STATE OF CONNECTICUT SUPREME COURT

S.C. 18032

CONNECTICUT COALITION FOR JUSTICE IN EDUCATION FUNDING, ET AL.

V.

GOVERNOR M. JODI RELL, ET AL.

BRIEF OF THE PLAINTIFF-APPELLANTS

FILED: December 21, 2007

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TABLE OF CONTENTS

STATEMENT OF ISSUES

(1) Whether the trial court erred in applying the six factor analysis from *State v. Geisler*, 222 Conn. 672 (1992) on an incomplete record;

(2) Whether the trial court erred in weighing abstract "prudential cautions" regarding judicial manageability on an incomplete record;

(3) Whether the trial court erred in concluding that plaintiffs fail to state a claim, despite recognizing that claims indistinguishable from plaintiffs' would be cognizable under article eighth, § 1 of the Connecticut Constitution;

(4) Whether the trial court erred in incorporating justiciability considerations into its *Geisler* analysis;

(5) Whether the trial court erred in concluding that a proper analysis of the six *Geisler* factors demonstrates that the fundamental right to education does not include a right to suitable educational opportunities, or at least a right to some minimum qualitative standard.

TABLE OF AUTHORITIES CITED

Cases

Statutes

Other Authorities

Constitutional Provisions

STATEMENT OF FACTS AND NATURE OF PROCEEDINGS

Each year, thousands of students leave the Connecticut school system with reading and math skills too rudimentary to compete for productive employment, pursue higher education, or participate fully in our democratic institutions. These students join the ranks of a burgeoning underclass that the state's educational system has failed. (Am. Compl. ¶¶ 2, 3.) Plaintiffs in this case are Connecticut schoolchildren that are trying desperately not to become members of that class.

However, plaintiffs' efforts will be in vain if the State continues to provide inadequate resources and allocate too few of those resources to the students with greatest need. Plaintiffs in this case include: students in classes too large to learn effectively (*Id.* ¶¶ 60, 61); students who have had no opportunity to attend preschool (*Id.* ¶¶ 56, 58, 60); students who perform poorly, yet lack access to remedial instruction or summer school (*Id.* ¶¶ 56, 58, 62, 64); students who share limited, poor-quality technological resources (*Id.* ¶¶ 56, 64); students who are taught by teachers lacking subject-matter expertise (*Id.* ¶ 56); students who attend schools with high concentrations of special education students (*Id.* ¶¶ 13, 14, 16, 29, 30), bilingual or English as a Second Language (ESL) students (*Id.* ¶¶ 9, 18, 23, 29); and students who are at-risk (poverty, ESL, single-parent), yet lack access to resources commensurate with their needs. (*Id.* ¶ 79.)

Connecticut's failure to provide adequate opportunities has resulted in a system that fails by any educational standard. The inability to meet state standards, which are the State's own guideposts for what a child should learn, are emblematic of the failure in many districts. "Proficient" is a state metric for measuring essential reading, writing and

mathematics skills. (*Id.* ¶ 90.). At Lincoln Elementary in New Britain, more than 80% of fourth-graders cannot read at a "proficient" level. (*Id.* ¶ 93.) At the Roosevelt School in Bridgeport, 69% of fourth graders cannot perform at a "proficient" level in math. (*Id.* ¶ 95.) These performance deficiencies exist at the tenth grade level as well. In Plainfield, more than 30% of tenth graders cannot read at "proficient" level, (*Id.* ¶ 96); and at East Hartford High School, more than 40% cannot perform at "proficient" level in math. (*Id.* ¶ 97.) In Plainfield, the dropout rate is 20%, and in Bridgeport's Bassick High School, nearly half of all students never earn a diploma. (*Id.* ¶114.) Measured against federal standards or the recommendations of education experts, the situation is equally bleak. (*Id.* ¶¶ 85-88, 99, 107, 112.)

On these facts, as set forth in plaintiffs' Amended Complaint, the defendants filed a motion to strike the first, second and fourth counts on September 15, 2006.[1] On September 17, 2007, the trial court granted the motion, holding that plaintiffs failed to state a claim. Plaintiffs appealed that decision. This Court granted jurisdiction pursuant to Conn. Gen. Stats. § 52-265(a) on October 31, 2007.

[1] First Count: By failing to maintain a public school system that provides plaintiffs with suitable and substantially equal educational opportunities, the State is violating Article Eighth, § 1 and Article First, §§ 1 and 20 of the State Constitution. (Am. Compl. ¶ 160.) Second Count: By failing to maintain a public school system that provides plaintiffs with suitable educational opportunities, the State is violating Article Eighth, § 1 of the State Constitution. (*Id.* ¶ 163.) Fourth Count: The State's failure to maintain a public school system that provides plaintiffs with suitable and substantially equal educational opportunities has disproportionately impacted African-American, Latino, and other minority students, in violation of Article Eighth, § 1 and Article First, §§ 1 and 20 of the State Constitution, and 42 U.S.C. § 1983. (*Id.* ¶ 170.) Plaintiffs' remaining count is as follows: By failing to maintain a public school system that provides plaintiffs with substantially equal educational opportunities, the State is violating Article Eighth, § 1 and Article First, §§ 1 and 20 of the State Constitution. (*Id.* ¶ 166.)

ARGUMENT

Thirty years ago, this Court held in *Horton v. Meskill* (*Horton I*) that education is a fundamental right. 172 Conn. 615, 648 (1977). This historic decision placed an affirmative duty on the State under article eighth, § 1 to uphold that right. *Sheff v. O'Neill*, 238 Conn. 1, 21 (1996). Article eighth, § 1 of the Connecticut Constitution provides: "There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation." Conn. Const. art. VIII, § 1. This Court has established that article eighth, § 1, in conjunction with the equal protection clause, entitles Connecticut schoolchildren to equal enjoyment of the right to education. *Horton I*, 172 Conn. at 649; *see also Sheff*, 238 Conn. at 34. What has remained undefined is what level of educational opportunity is guaranteed by the fundamental right to education. In the present case, plaintiffs seek an answer to that question. Plaintiffs claim that the right to education guarantees a qualitative standard that serves specific purposes, namely to prepare students to obtain gainful employment, participate fully in our democracy, advance to higher education, and meet state standards. (Am. Compl. ¶ 160.) The trial court, in striking plaintiffs' claim, committed both procedural and substantive errors.

Procedurally, the trial court erred in making a final determination on the contours of article eighth, § 1 on an incomplete record. In doing so, the trial court disregarded settled Connecticut practice with respect to motions to strike. Specifically, the trial court erred in determining that (1) plaintiffs must present all requisite evidence under the six factor *Geisler* test within the four corners of the complaint; (2) plaintiffs must allay a court's "abstract" concerns with judicial manageability prior to the presentation of evidence on

appropriate and intelligible standards; and (3) plaintiffs must rebut the evidentiary presumption that statutes are constitutional prior to the development of a record.

