

**SUPREME COURT OF THE
STATE OF CONNECTICUT**

S.C. 18032

**CONNECTICUT COALITION FOR JUSTICE IN
EDUCATION FUNDING, ET AL.**

V.

GOVERNOR M. JODI RELL, ET AL.

**BRIEF OF *AMICI CURIAE*
THE CAMPAIGN FOR EDUCATIONAL EQUITY, TEACHERS COLLEGE, COLUMBIA
UNIVERSITY, THE NATIONAL ACCESS NETWORK AND
THE EDUCATION LAW CENTER**

**Erika L. Amarante
WIGGIN and DANA LLP
One Century Tower
265 Church Street
P.O. Box 1832
New Haven, CT 061508-1832
Telephone: 203-498-4400
Fax: 203-782-2289**

**Of counsel:
Michael A. Rebell, Esq.
The Campaign for Educational Equity
Teachers College, Columbia University
525 West 120th Street, Box 219
New York, New York 10027
Phone: 212.678.4144
Fax: 212.678.3699**

301 CAPITOL AVENUE
HARTFORD, CT 06106

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INTERESTS OF AMICI CURIAE

The Campaign for Educational Equity at Teachers College, Columbia University (“the Equity Campaign”), the Access Network (“Access”) and the Education Law Center (“ELC”) are three non-profit organizations dedicated to improving adequacy and equity in education.

The Equity Campaign is committed to expanding and strengthening the national movement for quality public education for all by providing research-based analyses of key education policy issues. The Equity Campaign promotes educational equity through focused research, convening of major symposium and conferences, development of policy positions on major issues involving equity in education, and demonstrations of improved policy and practice.

Access is affiliated with the Equity Campaign and also based at Teachers College, Columbia University. Access’ mission is to provide up-to-date information on developments regarding fiscal equity reform, fiscal equity litigations and education adequacy litigations to researchers, policymakers, advocates and attorneys throughout the United States. Access operates a website (www.schoolfunding.info) which is the primary source in the country for up-to-date information on litigation, remedies (including cost studies), methods for public engagement on educational equity and educational adequacy issues. Access assists those promoting education and school funding reform through workshops, conferences, consultations, and periodic e-newsletters. Michael A. Rebell is the Executive Director of both the Equity Campaign and Access. Mr. Rebell also was lead counsel for plaintiffs in New York’s educational adequacy litigation, *CFE v. State of New York*, 86 N.Y.2d 475 (1995).

ELC is a not-for-profit organization based in New Jersey. ELC litigated the New Jersey education adequacy case, *Abbott v. Burke*, 119 N.J. 287 (1990), and advocates on behalf of public school children for access to an equal and adequate education under state and federal laws. ELC's work is based on a core value: if given the opportunity, all children can achieve high academic standards to prepare them for citizenship and to compete in the economy. ELC focuses on improving public education for disadvantaged children, and children with disabilities and other special needs. ELC uses a wide variety of strategies, including public education and engagement, policy initiatives, research, communications and, as a last resort, legal action.

Because of its nationwide expertise in school finance, preschool, facilities, and other areas of education law and policy, ELC has recently established Education Justice (EdJustice), a national program to advance education equity. EdJustice will collect and disseminate research, develop strategies, and provide information and technical assistance to policymakers, attorneys and other advocates seeking to improve public schools across the nation, especially those schools serving concentrations of low-income students and students of color.

PRELIMINARY STATEMENT

The question of whether schoolchildren have a substantive constitutional right to a “suitable” or “adequate” education is a matter of first impression in Connecticut. However, the issue has previously been considered by a majority of courts in other states. Twenty-seven states have reviewed this issue on its merits,¹ and twenty of those states have held that plaintiffs indeed have such a substantive constitutional right.

The trial court here held that these constitutional issues are justiciable, as it was bound to do by this Court’s holdings in *Horton v. Meskill*, 172 Conn. 615, 626-27 (1977) and *Sheff v. O’Neill*, 238 Conn. 1, 13-16 (1996). Nevertheless, the Superior Court refused to allow plaintiffs to proceed to trial to establish the contours of the constitutional right and whether, on the facts alleged, it had been violated. Instead, the trial court granted defendants’ motion to strike, holding that the question of the “suitability” of the education being provided to school children in Connecticut would require the court to encroach deeply “into the constitutional prerogatives of the other branches of state government.” Memorandum of Decision (“MOD”) at 35. These separation of power concerns echo the “political question” aspect of the justiciability doctrine as outlined in *Baker v. Carr*, 369 U.S. 186 (1962). But – having ruled that the right to an opportunity for a “suitable education” is a justiciable issue – there was no proper basis for the trial court to have denied plaintiffs the right to proceed to trial on these “political question” grounds.

The purpose of the present brief of *amicus curiae* is to bring to the Court’s attention the rulings and remedial experiences of the overwhelming majority of state courts, which have enforced the constitutional right to an adequate education without encroaching on the

¹ The seven courts that have denied relief to the plaintiffs refused to reach the question because of justiciability or separation of powers concerns (a route the trial court here expressly denounced).

constitutional prerogatives of the legislative and executive branches. Based on their extensive research, analysis and involvement in education adequacy litigations across the country, *amici* will first discuss why every state highest court that has deemed these issues justiciable and closely examined the facts has held that students do indeed have a substantive constitutional right to an adequate or “suitable” educational opportunity. *Amici* will also discuss in detail relevant aspects of the recent litigation in the neighboring state of New York. In particular, *amici* will examine the New York Court of Appeals’ decision to reject a motion to dismiss plaintiffs’ adequacy claims, which involved procedural issues strikingly similar to those at issue on the present appeal. Finally, this brief will demonstrate how courts in sister states, including New York, have worked effectively with the legislative and executive branches to devise practical and successful remedies in education adequacy cases.

