prescribed for his claim of discrimination, lacks the statutory authority to pursue that claim in the Superior Court." Sullivan, 196 Conn. at 216; see also Hayes v. Yale-New Haven Hosp., 82 Conn. App. 58, 60, fn.2, 842 A.2d 616 (2004).

Like the BSE, the CHRO does not have the authority to award all the remedies that an aggrieved party may be seeking, i.e. punitive damages, but that limitation does not provide a loophole for an individual to avoid the administrative process by simply asserting a claim for damages that the CHRO lacks the authority

to award. See Conn. Gen. Stat. § 46a-86(b). The same should hold true for parents seeking relief for a denial of a FAPE.

In the Second Circuit, the law is clear that a request for money damages does not eliminate the IDEA's exhaustion requirement. Polera, 288 F.3d at 487-88; Hope v. Cortines, 69 F.3d 687, 688 (2<sup>nd</sup> Cir. 1995) (a party "cannot escape IDEA's exhaustion requirement by drafting a complaint artfully avoiding an IDEA claim where IDEA offers plaintiffs the very relief they seek"). "Where, as here, a full remedy is available at the time of injury, a disabled student [or his parents] claiming deficiencies in his or her education may not ignore the administrative process, then later sue for damages." Polera, 288 F.3d at 488. The defendants submit that the Second Circuit's approach is the correct one.

Neither the IDEA, nor Connecticut's implementing statutes, nor the corresponding regulations, carve out an exception to the IDEA's exhaustion requirement for parents seeking monetary damages. As such, the trial court properly concluded that the plaintiff has not asserted any known exception to the IDEA's exhaustion requirement.

## **CONCLUSION AND RELIEF REQUESTED**

The judgment of the trial court in favor of the defendants should be affirmed.

First, the trial court properly concluded that the exhaustion requirement set forth in the Individuals with Disabilities Education Act and Connecticut General Statute § 10-76h applies to state law claims in addition to claims arising under federal law. Second, the trial court properly concluded that Counts One through Twenty of the plaintiff's complaint were subject to said exhaustion requirement because they seek relief for a denial of a FAPE. Third, the trial court properly concluded that the plaintiff did not identify any recognized exception to the exhaustion requirement in this case.

Wherefore, the defendants request that the trial court judgment be affirmed.

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## CERTIFICATION

This is to certify that the defendant-appellee's Brief complies with all of the provisions of Practice Book § 67-2. This Brief and Appendix is a true copy of the Brief and Appendix submitted electronically this 23<sup>rd</sup> day of September, 2019. This Brief and Appendix has been delivered electronically to the last known email addresses of each counsel of record for whom an email address has been provided. This Brief and Appendix does not contain any names or other personal identifying information prohibited from disclosure by rule, statute, court order or case law.

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