Substantively, the trial court erred in dramatically narrowing the scope of article eighth, § 1, holding that the State has fulfilled its constitutional duty as long as schools are "free" and "public." Such action strips the fundamental right to education of any substantive content, and denies Connecticut schoolchildren the opportunity to challenge the qualitative deficiencies of the State's educational system. The decision ignores this Court's precedent, is contrary to the text, history, and purpose of article eighth, § 1, and places Connecticut alone among the 25 states that have considered the issue. Like the *Horton I* plaintiffs thirty years ago, plaintiffs ask the Court to clarify the contours of the state's only affirmative constitutional provision. Plaintiffs acknowledge the gravity of their claim. Gravity alone, however, is not a ground on which to narrow one of Connecticut's most significant and cherished constitutional provisions and prevent plaintiffs from seeking redress under it.

Accordingly, plaintiffs respectfully ask this Court to reverse the trial court's decision, and provide guidance to the court that: (1) article eighth, § 1 includes a right to suitable educational opportunities, *viz.*, a qualitative standard that serves the purposes alleged in ¶ 46 of plaintiffs' Amended Complaint, *or* (2) article eighth, § 1 includes some minimum qualitative standard, the definition of which would be established on a full record, *or at the least*, (3) the trial court must review a full record before making its own determination of the contours of article eighth, § 1.

I. THE TRIAL COURT ERRED IN MAKING A PREMATURE DETERMINATION OF THE CONTOURS OF ARTICLE EIGHTH, § 1

In granting the motion to strike, the trial court procedurally erred, conducting a premature determination of the contours of article eighth, § 1. In Connecticut, a motion to strike is granted only when the existence of facts provable in the complaint would not support a cause of action as a matter of law. *See* Practice Book § 10-39(a)(1). This Court reviews motions to strike decisions *de novo*. *State v. Vakilzaden*, 272 Conn. 762, 768-69 (2005).

A. THE TRIAL COURT ERRED IN APPLYING *GEISLER* ON AN INCOMPLETE RECORD, AN ACTION THAT UNDULY BURDENS LITIGANTS

As the trial court recognized, the *Geisler* tools of analysis are the established method for determining the contours of the state constitution. (*See* Memorandum of Decision of September 17, 2007 (Mem. Decision Mot. Strike) p. 16 ("[I]n *State v. Geisler*, 222 Conn. 672, 685 (1992), the Supreme Court specified the six factors a court is to consider in conducting . . . an inquiry [into the contours of the state constitution].").)[2] Prior cases have shown that the application of this six factor test requires a broad, fact-intensive evidentiary record. As such, applying the *Geisler* test on a motion to strike, as the trial court did, is premature and places undue burdens on litigants. The factual requirements of the test counsel in favor of conducting such a determination after a full record has been developed. Indeed, plaintiffs are unaware of a single case in which a trial court has applied *Geisler* at the motion to strike stage.

[2] In *Geisler*, the Court enumerated six factors: (1) the text of the constitution; (2) prior holdings and dicta; (3) federal precedent; (4) sister state decisions; (5) historical information; and (6) economic and sociological considerations. 222 Conn. at 685.

A review of this Court's precedent demonstrates the broad array of factual evidence the Court takes into account in applying the *Geisler* framework. *See, e.g.*, *State v. Ledbetter*, 275 Conn. 534, 566 (2005) (finding that "[t]he sixth factor, economic and sociological considerations, favors the defendant [as] [t]he defendant cites to research studies critical of the [test currently used to determine the reliability of identifications]."); *Ramos v. Town of Vernon*, 254 Conn. 799, 838-39 (2000) (rejecting the plaintiff's constitutional argument regarding the existence of a right to family autonomy in part because the plaintiff "has provided no historical evidence of any constitutional or quasi-constitutional rights maintained by parents that were recognized at common law in this state prior to 1818."); *State v. Trine*, 236 Conn. 216, 230 n.12 (1996) (finding that there is no "textual or historical basis for assigning independent meaning to our state constitutional provision. . . . [and that] [t]he parties have advanced no compelling socioeconomic considerations other than those that we address in text.").

As these cases demonstrate, the trial court was correct to suggest that the *Geisler* framework requires "a complete review of the evidence." (Mem. Decision Mot. Strike p.15 (quoting *Moore v. Ganim*, 233 Conn. 557, 581 (1995)).) This requirement implies that cases which require a full *Geisler* analysis should not be resolved on a motion to strike. Otherwise, litigants would be forced to carry a significant evidentiary burden on pleadings alone, where plaintiffs have traditionally not been expected to put forward any evidence. *See Craig v. Driscoll,* 262 Conn. 312, 343 n.23 (2003) ("[M]atters of evidence are not required to be stated in the complaint.") (citing Practice Book § 10-1).

The practice in Connecticut is to allow plaintiffs in *Geisler* cases to present facts beyond those alleged in the complaint. As such, the trial court should have allowed the

development of a full record before employing *Geisler*.

B. THE TRIAL COURT ERRED IN STRIKING PLAINTIFFS' CLAIMS ON AN INCOMPLETE RECORD, DEPARTING FROM THE PRACTICE OF CONNECTICUT TRIAL COURTS AND SISTER STATE COURTS

Connecticut trial courts presented with claims requiring the examination of the contours of article eighth, § 1 have consistently denied motions to strike.[3] The State brought motions to strike in both *Broadley v. Board of Education of Meriden*, 229 Conn. 1 (1994), and *Sheff v. O'Neill*, 238 Conn. 1 (1996). In each case, the State's motion to strike was denied. *See Broadley v. Bd. of Educ. of Meriden*, 1990 WL 269168 (Conn. Super. Ct. July 20, 1990) (copy attached hereto as Exhibit A); *Sheff v. O'Neill*, 1990 WL 284341 (Conn. Super. Ct. June 18, 1990) (copy attached hereto as Exhibit B). These motions were denied, even though in both cases the trial court ultimately rejected plaintiffs' claims at trial. *See Broadley v. Bd. of Educ. of Meriden*, 1992 WL 204625 (Conn. Super. Ct. Aug. 18, 1992) (copy attached hereto as Exhibit C); *Sheff v. O'Neill*, 1995 WL 230992 (Conn. Super. Ct. Apr. 12, 1995) (copy attached hereto as Exhibit D).

The complaint in *Broadley* alleged that a state statute, informed by article eighth, § 1, established a right to special, individualized services for students with "extraordinary learning ability or outstanding talent in the creative arts." *Broadley*, 229 Conn. at 2 n.1. In rejecting the State's motion to strike, the trial court found dispositive that there was "no Connecticut case law in point" regarding the statute and its relation to article eighth, § 1.

