

STATEMENT OF AMICUS CURIAE

Education Law Center (ELC) is a non-profit organization in Newark, New Jersey established in 1973 to advocate on behalf of public schoolchildren for access to an equal and adequate education under state and federal laws. ELC works to improve educational opportunities for low-income students and students with disabilities through policy initiatives, research, public education, and legal action. ELC represented the plaintiff schoolchildren in *Abbott v. Burke*, 149 NJ 145, 693 A2d 417 (1997) and continues to advocate on their behalf to ensure effective implementation of the *Abbott* remedies.

Because of its expertise in education law and policy, ELC has recently established Education Justice, a national program to advance children's opportunities to learn. Education Justice provides to advocates seeking better education in states across the nation, *inter alia*, analyses and assistance on: educational opportunity and "adequacy" litigation; high quality preschool and other proven educational programs; education cost studies; resources gaps; and policies that help schools build the know-how to narrow and close achievement gaps. Education Justice/ELC has participated as *amicus curiae* in state educational opportunity cases in South Carolina, Colorado, Indiana, and Maryland.

INTRODUCTION

The Amicus seeks to assist the Court in reviewing the Court of Appeals' truncated treatment of the "uniform and general" education provision of the Oregon Constitution, Art. VIII, §3, and the right to educational opportunity this provision bestows on Oregon schoolchildren. Article VIII, § 3 provides:

The Legislative Assembly shall provide by law for the establishment of a uniform, and general system of Common schools.

Amicus also seeks to assist the Court by summarizing the historical background of the education clauses that appear in all 50 state constitutions and the manner in which numerous sister states have ruled in similar cases under these analogous education clauses. A rich body of decisions from other jurisdictions defines educational opportunity in substantive terms based on the education clauses in various state constitutions. In these cases, a constitutionally adequate education emphasizes preparation for productive citizenship and work.

ARGUMENT

A. The Court of Appeals' reliance on *Olsen* is misplaced.

In their First Amended Complaint, plaintiffs cite Article VIII, section 3, of the Oregon Constitution, which requires the Legislature to "provide by law for the establishment of a uniform and general system of Common schools" (§ 70) and assert that a controversy exists between the parties regarding their rights and duties under Article VIII, section 3, making a judicial declaration necessary and

appropriate at this time (§ 72). Before this Court, plaintiffs' Petition for Review, Questions Presented on Review, asks "(2) [w]hether the legislature violates Article VIII, section 3 of the constitution when it fails to fund public education sufficiently to maintain an adequate system of common schools in the state," that is, whether the legislature fails to fulfill its constitutional responsibility when it does not provide a "uniform and general system of Common schools."

In reviewing the "uniform and general" provision, the Court of Appeals misunderstood this Court's interpretation of Art. VIII, section 3, in *Olsen v. State*, 276 Or 9, 554 P2d 139 (1976) and relied on *dicta* in the unreviewed appellate ruling in *Sherwood School Dist. 88J v. Washington Cty. Ed.*, 167 Or App 372, 6 P3d 518, *rev den* 331 Or 361 (2000). In *Olsen v. State*, 276 Or 9, 554 P2d 139 (1976), this Court found that the Oregon Constitution's "uniform and general" education clause, "Art. VIII, § 3, is complied with if the state requires and provides for a minimum of educational opportunities[.]" The *Pendleton* plaintiffs allege that the State is not funding "a minimum of educational opportunity" in school districts across the state and has thus violated the constitution.

Other state courts in numerous educational opportunity cases have ruled that a minimum or basic educational opportunity is the right of schoolchildren in their states. These courts have afforded the parties the opportunity to argue the parameters of the requisite opportunity and have allowed plaintiffs to bring evidence to demonstrate that this level of opportunity is not available because of inadequate funding. Similarly here, because Article VIII, section 3, requires "a

minimum of educational opportunity,” Oregon courts can and should properly adjudicate whether this minimal opportunity is being provided.

**B. A rich body of constitutional interpretation confirms plaintiffs’
Article VIII, § 3 claim.**

1. The need for a well-educated populace to preserve a republican form of government is a cornerstone of American democracy.

