

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

No. 25330

MARK DAVIS AND BONNIE DAVIS, et al.
Plaintiffs and Appellants

v.

THE STATE OF SOUTH DAKOTA, et al.
Defendants and Appellees

APPEAL FROM
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE LORI S. WILBUR

ASSOCIATED SCHOOL BOARDS OF SOUTH DAKOTA
AMICUS CURIAE BRIEF

SCOTT ABDALLAH
RON PARSONS
PAMELA BOLLWEG
Johnson, Heidepriem & Abdallah, LLP
P.O. Box 2348
Sioux Falls, SD 57101
Attorneys for Plaintiffs/Appellants

DIANE BEST
State of South Dakota
Office of Attorney General
300 N Dakota Avenue, #403
Sioux Falls, SD 57104
Attorney for Defendants/Appellees

NAOMI R. CROMWELL
Tieszen Law Office, Prof. LLC
P.O. Box 550
Pierre, SD 57501
Attorney for Amicus Associated
School Boards of South Dakota

BOBBI RANK
State of South Dakota
Office of Attorney General
1302 E Highway 14, #1
Pierre, SD 57501
Attorney for Defendants/Appellees

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PRELIMINARY STATEMENT

The Associated School Boards of South Dakota (“ASBSD”) appears before this Honorable Court pursuant the Court’s Order dated November 9, 2009, granting ASBSD leave to file an Amicus Curiae brief in this matter. ASBSD appears in support of the position of Plaintiffs and Appellants, Mark Davis and Bonnie Davis, et al.

ARGUMENT

I. The Trial Court Correctly Held That All South Dakota Children Have a Constitutional Right to a Free and Adequate Public Education

In its May 4, 2007, Order on Plaintiff’s motion for partial summary judgment, the trial court correctly ruled that “Article VIII of the South Dakota Constitution guarantees as a constitutional right that all South Dakota children are entitled to a free and adequate public education.” (Order on Summary Judgment at 1-2) That ruling is consistent with the holdings of the vast majority of state courts that have considered the question of whether the Education Article of their state constitution guarantees a right to an adequate education.¹

The trial court further held that “an adequate education is one that provides the opportunity to prepare students for life after school in today’s modern society.” (Final Decision (FD 48) The trial court ruled that to be prepared for life after school in modern society means that public education must prepare students “to be responsible and

¹ Arizona (*Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994)); Arkansas (*Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472 (Ark. 2002)); 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)); Massachusetts (*McDuffy v. Secretary of the Executive Office of Educ.*, 615 N.E.2d 516 (Mass. 1993)); Montana (*Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 109 P.3d 257 (Mont. 2005)); New Hampshire (*Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997)); New Jersey (*Abbott v. Burke*, 575 A.2d 359 (N.J. 1990)); New York (*Campaign for Fiscal Equity, Inc. (CFE) v. State*, 801 N.E. 2d 326 (N.Y. 2003) (*CFE II*)); 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 Cty. Sch. Dist. v. State*, 515 S.E.2d 540 (S.C. 1999)); Texas (*Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989)); Washington (*Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978)); and Wyoming (*Campbell County Sch. Dist. v. State*, 907 P.2d 1238 (Wyo. 1995)).

intelligent citizens and to be competitive in areas beyond secondary education.” (FD 48)

This standard is congruent with other state highest courts that have considered the meaning of the right to an adequate education guaranteed by state constitutions.

Other states’ constitutions include a variety of terms that have been interpreted by their highest courts as imposing a duty to provide an “adequate” education. In most cases, the ultimate standard of a constitutionally adequate education has been viewed as an education that prepares students to function in society, or words to that effect.

Like the South Dakota Constitution, the New Jersey Constitution requires a “thorough” system of public schools. The New Jersey Supreme Court held that “[t]he Constitution's guarantee [of a ‘thorough and efficient system of free public schools’] must be understood to embrace 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).