[3] This approach is also consistent with this Court's prior statements on the role of a motion to strike. In *Trubeck v. Ullman*, 147 Conn. 633 (1960), a case involving a challenge to statutes forbidding the use and prescription of contraceptive devices, this Court stated that a demurrer (motion to strike) is properly sustained "[i]f the rights and jural relations of parties in the situation . . . have been conclusively determined by previous decisions of the court." *Id.* at 635 (citing *Buxton v. Ullman*, 147 Conn 48, 50-51 (1959)). The case at hand clearly presents a question that has not been determined by prior caselaw.

Broadley, 1990 WL 269168, at *1. Because there was sufficient ambiguity regarding plaintiffs' claims, the court denied the State's motion to strike. *Id.*

In *Sheff*, the plaintiffs alleged that extreme racial isolation violated the guarantee of substantially equal educational opportunities. The State's motion to strike in that case was similarly rejected because the question plaintiffs presented was an unsettled question of law under article eighth, § 1. Emphasizing that motions to strike should not be used to prejudge the propriety of "constitutional claims affecting the public interest," *Sheff*, 1990 WL 284341, at *6, the court declined to address "the merits of the constitutional issues presented . . . at this stage of the proceedings." *Id.* (citing *Tooley v. O'Connell*, 253 N.W.2d 335, 340 (Wis. 1977)). [4]

The courts of sister states have similarly recognized that in determining the contours of the right to education, dismissal at the motion to strike stage is inappropriate. In particular, these courts have rejected the type of factual determinations made by the trial court below. In South Carolina, the Supreme Court admonished the lower court for reaching similar factual conclusions based on pleadings alone: "While the order [of the circuit court] purports to decide a Rule 12(b)(6) motion, it is clear that the judge in fact granted respondents summary judgment, making numerous factual determinations, and finding appellants failed to present 'clear and convincing' evidence to support their claims." *Abbeville County Sch. Dist. v. State*, 335 S.C. 58, 64 (1999). Indeed, numerous sister courts have rejected attempts by trial courts, at the motion to strike stage, to find that the

[4] The plaintiffs in *Sheff* raised a claim similar to that stricken by the trial court in this case—that Connecticut schoolchildren have a right to a "minimally adequate education." *See Sheff*, 238 Conn. at 36. The Supreme Court ultimately failed to reach the merits of that claim. *Id.* at 36-37 ("Because . . . the plaintiffs' remedial claims do not depend upon the validity of the third count [the "adequacy" count] of their complaint, we need not reach the merits of this claim.").

right to education does not include a minimum qualitative standard. *See Idaho Schs. for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 579 (1993); *Claremont Sch. Dist. v. Governor*, 138 N.H. 183, 184 (1993); *Campaign for Fiscal Equity v. State* (*CFE I*), 86 N.Y.2d 307, 319 (1995); *Leandro v. State*, 346 N.C. 336, 353 (1997).

C. THE TRIAL COURT ERRED IN WEIGHING ABSTRACT "PRUDENTIAL CAUTIONS" ON AN INCOMPLETE RECORD

As discussed in Part III, *infra*, plaintiffs contend that the trial court inappropriately incorporated justiciability considerations into its *Geisler* analysis in striking plaintiffs' claims. However, the trial court's constitutional analysis also fails on entirely procedural grounds because it was conducted prematurely. To the extent that a court has concerns with judicial manageability, it should allow plaintiffs to present a full record to demonstrate whether such concerns are valid. Specifically, the trial court's early speculations on the relative difficulty of making determinations such as "appropriate class sizes" or "highly qualified teachers," (Mem. Decision Mot. Strike p.35), would have been more properly considered after plaintiffs had the opportunity to present appropriate and intelligible standards after discovery and at trial.

The trial court in *Sheff v. O'Neill* recognized the prejudice inherent in "abstract" justiciability determinations where the fundamental right to education is implicated. In that suit, defendants also urged the trial court to strike the *Sheff* plaintiffs' claims on justiciability grounds. 1990 WL 284341, at *4 (Conn. Super. Ct. June 18, 1990). Distinguishing that case from *Pellegrino*, the *Sheff* trial court adopted the rationale of the *Pellegrino* dissenters, who argued that "'[T]he plaintiffs should not be deprived of the opportunity that was afforded to the plaintiffs in *Horton I*, to make an evidentiary showing that the legislature has

violated the constitution'; and cautioned against prejudging the issue of justiciability 'in the abstract' without a full hearing on the plaintiffs' claims . . . ." *Id.* (quoting *Pellegrino v. O'Neill*, 193 Conn. 670, 689, 693 (Peters, J., dissenting). In stark contrast, the trial court in the present case made a "prudential cautions" determination in the abstract and prejudged the issue of judicial capacity before allowing plaintiffs to present any evidence as to appropriate and intelligible standards.

Further, in its concerns with manageable standards, the trial court misunderstood the role of the "inputs" in ¶ 53 of plaintiffs' Amended Complaint. The "inputs" alleged are a set of components, such as "appropriate class sizes" and "highly qualified teachers," that can be used to evaluate the quality of an educational system. These components are only relevant to proving breach, and the trial court would weigh them in their totality. The duty to provide suitable educational opportunities is defined by the purposes of article eighth, § 1 in ¶ 46, and this is the only paragraph directly relevant to determining the existence of the right to suitable educational opportunities. Plaintiffs freely concede that it is their burden to submit evidence at trial which would allow a court to make the factual determinations necessary to rule in their favor, and plaintiffs are prepared to do so. But, prior to the submission of evidence, the trial court could not have accurately gauged the difficulty of such determinations, and accordingly the court should not have relied on these concerns in striking plaintiffs' claims.

D. THE TRIAL COURT ERRED IN CONCLUDING THAT PLAINTIFFS FAIL TO STATE A COGNIZABLE CLAIM, EVEN UNDER ITS NARROW CONCEPTION OF ARTICLE EIGHTH, § 1

Plaintiffs presented a cognizable claim under the trial courts' own reasoning. In its Memorandum of Decision, the trial court states that it "can well imagine situations where

state or local authorities might seek to eliminate, cut back or restrict programs in such a way that the ability of children in the state or a particular town or region to receive an education would be endangered." (Mem. Decision Mot. Strike p.40.) The trial court asserts that such educational deprivations would create a viable claim. Yet the trial court strikes plaintiffs' claims which have alleged, *inter alia*, that "Roosevelt School offers zero hours of computer education instruction . . . [and] does not offer world language instruction." (Am. Compl. ¶ 60), and "Plainfield High School . . . offers no pull-out remedial instruction, in-class tutorials, [or] after school programs . . ." (Am. Compl. ¶ 62). There is no meaningful difference between plaintiffs' alleged deficiencies and the deficiencies considered cognizable by the court.