ARGUMENT

I. EVERY STATE HIGHEST COURT THAT HAS EXAMINED THE ISSUE HAS HELD THAT STUDENTS HAVE A SUBSTANTIVE CONSTITUTIONAL RIGHT TO AN ADEQUATE OR ‘SUITABLE’ EDUCATIONAL OPPORTUNITY.

A. Decisions in Sister States Overwhelmingly Support Plaintiffs’ Position.

More than thirty years ago, in a case involving inequities in the educational opportunities available to children in property-poor school districts, the United States Supreme Court held that education is not a “fundamental interest” under the federal constitution. *San Antonio Indep. Sch. Dist v. Rodriguez*, 411 U.S. 1 (1973). Education is, however, considered a fundamental interest under most state constitutions,² including that of Connecticut. *Horton v. Meskill*, 172 Conn. 615, 645 (1977). Accordingly, over the past

² See, e.g., *Serrano v. Priest*, 487 P.2d 1241, 1250 (Cal. 1971); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 206 (Ky. 1989); *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997).

three decades, in what has been described as the most dynamic demonstration of independent state court constitutional development in American history,³ constitutional challenges to the inequitable and inadequate funding of public education have been litigated in the state courts of 45 of the 50 states.⁴

In the early years, most of these cases, including this Court's decision in *Horton*, 172 Conn. at 626-27, were based on "equity" claims that challenged disparities in the levels of expenditure among different school districts on equal protection grounds. Since 1989, most of the cases have been based on "adequate education" claims where plaintiffs argue that state education clauses like article eighth, § 1 of the Connecticut Constitution guarantee students some basic or "adequate" level of public education. Since the current wave of adequacy litigations began, the courts have upheld plaintiffs' claims at an accelerating rate: plaintiffs have prevailed in almost 75% (20 of 27) of the final state court decisions in education adequacy cases decided since 1989.⁵

³ See, e.g., Paul D. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 VAL. U. L. REV. 459, 464-70 (1996)

⁴ An up-to-date tabulation of the status of state court fiscal equity and education adequacy decisions is maintained on the website of the Access Project of the Campaign for Educational Equity, www.schoolfunding.info.

⁵ Specifically, plaintiffs have prevailed in major liability decisions of the highest state courts or final trial court actions in the following 20 states: **Alaska**: *Kasayulie v. State*, No. 3AN-97-3782 (Alaska Super. Ct. Sept. 1, 1999) (A27); **Arizona**: *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994); **Arkansas**: *Tucker v. Lake View Sch. Dist. No. 25*, 917 S.W.2d 530 (Ark. 1996); see also *Lake View Sch. Dist. No. 25 v. Huckabee*, No. 1992-5318 (Pulaski County Ch. 2001) (A57) (equity and adequacy claims upheld and school funding system invalidated); *Lake View Sch. Dist. No. 25 v. Huckabee*, 10 S.W.3d 892 (Ark. 2000) (pending appeal claims from prior case mooted by enactment of new funding statute); **Idaho**: *Idaho Schs. for Equal Educ. Opportunity*, 976 P.2d 913 (Idaho 1998); *Idaho Schs. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724 (Idaho 1993); **Kansas**: *Montoy v. State*, 120 P.3d 306 (Kan. 2005); **Kentucky**: *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); **Maryland**: *Bradford v. Md. State Bd. of Educ.*, No. 94340058/CE189672 (Baltimore City Cir. Ct. 2000) (A1); **Massachusetts**: *McDuffy v. Secretary of the Executive Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); **Montana**:

Plaintiffs' extraordinary success rate in these cases is even more remarkable when one realizes that defendants have never prevailed in any final decision in a case in which the courts fully examined at trial the evidence as to whether students were receiving an adequate education. Defense victories have occurred only when the courts have ruled that the issue was not "justiciable" or that because of separation of powers reasons a trial should not be held and the evidence of inadequacy should not even be considered.⁶

Columbia Falls Elementary Sch. Dist. No. 6 v. State, 109 P.3d 257 (Mont. 2005); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989); **Missouri**: *Comm. for Educ. Equal. v. State*, 878 S.W.2d 446 (Mo. 1994) (final trial court decision; appeal dismissed on procedural grounds); **New Hampshire**: *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997); **New Mexico**: *Zuni School District v. State*, No. CV-98-14-II (McKinley County Dist. Ct. Oct. 14, 1999) (A98); **New Jersey**: *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); **New York**: *Campaign for Fiscal Equity, Inc. v. State of New York*, 801 N.E. 2d 326 (N.Y. 2003)); **North Carolina**: *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997)); **Ohio** *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997); **South Carolina**: *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535 (S.C. 1999); **Texas**: *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); **Vermont**: *Brigham v. State*, 692 A.2d 384 (Vt. 1997)); and **Wyoming**: *Campbell County Sch. Dist. v. State*, 907 P.2d 1238 (Wyo. 1995). *Amici's* list of states exceeds the list in plaintiffs' brief because it includes trial court decisions that were not appealed.

