CONNECTICUT STATE BOARD OF EDUCATION **INQUIRY #**
Complainant

v.

KILLINGLY BOARD OF EDUCATION **JANUARY 7, 2023**
Respondent

MOTION TO DISMISS THE COMPLAINT AND INQUIRY FOR LACK OF JURISDICTION

For the reasons more particularly set forth below, the Killingly Board of Education hereby respectfully submits this Motion to Dismiss for Lack of Jurisdiction the April 5, 2022 Complaint against the Board, as well as the State Board of Education's November 2, 2022 approval of an inquiry into the allegations.

I. Brief history of the case.

The State Board of Education, ("SBE"), approved a November 2, 2022 Resolution to conduct an Inquiry before a duly designated hearing panel, following receipt of a report by its legal counsel, and investigator, attorney Michael McKeon into the allegations raised by the complainants. Attorney McKeon's report alleged that the Killingly Board of Education failed or is unable to make reasonable provisions to implement the educational interest of the State of Connecticut.

II. Argument for dismissal.

A. The Motion to Dismiss Must Be Granted Because the Hearing Panel Lacks Jurisdiction on Procedural Grounds.

Pursuant to §10-4b(a), prior to filing a §10-4b Complaint, a resident of the local school district **first** must file a Complaint with the **local school district** alleging the failure or inability of the local board of education to implement the educational interest of the state, **and attempt to resolve it with the local school district.** The relevant portion of the statute specifically says,

> "Any resident of a local or regional school district, or parent or guardian of a student enrolled in the public schools of such school district **who has been unable to resolve a complaint with the board of education of such local or regional school district may file** with the State Board of Education a complaint in writing…"

The statute makes it clear that it is only **after that preliminary step has been taken**, and after attempts to resolve the issue with the local board have failed, is the resident allowed, by statute, to file a §10-4b Complaint with the State Commissioner of Education.

This mandatory prerequisite further is emphasized, and repeated, in the State Department of Education's own regulations.

See Agency Regs. §10-4b-3a(1) specifically states,

> "A resident of a local or regional school district, or parent or guardian of a student enrolled in the public schools of such school district **who has been unable to resolve a complaint with the board of education may file a written complaint with the Commissioner…"**

In this case, the complainants, irrefutably and undeniably, failed to follow the requirements of Agency Regs. §10-4b(a) and §10-4b–3a(1). They failed to take the required preliminary step of **first** filing a complaint with the local board of education, and attempting unsuccessfully to resolve it there, **before** filing their complaint with the Commissioner and the State Board of Education. Therefore, as a matter of law, the Commissioner and the State Board of Education lack jurisdiction to hear the complaint, such that the complaint must be dismissed.

Assuming arguendo the complainants attempt to refute this undeniable fact, the record supports the factual and legal basis for the motion.

Here, the record shows that the complainants failed to undertake that crucial first step. The record shows that in their April 5, 2022 complaint, the complainants asserted that "the Killingly Board of Education has "failed to fulfill the educational interest of the State of Connecticut by failing to provide the minimum services and supports necessary to deal with the social, emotional and mental health needs of the students of Killingly High School." Complaint, p.1, ¶2.

The record shows, however, no indication in either the complaint, or in attorney McKeon's report, that the complainants filed any complaint, whatsoever, with the local board of education, let alone a complaint alleging the local Board "failed to fulfill the educational interest of the State of Connecticut by failing to provide the minimum services and supports necessary

to deal with the social, emotional and mental health needs of the students of Killingly High School."

The record further shows no indication in either the complaint, or in attorney McKeon's report, that the issues in any such mythical complaint were unsuccessfully attempted to be resolved with the local Board before the complainants filed their complaint with the Commissioner and the State Board of Education. Indeed, the record shows that the complainants took no "good faith" or any other kind of efforts, at all, to resolve the purported "failure" of the local Board to fulfill the educational interest of the state "by failing to provide the minimum services and supports necessary to deal with the social, emotional and mental health needs of the students of Killingly High School." To the contrary, the complainants completely skipped over the crucial required first step in the statutory and regulatory process, jumping instead to filing a complaint with the State Commissioner and the State Board of Education.