More specifically, the trial court states that "a lawsuit brought by students with limited proficiency in English, challenging the town's action as denying them the right to a free education, would present a justiciable issue and one which the courts could entertain in their role as guardians of the public's constitutional right to a free elementary and secondary education." (Mem. Decision Mot. Strike 40.) Yet plaintiffs have alleged that substantial numbers of at-risk (poverty, ESL, single-parent) plaintiff-children attend schools lacking necessary resources. (Am. Compl. ¶ 78.) As such, it is clear that there is a "set of facts that could be proved consistent with the allegations" that would establish a viable claim. *Pellegrino v. O'Neill*, 193 Conn. 670, 692 (1984) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 104 (1984)). *See also Violano v. Fernandez*, 280 Conn. 310, 317 (2006) ("Moreover . . . [w]hat is necessarily implied in an allegation need not be expressly alleged.") (internal quotation and brackets omitted).

Based on this ground alone, the Court should hold, at minimum, that the trial court

erred in granting the State's motion to strike and remand for further proceedings on the claim acknowledged by the trial court. However, for the reasons discussed above, this Court should reject the trial court's premature determination in its entirety.

II. A PROPER ANALYSIS OF THE SIX *GEISLER* FACTORS DEMONSTRATES THAT THE FUNDAMENTAL RIGHT TO EDUCATION INCLUDES A QUALITATIVE STANDARD THAT SERVES THE PURPOSES OF ARTICLE EIGHTH, § 1

In granting the motion to strike, the trial court substantively erred because the text of the constitution, prior holdings and dicta, the history of the constitutional convention, and sister state jurisprudence demonstrate that the fundamental right to education includes a qualitative standard that serves the purposes of article eighth, § 1. Further, while plaintiffs have not been afforded discovery, currently available fact-based historical authorities and economic and sociological considerations also clearly support the recognition of that right.

A. THE TEXT OF THE CONSTITUTION SUPPORTS RECOGNIZING A QUALITATIVE STANDARD THAT SERVES THE PURPOSES OF ARTICLE EIGHTH, § 1

Proper textual analysis of article eighth, § 1 requires finding a qualitative standard that serves the purposes of public education. Article eighth, § 1 reads: "There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation." Conn. Const. art. VIII, § 1.

While the trial court focused on "free" and "public," the text derives most of its meaning from the object of those terms, the word "schools." The Concise Oxford English Dictionary (11th ed. 2004), defines "school" as "[a]n institution for educating children." To "educate," in turn, means "[to] give intellectual, moral, and social instruction." *Id.* Similarly, the Shorter Oxford English Dictionary (6th Ed. 2007) defines "school" as "[a]n

establishment in which children are given formal education," and education as "[t]he systematic instruction, schooling, or training of children and young people." Whether it is "intellectual, moral and social," or "systematic instruction," these definitions necessarily imply that article eighth, § 1 includes a qualitative component.[5] In contrast, the trial court's constricted reading of the text would allow the legislature to fulfill its constitutional duty as long as schools are "free" and "public," even if the quality of education these schools provide fails to serve any of the purposes of public education. Such a reading eviscerates the text and voids the significance of Connecticut's education clause.

The standard of constitutional interpretation this Court declared in *State* v. *Dukes* clearly supports plaintiffs' reading of the text: "[t]he Connecticut constitution is an instrument of progress, it is intended to stand for a great length of time and should not be interpreted too narrowly or too literally so that it fails to have contemporary effectiveness for all of our citizens." 209 Conn. 98, 115 (1988). As *Dukes* directs, when interpreting the text of the constitution, it is the "court's duty to assure that our constitution does not become a magnificent structure to look at, but totally unfit for use." *Id*. (internal quotations and alterations omitted). Indeed, the interpretation of "schools" must ensure that article eighth, § 1 continues to have "contemporary effectiveness" for all Connecticut children.

B. THE HOLDINGS AND DICTA OF THIS COURT SUPPORT RECOGNIZING A QUALITATIVE STANDARD THAT SERVES THE PURPOSES OF ARTICLE EIGHTH, § 1

This Court's precedent speaks expansively on the right to education enshrined in

[5] Justice Loiselle recognizes as much in his oft-quoted dissent from *Horton I.* "A town may not herd children in an open field to hear lectures by illiterates." *Horton v. Meskill*, 172 Conn. 615, 659 (1977) (Loiselle, J., dissenting). Further, Justice Loiselle continues, explaining that education must be "meaningful" and must "measure up to standards accepted by knowledgeable leaders in the field of education." *Id.*

article eighth, § 1. In *Horton I*, the Court found that "the right to education is so basic and fundamental that any infringement of that right must be strictly scrutinized." 172 Conn. 615, 646 (1977). Article eighth contains "the only constitutional provisions, recognized to date, that impose affirmative obligations on the part of the state to expend public funds to afford benefits to its citizenry." *Moore v. Ganim,* 233 Conn. 557, 596 (1995). Further, the Court has recognized the critical purposes that education serves, both for individual children and for the state as a whole. *See Sheff v. O'Neill,* 238 Conn. 1, 43-44 (1996) ("We have recognized the public schools as a most vital civic institution for the preservation of a democratic system of government.") (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982)).

In this case, plaintiffs allege that widespread qualitative deficiencies in the Connecticut educational system constitute an infringement of the fundamental right to education for thousands of Connecticut schoolchildren. Plaintiffs contend that such an educational system fails to serve the purposes of article eighth, §1 and is therefore unconstitutional. Although the prior opinions of this Court have never addressed the issue directly, this Court's precedent supports plaintiffs' contention that the right to education includes a right to suitable educational opportunities.

In *Horton I,* the Court's core holding was that education is a fundamental right. Reading article eighth, § 1 in conjunction with the equal protection clause, the Court also found that "pupils in the public schools are entitled to the equal enjoyment of [the] right" guaranteed under article eighth. 172 Conn. at 649. In reaching this holding, the Court demonstrated its concern with the quality of education. (*See also* Mem. Decision Mot. Strike p.17 ("*Horton I* . . . does suggest a concern on the part of the Supreme Court with the content of the education provided to Connecticut schoolchildren not just the funding made

available.").) Disparities in funding were only a proxy for disparities in quality. *Horton I*, 172 Conn. at 635 (finding "a direct relationship between per pupil school expenditures and the breadth and quality of educational programs"). The Court in *Horton I* even delineated "criteria for evaluating the 'quality of education'":

> (a) size of classes; (b) training, experience and background of teaching staff; (c) materials, books and supplies; (d) school philosophy and objectives; (e) type of local control; (f) test scores as measured against ability; (g) degree of motivation and application of the students; (h) course offerings and extracurricular activities.