West Virginia has a similar mandate, requiring the legislature to “provide, by general law, for a thorough and efficient system of free schools.” WV Const, art. XII, § s 1. The Supreme Court of Appeals of West Virginia held that a thorough and efficient education is a comprehensive one that must prepare students for citizenship and responsible adulthood in general, encompassing not only basic reading and mathematics

skills, but civics, advanced-coursework, arts, and life-skills as well.² *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979).

The North Carolina Supreme Court held that the right to the “privilege of education” gave rise to the right to a “sound basic education”, which must “enable the student to function in a complex and rapidly changing society.” *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997). This includes “enabl[ing] the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.” *Id.* The North Carolina Court also applied judicial standards of an adequate education that emphasized preparation to function in society, enumerating elements similar to those recognized by the New Jersey court in *Robinson*. *Id.* at 255; *see Robinson*, 303 A.2d at 877.

Likewise, in New York, the constitutional mandate of a school system “wherein all the children of this state may be educated,” was held to require the state to ensure a “sound basic education” for all children. A sound basic education must provide “1the

² The court defined a thorough and efficient system of public schools as follows: “It develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically. Legally recognized elements in this definition are development in every child to his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work to know his or her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts, such as music, theatre, literature, and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society.” *Id.* at 877.

opportunity for a meaningful high school education, one which prepares them to function productively as civic participants.” *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 328, 330-332 (N.Y. 2003). This includes an “employment component” because for employment today “1a high school level education is now all but indispensable.” *Id.*

Similarly, the Kentucky Supreme Court, in holding the state’s school funding system constitutionally inadequate in violation of the requirement for an “efficient” system of public schools, articulated the capabilities that individuals need in order to function in modern society, both as civic participants and as individuals who are self-sufficient and have an understanding of the society in which they function. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989). The Kentucky standards were based on earlier standards applied by the West Virginia Supreme Court³ and were subsequently adopted by the Supreme Courts of Arkansas⁴, South Carolina⁵, Massachusetts⁶ and New Hampshire⁷ for testing the constitutional adequacy of their school funding systems.

Thus, many states’ highest courts are in agreement that the primary purpose of an adequate education is to produce individuals who can function in society. To function in

³ See note 2, *supra*, *Pauley v. Kelly*, 255 S.E.2d at 877 (W.Va. 1979) (interpreting the requirement for a “thorough and efficient” system of public schools).

⁴ *Lake View Sch. Dist. v. Huckabee*, 91 S.W.3d 472, 486-488 (Ark. 2002)

⁵ *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535, 539-540 (S.C. 1999)

⁶ *McDuffy v. Secretary of Executive Office of Education*, 615 N.E.2d 516, 517 (Mass. 1993)

⁷ *Claremont Sch Dist. v. Governor*, 703 A.2d 1353, 1361-1362 (N.H. 1997)

a democratic society an individual must be prepared for civic participation, including voting and jury service⁸, and for productive employment or further education, and must have an understanding of how our increasingly complex and technological society works.

Indeed, the South Dakota Department of Education (“DOE”) refers to South Dakota’s educational content standards in precisely these terms. The DOE’s overview of the content standards states: “The core of knowledge and skills set forth as board-adopted *Standards* is essential to prepare South Dakota students for work, for post-secondary education, for responsible citizenship, and for personal fulfillment as life-long learners.”⁹ In other words, the content standards established by the DOE are said to encompass the knowledge and skills that are essential for all students to function as adults in today’s modern society.

We respectfully request that this Court affirm the trial court’s rulings that Article VIII of the South Dakota Constitution guarantees all South Dakota children a free and adequate public education, and an adequate education must provide the opportunity to prepare students for life after school in today’s modern society, including to be responsible and intelligent citizens and to be competitive in post-secondary education and the job market. Although ASBSD submits that the trial judge did not apply these constitutional principles correctly in this case, these are bedrock principles that reflect the

⁸ As noted by the New York Court of Appeals, for individuals to serve on juries “capably and knowledgeably” they must have at least a “meaningful high school education.” *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d at 330-331 (NY 2003).