Quite simply, procedurally, the complainants' complaint is precluded, as a matter of law, never should have been accepted by the Commissioner for investigation, and a vote on the subsequent investigation of the complaint never should have been taken by the State Board of Education. The filing of the complaint with the Commissioner and the State Board, along with the State Board's vote on the inquiry, were precluded, and, thus, were void ab initio. Therefore, the Motion to Dismiss must be granted.

B. The Motion to Dismiss Must Be Granted Because the Hearing Panel Lacks Jurisdiction on Substantive Grounds.

The Motion to Dismiss must be granted because the hearing panel lacks jurisdiction to act on the Complaint, and to conduct the inquiry, because the petitioners raise only a non-justiciable discretionary political question.

A motion to dismiss

> "properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court." (Internal quotation marks omitted.) *C.R. Klewin Northeast, LLC v. State*, 299 Conn. 167, 174, 9 A.3d 326 (2010). "Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it.... [A] court lacks discretion to consider

> the merits of a case over which it is without jurisdiction.... The objection of want of jurisdiction may be made at any time ... [a]nd the court or tribunal may act on its own motion, and should do so, when the lack of jurisdiction is called to its attention.... The requirement of subject matter jurisdiction cannot be waived by any party and can be raised at any stage in the proceedings." (Internal quotation marks omitted.) *Burton v. Dominion Nuclear Connecticut, Inc*., 300 Conn. 542, 550, 23 A.3d 1176 (2011).

It is axiomatic that

> "no branch of a government organized under a constitution may exercise any power that is not explicitly bestowed by that constitution or that is not essential to the exercise thereof." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 2 L.Ed. 60 (1803); *State v. Clemente*, 166 Conn. 501, 533, 353 A.2d [192 Conn. 724] 723 (1974); *Norwalk Street Ry. Co.'s Appeal,* 69 Conn. 576, 597, 37 A. 1080 (1897); *Opinion of the Judges of the Supreme Court as to Constitutionality of Soldiers' Voting Act,* 30 Conn. 591, 593-94 (1862).

The constitution of this state,

> "framed by a convention elected for that purpose and adopted by the people, embodies their supreme original will, in respect to the organization and perpetuation of a state government; the division and distribution of its powers; the officers by whom those powers are to be exercised; and the limitations necessary to restrain the action of each and all for the preservation of the rights, liberties and privileges of all; and is therefore the supreme and paramount law, **to which the legislative, as well as every other branch of the government, and every officer in the performance of his duties, must conform.**" (Emphasis added). *Kinsella v. Jaekle,* 192 Conn. 704, 475 A.2d 243 (1984).

> "Whatever that supreme original will prescribes, the General Assembly, and every officer or citizen to whom the mandate is addressed, **must do; and whatever it prohibits, the General Assembly, and every officer and citizen, must refrain from doing**; and if either attempt to do that which is prescribed, in any other manner than that prescribed, or to do in any manner that which is prohibited, **their action is repugnant to that supreme and paramount law, and invalid**." (Emphasis in original.) *Opinion of the Judges of the Supreme Court as to Constitutionality of Soldiers' Voting Act*, 30 Conn. 591, 593-94 (1862).

The political question doctrine, is based on the principle of separation of powers. *Board of Education v. Naugatuck,* 257 Conn. 409, 424, 778 A.2d 862 (2001); *Nielsen v. Kezer,* 232 Conn. 65, 75, 652 A.2d 1013 (1995). The characterization of an issue as political is a convenient shorthand for declaring that some other branch of government has constitutional authority over the subject matter.

