



IN THE CHANCERY COURT OF THE STATE OF DELAWARE

DELAWAREANS FOR
EDUCATIONAL OPPORTUNITY
& NAACP DELAWARE STATE
CONFERENCE OF BRANCHES,

Plaintiffs

C.A. No. 2018-0029-JTL

v.

JOHN CARNEY, Governor of the
State of Delaware; SUSAN
BUNTING, Secretary of Education
of the State of Delaware; KENNETH
A. SIMPLER, Treasurer of the State
of Delaware; SUSAN DURHAM,
Director of Finance of Kent County,
Delaware; BRIAN MAXWELL,
Chief Financial Officer of New
Castle County, Delaware; and GINA
JENNINGS, Finance Director for
Sussex County, Delaware,

Defendants

***Amicus Curiae* Brief of Education Law Center in Support of Plaintiffs**

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Education Law Center (“ELC”) is a non-profit organization that advocates, on behalf of public school children, for access to fair and adequate educational opportunity under state and federal laws through policy initiatives, research, public education, and legal action. ELC represented the plaintiff school children in the landmark case *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990), which presented a threshold justiciability issue similar to that presented by this case. The New Jersey Supreme Court held in *Abbott* that the plaintiffs’ claims were justiciable, and, following a ruling on the merits, ELC secured a series of remedial measures to ensure disadvantaged school children a constitutional education. ELC continues to advocate for effective implementation of the *Abbott* remedies, which the New Jersey Supreme Court recently found “enabled children in [urban] districts to show measurable educational improvement.” *Abbott v. Burke*, 971 A.2d 989, 995 (N.J. 2009) (internal citation omitted).

In states across the nation, ELC also advances children’s opportunities to learn and assists those who promote such opportunities. ELC provides research and analyses related to education cost and fair school funding, high quality preschool, and other proven educational programs; assistance to parent and community organizations, school districts, and states in gaining the expertise needed to narrow and close achievement gaps for disadvantaged children; and

support for litigation and other efforts to bridge resource gaps in the nation’s high-need schools. As part of its work, ELC has participated as *amicus curiae* in state educational opportunity cases in California, Colorado, Connecticut, Indiana, Maryland, Pennsylvania, Oregon, South Carolina, and Texas.

PRELIMINARY STATEMENT

Amicus curiae ELC respectfully submits this brief to address the issue of justiciability. Delaware’s Department of Education, as authorized by the General Assembly, has adopted substantive education standards that can guide judicial evaluation of Plaintiffs’ claim that the State has failed to fulfill its constitutional duty to provide a “general and efficient” public education to Delaware school children. Further, this Court should follow the majority of sister state courts—including the decision of the Supreme Court of Pennsylvania in *William Penn School District v. Pennsylvania Department of Education*, 170 A.3d 414 (2017)—which have found similar inadequate-education constitutional claims justiciable.

ARGUMENT

I. PLAINTIFFS’ CLAIMS ARE JUSTICIABLE

Delaware’s education standards provide a basis on which the judiciary can assess whether the State has fulfilled its constitutional duty to provide a “general and efficient” system of public education to Delaware school children. As explained below, Plaintiffs’ challenge to the State’s glaring failure to provide adequate resources, funding and opportunities in violation of the Education Clause

of the Delaware Constitution are justiciable. Other state courts faced with claims of unconstitutional education have similarly concluded that such challenges are justiciable.

A. The General Assembly Has Authorized the Adoption of Substantive Education Standards for Determining Whether the State Has Fulfilled Its Constitutional Duties Under the Education Clause

Delaware’s education standards provide this Court with ample guidance to evaluate whether the State has fulfilled its constitutional education mandate. The Education Clause of the Delaware Constitution directs the General Assembly to “provide for the establishment and maintenance of a general and efficient system of free public schools.” Del. Const. art. X, § 1. In furtherance of its obligation under the Education Clause, the General Assembly established the Department of Education (the “Department”), to which the General Assembly delegates “the general administration of the educational interests of the State.” 14 Del. C. § 101.