The Founders of the American Republic strongly emphasized the importance of education in building the new nation. They believed an enlightened, broad-based approach to schooling was needed in order to develop “a new republican character, rooted in the American soil * * * and committed to the promise of an American culture.” Lawrence A. Cremin, *American Education: The National Experience 1783-1876*, 3 (1980).

This “new republican character” was to have two primary components. First was the implanting of “virtue,” as defined by the classical notion that citizenship required a commitment to a shared public life of civic duty. *See* Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (1969). Second was the notion that all citizens must obtain the knowledge and skills needed to make intelligent decisions. As John Adams put it:

[A] memorable change must be made in the system of education and knowledge must become so general as to raise the lower ranks of society nearer to the higher. The education of a nation, instead of being confined to a few schools and universities for the instruction of the few, must become the national care and expense for the formation of the many.

David McCullough, *John Adams* 364 (2001). Thomas Jefferson also wrote extensively on the need for common schools for all people:

I think by far the most important bill in our whole code is that for the diffusion of knowledge among the people. No other sure foundation can be devised for the preservation of freedom and happiness.

Letter to George Whyte (1786).

The Founders' ideals for democracy were clearly reflected in the education clauses of the northeastern states' constitutions that had been originally written in the 17th century colonial period and were adopted into their first state constitutions in the late 18th century. They have remained largely unchanged ever since. The Massachusetts Constitution, for example, provides:

Wisdom, and knowledge, as well as virtue * * * being necessary for the preservation of their rights and liberties * * * it shall be the duty of legislators and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and * * * public schools and grammar schools in the towns * * *.

Mass. Const. pt. II, ch. V, § 2 (1780). The British Privy Council vetoed some colonial provisions as contrary to English educational traditions, but they were later reenacted, in Pennsylvania, for example. *See* 1 *Children and Youth in America: A Documentary History* 632 n. 2 (Robert H. Bremner ed., 1970).

The education clauses of most state constitutions in other parts of the country were written during the 19th century, generally inspired by the common schools movement that was the major education initiative of that era. Cremin, *supra*, at 3. As its name implies, the common schools movement was an attempt to educate in one setting all children living in a particular geographic area,

whatever their class or ethnic background. The common school “would be open to all and supported by tax funds. It would be for rich and poor alike[.]” Cremin, *supra*, at 138. Furthermore, the common schools movement continued and advanced the belief that education was preparation for citizenship and, as such, was essential to preserving the American Republic and its democratic principles.

During this period, dozens of states adopted constitutional provisions that guaranteed “a system of common schools.” *See, e.g.*, Cal. Const. Art. IX, §1 (1849). Some states further emphasized the importance of fully educating all citizens by calling for a “thorough and efficient system of common schools” (*see, e.g.*, Ohio Const. Art. VI, § 2; N.J. Const. Art. VIII, § 4, para. (1)) or – as in Oregon – a “general and uniform system of common schools” or similar language (*see, e.g.*, Idaho Const. Art IX, § 1 (“general, uniform and thorough system of public, free common schools”); Ind. Const. Art. 8, § 1 (“general and uniform system of Common Schools”); Minn. Const. Art. XIII, § 1 (“general and uniform system of public schools”); N.C. Const., Art. IX, § 2 (“general and uniform system of free public schools”); S.D. Const. Art. VIII, § 1 (“general and uniform system of public schools”); Wash. Const. Art. IX, § 2 (“general and uniform system of public schools”).

As the nation expanded westward, Congress required every territory seeking to become a state and join the United States to commit to creating its own system of public schools. To promote nationwide systems of education, the land was ceded to new states only after provision for educational funds. Surveyors

divided the territories into townships six miles square and the sixteenth plot out of every township was reserved “for the maintenance of public schools.” *Education in the 50 States: A Deskbook of the History of State Constitutions and Laws about Education*, 28-29 (Institute for Educational Equity and Opportunity July 2008).