The courts long have recognized that the separation of powers

"is one of the fundamental principles of the American and Connecticut constitutional systems." *Stolberg v. Caldwell,* 175 Conn. 586, 598, 402 A.2d 763 (1978), appeal dismissed sub nom. *Stolberg v. Davidson*, 454 U.S. 958, 102 S.Ct. 496, 70 L.Ed.2d 374 (1981); see also Conn. Const., amend. XVIII ("[t]he powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another")…"[t]he essential purpose of the separation of powers is t**o allow for independent functioning of each coequal branch of government within its assigned sphere of responsibility, free from risk of control, interference, or intimidation by other branches.**" (Emphasis added.) *Nixon v. Fitzgerald*, 457 U.S. 731, 760-61, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982); OFFICE OF GOV. v. SELECT COMMITTEE OF INQ., 858 A.2d 709, 271 Conn. 540 (2004).

"Unlike many other constitutional guarantees, violations of which require a showing of harm in order to entitle the victim of the violation to relief, **a breach of the separation of powers principle is, contemporaneously, a constitutional violation and a tangible harm.** In other words, **action by one branch of government that violates the separation of powers is, in and of itself, a harm,** in that the branch whose sphere of authority has been encroached upon has remained neither independent nor free from the risk of control, interference or intimidation by other branches. Id.

Additionally, it is well established

"that a court **cannot mandate performance of a constitutional duty** by a legislature, particularly where that duty **involves the exercise of discretion necessary to the enactment of legislation**.... [I]n all human contrivances confidence must be reposed somewhere, and ... under the distribution of powers ... in our State, it is not given to the judiciary to compel action on the part of a coordinate branch of the government.... That the votes of individual legislators should be subject to direct control by judicial decree ... is a proposition we cannot accept." (Emphasis added, Citations omitted; emphasis in original; internal quotation marks omitted.) *Nielsen v. State*, 236 Conn. 1, 670 A.2d 1288 (1996).

Similarly, the State's executive branch cannot mandate performance of a constitutional duty of voting on issues before it by a policy making body such as a local Board of Education where that duty, the duty to vote, involves the exercise of discretion necessary to the enactment of the policy at issue.

Indeed, it is the "**exclusive legislative jurisdiction… over non-mandatory votes by a duly elected municipal agency on a purely political question**." *OFFICE OF GOV. v. SELECT COMMITTEE OF INQ.*, 858 A.2d 709, 271 Conn. 540 (2004). Those non-mandatory votes are nonjusticiable political questions.

There are six circumstances in which a given issue may be characterized as a nonjusticiable political question, the first of which is where the text of the constitution demonstrates that the issue is committed to another branch of government. *Roger Sherman Liberty Ctr. Inc. v. Williams,* 52 Conn. Supp. 118, 28 A.3d 1026 (2011).

The vote of a duly elected agency implicates a clear separation of powers issue and must be suppressed as it involves a nonjusticiable political question.

In this case, the duly authorized elected agency of the town of Killingly, the Killingly Board of Education, considered the approval of a School Based Health Center at Killingly High School, and, at its March 16, 2022 meeting, voted to reject authorization of such a center at the High School. That is, the vote involved a nonjusticiable political question and implicates a clear separation of powers issue. The Killingly Board of Education's decisions on a purely discretionary political question are owed due respect.

For the State to interfere and "force corrective action" after a local policy making Board of Education exercises its right to vote on a discretionary purely political policy making question such as the establishment of a School Based Health Center impermissibly violates the right of each individual member of that policy making Board to exercise his or her right to vote.

Here, deciding the merits of the petitioners' claims, that the Killingly Board of Education failed to implement the educational interests of the state by voting to reject a proposal for establishment of a School Based Health Center, inextricably and impermissibly involves this panel in making an initial policy determination of a clearly discretionary political question. There was no failure to implement the educational interests of the state by voting to reject a School Based Health Center, when the adoption of a School Based Health Center is

discretionary and not required by law. Because the adoption of a School Based Health Center was discretionary in nature, the Killingly Board had absolute authority, as a policy making body, to vote to reject adoption of that policy to establish a School Based Health Center.