⁹ <http://doe.sd.gov/contentstandards/overview.asp>.

plain meaning of the language of Article VIII and the great weight of authority of state courts that have considered similar language.

II. The Trial Court Incorrectly Interpreted and Applied Its Ruling

Although the trial court correctly ruled that all South Dakota children have a constitutional right to a free and adequate public education and that such an education must prepare students to be responsible and productive adult citizens, the court nevertheless interpreted and applied that right in a way that makes it virtually meaningless.

The trial court refers to a “thorough and efficient” education as a “basic education” but cites only cases from other states that have rendered the term “basic education” to have little meaning other than the opportunity to attend public schools without tuition with no consideration as to the appropriateness of the educational opportunities in those schools for the children required to attend them. (FD 48, citing *Hornbeck v. Somerset County Bd. of Ed.*, 458 A.2d 758, 776-777 (Md. 1983) and *Lujan v. Colorado State Bd. Ed.*, 649 P.2d 1005, 1018-19 (Colo. 1982)).

Significantly, the trial court ignored decisions by the supreme courts of New Jersey and West Virginia, which have provided the most extensive analysis of the mandate to provide a “thorough and efficient” system of free public schools. *Robinson v. Cahill*, 303 A.2d 273, 294 (N.J. 1973); *Abbott v. Burke*, 575 A.2d 359, 372 (N.J. 1990); *Pauley v. Kelly*, 255 S.E.2d 859, 874 (W. Va. 1979). Both the New Jersey and West Virginia constitutions contain a mandate for a “thorough and efficient” system of free public schools. Since these are earlier admitted states, it is likely their constitutions were

some of the models the framers of the South Dakota Constitution used as the basis for Article VIII. The West Virginia Supreme Court in *Pauley* conducted a thorough examination of the texts, cases, constitutional histories and definitions of the education articles requiring a "thorough and efficient," "thorough" or "efficient" system of education. Based on this analysis, the court concluded that the "thorough and efficient" language mandates "that the education system be absolutely complete, attentive to every detail, extending beyond ordinary parameters. And further, it must produce results without waste." 255 S.E.2d at 874.

The trial court ruled that education is not a "fundamental interest" for purposes of constitutional scrutiny. (FD 34-42) Although this is a test of judicial scrutiny for equal protection issues, the trial court appeared to consider this finding the touchstone of whether to provide any meaningful review of impairments to the constitutionally protected right to education. As a result, the trial court applied only the most minimal scrutiny in this case. The constitutional importance of public education under Article VIII of the South Dakota Constitution, coupled with the specific language of that article, requires greater scrutiny than given in this case.

For example, the New Jersey Supreme Court, in *Robinson v. Cahill*, declined to find that education was a fundamental right in the state, citing concerns that a vast number of other government services would then also receive such a classification.¹⁰ Nevertheless, the court recognized that the New Jersey constitution imposes a mandate that the state afford all pupils that educational opportunity which is needed in the

¹⁰ 303 A.2d at 284-285

contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market.”¹¹ The New Jersey Supreme Court has consistently held the state to that standard, requiring the state to provide appropriate educational resources for disadvantaged students to ensure that they too receive “a thorough and efficient education – one that will enable [them] to function effectively in the same society with their richer peers both as citizens and as competitors in the labor market.”¹² Although education is not a fundamental right in New Jersey, this finding in no way absolved the state from fulfilling its constitutional obligation to provide a thorough and efficient system of education under the Education Article.

¹¹ *Id.* at 295.

¹² *Abbott v. Burke*, 643 A.2d 575, 580 (N.J. 1994).

A. Under the South Dakota Constitution Education is of Utmost Importance

The South Dakota Constitution, Article VIII, has among it the strongest language protecting the right to a free and adequate education of any state constitution.¹³ The South Dakota Constitution states:

“The stability of a republican form of government depending on the morality and intelligence of the people, it shall be the duty of the Legislature to establish and maintain a general and uniform system of public schools wherein tuition shall be without charge, and equally open

¹³ Law review articles set forth two distinct methods for evaluating the strength of state constitution education clauses. South Dakota’s education article is classified in the second-strongest category under both analyses, making it one of only five states to be in the strongest or second-strongest category under both methodologies.