The General Assembly has further authorized and directed the Department to promulgate substantive education standards for the delivery of a “general and efficient system” of public education. 14 Del. C. § 122(a) and (b)(6). The Department has done so by codifying uniform academic standards for every major learning subject area and grade level. *See* 14 Del. Admin. Code 501, § 1.1 (listing areas of study subject to “content standards”); *id.* 502 (“Alignment of Local School District Curricula to State Content Standards”); *id.* 503 (requiring local school

districts to provide instruction in English Language Arts, Mathematics, Science, Social Studies, Physical Education, Visual and Performing Arts, Career and Technical Education, and World Language to grades K-12). Other regulations impose strict requirements on school resources, personnel, and other aspects of instruction. *See, e.g., id.* 106-108 (teacher, specialist, and administrator appraisal); *id.* 616 (school discipline); *id.* 815 (health examinations and screening); *id.* 901 (education of homeless children and youth).

The Department, under express direction from the General Assembly, has also established comprehensive assessments to measure student achievement and to hold local districts and schools accountable for student performance. 14 Del. C. § 151(a) (“The Department shall adopt rules and regulations consistent with the laws of this State governing the statewide assessment of student achievement and the assessment of the educational attainments of the Delaware public school system.”). The Department has adopted a standardized-testing regime known as the Delaware System of Student Assessment (“DeSSA”), which is “designed to measure student achievement of state content standards,” including grade-level standards, college readiness, and an assessment for English-language learners. 14 Del. Admin. Code 101. The DeSSA assessments include English/language arts and mathematics tests for grades 3-8; the SAT for high school students; the Delaware Comprehensive Assessments System (“DCAS”) for grades 5, 8, and 10;

and a DCAS variant for students with certain intellectual disabilities. *See* Delaware Department of Education, Delaware System of Student Assessments (DeSSA) Executive State Summary, 2016-2017 Administration 6 (July 2017), <https://www.doe.k12.de.us/cms/lib/DE01922744/Centricity/Domain/535/DeSSA%20Executive%20State%20Summary%202017.pdf>. High school students must also meet state testing requirements in order to graduate, in addition to completing required coursework. *See* 14 Del. C. § 152.

The State employs a detailed tracking regime to measure academic performance and other education metrics. The Department mandates that “Adequate Yearly Progress” on exams be determined for all public schools on an annual basis, measured by whether a school or school district meets “Above Target,” “Meets Target,” or “Below Target” levels. 14 Del. Admin. Code 103 (Accountability for Schools, Districts and the State). In addition, the Department is required to publish online “Public Education Profiles,” which “report on the state of Delaware’s public education system and the progress toward achieving the educational goals established by the General Assembly, State, and [federal law].” 14 Del. C. § 124A(a); 14 Del. Admin. Code 104. School education profiles include student achievement data broken down by race, ethnicity, gender, disability status, migrant status, English proficiency, and whether a student is considered economically disadvantaged. 14 Del. Admin. Code 104. The annually compiled

profiles also list year-over-year testing data, graduation rates broken down by race, ethnicity, special education status and income, and list other relevant information such as school districts' expenditure by pupil and breakdowns of the percentages of districts' revenue from federal, state, and local sources. *See* State of Delaware, <http://profiles.doe.k12.de.us/SchoolProfiles/State/Default.aspx> (last visited May 24, 2018).

These legislatively authorized content, performance and accountability standards can give the judiciary concrete, practical criteria for evaluating the Plaintiffs' claims. These academic standards were explicitly enacted to define the curriculum content and measure the performance of the State's public schools and students, and to fulfill the Education Clause's mandate that the General Assembly maintain and support a "general and efficient" public-education system for all Delaware school children.

B. State Courts Have Relied on Legislatively Mandated Education Standards to Adjudicate Claims of Unconstitutional Education

Other sister state courts have similarly held that claims of educational deprivation under their state constitutions are justiciable by relying on content and performance standards remarkably similar to those the State of Delaware has adopted. These decisions confirm that a court can use "the standards enunciated by the legislature" to meet its duty to "interpret[] the Constitution and safeguard[] the basic right[]" of sound public education. *Unified Sch. Dist. No. 229 v. State*,