Id. at 634-35. (*See also* Mem. Decision Mot. Strike p.17 (stating that these criteria "sound a lot like the fourteen 'components'" alleged in plaintiffs' Amended Complaint).) The Court also explicitly referenced Conn. Gen. Stat. § 10-4(a) which states that "each child shall have . . . equal opportunity to receive a *suitable program of educational experiences*." *Horton I*, 172 Conn. at 647 (quoting Conn. Gen. Stat. § 10-4(a) (emphasis added).[6] Even the trial court acknowledged that *Horton I* was "not just an exercise in mathematics. The Court was not concerned with equalizing education spending among towns for its own sake . . . ." (Mem. Decision Mot. Strike p.18.)

In the intervening years between *Horton I* and the Court's next landmark education decision, *Sheff*, the Court decided two other cases involving allegations relating to the field of education—*Savage v. Aronson*, 214 Conn. 256 (1990) and *Broadley v. Board of Education of Meriden*, 229 Conn. 1 (1994).[7] The issues involved in these cases are clearly

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[6] In addition, the State Board of Education holds as one of its "Core Beliefs" that "[e]very Connecticut public school student has a fundamental right to an equal educational opportunity as defined by free public education and a *suitable program of educational experiences*." (Am. Compl. ¶ 51.) (emphasis added)

[7] Although the Court in *Campbell v. Board of Education of New Milford*, 193 Conn. 93 (1984), referred tangentially to article eighth, that case provides no guidance in interpreting the fundamental right to education.

distinguishable from those found in *Horton I, Sheff*, and the case at hand.

In *Savage*, the plaintiffs claimed a constitutional right to the provision of emergency housing under article eighth, § 1. 214 Conn. at 256. The Court found that plaintiffs' claims did not implicate the right to education, but instead sought to establish a right to housing. *Id.* at 286-87. Accordingly, the Court rejected the *Savage* plaintiffs' claim. *See Sheff*, 238 Conn. at 19-20 (distinguishing *Savage* as follows: "while [the state] does have an affirmative constitutional obligation with respect to public elementary and secondary education . . . the state has no affirmative constitutional obligation to provide emergency housing . . . ."). *Savage*, therefore, does not bear on the decision the Court faces here.

In *Broadley,* the plaintiffs alleged that the State had a duty to provide additional, personalized services to meet the unique needs of gifted students. 229 Conn. at 2-3. The Court denied the *Broadley* claim on statutory grounds. *Id.* at 6 ("We reject the plaintiff's argument because it is contrary to the intent and purpose of the statutory scheme."). Because the decision in *Broadley* turned on statutory interpretation, it fails to implicate article eighth, § 1. Moreover, even though the *Broadley* plaintiffs did not make a direct constitutional challenge, the Court explained in dicta that the intent of the framers would not support such a challenge. *Id.* at 4 ("When neither the legislature *nor the framers of our constitution* have vested in gifted children any right to an individualized education program, we cannot conclude that the plaintiff's right to a free public education . . . includes a right to a special education program.") (emphasis added). While the holding in *Broadley* is not relevant here, the Court's dicta supports plaintiffs' contention that framers' intent matters.

Sheff is this Court's most recent pronouncement on article eighth, § 1. The Court's enunciation of the constitutional violation in *Sheff*—that racial isolation deprived students of

substantially equal educational opportunities—reaffirms that the right to education is fundamental and demonstrates that *Savage* and *Broadley* did nothing to diminish the strength of that right. The *Sheff* Court also emphasizes that the right to education must be read in light of its purposes, quoting extensively from other courts in doing so. *Sheff*, 238 Conn. at 43 ("'[E]ducation is the very foundation of good citizenship.'" (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)); *Id.* at 44 ("Education provides the basic tools by which individuals might lead economically productive lives . . . . ") (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982)); *Id.* ("[Educational deprivation impacts] the entire state and its economy—not only on its social and cultural fabric, but on its material well-being, on its jobs, industry, and business.") (quoting *Abbott v. Burke*, 119 N.J. 287, 392 (1990)). A Court quoting so heavily on the purposes of education could not have been indifferent to the quality of an educational system designed to reach such purposes.

C. SISTER STATE JURISPRUDENCE SUPPORTS RECOGNIZING A QUALITATIVE STANDARD THAT SERVES THE PURPOSES OF ARTICLE EIGHTH, § 1

Contrary to the trial court's determination that sister state decisions "are a decidedly mixed bag," (Mem. Decision Mot. Strike p.29), these cases strongly support the recognition of the right to suitable educational opportunities.[8] The trial court classified the decisions of

[8] The highest courts of eighteen states have found a minimum qualitative standard in their state's education clause: *Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark. 31 (2002); *McDaniel v. Thomas*, 248 Ga. 632 (1981); *Idaho Schs. for Equal Educ. Opportunity v. Evans,* 123 Idaho 573 (1993); *Montoy v. State*, 275 Kan. 145 (2003); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *Hancock v. Comm'r of Educ.*, 443 Mass. 428 (2005); *Columbia Falls Elem. Sch. Dist. No. 6 v. State,* 326 Mont. 304 (2005); *Claremont Sch. Dist. v. Governor*, 138 N.H. 183 (1993); *Abbott v. Burke,* 149 N.J. 145 (1997); *Campaign for Fiscal Equity, Inc. v. State (CFE I),* 86 N.Y.2d 307 (1995); *Leandro v. State,* 346 N.C. 336 (1997); *DeRolph v. State,* 78 Ohio St. 3d 193 (1997); *Abbeville County Sch. Dist. v. State,* 335 S.C. 58 (1999); *Neeley v. W. Orange-Cove Consol. Indep. Sch.*

other state courts into three categories: (1) decisions that held that there is a minimum qualitative standard in education provisions similar to article eighth, § 1;[9] (2) decisions that held that there is a minimum qualitative standard in education provisions with more expansive language than article eighth, § 1; and (3) decisions that failed to reach the merits because the matter was nonjusticiable. Conspicuously absent is a category for decisions that have held that the right to education does not include a minimum qualitative standard. This category is lacking because there are *no such decisions*. In short, if this Court affirms the trial court's decision, Connecticut would be the first and only of 25 states that have considered this issue to deny that the education clause of the state constitution includes a right to a minimum qualitative standard of education.