The most widely used categorization scheme was established by Erica Black Grubb in 1974. Erica Black Grubb, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 Harv. C.R.-C.L. L. Rev. 52, 66-70 (1974). She divided education articles into four increasingly-strong categories: Category I clauses simply establish a school system; Category II clauses mandate that the system of education meet a certain level of quality, such as “thorough and efficient;” Category III clauses, such as South Dakota’s, contain not only mandates regarding the quality of the education that must be provided, but also include language regarding the purpose and/or benefit of a quality education. Grubb found only six states to fall into Category IV, though Florida’s constitution, which has since been amended, would now fit into Category IV as well.

Molly McUsic’s approach sorts clauses according to the minimum standard of quality each clause imposes on the state system of education: Group I constitutions specify an explicit level of education; Group II constitutions, such as South Dakota’s, contain language committing the state to a considerable quality standard for education, but which is not as explicit as the language of the constitutions in the first grouping; Group III constitutions suggest a lower minimum standard of education than those in Group II, and Group IV constitutions express a minimal commitment to educational quality. McUsic found only five states to meet the Group I standard, though Florida’s revised clause would now fall under that classification. Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 Harv. J. on Legis. 307, 326-39 (1991).

Only Washington and Florida fall into the strongest category under both systems of classification. Those states, as well as South Dakota, Wyoming, and Rhode Island, are the only states to be in the strongest or second-strongest category based on both analyses.

to all; and to adopt all suitable means to secure to the people the advantages and opportunities of education.” S.D. Const. art. VIII, § 1.

The Constitution further requires the legislature to “make such provision by general taxation and by authorizing the school corporations to levy such additional taxes as with the income from the permanent school fund shall secure a thorough and efficient system of common schools throughout the state.” S.D. Const. art VIII, §15.

Not satisfied with specifying a single duty respecting education on the State, Article VIII has three reinforcing mandates:

- (1) “it shall be the duty of the Legislature to establish and maintain a general and uniform system of public schools wherein tuition shall be without charge, and equally open to all”;
- (2) it shall be the duty of the Legislature to . . . adopt all suitable means to secure to the people the advantages and opportunities of education”;
- and
- (3) “The legislature shall make such provision by general taxation and by authorizing the school corporations to levy such additional taxes as with the income from the permanent school fund shall secure a thorough and efficient system of common schools throughout the state.”

In addition, Article VIII explicitly links the fulfillment of these duties to the “stability of a republican form of government.” Under the South Dakota Constitution, education stands with the electoral franchise itself in importance to the stability and maintenance of our form of government. Indeed, a well-education citizenry is deemed so important by the State of South Dakota that the State has long made education compulsory, with parents who refuse to have their children educated subject to criminal penalties. (SDCL § 13-27-11).

This Court, in 1921, found Article VIII’s language regarding education to demonstrate that “during the whole history of our nation, . . . education ha[s] been

recognized as [a] foundation pillar[] of American civilization.”¹⁴ Last year, this Court reiterated that “[i]t is undisputed that public education is of utmost importance to the state [of South Dakota] and its citizens.”¹⁵ This Court further observed that “education is perhaps the *most important function* of state and local governments.”¹⁶

This clearly reflects the strongly held opinions of the leaders of the Dakota Territory and those who lead the Territory to statehood. In his first address to the first Territorial Legislature in 1862, Governor William Jayne focused on the value of education, proclaiming:

There is no subject more essential and vital to the prosperity and general welfare of the Territory, than the subject of education. The virtue, intelligence, and public happiness of the people, and all that conduces to the advancement of prosperity, wealth, and power of country, is intimately associated with, and dependent upon, the development of the educational interest of the state. ⁷₁

The state’s first governor, Arthur C. Mellette, reiterated this, stressing that one of the primary purposes of the new government was “to promote a common education, which is the preserver of all.”¹⁸

¹⁴ *State v. Erikson*, 44 S.D. 63, 182 N.W. 315, 316 (SD 1921)

¹⁵ *Olson v. Guindon*, 2009 S.D. 63, ¶ 15, 771 N.W.2d 318, 323

¹⁶ *Id.* (Quoting *Brown v. Board of Education of Topeka*, 347 US 483, 493 (1954)).