885 P.2d 1170, 1185-87 (Kan. 1994); *see also Abbott v. Burke*, 693 A.2d 417, 427 (N.J. 1997) (recognizing the “substantial efforts of the coordinate branches” to establish an education system “founded on standards that define the substantive meaning of education” and “provide for measures of educational performance and achievement”). Similarly, the Idaho Supreme Court has held that its “duty to define the meaning” of the state education clause had “been made simpler for this court because . . . the government has already promulgated educational standards pursuant to the legislature’s directive.” *Idaho Schs. for Equal Educ. Opportunity v. State*, 976 P.2d 913, 919 (Idaho 1998). The Supreme Court of North Carolina likewise invoked the “[e]ducational goals and standards adopted by the legislature” in determining whether the state satisfied its constitutional obligation. *Leandro v. State*, 488 S.E.2d 249, 259 (N.C. 1997). In addition, the Maryland Court of Appeals ruled that the Legislature’s “comprehensive statewide qualitative standards” were reasonable guidelines to determine whether the state has “provid[ed] a thorough and efficient public school education” in compliance with the state constitution. *Hornbeck v. Somerset Cty. Bd. of Educ.*, 458 A.2d 758, 780 (Md. 1983).

The highest courts in Kansas, *Montoy v. State*, 120 P.3d 306, 309 (Kan. 2005), New Jersey, *Abbott*, 693 A.2d at 427, and West Virginia, *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979) (giving “great weight” to “legislatively

established standards” when interpreting the state’s education clause) have also adopted this approach. These and other courts have held that content-based standards give substantive meaning to the broader guarantees in the constitutional text. The Washington Supreme Court, for example, noted that standards can offer “substantive content to . . . the broad educational concepts” contained in the constitution’s provisions. *McCleary v. State*, 269 P.3d 227, 247 (Wash. 2012). And the Wyoming Supreme Court has ruled that the legislature’s broad “constitutional duty” over public education involved “defin[ing] and specify[ing] what that [duty] is.” *Campbell Cty. Sch. Dist. v. State*, 907 P.2d 1238, 1239 (Wyo. 1995); *see also Abbott*, 693 A.2d at 428 (holding that the standards are “a reasonable legislative definition of a constitutional thorough and efficient education”).

Courts have also noted that the judiciary accords proper respect to a state’s legislature in ruling that legislatively authorized standards engraft enforceable standards onto constitutional mandates. The Wisconsin Supreme Court, for instance, interpreted the education clause in Wisconsin’s Constitution by “grounding [its interpretation] in statutes,” which was consistent with acknowledging “the legislature’s wisdom” in choosing the constitutional requirements of a sound education. *Vincent v. Voight*, 614 N.W.2d 388, 407 (Wis. 2000). Judicial acknowledgement of education standards issued pursuant to

legislative authorization, therefore, is in line with the notion that “the people have reposed in [the legislature] . . . [the] authority and responsibility for the school system.” *Pauley*, 255 S.E.2d at 878.

Amicus curiae respectfully submits that this Court should follow its sister states and hold that legislative and administrative standards may give sufficient meaning to the Education Clause so that the Court may adjudicate Plaintiffs’ claims that Delaware’s schoolchildren are not receiving the education that the Delaware Constitution commands.

C. Other States Have Held That Public-Education Challenges Are Justiciable

Dozens of other state high courts have also reaffirmed their judiciary’s role in vindicating constitutional education guarantees to children. As the Pennsylvania Supreme Court recently noted, “*courts in a substantial majority of American jurisdictions* have declined to let the potential difficulty and conflict that may attend constitutional oversight of education dissuade them from undertaking the task of judicial review [I]t cannot be said that the inability to fashion a tidy, mechanical standard of review for such challenges has prompted many other states to abandon their judicial function.” *William Penn*, 170 A.3d at 455 (emphasis added). These decisions all conclude that the judiciary’s role is adjudicating

claims of whether a public education system meets constitutional standards.¹ *See William Penn*, 170 A.3d at 438 (“The need for courts to fulfill their role in constitutional limitations is particularly acute where the interests or entitlements of individual citizens is at stake.”) (citation omitted).