These western lands were regarded as a great resource for revenue; the right of Congress to dispose of them was unclogged by conditions; and yet the Congress of the Confederation determined to recognize, in the earliest legislation for their survey and sale, the paramount interest of public education.¹

Acceptance of these lands by the new states constituted “an irrevocable compact, besting title to the described lands in the state and creating a trust for the use of schools.” *Milliken v. Green*, 389 Mich 1, 45, 203 NW 2d 457 (1972) (Brennan, J. dissenting) (citing *Minn. Mining Co., v. Nat’l. Mining Co.*, 11 Mich 186 (1863)).

As the territories in the Northwest sought admission to the union, Congress required the new states to enact constitutional provisions that established common schools. By 1930, Congress had allocated 145 million acres of public land (226,562 square miles) to provide sufficient funds to cover the operating costs of public school systems throughout the nation. *Education in the 50 States, supra*, at 29.

¹ James W. Taylor, *A Manual of the Ohio School System: Consisting of an Historical View of its Progress, and a Republication of the School Laws in Force* 32, 62 (H.W. Derby & Co., Cincinnati 1857).

Thus, the historical underpinnings of the 50 state education clauses are well documented and common to all. The principle belief of the framers of these provisions was that in order to preserve a republican form of government and individual freedoms, the people must be educated to be capable citizens.²

2. As other state high courts have done, this court should distinguish plaintiffs’ § 3 claim -- as an “adequacy” Or “educational opportunity” claim -- from the earlier “equity” claims in *Olsen*.

Thirty-five years ago, in a case involving the lack of educational opportunities available to children in property-poor Texas school districts, the United States Supreme Court held that education is not a fundamental right under the federal constitution, where education is not mentioned. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 US 1, 34-35, 93 S Ct 1278, 36 LEd 2d 16 (1973). Education is, however, a positive right written into all state constitutions,³

² See generally L. Cremin, *American Education: The National Experience 1783-1876* (1980); C. Kastle, *Pillars of the Republic: Common Schools and American Society 1780-1860* (1983).

³ See Ala. Const., Art. XIV, § 256; Alaska Const., Art. VII, § 1; Ariz. Const., Art. XI, § 1; Ark. Const., Art. XIV, § 1; Cal. Const., Art. IX, § 1; Colo. Const., Art. IX, § 2; Conn. Const., Art. VIII, § 1; Del. Const., Art. X, § 1; Fla. Const., Art. IX, § 1; Ga. Const., Art. VIII, § 1, para. (1); Haw. Const., Art. X, § 1; Idaho Const., Art. IX, § 1; Ill Const., Art. X, § 1; Ind. Const., Art. VIII, § 1; Iowa Const., Art. IX 2d, § 3; Kan. Const., Art. VI, § 1; Ky. Const., § 183; La. Const., Art. VIII, § 1; Me. Const., Art. VIII, part 1, § 1; Md. Const., Art. VIII § 1; Mass. Const., pt. 2, ch. V, § 2; Mich. Const, Art. VIII, § 2; Minn. Const., Art. XIII, § 1; Miss. Const., Art. VIII, § 201; Mo. Const., Art. IX § 1, cl. a; Mont. Const., art. X, § 1; Neb. Const., art. VII, § 1; Nev. Const., art. XI, § 2; N.H. Const., part 2, Art. 83; N.J. Const., Art. VIII, § 4, para. (1); N.M. Const., Art. XII, § 1; N.Y. Const., Art. XI, § 1; N.C. Const., Art. IX, § 2; N.D. Const., Art. VIII, § 1; Ohio Const., Art. VI § 3; Okla. Const., art. XIII, § 1; Or. Const., art. VIII, § 3; Pa. Const., art. III, § 14; R.I. Const., Art. XII, § 1; S.C. Const., Art. XI, § 3, S.D. Const., Art. VIII, § 1; Tenn. Const., Art. XI, § 12; Tex. Const., Art. VII, § 1; Utah Const., Art. X, § 1; Vt.

including that of Oregon. Accordingly, over the past four decades, in what has been described as the most dynamic demonstration of independent state court constitutional development in American history,⁴ litigants have filed constitutional challenges to the inequitable and inadequate educational opportunities in the public education systems in the state courts of 45 states.