⁶ See, e.g., *Coalition for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 408 (Fla. 1996) (holding that there were "no judicially manageable standards" which would not "present a substantial risk of judicial intrusion into the powers and responsibilities assigned to the legislature . . ."); *Marrero v. Commonwealth*, 739 A.2d 110, 113-14 (Pa. 1999) (issue is nonjusticiable because the court is "unable to judicially define what constitutes an 'adequate' education or what funds are 'adequate' to support such a program.")

The vast majority of the state courts which did review the evidence and find constitutional violations viewed the separation of powers and justiciability issues very differently. As the Kentucky Supreme Court put it: "To avoid deciding the case because of 'legislative discretion,' 'legislative function,' etc., would be a denigration of our own constitutional duty. To allow the General Assembly (or, in point of fact, the Executive) to decide whether its actions are constitutional is literally unthinkable." *Rose v. Council for Better Education*, 790 S.W.2d. 186, 209 (KY 1989). See also *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 109 P.3d 257, 261 (Mont. 2005) ("As the final guardian and protector of the right to education, it is incumbent upon the court to assure that the system enacted by the Legislature enforces, protects and fulfills the right. We conclude this issue is justiciable.").

Based on this Court's unequivocal holdings in *Horton*, 172 Conn. at 626-27, and *Sheff*, 238 Conn. at 25, the court below held that the issues raised here regarding students' rights to an opportunity for an adequate or "suitable" education are justiciable. MOD at 11. Surprisingly, and without allowing or considering evidence examining the constitutional history and other relevant factual issues, the trial court summarily determined that article eighth, § 1's "affirmative constitutional obligation" *Sheff*, 238 Conn. at 25, to ensure that "[t]here shall always be free public elementary and secondary schools in the state" has no substantive content regarding an adequate or "suitable" educational opportunity that the court may define and enforce. MOD at 16-18. Because this decision is at odds with the unanimous agreement of all of the other state highest courts that have examined the issue, it is important to consider the reasons for this national consensus and to consider whether the trial court had a reasonable basis for dissenting from it.

B. The Constitutional Right to an Adequate Education Is Rooted in the Historical and Contemporary Need for an Educated Populace in a Democratic Society.

The trial court acknowledged that the large number of state courts throughout the country that have upheld students' rights to the opportunity for an adequate education include both states with "substantive" or "qualitative" language in their state constitutions like Washington and New Jersey, and states like South Carolina and New York that have more general, open language like that in article eighth, § 1 of the Connecticut Constitution. MOD at 22-28. The trial court then abruptly concluded that the decisions of the sister state courts are a "decidedly mixed bag and of limited utility" because they are "based on each state's history and the context in which the education clause of its constitution was adopted." *Id.* at 29. But this conclusion was illogical. The strong consensus of every state court that has examined this issue and concluded that its constitution calls for some basic

level of adequate education for all students is not “a mixed bag;” rather, it reflects an overarching national agreement that an educated citizenry is vital to the maintenance and the flourishing of a democratic society.

The founding fathers of the American Republic strongly emphasized the importance of schools in building the new nation. A new, broad-base 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. 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).

The founding fathers’ democratic ideals were clearly spelled out in the education clauses of most of the New England state constitutions, which were originally written in the eighteenth century and have been largely unchanged since. For example, the Massachusetts Constitution 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 education clauses of state constitutions in most other parts of the country were written during the nineteenth century, and they were generally inspired by the common school movement that was the major education reform initiative of that era. CREMIN, *supra*, at 3. The common school movement, in essence, represented a delayed implementation of the founding fathers' educational goals. As its name implies, the common school movement was an attempt to educate in one setting all children living in a particular geographic area, whatever their class or ethnic background. These schools would replace the prior patchwork pattern of town schools partially supported by parental contributions, church schools, "pauper schools," and private schools with a new form of democratic schooling. The common school "would be open to all and supported by tax funds. It would be for rich and poor alike, the equal of any private institution." CREMIN, *supra*, at 138.

In the latter half of the nineteenth century, the fierce political battle to implement these common schools culminated in the incorporation in dozens of state constitutions of provisions that guaranteed the establishment of "a system of free common schools in which all the children in the state may be educated." N.Y. Const. art. XI, § 1 (1894). Some states further emphasized the importance of fully educating all citizens by calling for a "*thorough and efficient* system of common schools throughout the state." Ohio Const. art. VI, § 2 (1851) (emphasis added).

Although Connecticut did not amend its constitution during the nineteenth century to include explicit language guaranteeing a common school system or a thorough and efficient public school system, Connecticut clearly implemented a broad-based, democratic common school system and subscribed to the same ideals and purposes as its sister

states. In 1965, the framers of the state's present constitution explicitly recognized that Connecticut's tradition of "good schools" paralleled the "common school tradition" of New York and the other New England states and decided that the state constitution should include explicit language to acknowledge that reality. Constitutional convention delegate Simon Bernstein, the principal drafter of the present article eighth, § 1 clearly stated this precise intent:

It was because our Constitution had no reference to our school system that I submitted my resolution and of course others were aware of the same omission in our Constitution and other similar resolutions were submitted. . . . [W]e do have the tradition which goes back to our earliest days of free good public education and we have h[ad] good public schools so that this again is not anything revolutionary, it is something which we have, it is which is practically all Constitutions in the States of our nation and Connecticut with its great tradition *certainly ought to honor this principle*.