In evaluating sister state jurisprudence, this Court has recognized that it should look to comparable provisions in other jurisdictions. *See State v. Gethers*, 197 Conn. 369, 386-87 (1985). There are four states whose education clauses closely resemble article eighth, § 1—New York, North Carolina, Oklahoma and South Carolina—and all four have concluded that there is a minimum qualitative standard guaranteed by their education clauses. (*See* Mem. Decision Mot. Strike p.22-24.) The highest courts of New York and North Carolina have both interpreted the text of their state's respective education clauses to

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Dist., 176 S.W.3d 746 (Tex. 2005); *Seattle Sch. Dist. No. 1 v. State,* 90 Wash.2d 476 (1978); *Pauley v. Kelly,* 162 W.Va. 672 (1979); *Vincent v. Voight*, 236 Wis.2d 588 (2000); *Campbell Sch. Dist. v. State,* 907 P.2d 1238 (Wyo. 1995). Just seven state high courts have found these cases nonjusticiable: *Ex parte James*, 836 So. 2d 813 (Ala. 2002); *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400 (Fla. 1996); *Lewis v. Spagnolo*, 186 Ill.2d 198 (1999); *Neb. Coal. for Educ. Equity & Adequacy v. Heinman*, 273 Neb. 531 (2007); *Okla. Educ. Ass'n v. State ex rel. Okla. Legislature*, 158 P.3d 1058 (Okla. 2007); *Marrero v. Commonwealth*, 559 Pa. 14 (1999); *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995).

[9] "The court cannot blink the fact [sic] that the highest courts of several states have found a 'substantive' or 'qualitative' component in their constitution's educational clauses without any mention thereof in the text of the document." (Mem. Decision Mot. Strike p.22.)

create an affirmative duty for the state to provide schoolchildren with a "sound basic" education. *See Bd. of Educ. of Levittown v. Nyquist*, 57 N.Y.2d 27, 48 (1982);[10] *Leandro v. State*, 346 N.C. 336, 347 (1997).[11] The Oklahoma Supreme Court has recognized that "the right guaranteed by [our constitution] *is a basic, adequate education* . . . ."[12] *Fair Sch. Fin. Council of Okla., Inc. v. State*, 746 P.2d 1135, 1149 (Okla. 1987). Finally, the South Carolina Supreme Court has held that a "minimally adequate" education is constitutionally required.[13] *Abbeville County Sch. Dist. v. State*, 335 S.C. 58, 67 (1999).

These four state courts not only declared a minimum qualitative standard, but also stated that such a standard must serve the purposes of public education. In *Leandro v. State*, 346 N.C. 336 (1997), for example, the North Carolina Supreme Court reversed a motion to dismiss that had been granted on the grounds that the right to education "does not embrace a qualitative standard." *Id.* at 344. The Court concluded that "[a]n education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and constitutionally inadequate." *Id*. at 345.

The South Carolina Supreme Court similarly reversed two lower court decisions that

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[10] N.Y. Const. art. XI, § 1 (formerly art. IX, § 1): "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."

[11] N.C. Const. art. IX, § 2: "The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools . . ."

[12] Article XIII, Section 1 of the Oklahoma Constitution states: "The Legislature shall establish and maintain a system of free public schools wherein all the children of the State may be educated." However, a more recent decision from the Oklahoma Supreme Court found claims under this provision nonjusticiable. *Okla. Educ. Ass'n v. State ex rel. Okla. Legislature*, 158 P.3d 1058, 1065-66 (Okla. 2007).

[13] S.C. Const. art. XI, § 3: "The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the state and shall establish, organize and support such other public institutions of learning as may be desirable."

struck plaintiffs' claims on the basis that the wording of the education clause "means simply that there be [a system of free public schools], and that the clause contains no qualitative component." *Abbeville County Sch. Dist. v. State*, 335 S.C. 58, 67 (1999). Instead, the South Carolina Court recognized that the state must provide a "minimally adequate education" that offers schoolchildren "the opportunity to acquire . . . a fundamental knowledge of the economic, social, and political systems, and of history and governmental processes" along with other necessary "academic and vocational skills." *Id*. at 68.

Finally, in *Campaign for Fiscal Equity v. State* (*CFE I*), the New York Court of Appeals reversed a lower court's decision granting a motion to dismiss, commenting "we are unable to adopt the view that the constitutional language at issue is, in effect, hortatory." 86 N.Y.2d 307, 315 (N.Y. 1995). The Court found that the qualitative standard should "enable children to eventually function productively as civic participants capable of voting and serving on a jury." *Id*. at 316. A later trial court further explained, "productive citizenship implies engagement and contribution in the economy as well as in public life." *Campaign for Fiscal Equity v. State* (*CFE II*), 719 N.Y.S.2d 475, 485 (N.Y.S. 2001).

Indeed, "[m]ost state courts that have examined the substantive right to education under the Education Clauses of their constitutions have recognized both civic participation and preparation for employment as the basic purposes of public education." *Id*. at 486. This shared understanding among the states regarding the purpose of public education helps explain why each state that has examined the content of its education clause has reached a remarkably similar conclusion. All eighteen state supreme courts that have reached the issue have found that the right to education must contain a minimum qualitative standard that serves particular purposes.

D. THE HISTORY OF THE RIGHT TO EDUCATION IN CONNECTICUT SUPPORTS RECOGNIZING A QUALITATIVE STANDARD THAT SERVES THE PURPOSES OF ARTICLE EIGHTH, § 1

Every authority—the legislative branch, the judicial branch, and article eighth's framers—has offered support for the existence of a right to suitable educational opportunities, both generally and as plaintiffs have defined it. Inquiry into the historical support for the alleged right should examine all sources: the history of education in Connecticut, judicial interpretations of that history, and the commentary of our constitutional framers. *See, e.g.*, *State v. Lamme*, 216 Conn. 172, 178-80 (1990) (examining the evolution of the text and judicial interpretations of article first, § 9 from the Code of 1650 (Ludlow Code) to the present) (cited by the *Geisler* Court as a model of the "historical approach." *State v. Geisler*, 222 Conn. 672, 685 (1992)).

1. THE STATE HAS ALWAYS RECOGNIZED A DUTY TO PROVIDE "GOOD" EDUCATION IN ORDER TO PREPARE STUDENTS FOR HIGHER LEARNING AND EMPLOYMENT

Connecticut's history demonstrates that the State's duty to educate was a duty to provide "good" education, defined in reference to concrete purposes. Connecticut's first comprehensive set of laws was called the Ludlow Code. *The Code of 1650* (photo. reprint 2003) (Hartford, Judd, Loomis, & Co. 1836). The Ludlow Code placed significant emphasis on the subject of education, declaring that a "good education. . . is of singular behoofe and benefit." *Children, in The Ludlow Code of 1650*, *supra*, at 38. The Code required masters "to teach all such children, as shall resorte to him, to write and read" and in towns of a hundred households or more, "to instruct youths so farr as they may bee fitted for the university." *Schooles, in The Ludlow Code of 1650*, *supra*, at 90-91; *see also Horton I*, 172 Conn. at 647 (quoting from the Ludlow Code). Further, the Code required that children

receive “so much learning, as may inable them perfectly to read the English tongue, and knowledge of the capital lawes.” *Children*, *supra*, at 39 Lastly, schoolmasters were obligated to “bring up theire children and apprentices in some honest lawfule calling, labour or imployment . . . proffitable for themselves and the commonwealth.” *Id.* Thus, the State’s oldest laws support the notion that education should serve the purposes that plaintiffs allege: advancement to institutions of higher learning (“as they may bee fitted for the university”) and attainment of productive employment (“some honest lawfule calling, labour or imployment”). (*See* Am. Compl. ¶ 46.)