In the early years, most of these cases, including *Olsen v. State, supra*, were “equity” claims that challenged the disparities in expenditure among different school districts within a particular state. Equal protection and equity cases were common in the 1970s and 1980s, and defendant states won about two-thirds of those cases, including *Olsen*. Since 1989, most of the cases have been “adequacy” or “educational opportunity” cases based on clauses in state constitutions that, like Article VIII, § 3, of the Oregon Constitution, guarantee students some basic level of public education or “minimum of educational opportunities.” This change in legal claim from equity to adequate opportunity led courts in several states to distinguish earlier cases in which defendants had prevailed.

In South Carolina and New York, for example, the state high courts rejected “equity” cases, but distinguished “minimum opportunity” cases. In 1988, the South Carolina Supreme Court affirmed a circuit court's dismissal of a lawsuit challenging the constitutionality of the state's public school funding system in

Const., ch. II, § 68; Va. Const., Art. VIII, § 1; Wash. Const., Art. IX, § 1; W. Va. Const., Art. XII, § 1; Wis. Const., Art. X, § 3; Wyo. Const., Art. VII, § 1.

⁴ See, e.g., Kahn, *State Constitutionalism and the Problems of Fairness*, 30 Val U L Rev 459, 464-470 (1996).

Richland County v. Campbell, 294 SC 346, 364 SE 2d 470 (1988), because plaintiffs had claimed the system was inequitable based on major disparities in per-pupil spending between high-and low-wealth school districts.

Despite this precedent, in 1993, many South Carolina school districts sued the State, alleging, *inter alia*, that the education finance system violated the state constitution. The trial court granted defendants' motion to dismiss, but the South Carolina Supreme Court, in *Abbeville County School District v. State*, 335 SC 58, 515 SE 2d 535 (1999), distinguished its earlier *Richland County* decision, upheld plaintiffs' "adequacy" claim based on the South Carolina education clause, and remanded the case for trial. The court also held that the education clause "requires the General Assembly to provide the opportunity for each child to receive a minimally adequate education" and defined that education to include providing students adequate and safe facilities in which they have the opportunity to acquire: 1) the ability to read, write, and speak the English language, and knowledge of mathematics and physical science; 2) a fundamental knowledge of economic, social, and political systems, and of history and governmental processes; and 3) academic and vocational skills.

In 1978 in New York, a group of property-poor school districts, joined by the five large urban New York districts, challenged the state's unequal education finance system. In its 1982 decision, New York State's highest court ruled that while substantial inequities in funding did exist, the state constitution does not require equal funding for education. *Board of Educ., Levittown Union Free School Dist. v. Nyquist*, 57 NY 2d 27, 439 NE 2d 359, 453 NYS 2d 643 (1982). However, the court also held that the state constitution guarantees students the right to the opportunity for a "sound basic education."

This right was at the center of later litigation which asserted that New York State was failing in its constitutional duty to provide the opportunity for a sound basic education to hundreds of thousands of its schoolchildren. In a landmark 1995 decision, the New York court distinguished its *Levittown* ruling and remanded the case for trial. *Campaign for Fiscal Equity, Inc. v. State*, 86 NY 2d 307, 655 NE 2d 661, 631 NYS 2d 565 (1995) (*CFE I*).

Also, in a few states, such as Wisconsin, the state supreme courts have indicated that an “adequate opportunity” claim would have fared better than the “equity” claim before the courts. In *Kukor v. Grover*, 148 Wis 2d 469, 436 NW 2d 568 (1989), the Wisconsin Supreme Court held – as this Court did in *Olsen* – that the then-current state education finance system did not violate the **uniform** education or equal protection provisions of the state constitution. The court observed that plaintiffs complained of inequities among school districts in the state's system of school aid distribution but had not alleged that this system caused their districts to fall short of state educational opportunity standards.