Moore v. Ganim, 233 Conn. 557, 596 n.51 (1995). In light of the extensive "history and tradition" that Mr. Bernstein and the other delegates consciously incorporated into article eighth, § 1 of the Connecticut Constitution of 1965, the trial court's conclusion that there was no intent to incorporate a substantive adequacy concept into the Connecticut Constitution totally misreads the applicable history and the strong national pattern of interpreting adequacy clauses, whatever their precise language, to include a substantive right to an adequate or "suitable educational opportunity."⁷

⁷ The trial court's statement that an intent to incorporate an adequacy concept into the Connecticut Constitution would have required the inclusion of specific words to that effect "as do some other state constitutions," MOD at 32, is belied by the fact that the constitutions in New York and a number of other states, which, as the trial court itself acknowledged, do not contain these words, have been interpreted by their highest state courts to have clearly had such an intent. See MOD at 23-24.

II. RULINGS OF THE NEW YORK COURT OF APPEALS BEAR DIRECTLY ON THE SPECIFIC ISSUES RAISED IN THIS APPEAL.

The relevance of sister state decisions in education adequacy cases is well illustrated by the fact that the precise issue raised on this appeal, *i.e.*, whether the contours of the constitutional definition of an “adequate” or “suitable” education can be decided adversely to plaintiffs on a motion to strike, was specifically considered by the New York Court of Appeals. In the first of its three decisions in *Campaign for Fiscal Equity, Inc. (“CFE”) v. State of New York*, the New York Court of Appeals reversed a lower court decision that had upheld a motion to dismiss plaintiffs’ adequacy claims and remanded for trial. See 86 N.Y.2d 307 (1995).

Plaintiffs’ complaint in *CFE I* had defined “sound basic education,” the applicable constitutional standard,⁸ in terms of the minimum statewide educational standards established by the Board of Regents and the Commissioner of Education. The complaint coupled descriptions of inadequate resources or inadequate services provided to New York City students in particular areas with an allegation that the current level of resources or services violated specific aspects of the Regents standards. For example: “[A]verage class sizes in New York City are in excess of those which the Regents and the Commissioner

⁸ In New York’s previous “equity” litigation, *Bd. of Educ., Levittown Sch. Dist. v. Nyquist*, 57 N.Y.2d 27 (1982), the Court of Appeals had determined that the general language of N.Y. Const. art. XI, § 1, which states that “the legislature shall provide for the maintenance and support of a system of free common schools, wherein all of the children of this state may be educated,” must have “substantive” or “qualitative” meaning. Thus, the Court stated that the constitutional reference to the fact that all children are to be “educated” must be interpreted to “connote a sound basic education.” *Levittown*, 57 N.Y.2d at 48. The Court of Appeals did not need to explicate the meaning of “a sound basic education” further in *Levittown* because the claim that “minimally acceptable educational services and facilities are not being provided in plaintiffs’ school districts” had not been raised by the Complaint in that case. See *CFE I*, 86 N.Y.2d at 316.

consider adequate to assure that all students have an opportunity to meet the minimum standards.” *CFE I* Amended Complaint ¶ 49 (A119). *CFE* also argued that New York City students had inadequate access to instructional materials (*Id.*, ¶ 54, A120-21), computers and other technology (*Id.*, ¶ 56, A121), and library services (*Id.*, ¶ 60, A122) in the quantities and quality required by the Regents and the Commissioner.

The Court began its analysis by emphasizing that Art XI, § 1 of the New York State Constitution, despite the generality of its language, is not merely “hortatory” and that it establishes a constitutional floor with respect to education adequacy. *CFE I*, 86 N.Y.2d at 315. Nevertheless, the Court held that the particular definition of the constitutional requirements upon which plaintiffs had based their complaint “exceed[s] notions of a minimally adequate or sound basic education.” *Id.* at 317.

Rather than dismissing plaintiffs’ complaint for failure to set forth an acceptable constitutional definition, however, the Court considered the over-all thrust of the complaint and determined that “there can be no question that the pertinent pivotal claim made here is that the present financing system is not providing City school children with an opportunity to obtain a sound basic education.” *Id.* Nor did the Court attempt at this stage “to definitively specify what the constitutional concept and mandate of a sound basic education entails.” *Id.* Instead, it sensibly concluded that: “*Given the procedural posture of this case, an exhaustive discussion and consideration of the meaning of a ‘sound basic education’ is premature. Only after discovery and the development of a factual record can this issue be fully evaluated and resolved.*” *Id.* at 317 (emphasis added).

In order to facilitate the detailed analysis of the meaning of the constitutional language at trial, the Court also articulated:

.... a template reflecting our judgment of what the trier of fact must consider in determining whether defendants have met their constitutional obligation. The trial court will have to evaluate whether the children in plaintiffs' districts are in fact being provided the opportunity to acquire the basic literacy, calculating and verbal skills necessary to enable them to function as civic participants capable of voting and serving as jurors.⁹

Id. at 317-318.