The law is clear on this. No executive branch agency has the authority to interfere with a lawful vote by any legislative policy making body. That is called a non-justiciable political question, left solely to the legislative policy making branch to decide.

> "An **administrative agency, as a tribunal of limited jurisdiction, must act strictly within its statutory authority."** (Internal quotation marks omitted.) *State v. State Employees' Review Board,* supra, 231 Conn. 406. "It is a familiar principle that [an administrative agency] which exercises a limited and statutory jurisdiction **is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation.**... [*Castro v. Viera*, 207 Conn. 420, 427-28, 541 A.2d 1216 (1988)]." (Internal quotation marks omitted.) *Hall v. Gilbert & Bennett Mfg. Co.*, 241 Conn. 282, 291, 695 A.2d 1051 (1997)". (Emphasis added.) *Nizzardo v. State Traffic Commission*, 788 A.2d 1158, 259 Conn. 131 (2002).

There is no enabling legislation that allows any State agency to compel the reversal of a discretionary vote by a local policy making body. There also is no enabling legislation that allows any State agency to compel a local policy making body into voting to approve a School Based Health Center, when a School Based Health Center is not statutorily mandated.

Furthermore, the facts contained in the petitioners' Complaint are paramount and determinative as to the agency's determination of jurisdiction. *Nizzardo v. State Traffic Commission*, 788 A.2d 1158, 259 Conn. 131 (2002).

The facts on the face of the Complaint and the petitioners' Motion, here, clearly demonstrate that this State agency has absolutely no jurisdiction to allow the petitioners to intervene in the Killingly Board's policy making decision.

Yet, in their Complaint, the petitioners seek just that - for this State executive branch agency, without authority to do so, to interfere with, and decide upon, a lawful vote by a local local policy making body. More importantly, the petitioners seek this agency to compel the petitioners to do their bidding through the awesome power of the State on a nonjusticiable political issue. Needless to say, this is wholly impermissible and cannot happen.

It was clear, first, from the petitioner's initial Complaint, that they filed it for an improper purpose, but that purpose has become abundantly clearer in their Motion to Intervene. They filed their claim, and eagerly await participation in pushing for success on their claim, for only one specific improper purpose: to **"force"** (their word) a duly elected local Board of Education to change a lawful vote rejecting the adoption of a School Based Health Center operated by a provider called "Generations Family Health Center". The petitioners lobbied their elected representatives on the Killingly Board of Education strenuously for the adoption of that proposal, but the petitioners didn't get their way. The Board rejected that proposal in a properly conducted public meeting in a properly called vote by its duly elected members. The petitioners were sorely angered by that vote. So they took their battle to the State, filing the §10-4b Complaint. As can be seen in the Complaint, they were quite clear as to what they wanted the State to do. They said, quite blatantly, that they want the State to **"force corrective action**" against the Killingly Board of Education for its **"failure" to vote to approve a School Based Health Center"** proposed by Generations Family Health Center. The petitioners also, quite clearly, stated in their Motion that they continue to urge the State to **"force corrective action"** on the Killingly Board, in part now also, because they are "troubled" by their perceived and purported "differences" in a proposal the Board may vote to approve for a School Based Health Center submitted by a competitor provider, Community Health Centers, Inc.

They were even clearer in this latest pleading, that they seek State assistance in compelling the local Board to act in its favor on a purely discretionary political decision, stating in their Motion to Intervene,

> "Of note **for purposes of this motion** is the fact that an unincorporated group of 57 parents, teachers, students and other citizens (sic) of Killingly, under the name Concerned Residents/Parents of Killingly Students (hereinafter "Concerned Residents:), filed a complaint pursuant section (sic) 10-4b of the Connecticut General Statutes, on April 5, 2022, asserting that, in **voting down on March 16, 2022, a proposal by the Superintendent of Schools of Killingly to contract with Generations Family Health Centers** (hereinafter "Generations") for the establishment of a school-based health center,

the Killingly Board of Education failed to implement the educational interests of the state." Compl. 1-2.