In the subsequent Wisconsin case, *Vincent v. Voight*, 236 Wis 2d 588, 614 NW 2d 388 (2000), the state supreme court held that Wisconsin’s students have the right to a "sound basic education [that] will equip students for their roles as citizens and enable them to succeed economically" and defined that right to include "the opportunity for students to be proficient in mathematics, science, reading and writing, geography, and history, and * * * receive instruction in the arts and music, vocational training, social sciences, health, physical education and foreign language." However, the court also concluded that the plaintiffs’ complaint had not adequately pled that students were being denied these opportunities.

Like South Carolina, New York, and Wisconsin, this Court rejected the “equity” claims in *Olsen*. Now, this court should likewise distinguish and affirm

the rights of Oregon's students to "a minimum of educational opportunity" as required by Article VIII, § 3.

In the current wave of litigation about adequate education funding, courts have upheld plaintiffs' claims in about two-thirds (19 of 28) of the state court decisions.⁵ Plaintiffs' extraordinary success rate in these cases is even more remarkable when one realizes that defendants have *never* prevailed in any case in which the courts fully examined the evidence as to whether the states were providing their schoolchildren with an adequate educational opportunity.

Defendant victories occurred only when the courts in a particular state ruled that

⁵ Specifically, plaintiffs have prevailed in major decisions of the highest state courts or final trial court actions in 19 states: Alaska (*Kasayulie v. State*, No. 3AN-97-3782 (Alaska Super Ct September 1, 1999)); Arizona (*Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 179 Ariz 233, 877 P2d 806 (1994)); Arkansas (*Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark 31, 91 SW 3d 472 (2000)); Idaho (*Idaho Schs. for Equal Educ. Opportunity v. State*, 132 Idaho 559, 976 P2d 913 (1998); *Idaho Schs. for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 850 P2d 724 (1993)); Kansas (*Montoy v. State*, 278 Kan 769, 120 P3d 306 (2005)); Kentucky (*Rose v. Council for Better Educ.*, 790 SW 2d 186 (Ky 1989)); Maryland (*Bradford v. Md. State Bd. of Educ.*, No. 94340058/CE189672 (Baltimore City Cir Ct 2000)); Massachusetts (*McDuffy v. Secretary of the Executive Office of Educ.*, 415 Mass 545, 615 NE 2d 516 (1993)); Montana (*Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 326 Mont 304, 109 P3d 257 (2005)); Missouri (*Comm. for Educ. Equal. v. State*, 878 SW 2d 446 (Mo 1994) (final trial court decision; appeal dismissed on procedural grounds)); New Hampshire (*Claremont Sch. Dist. v. Governor*, 142 NH 462, 703 A2d 1353 (1997)); New Mexico (*Zuni Sch. Dist. v. State*, No. CV-98-14-II (McKinley County Dist Ct October 14, 1999)); New Jersey (*Abbott v. Burke*, 119 NJ 287, 575 A2d 359 (1990)); New York (*Campaign for Fiscal Equity, Inc. v. State*, 100 NY 2d 893, 801 NE 2d 326, 769 NYS 2d 106 (2003)); North Carolina (*Leandro v. State*, 346 NC 336, 488 SE 2d 249 (1997)); Ohio (*DeRolph v. State*, 78 Ohio St 3d 193, 677 NE 2d 733 (1997)); Texas (*Edgewood Indep. Sch. Dist. v. Kirby*, 777 SW 2d 391 (Tex 1989)); Vermont (*Brigham v. State*, 166 Vt 246, 692 A2d 384 (1997)); and Wyoming (*Campbell County Sch. Dist. v. State*, 907 P2d 1238 (Wyo 1995)).

the issue was not justiciable or that because of separation of powers reasons a trial should not be held and the evidence of inadequate opportunity should not even be considered.⁶

3. Every state high court that has examined the issue has held that students have a substantive constitutional right to educational opportunity.

In *Olsen, supra*, this court stated:

We are of the opinion that Art. VIII, s 3, is complied with if the state requires and provides for a **minimum of educational opportunities** in the district and permits the districts to exercise local control over what they desire, and can furnish, over the minimum. 276 Or at 27. (Emphasis added).