The Court of Appeals' "template" did, in fact, provide meaningful parameters for the trial court's consideration of the extensive evidence compiled during a lengthy seven-month trial. It also informed the trial judge's detailed analysis of the specific skills that students would need to "function as civic participants capable of voting and serving as jurors." *Id.* at 318.¹⁰ Based on the extensive record compiled at the trial, the high court was able to resolve the definitional differences that arose between the parties and the courts below and to articulate a final definition of the constitutional requirement that all students receive an opportunity for a sound basic education. Thus, in its final liability ruling, the Court determined that: a) the term "function productively" in the template definition impliedly contains an employment component; b) a meaningful high school level education is now all but indispensable for productive employment; and c) productive citizenship means "more

⁹ The Court also specified that:

The State must assure that some essentials are provided. Children are entitled to minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn. Children should have access to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks. Children are also entitled to minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas.

CFE I, 86 N.Y. 2d at 317.

¹⁰ See also *CFE v. State of New York (CFE II)*, 100 N.Y.2d 893, 902 (2003) ("In keeping with our directive, the trial court first fleshed out the template for a sound basic education that we had outlined in our earlier consideration of the issue.").

than being merely qualified to vote or serve as a juror, but to do so capably and knowledgeably.” *CFE II*, 100 N.Y.2d 906.

In the present case, plaintiffs’ appeal of the Superior Court’s striking of the adequacy claims in their complaint presents the core issues in precisely the same procedural posture as the issues that were before the New York Court of Appeals in *CFE I*. The trial court here held that the complaint in this case lists “fourteen components of a suitable educational opportunity,” MOD at 35, which the trial court considers an excessive definition as they would require a “deep intrusion by the court into the constitutional affairs of the other branches of government.” *Id.*¹¹ Assuming *arguendo* that this Court accepts the trial court’s determination that plaintiffs’ definition of the substantive content of students’ rights to “free public elementary and secondary schools” under article eighth, § 1 exceeds constitutional requirements, consistent with *CFE I*, the trial court should have: 1) denied the motion to strike, 2) provided a “template” indicating the general parameters of the appropriate Constitutional requirements, and 3) scheduled the matter for a trial at which, *inter alia*, evidence can be compiled regarding the content of an adequate or “suitable” education for Connecticut’s schoolchildren in the 21st century. This Court should reverse and remand accordingly.

¹¹ As discussed at Pt. III below, the *amici* do not think that plaintiffs’ allegations would, in fact, require any such inappropriate intrusion into the affairs of the other branches.

III. COURTS IN SISTER STATES HAVE WORKED EFFECTIVELY WITH THE LEGISLATIVE AND EXECUTIVE BRANCHES TO DEVISE PRACTICAL AND SUCCESSFUL REMEDIES IN ADEQUACY CASES.

A. The Contemporary Standards-Based Reform Movement Has Provided Courts With “Judicially Manageable Standards” for Enforcing the Constitutional Right to an Adequate Education.

A major reason why so many of the state courts have enforced the constitutional right to an adequate education in recent years is that both the need to do so and the means to do so have been brought to the fore by the standards-based reform movement. In the mid-1980's a slew of commission reports warned of a “rising tide of mediocrity” in American education that was undermining the nation’s ability to compete in the global economy. See, e.g., National Commission on Excellence in Education, *A Nation at Risk: The Imperative for Educational Reform* 5 (1983). In response to this challenge, the nation’s governors, business leaders, and educators began to work with the federal government to articulate specific national academic goals, an effort which commenced with the 1989 National Education Summit convened by President George H.W. Bush and attended by all fifty governors. See MARC S. TUCKER & JUDY B. CODDING, *STANDARDS FOR OUR SCHOOLS* 40-43 (1998). This federal effort culminated in the federal No Child Left Behind Act (“NCLB”), 20 U.S.C. § 6301 (2001), and has been paralleled by the development of an extensive standards-based education reform approach in virtually all of the fifty states.

State standards-based reforms are built around substantive content standards in English, mathematics, social studies and other major subject areas. These content standards are usually set at sufficiently high cognitive levels to meet the competitive standards of the global economy. Further, they are premised on the assumption that virtually all students can meet these high expectations if given sufficient opportunities and resources. Once the content standards have been established, all other aspects of the

education system—including teacher training, teacher certification, curriculum frameworks, textbooks and other instructional materials, and student assessments—are revamped to conform to these standards. The aim is to create a seamless web of teacher preparation, curriculum implementation, and student testing, all coming together to create a coherent system which will result in significant improvements in achievement for all students. See DESIGN OF COHERENT EDUCATION POLICY: IMPROVING THE SYSTEM (Susan H. Fuhrman ed., 1993).¹²

These standards also provide judges with workable criteria for applying to contemporary needs the constitutional concepts that had originally been articulated in the 18th and 19th centuries. Further, they give judges significant input for developing “judicially manageable standards” and for crafting practical remedies in these litigations. As the Idaho Supreme Court stated:

Balancing our constitutional duty to define the meaning of the thoroughness requirement of art. 9 § 1 with the political difficulties of that task has been made simpler for this Court because the executive branch of the government has already promulgated educational standards pursuant to the legislature’s directive in I.C. § 33-118.