These decisions make it clear that courts have the “final obligation to guard, enforce, and protect” their states’ constitutional education requirements. *Columbia Falls*, 109 P.3d at 261. To find otherwise, they conclude, “would be a complete abrogation of our judicial responsibility” and would do a “severe disservice to the people.” *Lake View Sch. Dist.*, 91 S.W.3d at 484. The Arkansas Supreme Court’s decision was based on first principles of judicial review: “Early on, this court announced [that t]he people of this state in the rightful exercise of their sovereign

¹ Numerous states have similarly found education article claims justiciable: Arkansas, *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472 (Ark. 2002); Connecticut, *Conn. Coal. for Justice in Educ. Fin. v. Rell*, 990 A.2d 206 (Conn. 2010); Idaho, *Idaho Schs. for Equal Educ. Opportunity*, 976 P.2d at 919; Kansas, *Gannon v. State*, 319 P.3d 1196 (Kan. 2014); Kentucky, *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); Maryland, *Hornbeck*, 458 A.2d at 780; Massachusetts, *McDuffy v. Sec’y of the Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); Montana, *Columbia Falls Elementary Sch. Dist. v. State*, 109 P.3d 257 (Mt. 2005); New Hampshire, *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997) (Claremont II); New Jersey, *Abbott v. Burke*, 495 A.2d 269 (N.J. 1985); New York, *Hussein v. State*, 973 N.E.2d 752 (N.Y. 2012); North Carolina, *Leandro*, 488 S.E.2d at 259; Ohio, *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997); Pennsylvania, *William Penn*, 170 A.3d 414; Tennessee, *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993); Texas, *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746 (Tex. 2005); Vermont, *Brigham v. State*, 889 A.2d 715 (Vt. 2005); Washington, *McCleary*, 269 P.3d at 258; West Virginia, *Pauley*, 255 S.E.2d 859; Wisconsin, *Vincent*, 614 N.W.2d 388; and Wyoming, *Campbell Cty. Sch. Dist.*, 907 P.2d 1238.

powers, ordained and established the constitution; and the only duty devolved upon this court is to expound and interpret it.” *Id.* (quoting *State v. Floyd*, 9 Ark. 302, 315 (1849)). As the New York Court of Appeals held, judicial review is the only way to ensure that “the Legislature . . . fulfill[s] [its] constitutional mandate” to provide a sound education. *Hussein*, 973 N.E.2d at 754. *See also Aristy-Farer v. State*, 81 N.E.3d 360, 372 (N.Y. 2017) (“there is a constitutional floor with respect to educational adequacy under the Education Article, and [this] Court is responsible for adjudicating the nature of the State’s duty”) (quoting *Campaign for Fiscal Equity v. State of N.Y.*, 655 N.E.2d 661 (N.Y. 1995)) (internal quotation marks omitted). Indeed, “[t]he duty rests upon all courts, federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation.” *Smyth v. Ames*, 169 U.S. 466, 527–28 (1898), *overruled on other grounds by Fed. Power Comm’n v. Nat. Gas Pipeline Co. of Am.*, 315 U.S. 575 (1942).

Moreover, challenges asserting a deprivation of education to a state’s schoolchildren are justiciable even when a constitution’s text gives “a directive to the legislature.” *Columbia Falls*, 109 P.3d at 260. In *William Penn*, for example, the question was not whether the General Assembly was obligated to maintain the school system; it was whether “the Constitution confers upon the General Assembly the exclusive authority to *monitor its own compliance* with the

Education Clause.” 170 A.3d at 439 (emphasis added). The court answered that question in the negative, concluding that the Education Clause’s “mandate charg[ing] the General Assembly with maintaining and supporting ‘a thorough and efficient system of public education’ by no means implies that the legislature’s efforts at doing so may be graded exclusively by that body without judicial recourse.” *Id.* at 446. Thus, once “the [l]egislature has acted . . . [to] execute[.]” an education clause, “courts can determine whether that enactment fulfills the [l]egislature’s constitutional responsibility.” *Columbia Falls*, 109 P.3d at 260 (quoting *City of Boerne v. Flores*, 521 U.S. 507 (1997)). When the “question becomes whether the legislature has actually performed its duty [under the education clause], . . . [it] is left to the courts to answer.” *Gannon v. State*, 319 P.3d 1196, 1226 (Kan. 2014). To these courts, the separation-of-powers principle *demand*s that courts hear public-education challenges: “[t]o allow the General Assembly . . . to decide whether its [own] actions are constitutional,” the Kentucky Supreme Court held, “is literally unthinkable.” *Rose*, 790 S.W.2d at 209.

CONCLUSION

Plaintiffs have asserted vitally important claims that implicate the educational opportunity afforded to Delaware public school children. This Court is fully able to—and should—adjudicate the merits of their claims. *Amicus curiae* urges the Court to deny the motion to dismiss.

Dated: May 30, 2018
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Respectfully submitted,

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CERTIFICATE OF SERVICE

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