Many other state courts have interpreted their constitutional provision to guarantee students' rights to the *opportunity* for an education, including (1) states with "uniform and general" language like Oregon's, (2) states with more vague, open language like South Carolina⁷ and New York,⁸ and (3) states with qualitative descriptors like Georgia.⁹

⁶ See, e.g., *Marrero v. Commonwealth*, 559 Pa 14, 739 A2d 110, 113-14 (1999) (issue is nonjusticiable); *Coalition for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So 2d 400, 408 (Fla 1996) (same).

State courts that remanded adequate opportunity cases for trial on the merits have found constitutional violations, and those courts, like this Court, found the cases justiciable and compatible with the principles of separation of powers. See, e.g., *Leandro v. State*, 346 NC 336, 488 SE 2d 249 (1997); *Rose v. Council for Better Education*, 790 SW 2d 186, 209 (Ky 1989).

⁷ South Carolina's constitution provides: "The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State[.]" S.C. Const. Art. XI, § 3. "[T]he South Carolina Constitution's education clause requires the General Assembly to provide the *opportunity* for each child to receive a minimally adequate education." *Abbeville*

For example, the North Carolina Supreme Court, in *Leandro v. State*, 346 NC 336, 488 SE 2d 249, 255 (1997), held that the North Carolina Constitution’s “general and uniform” education clause “guarantee[d] every child of [the] state an *opportunity* to receive a sound basic education in our public schools” (emphasis added).¹¹ *See also Seattle Sch. Dist. No. 1 v. State*, 90 Wash 2d 476, 585 P2d 71 (1978) interpreting Washington’s educational constitutional provisions, including its requirement for a “general and uniform system of public schools”: “[T]he

County School Dist. v. State, 335 SC 58, 68, 515 SE 2d 535 (1999). (Emphasis added).

⁸ New York’s constitution provides: “The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.” N.Y. Const. Art. XI, § 1. “A ‘sound basic education’ . . . affords New York City schoolchildren the *opportunity* for a meaningful high school education, one which prepares them to function productively as civic participants.” *Campaign for Fiscal Equity, Inc. v. State*, 100 NY 2d 893, 801 NE 2d 326, 331-332, 769 NYS 2d 106 (2003). (Emphasis added).

⁹ Georgia’s constitution provides: “The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia.” Ga. Const. art. 8, § 1, ¶ I. The adequacy standard is not met if “evidence that shows that current State funding for public education is so low that ‘it deprives students in any particular school district of basic educational *opportunities*[.]’” *Consortium for Adequate Sch. Funding in Ga. v. State*, (Super Ct of Fulton County, Civ. Action No. 2004CV91004, Order dated November 21, 2006) (pending case) (quoting *McDaniel v. Thomas*, 248 Ga 632, 285 SE 2d 156 (1981)) (Emphasis added).

¹¹ The North Carolina Constitution provides: “The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools[.]” N.C. Const. Art. IX, § 2.

State's constitutional duty goes beyond mere reading, writing and arithmetic. It also embraces broad educational *opportunities* needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today's market as well as in the market place of ideas." 90 Wash 2d at 517. (Emphasis added).¹²

Other states' have interpreted comparable constitutional clauses as substantive guarantees of basic educational opportunity. Other courts permit the parties to litigate whether actual opportunities available to schoolchildren fall below the court's determination of the constitutional standard with evidence of insufficient educational resources, inadequate outcomes (test scores, graduation

¹² The Washington Constitution provides: "The legislature shall provide for a general and uniform system of public schools[.]" Wash. Const. Art. IX, § 2.

²⁰ The trial court explained at length the broad, diverse educational grounding in multiple fields of study necessary for any citizen to become a capable voter and juror in the 21st century:

rates, and preparation for further education or work), and a causal link to the State's school funding. The terms "minimum" and "opportunity" have acquired legal meanings in educational opportunity cases that focus on some of the same questions posed here in this case.

Leandro v. State, supra, explained its "uniform and general" education clause as follows:

An education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate. 488 SE 2d at 345.

The court found that the State must provide an educational opportunity sufficient for students to be able to acquire the

ability to read, write and speak the English language . . . sufficient knowledge of fundamental mathematics and physical science . . . basic economic and political systems . . . [and] sufficient academic and vocational skills. 488 SE 2d at 347.