¹² The standards-based reform approach responds to the reality that the student population in America’s schools is becoming increasingly heterogeneous and the proportion of students from disadvantaged socio-economic backgrounds is rapidly increasing; if these students are not well-educated, the United States will be at a severe competitive advantage in maintaining its standard of living in an increasingly “flat world.” Thomas Bailey, *Implications of Educational Inequality in A GLOBAL ECONOMY*, IN THE PRICE WE PAY: ECONOMIC AND SOCIAL CONSEQUENCES OF INADEQUATE EDUCATION 89 (Clive R. Belfield & Henry M. Levin eds., 2008). Moreover, the cost to the nation of inadequately educating our young people is approximately \$219,000 for each of the approximately 600,000 students who drop out of high school each year in terms of lost tax payments, health and welfare costs, criminal justice expenses, and welfare payments. CLIVE R. BELFIELD & HENY M. LEVIN, A GLOBAL ECONOMY, IN THE PRICE WE PAY: ECONOMIC AND SOCIAL CONSEQUENCES OF INADEQUATE EDUCATION 117, 189 (2008).

Idaho Schools for Equal Educational Opportunity v. State, 976 P.2d 913, 919 (Idaho 1998) (citation omitted).

The Supreme Court of North Carolina explicitly directed the trial court to consider the “[e]ducational goals and standards adopted by the legislature” to determine “whether any of the state’s children are being denied their right to a sound basic education.” *Leandro v. State*, 488 S.E.2d 249, 259 (N.C. 1997). The trial judge then reviewed the standards in a number of subject areas and concluded that they did provide students a reasonable opportunity to acquire the skills that constituted a sound basic education as defined by the Supreme Court. *Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365 (N.C. 2004).

The statutory and regulatory standards and related assessments developed by legislatures and state education departments provide very clear analyses of what children are expected to learn in contemporary schools and important data on whether they have, in fact, learned this material. These standards also provide practical benchmarks for determining whether all schools have been provided with sufficient resources to provide their students with a reasonable opportunity to meet the standards that the states themselves have established.

Although these state standards provide the courts extremely valuable input on these points, other state courts have also been careful to distinguish between the appropriate functions of regulatory standards *vis à vis* constitutional standards. The New York courts were quite explicit about this distinction. Although the standards adopted by the state Board of Regents strongly influenced the development of a constitutional standard by the courts, the courts declined to adopt the regulatory standards *per se* as the constitutional requirement because “this approach would essentially define the ambit of a constitutional

right by whatever a state agency says it is." *CFE v. State of New York*, 719 N.Y.S. 2d 475, 484 (N.Y. Sup. Ct. 2001), *aff'd*, *CFE v. State of New York*, 801 N.E.2d 326, (N.Y. 2003).¹³

Standards-based reform has also put into focus the fundamental goals and purposes of our system of public education. The overwhelming majority of state highest courts that have defined an adequate education have focused on the importance of preparing students to be effective citizens and competitive participants in the economy. For example, the New Jersey Supreme Court defined the constitutional requirement as "that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market." *Robinson v. Cahill*, 303 A.2d 273, 295 (N.J. 1973). Similarly, the Vermont Supreme Court declared that the state's right to education clause "guarantees . . . political and civil rights" and preparation "to live in today's global marketplace." *Brigham v. State*, 692 A.2d 384, 390, 397 (Vt. 1997).¹⁴

¹³ At the same time, the constitutional concepts of adequate education that some of the courts have developed in these cases have also provided important guidance to the states in crafting their standards, and reforming their educational policies. For example, in Kentucky, the Supreme Court first articulated constitutional guidelines for an adequate education that the legislature then developed into specific statutory and regulatory concepts. See Kentucky Education Reform Act ("KERA"), Ky. Rev. Stat. Ann. §§ 156.005-156.990 (1990); *Rose v Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989).

¹⁴ See also *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979) (defining the core adequacy requirement in terms of preparation for "useful and happy occupations, recreation and citizenship."); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 94 (Wash. 1978) (defining the state constitution's mandate in terms of the "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."); *Serrano v. Priest*, 487 P.2d. 1241, 1258-59 (Cal. 1971) (education is "crucial to . . . the functioning of a democracy [and to] an individual's opportunity to compete successfully in the economic marketplace . . ."); *Edgewood Indep. Sch. Dist v. Kirby*, 777 S.W.2d 391, 395-96 (Tex. 1989) (citing intent of framers of education clause to diffuse knowledge "for the preservation of democracy . . . and for the growth of the economy."); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1381 (N.H. 1993) (defining constitutional duty in terms of preparing "citizens for their role as participants and as potential competitors in today's marketplace of ideas"); *Campbell Sch. Dist. v. State*, 907 P.2d 1238, 1259 (Wyo. 1995) (defining the core constitutional requirement in terms of providing students with "a uniform

B. Sister State Courts Have Devised Workable Remedies in Adequacy Cases That Are Fully in Accord with Appropriate Separation of Powers Precepts.

Education adequacy cases have proved enormously successful in many states as measured by long-term gains in student achievement scores. For example, in Massachusetts, where the Supreme Judicial Court issued an extensive education adequacy decision in 1993, the failure rate of 10th graders taking the highly challenging Massachusetts Comprehensive Assessment System (MCAS) exams dropped dramatically between 1998 and 2004 from 45% to 15% in math and from 34% to 11% in English language arts. See Paul Reville, *The Massachusetts Case: A Personal Account*, (Symposium on "Equal Educational Opportunity: What Now?" Teachers College, Columbia University, Nov. 12-13, 2007, Working Paper) available at www.tc.edu/symposium/symposium07/resource.asp.