Unfortunately, the facts on the face of the Complaint, and now their Motion to Intervene, show the filing of those pleadings was for that entirely improper purpose. One that violates the doctrine of separation of powers, and that seeks improperly to use the full force of the State to interfere with the right of duly elected official members of the local Board of Education to cast their votes on a discretionary purely political issue. Interference with the vote of anyone, let alone duly elected officials, defies the most basic tenets of our Constitutional republic, and of our State, (the "Constitution State").

Here, the petitioners filed their Complaint for a wholly improper purpose, and this agency panel's inquiry also was established based on a wholly improper purpose: to compel elected officials to reverse their vote on a public issue, and, now apparently, to preclude a potential vote of approval on a second public issue involving a competitor proposal.

An electorate's satisfaction with its local government is a matter left to the ballot box, not to "forced" compulsion by an administrative agency of the State.

Neither the State Department of Education, nor this panel of the State Board of Education, has the jurisdiction or authority to interfere with a duly elected policy making Board's discretionary decision to vote to reject a proposal to adopt any School Based Health Center. For this panel to accept jurisdiction under such circumstances, inextricably and improperly involves both agencies in making a policy determination of a clearly political discretionary nature. See *Connecticut Coalition for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 295 Conn. 240 (2010).

The simple truth is that the Killingly Board of Education, as an independently functioning branch of municipal government, had, and has, an absolute constitutional right, as individually elected members of the Board, to vote their conscience on a discretionary matter of public policy, free from the risk of control, interference or intimidation by other branches of government, including from the State Department of Education and the State Board of Education. The power to interfere in such a manner, as is being requested of this panel by the

petitioners, simply is not, and never was, explicitly bestowed upon it. To do as the petitioners demand, to find that the Killingly Board of Education, by its March 16, 2022 vote to reject the School Based Health Center, failed to implement the educational interest of the State, (which is the only claim that the petitioners have citied in their Complaint, as is expressly emphasized by their admission of the purpose of their Complaint in their Motion to Intervene), unquestionably would be repugnant to the law, and would be invalid ab initio.

Not only can this agency panel not provide the relief the petitioners seek. It also has no jurisdiction to even consider the propriety of the Killingly Board's vote on any particular discretionary political policy issue without violating constitutional principles of separation of powers and the right of duly elected officials to vote their conscience. That is squarely left up to the exclusive jurisdiction to the Killingly Board.

Given the impropriety of the basis for this Complaint, the State Board of Education never should have accepted the Complaint, in the first place, and the State Board of Education never should have approved an inquiry, as neither had the statutory or constitutional basis to do so. Having done so, nonetheless, the Motion to Dismiss for lack of jurisdiction must be GRANTED forthwith.

III. Conclusion.

WHEREFORE, for all of the reasons set forth above, and as a matter of law, the complainants' April 5, 2022 complaint, along with the State Board of Education's November 2, 2022 vote to conduct an inquiry into that complaint, must be dismissed by this panel for lack of jurisdiction.

Respectfully submitted,
KILLINGLY BOARD OF EDUCATION

By: *Deborah G. Stevenson*

Attorney Deborah G. Stevenson
Juris No. 716740
P.O. Box 704
Southbury, CT 06488
Tel. (860) 354-3590
Fax (860) 354-9360
Stevenson@dgstevensonlaw.com

CERTIFICATION

This is to certify that, on this date, the above document was provided electronically, in person, or by direct mail to: Assistant Attorney General Darren Cunningham, Office of the Attorney General, 165 Capitol Avenue, Hartford, CT 06106, Tel. (860) 808-5210, Fax (860) 808-5385, email: darren.cunningham@ct.gov; attorney Michael McKeon, Connecticut State Department of Education, 450 Columbus Boulevard, Hartford, Ct 06103, Tel. 860-713-6517, email: mike.mckeon@ct.gov.

Deborah G. Stevenson
Deborah G. Stevenson