These are the types of opportunities that this Court could determine are encompassed by *Olsen's* requirement for "a minimum of educational opportunities" in this state. *Olsen, supra*, 276 Or at 27.

Campaign for Fiscal Equity, Inc. v. State, 100 NY 2d 893, 801 NE 2d 326 769 NYS 2d 106 (2003) (*CFE II*), provides another helpful reference point. After a full trial on the issues delineated above, New York's highest court held that students needed a "meaningful high school level education" because "the record establishes that * * * a high school level education is now all but indispensable." 801 NE 2d at 331. In fact, students also needed to have employment skills that

prepared them for more than “the ability to get a job * * * and thereby not be a charge on the public fisc.” *Id.* In terms of civic skills, the court held that “citizenship means more than just being *qualified* to vote or serve as a juror, but to do so capably and knowledgeably.” *Id.*²⁰

The comprehensive view of an adequate educational opportunity found in *Leandro* and *Campaign for Fiscal Equity* demonstrate that the full meaning of “a minimum of educational opportunity” must be formulated in the context of our increasingly complex world and the need for knowledgeable citizens – voters and jurors – and competitive workers.

4. Other courts have devised workable and effective solutions in educational opportunity cases.

Experience with successful educational opportunity cases has shown that constitutional rights in this area can be vindicated through the efforts of a state court fulfilling its prime responsibility to interpret the state constitution and determine whether the state’s education finance system passes constitutional muster. For example, in Arkansas, the state Supreme Court delineated the respective roles of the complementary branches of government:

Development of the necessary educational programs and the implementation of the same falls more within the bailiwick of the General Assembly and the Department of Education The trial court’s role and this court’s role, as previously discussed in this opinion, are limited to a determination of whether the existing school-funding system satisfies constitutional dictates and, if not, why not. *Lake View Sch. Dist. v. Hucklebee*, 351 Ark 31, 91 SW 3d 472, 507-08 (2002) (*Lake View III*).

A similar process was undertaken in Arizona:

There are doubtless many ways to create a school financing system that complies with the constitution. As the representatives of the people, it is up to the legislature to choose the methods and combinations of methods from among the many that are available. Other states have already done so. *Roosevelt Elementary Sch. Dist. v. Bishop*, 179 Ariz 233, 877 P2d 806, 816 (1994).

In New York as well, the Court of Appeals, the state's highest court, in *CFE II* took an approach that afforded the state flexibility and discretion to determine the actual cost of providing a constitutional education, without intruding upon the other branches by specifying class sizes, teacher quality characteristics, or other specific criteria that would inform such a judgment. *CFE II*, 801 NE 2d at 348.

Similarly, the South Carolina Court declared its commitment to honoring the respective authority of the judicial branch and the legislature:

We recognize that we are not experts in education, and we do not intend to dictate the programs utilized in our public schools. * * * [W]e emphasize that the constitutional duty to ensure the provision of a minimally adequate education to each student in South Carolina rests on the legislative branch of government. We do not intend by this opinion to suggest to any party that we will usurp the authority of that branch to determine the way in which educational opportunities are delivered to the children of our State. *Abbeville, supra*, 515 SE 2d at 540-41.

Courts play a critical part in repairing defects in our public institutional systems. They take a principled approach to issues, and their long term “staying power” is essential for providing continuing guidance on constitutional requirements and sustained commitment to meeting constitutional goals. The types of remedial orders that state courts have issued in these educational

opportunity cases demonstrate a restrained yet effective use of judicial power and meaningful vindication of students' constitutional rights.

CONCLUSION

This Court has an opportunity to clarify its holding in *Olsen* and reaffirm that the essential minimum of educational opportunities the State must provide to its students are the opportunities to become capable citizens and workers in the 21st century. The Court of Appeals decision should be reversed and the case remanded.

Respectfully submitted this 29th day of September 2008,

EDUCATION JUSTICE
EDUCATION LAW CENTER

Maureen Leonard OSB 823165

Charles R. Williamson OSB 701612

Attorneys for Amicus Curiae
Education Justice
Education Law Center