Statutes passed since 1650 illustrate a clear continuity from the era of the Ludlow Code to the modern era. In 1795, Connecticut became one of only three states to require state-level funding for local public schools, along with New York and Massachusetts. An Act Appropriating the Moneys Which Shall Arise on the Sale of the Western Lands Belonging to this State 1793 Conn. Spec. Acts. *See also* Carl Kaestle, *Pillars of the Republic, Common Schools and American Society 1780-1860*, at 11 (1983). In 1909, the Ludlow Code’s emphasis on “good schools” was still visible in the state’s education statutes. *See, e.g.,* 1909 Conn. Pub. Acts 146, § 4 (the precursor to current Conn. Gen Stat. § 10-220) (“They shall maintain in their several towns good common schools.”). An examination of Connecticut’s history prior to the 1965 constitution reveals the State’s continuing commitment to the concept of “good” education. *See State ex rel. Huntington* v. *Huntington Sch. Comm.,* 82 Conn. 563, 566 (1909) ("Connecticut has for centuries recognized it as her right and duty to provide for the proper education of the young.").

2. THE FRAMERS OF ARTICLE EIGHTH, § 1 AFFIRMATIVELY ADOPTED THE HISTORICAL DUTY TO PROVIDE "GOOD" EDUCATION

Moreover, the Constitution's framers incorporated the State's historical duty to provide "good" education in codifying the right to education in article eighth, § 1. As the trial court recognized, the framers, including the principal sponsor of article eighth Simon Bernstein, meant to incorporate Connecticut's historical tradition into the constitution: "[Bernstein's] intent was to ensure that what had been a matter of history and tradition would now be a matter of constitutional right." (Mem. Decision Mot. Strike p.31.)

However, the trial court selectively quoted from Bernstein's comments at the Constitutional Convention, *id.*, ignoring the fact that Bernstein made clear that article eighth incorporated the history of "good" schools. Immediately after the comments cited by the trial court, Bernstein says, "We have good public schools so that this again is not anything revolutionary, it is something which we have, it is which is [in] practically all constitutions in the States of our nation and Connecticut with its great tradition certainly ought to honor this principle." 3 Proceedings of the Connecticut Constitutional Convention of 1965, p.1039 (remarks of delegate Simon J. Bernstein). *See also Moore v. Ganim*, 233 Conn. 557, 596 (1995) ("[T]he framers of the education provision looked to the historical statutory tradition of free public education in this state to support its explicit inclusion in the state constitution."). Later, Bernstein quotes from the Ludlow Code, further emphasizing the framers' intention to incorporate the State's historical duty to provide "good" education:

> I . . . was surprised to find that Connecticut with its traditional good education had no reference to it in the Constitution[;] when I use the word "good education" I am quoting, because if I may I would like to quote from the Connecticut code of 1650 which others I believe call the Ludlow Code. Quote "a good education of children is a singular of behoove and benefit to any Commonwealth" so we do have the tradition which goes back to our

earliest days of free good public education.

3 Proceedings at 1039-40 (remarks of delegate Simon J. Bernstein).

This Court in *Moore v. Ganim* acknowledged that the adoption of article eighth was not merely "cosmetic":

> [Plaintiffs' argument] incorrectly suggests that when the members of the 1965 constitutional convention adopted article eighth, § 1, it was simply for reasons of cosmetics or codification, and that the new provision had no substantive content that was not already clearly embodied in the constitution. Such unsubstantial motives are inconsistent with the serious task of constitutional amendment embarked upon by the members of the 1965 convention, and with the remarks by the delegate [Simon Bernstein] who offered and explained the resolution that became article eighth, § 1.

233 Conn. at 596 n.51.

The comments of the framers also support the notion that the right to education is aimed at preparing students for citizenship: "It goes without saying that if we are going to have a representative government elected by a public, that the education of the public is the first and best way of promoting the best representatives be elected." 3 Proceedings at p.312 (remarks of delegate Simon J. Bernstein). *See also Wardell v. Killingly*, 97 Conn. 423, 429 (1922) (reasoning that music is not a required part of the curriculum only because music "is not an essential element of the teaching of children to fit them to become good citizens"); *Bissell v. Davison*, 65 Conn. 183, 190-91 (1894) (noting that the duty to provide education "has always been assumed by the state; not only because the education of youth is a matter of great public utility, but also, and chiefly, because it is one of great public necessity for the protection and welfare of the state itself."). In light of Bernstein's remarks as well as the Court's interpretation of these remarks in *Moore,* the trial court erred in concluding that historical support for plaintiffs' claim is "too slender a reed." (Mem. Decision Mot. Strike 31.) The historical record shows that Connecticut's tradition is one of "good"

schools, not just “free” schools, and that “good” was defined in terms of the clear purpose of equipping students with the necessary tools to participate in democratic government.

E. ECONOMIC AND SOCIOLOGICAL CONSIDERATIONS SUPPORT RECOGNIZING A QUALITATIVE STANDARD THAT SERVES THE PURPOSES OF ARTICLE EIGHTH, § 1

Plaintiffs assert, as an initial matter, that the trial court has misconceived the nature of the economic and sociological considerations factor. *See infra* Section III.A. A proper analysis under this factor must focus on the “demands of modern society.” *See State v. Dukes*, 209 Conn. 98, 115 (1988) (cited by the *Geisler* Court as a model of analysis under the sixth factor, *State v. Geisler*, 222 Conn. 672, 685 (1992)). Even so, the trial court acknowledged that economic and sociological considerations support a reading of article eighth, § 1 that includes the right to suitable educational opportunities. (*See* Mem. Decision Mot. Strike p.33.) These economic and sociological considerations are compelling with respect to individual Connecticut schoolchildren, as well as for the state as a whole.