Improvements in student achievement in state assessments in New Jersey have also been dramatic in the wake of the Supreme Court's decision in *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990). From 1999 to 2005, mean scale scores rose 19 points in 4th grade mathematics, with the greatest increases occurring in the poor urban districts, which were the focus of the judicial remedies. Margaret E. Goertz & Michael Weiss, *Assessing Success in School Finance Litigation: The Case of New Jersey*, (Symposium on "Equal

opportunity to become equipped for their future roles as citizens, participants in the political system, and competitors both economically and intellectually."); *CFE II*, 801 N.E. 2d 326, 331-32 (N.Y. 2003) (defining "sound basic education" in terms of the "opportunity for a meaningful high school education, one which prepares [students] to function productively as civic participants. . . . [and] to compete for jobs that enable them to support themselves"); *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535, 540 (S.C. 1999) (defining minimum adequacy, *inter alia*, in terms of "fundamental knowledge of . . . history and governmental processes . . . and vocational skills.").

Educational Opportunity: What Now?" Teachers College, Columbia University, November 12-13, 2007, Working Paper) available at www.tc.edu/symposium/symposium07/resource.asp. The achievement gaps between the *Abbott* districts and the rest of the state decreased by almost fifty percent. *Id.* In Kentucky, where the legislature had instituted extensive reforms immediately after the Court's decision in *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989), free and reduced lunch students outscored students from similar backgrounds nationally by seven points in 4th grade reading and five points in 8th grade reading on the 2007 National Assessment of Educational Progress (NAEP) tests. Susan Perkins Weston & Robert F. Sexton, *Substantial and Yet Not Sufficient: Kentucky's Effort to Build Proficiency for Each and Every Child*, (Symposium on "Equal Educational Opportunity: What Now?" Teachers College, Columbia University, November 12-13, 2007, Working Paper) available at www.tc.edu/symposium/symposium07/resource.asp.

Although legislatures and governors have responded promptly and positively to judicial decrees in many of the adequacy cases, it is also true that in other instances there has been excessive delay and resistance to court orders. The New York Court of Appeals was well aware of this variegated pattern of state court remedial experience. In formulating the remedial order it issued in *CFE II*, therefore, the Court explicitly made "an effort to learn from our national experience and fashion an outcome that will address the constitutional violation instead of inviting decades of litigation." 100 N.Y.2d at 931.

The remedy the Court of Appeals devised provided clear guidance to the legislature on how it should proceed, without undue intrusion on legislative prerogatives. This remedy consisted of a simple, three-part directive that called upon the legislature to 1) determine the "actual costs of providing a sound basic education"; 2) reform the current system of

school funding and managing schools to ensure that every school has the resources necessary to provide the opportunity for a sound basic education; and 3) ensure a “system of accountability to measure whether the reforms actually provide[d] the opportunity for a sound basic education.” *Id.* at 930. Although the legislature did not meet the Court’s original thirteen-month timeline for accomplishing these tasks, compliance was successfully achieved three years after issuance of the remedial decree, and the Court has now terminated its jurisdiction.¹⁵

As in *CFE*, the other state courts that have developed successful remedies in educational adequacy cases have tended to do so by promoting an effective “implicit dialogue” with the legislative and executive branches. Referring to the interactions among the branches in states such as Vermont and Massachusetts, which also reflect this pattern of “implicit dialogue” between the branches of state government in school finance cases, Professor George Brown has compared this remedial pattern with the role of the federal courts in school desegregation and other institutional reform contexts and concluded that:

. . . the school finance cases represent development of a new form of public law litigation: the dialogic as opposed to the managerial model. The state judiciary is taking a track different in two ways from the federal judicial approach. They are less managerial and more advisory. . . what is transpiring is a multi-faceted dialogue between these courts and legislatures, across state judicial systems . . .

¹⁵ In *CFE v. State (CFE III)*, 861 N.E.2d 50 (N.Y. 2006), the Court resolved a dispute regarding the “actual cost of a sound basic education.” In that decision, the Court deferred to the Governor and accepted the figure he had proposed, \$1.93 billion, as being an acceptable “constitutional minimum.” *Id.* at 58. Judge Rosenblatt, concurring, emphasized that although \$1.93 billion reflected a constitutional floor, “[w]hen it comes to educating its children, New York State will not likely content itself with the minimum.” *Id.* at 61 (Rosenblatt, J., concurring). As Judge Rosenblatt had anticipated, shortly thereafter, the legislature authorized the approximately \$5 billion in additional funding, phased in over four years, that had been recommended by the lower courts, together with a detailed accountability system. See N.Y. Educ. Law § 211-d (2007).

George D. Brown, *Binding Advisory Opinions: A Federal Court's Perspective on State Court School Finance Decisions*, 35 B.C. L. REV. 543, 566-67 (1994.)

Experience with successful education adequacy cases has shown that if constitutional rights in this area are to be vindicated, it will be through the combined efforts of all three branches of government. In the complex administrative environment in which we now live, courts, legislatures, and administrative agencies operating alone cannot successfully resolve major social problems. Although one of the branches may initiate a reform or take prime responsibility, successful policy making in a complex regulatory environment requires the extensive, complementary involvement of all three branches of government.

Discussions of judicial remedial capability often emphasize the judiciary's deficiencies without considering whether the task at hand can better be performed by a legislature, a state education department or another governmental or private agency. As Wisconsin Law Professor Neil Komesar has pointed out, all government institutions are imperfect. In the relevant comparative institutional world, "courts may be called upon to consider issues for which they are ill equipped in some absolute sense because they are better equipped to do so in a relative sense." NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW ECONOMICS AND PUBLIC POLICY* 149 (1994).