¹⁷ Cleata B. Thorpe, “Education in South Dakota: Its First Hundred Years 1861-1961” SOUTH DAKOTA HISTORICAL COLLECTIONS , VOL XXXVI 213 (1972).

¹⁸ Institute for Educational Equity and Opportunity, *Education in the 50 States: A Deskbook of the History of State Constitutions and Laws About Education* 141 (July 2008) (“*Education in the 50 States*”).

Article VIII imposes three separate and reinforcing obligations on the legislature relating to the system of public education that must be established, maintained and funded. These public schools must be “thorough”, “efficient”, “general” and “uniform.”. They must be “equally open to all” and in these schools “tuition shall be without charge.”. And the legislature is duty bound “to adopt all suitable means to secure to the people the advantages and opportunities of education.” What the framers of Article VIII did was to take the strongest language they could find from other state constitutions concerning the state’s obligation to provide adequate, free and equal educational opportunities and roll that language into Article VIII of the South Dakota Constitution. Article VIII was not intended as a hortatory exercise. Rather, Article VIII expresses a solemn obligation of utmost importance to the State of South Dakota, placing public schools at the pinnacle of state constitutional interests. Recognizing that public schools are essential to the stability of republican form of government, Article VIII leaves no doubt about the duties of the legislature to provide adequate public schools.

Unfortunately, the trial court used an “equal protection” analysis of fundamentality to examine Article VIII and overlooked the clear language of this article that imposes mandates on the legislature and its powerful constitutional history that attests to the framer’s intent that these mandates be enforced.

B. A Thorough and Efficient System of Public Schools Must Provide Educational Opportunities to All Children

1. The Trial Court Dismissed the Plight of Disadvantaged Students and Poor School Districts

The trial court largely disregarded the plight of South Dakota's poor school districts and educationally disadvantaged students who are struggling to obtain an education in the absence of appropriate educational programs, services and facilities. The trial court focused almost exclusively on the overall or average performance of South Dakota public school students and treated the poor performance of certain "subgroups" as largely irrelevant. (FD at 93)

The trial court also minimized the educational harm resulting from students lacking proficiency as measured by state content standards. The trial court erroneously ruled that the constitutional mandate does not require the state to ensure that all students have the opportunity to meet South Dakota's educational requirements and goals including its educational content standards. (FD at 50) Consequently, the trial court took the position that it could not assume that the lack of academic proficiency shown by state tests had any relevance to whether the South Dakota school funding system provided constitutionally adequate public schools. (FD at 50) The basis for these conclusions is the trial court's finding that South Dakota "accreditation, assessment, and accountability system...exceeds the standard in the state constitutional requirements." (FD at 16)

We believe this finding was clear error since the South Dakota Department of Education (DOE), which established these standards, has taken the firm position that these content standards are subminimal as a measure of whether a student is prepared for adulthood, including post-secondary education or as a participant in the job market. The DOE's overview of the content standards states: "The core of knowledge and skills set forth as board-adopted *Standards* is essential to prepare South Dakota students for work,

for post-secondary education, for responsible citizenship, and for personal fulfillment as life-long learners.”¹⁹ Based on this statement the content standards established by the DOE encompass the knowledge and skills that are essential for all students to function as adults in today’s modern society; in other words, they are at least coterminous with the definition of a constitutionally adequate education, as interpreted by the trial court – and certainly not in excess of that definition. However, the DOE overview goes on to articulate a much narrower scope for these standards than the constitutional definition:

*The Content Standards define only the core elements of education that should apply to all students without regard to their specific career and academic plans. Every student is expected to achieve goals that are broader than those outlined by the Standards. At the high school level, for instance, many students heading directly to post-secondary study or to the workplace will require learning experiences that are outside of the essential core in specific content areas set forth in the Standards.*²⁰

This suggests that, if anything, the content standards do not encompass the constitutional requirement, because meeting the content standards does not ensure that students have been adequately prepared for post-secondary study or the workplace. Nevertheless, the trial court erred in concluding that the state’s content standards exceed the constitutional minimum, and should have found that an important indicia of an adequate education is, at a minimum, the opportunity for all students to achieve the state education standards.