From this comparative institutional perspective, it is clear that the courts' principled approach to issues and their institutional stability are essential for providing continuing guidance on constitutional requirements and sustained commitment to meeting constitutional goals. Legislatures, however, are better equipped to develop specific reform policies and executive agencies are most effective in undertaking the day to day implementation tasks of explaining what is required, and then checking that districts and

schools can and do carry out those requirements. The types of remedial guidelines that have been issued by the state courts in New York and Kentucky promote an effective use of the comparative strengths of each of the branches and lead to successful resolution of litigation and meaningful vindication of children's constitutional rights.

C. The CFE Court Determined Issues Relating to Educational Quality Without Intruding Into the Prerogatives of the Other Branches of State Government.

In this case, the trial court summarily rejected the specific elements of a "suitable educational opportunity" that plaintiffs had set forth in their complaint because of its determination that, *inter alia*, examining such questions as "what are appropriate class sizes," what "programs and services are necessary or desirable for 'at-risk students,'" and "what constitutes a 'modern and adequate library,' 'modern technology' and 'appropriate instruction'" would require the court to undertake a "deep . . . intrusion into the constitutional prerogatives of state government." MOD at 35. The history of the development of the substantive issues in the CFE litigation—and in all of the other state cases which have held that these issues are justiciable—indicates that proper constitutional analysis of student rights to an adequate education can proceed without "deeply intruding" into the constitutional prerogatives of the other branches.

As discussed in Part III-A above, in most instances, the state courts have relied on the standards and regulations that had been promulgated by the state officials themselves and, in essence, held them responsible for meeting their own stated requirements. Thus, the most telling evidence on the quality of teaching in the New York Public Schools was that 17% of New York City's public school teachers were either uncertified or taught in areas other than those in which they were certified, and that these uncertified teachers

tended to be concentrated in the lowest performing schools. *CFE II*, 100 N.Y.2d at 910.¹⁶ Similarly, in regard to class sizes, the Court did not mandate any specific maximum size. Rather, it took note of the fact that class sizes in New York City, according to the State's own figures, were substantially larger than those in other cities and school districts in the state and were far in excess of the sizes that numerous federal and state programs deemed desirable. *Id.* at 911-12. "Particularly poignant" in the Court of Appeals' opinion was the fact that thirty-one New York City high schools had no science laboratories whatsoever, at a time when the Regents' Learning Standards required students to pass an examination in a laboratory science in order to obtain a high school diploma. *Id.* at 911 n.4. At the remedy stage, the Court afforded the State broad discretion to determine the "actual cost of providing a sound basic education" without specifying the class sizes, teacher quality characteristics, or other specific criteria that would inform such a judgment. *Id.* at 930.

In short, the trial court's assumption that issues of adequacy require courts to wander "far afield from the courts' constitutional function," MOD at 37, is belied by the experience of courts in New York and other states that have actually tried these cases—the examination of which is altogether lacking in the trial court's discussion.

CONCLUSION

For all the aforesaid reasons, the Court should reverse the decision of the trial court on the education adequacy claims and remand this issue for trial.

¹⁶ These facts were uncontested, having come from the State Education Department's own annual statistical report to the Legislature. *Id.*

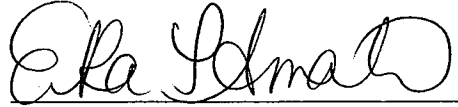
Respectfully submitted,

By: 
Erika L. Amarante
Wiggin and Dana LLP
One Century Tower
265 Church Street
P.O. Box 1832
New Haven, CT 06508-1832
Phone: 203-498-4400
Fax: 203-782-2289
Email: eamarante@wiggin.com
Juris No.: 67700

Of counsel:
Michael A. Rebell, Esq.
The Campaign for Educational Equity
Teachers College, Columbia University
525 West 120th Street, Box 219
New York, New York 10027
Phone: 212.678.4144
Fax: 212.678.3699
Email: mar224@columbia.edu

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of *Amici Curiae* complies with all of the provisions of the Connecticut Rules of Appellate Procedure § 67-2.

A handwritten signature in black ink, appearing to read "Erika L. Amarante", written over a horizontal line.

Erika L. Amarante

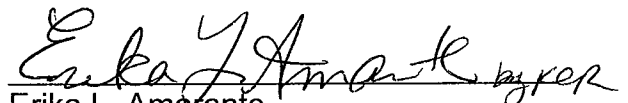
CERTIFICATION

This is to certify that on this 14th day of February, 2008, a copy of the foregoing Brief of Amici Curiae and separately-bound appendix was served by first-class mail, postage prepaid, upon the trial judge and all counsel and pro se parties of record, as follows:

The Honorable Joseph M. Shortall
Superior Court Judge
Complex Litigation Docket
95 Washington Street
Hartford, CT 06106

Robert A. Solomon, Esq.
Robin Golden, Esq.
Jerome N. Frank Legal Services Organization
P.O. Box 209090
New Haven, CT 06520-9090
Tel: 203-432-4760
Fax: 203-432-1426

Clare E. Kindall
Assistant Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06106
Tel: 860-808-5020
Fax: 860-808-5347


Erika L. Amarante