The trial court justified the neglect of at-risk students’ pressing educational needs on the ground that “no one has yet determined what group of replicable strategies can

¹⁹ <http://doe.sd.gov/contentstandards/overview.asp>.

²⁰ *Id.* (emphasis supplied).

eliminate an entire district's (much less a state's) achievement gap for at-risk kids," (FD at 16-17) but this conclusion was contradicted even by defense expert witness Dr. John Murphy who testified that neither socio-economic status nor race are valid excuses for poor performance; while they may present additional hurdles, these challenges are surmountable. (John Murphy, Day 18 at 3503-06) Moreover, decisions from other state's highest courts interpreting state constitutional obligations to provide an adequate education would find this neglect of appropriate educational opportunities for at-risk students unacceptable and an abnegation of the critical role of the public schools in maintaining a stable republican form of government.

The record in this case clearly demonstrates that a significant number of students in South Dakota fail to achieve academic proficiency or graduate from high school, and that lack of resources prevents school districts from providing at-risk students the educational opportunities they need to succeed. A school funding system that largely ignores the educational opportunities appropriate for a significant group of students and the educational tasks that school boards must undertake to educate at-risk students cannot be considered constitutionally adequate.

2. A Constitutional System of Public Schools Guarantees All Children an Adequate Education

The language of Article VIII leaves no doubt that the South Dakota system of public schools must educate all the children in the state, including those who are not "average". These schools must be "equally open to all" and "tuition shall be without charge".

The Founding Fathers of the American Republic strongly emphasized the importance of education in building the new nation. The seeds of the common school movement were laid by those such as John Adams and Thomas Jefferson who viewed the future of the republic as based on universal education. According to John Adams:

[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.²¹

Similarly, Thomas Jefferson wrote extensively on the need for free public 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.²²

Thus, the plain language of Article VIII and the context in which it was drafted recognize and mandate the education of all students from the most disadvantaged to the most advantaged. In a republic each vote counts the same. Accordingly, the public education system, on which depends the stability of a republican form of government, must provide educational opportunities that will prepare all children to become a responsible citizens and productive members of society.

This conclusion that the Education Article requires the state to educate all students is supported by decisions of the highest courts of other states. Overall high achievement within a state does not mean that the state is fulfilling its constitutional

²¹ David McCullough, *John Adams* 364 (2001).

²² Letter to George Whyte, p. 452 (1786) (emphasis added).

responsibilities regarding education. Other state courts have invalidated their states' systems of school finance in spite of satisfactory overall performance because the states were nevertheless failing to provide adequate educational opportunities to some children.

The New Jersey Supreme Court held in 1973 that “[t]he mandate that there be maintained and supported ‘a thorough and efficient system of free public schools’ ... can have no other import” than “an equal educational opportunity for children.” *Robinson v. Cahill*, 303 A.2d 273, 294 (N.J. 1973). The court concluded that “[t]he Constitution's guarantee must be understood to embrace 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.” *Id.* at 295. The court later clarified that a “thorough and efficient” system of public schools requires that “poorer disadvantaged students must be given a chance to compete with relatively advantaged students.” *Abbott v. Burke II*, 575 A.2d 359, 372 (N.J. 1990). The court reiterated this point in 1997, holding:

Of course, the right to a thorough and efficient education does not ensure that every student will succeed. It must, however, ensure that every child in New Jersey has the opportunity to achieve. As we noted in *Abbott II*, *supra*, “[i]f the claim is that these students simply cannot make it, the constitutional answer is, give them a chance.” *Abbott VI*, 693 A.2d 417, 443 (N.J. 1997) (citing 575 A.2d 359).

The court further concluded:

Our Constitution requires that public school children be given the opportunity to receive a thorough and efficient education. That constitutional vision irrefutably presumes that every child is potentially capable of attaining his or her own place as a contributing member in society with the ability to compete effectively with other citizens and to succeed in the economy. The wisdom giving rise to that vision is that both the child and society benefit immeasurably when that potential is realized.” *Abbott VI*, at 445.

The New Jersey court ruled a thorough and efficient education must prepare disadvantaged students to function as citizens and workers in the same society as students from more advantaged backgrounds, and that to accomplish this requires affording disadvantaged students resources above and beyond those needed to educate their wealthier counterparts. 575 A.2d at 403.

The Kansas trial court held the state's school funding system to be unconstitutional because it "dramatically and adversely impact[ed] the learning and educational performance of the most vulnerable and/or protected Kansas children." *Montoy v. State*, No. 99-C-1738, Memorandum Decision and Order, Fact 2c (Dist. Ct. Shawnee Cty, Dec. 19, 2003) *Affirmed*, *Montoy v. State*, 1278 Kan. 769; 102 P.3d 1160 (Kan. 2005) (affirmed based on violation of education article of state constitution). *See also Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 332 (NY 2003)(*CFE*), (invalidating the state's school funding system as to one school district, New York City, because students in the city were denied a sound basic education, which the court interpreted as requiring a meaningful high school education).

The language of Article VIII, the history of common schools, as well as precedent from the highest courts of other states, leaves no doubt that a constitutionally adequate system of public schools must provide educational opportunities that will prepare all children to become a responsible citizens and productive members of society.

III. South Dakota's Funding System Should be Based on Factors Directly Related to Accomplishing the Constitutional Result.

It is undisputed that, despite the constitutional importance of education in South Dakota, the funding the state provides for education is in no way based on education-

related considerations. Moreover, this state has never conducted an analysis to determine the cost of providing an adequate education to students in the state. As acknowledged by South Dakota Secretary of Education Rick Melmer, Representative James Putnam, Susan Woodmanson, the Program Administrator for the Department of Education Office of State Aid and School Finance, and Tami Darnell, Director of the Office of Finance and Management for the Department of Education, South Dakota's education funding formula provides a set amount regardless of what may be the actual need within a particular district. (Day 8, pg 1509-10; Day 9, pg 1681; Day 11, pg 2215; Day 19 pg 3616). The Department of Education collects no data from districts about programs that they need to implement but do not have the funds to implement. (Tami Darnell Day 19 pg 3616). In short, the state has no knowledge of, nor any mechanism for determining, the extent to which any of its schools or districts are inadequately funded.

The highest courts of states interpreting similar constitutional mandates for educational adequacy have required that school funding systems be based on factors that are directly related to accomplishing the constitutional result, particularly when presented with factual situations similar to those testified to at trial.²³ They have required that in structuring and implementing school funding systems, states use relevant education need and cost factors focused on assuring that a constitutionally adequate education is available to all children in the state. These factors are necessary to ensure that resources

²³ See, e.g., *Campaign for Fiscal Equity Inc.*, 801 N.E.2d at 345, 348 (N.Y. 2003); *Montoy v. State*, 102 P.3d 1160, 1164 (Kan. 2005); *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 486 (Ark. 2002); see also *Campbell Cty. Sch. Dist. v. State*, 907 P.2d 1238, 1259 (Wyo. 1995); *Opinion of the Justices*, 765 A.2d 673, 677 (N.H. 2000) (State must define the content of and "underwrite the cost of an adequate education for each educable child").

are *actually available* for students with varying needs who require varying educational programs and services.

A definition of the constitutional obligation is the starting point for an analysis of the educational needs and costs. As noted by the Montana Supreme Court in a similar case:

Without an assessment of what constitutes a "quality" education, the Legislature has no reference point from which to relate funding to relevant educational needs. In the absence of a threshold definition of quality, we cannot conclude that the system is adequately funded as required by Article X, Section 1(3). *Columbia Falls Elementary School Dist. No.6 v. State*, 109 P.3d 257, 262 (Mont. 2005).

The Kansas Supreme Court in a similar education adequacy case relied on the absence of a cost study to establish the reasonableness of certain cost factors in the Kansas school funding system as a basis for determining that the Legislature had failed to comply with the constitutional mandate to "make suitable provision" for public education:

[T]he district court found that the financing formula was not based upon actual costs to educate children but was instead based on former spending levels and political compromise. This failure to do any cost analysis distorted the low enrollment, special education, vocational, bilingual education, and the at-risk student weighting factors. *Montoy v. State*, 102 P.3d 1160, 1164 (Kan. 2005).

The courts have recognized that a study of relevant educational needs and costs is important for assuring that the constitutional mandate will be met, and provides a basis for considering whether and how education factors have figured in decisions concerning school funding. Although studies of educational costs and needs do not guarantee that the constitutional mandate will be met, they do ensure a rational *education-focused*

foundation and referent for analysis. The requirement that the State, in implementing its constitutional obligation, use factors that relate directly to the accomplishment of this obligation is an essential initial step in ensuring that the school funding system is actually designed to prepare individuals to function in society.

Comprehensive cost studies have been undertaken in many states, sometimes as a result of adequacy lawsuits and sometimes wholly apart from litigation. We submit that it will not be necessary for this Court to address, much less to make a factual finding as to, a precise dollar amount of funding that would be required to enable all South Dakota students to receive a constitutionally adequate education. Rather, what is sought is a determination and declaration only that the current system, as funded and implemented, is not designed to provide an adequate education to all South Dakota students.

IV. Conclusion

For the foregoing reasons, we ask this Honorable Court to do the following:

1. Affirm the trial court's determination that Article VIII of the South Dakota Constitution guarantees as a constitutional right that all South Dakota children are entitled to a free and adequate public education.
2. Affirm the trial court's determination that "an adequate education is one that provides the opportunity to prepare students for life after school in today's modern society," which means that it prepares them "to be responsible and intelligent citizens and to be competitive in areas beyond secondary education."
3. Declare that an adequate education must give all students the opportunity to meet the state education standards.
4. Declare that the state must conduct a study of the actual cost of providing all South Dakota students with an adequate education, and fund schools accordingly.

Respectfully submitted,

TIESZEN LAW OFFICE, PROF. LLC
For the Firm

Naomi R. Cromwell
306 East Capitol, Suite 300
Pierre, SD 57501
Tel: (605) 224-1500

William H. Engberg
Associated School Boards of South Dakota
306 East Capitol
Pierre, SD 57501
Tel: (605) 773-2500

Emily Bloomenthal
Education Law Center
60 Park Place, Suite 300
Newark, New Jersey 07102
Tel: (973) 624-1815

David C. Long
333 Lowell Avenue
Mill Valley, CA 94941-3845
Tel: (415) 383-1942

*Attorneys for Amicus Curiae
Associated School Boards of South Dakota*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the Brief of Amicus in the above-captioned matter were served by First Class United States mail, postage prepaid, upon Scott Abdallah, Ron Parsons, and Pamela Bollweg, Johnson, Heidepriem, Abdallah & Johnson, P.O. Box 2348, Sioux Falls, SD 57101; and Diane Best, State of South Dakota, Office of Attorney General, 300 N. Dakota Avenue, #403, Sioux Falls, SD 57104, and Bobbi Rank, State of South Dakota, Office of Attorney General, 1302 E. Highway 14, #1, Pierre, SD 57501, on this 8th day of February, 2010.

Naomi R. Cromwell

CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the type volume limitation. According to the word and character count of the word processing program used to prepare this Brief, it contains 4,985 words, not including matters excluded by 15-26A-66(b)(3).

Naomi R. Cromwell