Every year, thousands of students drop out of Connecticut schools, or graduate lacking the basic skills necessary to succeed. For most of these children, the prospect of higher education is extremely unlikely. *See* Connecticut Economic Resource Center (CERC) Town Profiles, http://www.cerc.com/townprofiles.html (last visited Dec. 20, 2007) (12% of Hartford’s adult population has a bachelors degree, compared to 31% statewide; Bridgeport: 12%; Plainfield: 10%). Because higher education and employment are inextricably intertwined, s*ee* Connecticut Workforce Alliance, *State of the Workforce Report 2006*, http://www.workforcealliance.biz/Downloads/SOW9.pdf (noting that “college graduates . . . are half as likely to be unemployed compared with high school graduates”), these students are more likely to join the ranks of the unemployed. *Id.* (9.7% of Hartford’s

working population is unemployed, compared to 4.9% statewide; Bridgeport: 7.7%). Thus, as the Connecticut economy undergoes an unprecedented degree of structural change, prospects for this segment of the population grow increasingly dim. Entire fields of work are becoming obsolete, and Connecticut schools are not preparing their students to succeed in today's workforce environment. *Id.*

Predictably, schools that fail to provide adequate educational opportunities create an apathetic citizenry. These citizens fail to exercise their most fundamental citizenship rights. In Connecticut, turnout among voters aged 18-29 is less than 25%, which ranks 43rd in the nation; among voters without a high school diploma, a mere 7% cast a ballot on election day. Mark Hugo Lopez et al, The Center For Information & Research on Civic Learning & Engagement (CIRCLE), *Quick Facts about Young Voters in Connecticut: The Midterm Election Year 2006 Fact Sheet*, http://www.democracyworksct.org/CIRCLEFactsYoung Votersconnecticut_final.pdf.

An educational system that fails to address the needs of its students creates barriers that are often insurmountable. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."). Further, these developments portend broader societal breakdown. As Justice Bogdanski notes in his concurrence in *Horton I*, education "is the cohesive element that binds the fabric of society together." 172 Conn. 615, 654 (1977) (Bogdanski, J., concurring).

The exigencies of life in modern society demand that this Court declare that the fundamental right to education encompasses a right to suitable educational opportunities.

F. FEDERAL PRECEDENT LEAVES THIS COURT WITH COMPLETE DISCRETION TO DETERMINE THE NATURE OF THE RIGHT

The only potentially relevant federal precedent is *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), in which the U.S. Supreme Court upheld the financing system for public education in Texas against a federal equal protection challenge. The Court held that the federal constitution neither explicitly nor implicitly guarantees a right to education. *Id.* at 37-38. This holding "sheds no light on the contours of Connecticut's constitution," (Mem. Decision Mot. Strike p. 22), and thus is irrelevant to this analysis.

III. THE TRIAL COURT IMPROPERLY CONSIDERED "PRUDENTIAL CAUTIONS," WHICH IN ANY EVENT DO NOT MAKE PLAINTIFFS' CLAIMS NONJUSTICIABLE

Despite the trial court's conclusion that "the issues raised by the complaint in this case are justiciable," (Mem. Decision Mot. Strike p.11), the court nevertheless incorporated justiciability considerations into its *Geisler* analysis. Such action was unprecedented and in error because the trial court's "prudential cautions" are not a relevant part of the *Geisler* analysis. This improper application of *Geisler* provides an independent ground for reversal.

If the trial court's "prudential cautions" are relevant to this case, they belonged within the trial court's justiciability analysis. Thus, if justiciability were not a settled question, this Court should still reverse and remand on the trial court's justiciability determination. However, insofar as the opinions of this Court as well as the practice of other Connecticut trial courts make clear that plaintiffs' claims are justiciable, this Court should affirm the trial court's justiciability determination and engage in a constitutional analysis devoid of "prudential cautions" considerations.

A. THE TRIAL COURT ERRED IN CONSIDERING "PRUDENTIAL CAUTIONS" WITHIN ITS *GEISLER* ANALYSIS

Plaintiffs know of no case in which the *Geisler* analysis has included considerations of judicial capacity. This is not surprising given that the *Geisler* framework is a method for examining the contours of state constitutional provisions, not a replay of justiciability analysis. Accordingly, the court improperly employed the *Geisler* framework and should be reversed.[14]

Specifically, the trial court posited that these "prudential cautions" are "public policy considerations" that counsel against recognizing the right to suitable educational opportunities. (*See* Mem. Decision Mot. Strike p.37-38.) However, the trial court's concerns regarding judicial capacity are wholly misplaced, as the sixth *Geisler* factor is solely concerned with the "real world" consequences of a constitutional rule, and not with the proper role of the judiciary. *See*, *e.g.*, *State v. Davis*, 283 Conn. 280, 317 (2007) (concluding under the sixth *Geisler* factor that the automatic standing rule is not necessary to deter police misconduct, since "[p]olice already have a strong incentive to comply with constitutional requirements, lest otherwise valid cases could be lost."); *State v. Piorkowski*, 243 Conn. 205, 220 (1997) ("If we were to rule that the police acted as agents in this case because they sought advice from the state's attorney, we would discourage the police from seeking such advice regarding the propriety of their conduct in the future."); *State v. Dukes*,

[14] The trial court rests its inclusion of justiciability considerations in its *Geisler* analysis on a single line of dicta from this Court in *Sheff v. O'Neill*, 238 Conn. 1 (1996). *See* Mem. Decision. Mot Strike 37 ("[W]hile the court has rejected the State's argument that the questions raised by the plaintiffs are not justiciable, it cannot ignore 'prudential cautions [which] shed light on the proper definition of constitutional rights and remedies.'" (quoting *Sheff*, 238 Conn. at 15). However, plaintiffs know of no case where this line of dicta has been invoked in a subsequent decision by this Court—in *Geisler* cases or in any other form of constitutional interpretation.

209 Conn. 98, 115 (1988) (evaluating a constitutional claim "in accordance with the demands of modern society").

B. THE TRIAL COURT'S CONCERN WITH SEPARATION OF POWERS IS MISPLACED IN LIGHT OF *HORTON I* AND *SHEFF*

To the extent that this Court seeks to determine the justiciability of plaintiffs' claims, it revisits a question that has already been conclusively determined. Indeed, the trial court's concern with "intrusion by the court into the constitutional prerogatives of the other branches," (Mem. Decision Mot. Strike p.35), plainly ignores this Court's precedent. In *Sheff v. O'Neill*, this Court dismissed any concern that the judiciary's involvement in vindicating the fundamental right to education would constitute an intrusion into the role of the legislature: "Just as the legislature has a constitutional duty to fulfill its affirmative obligation to the children who attend the state's public elementary and secondary schools, so the judiciary has a constitutional duty to review whether the legislature has fulfilled its obligation." 238 Conn. 1, 15 (1996). The Court continued, further noting that, "[i]n *Horton I* [and *Horton III*], we reviewed, in plenary fashion, the actions taken by the legislature to fulfill its constitutional obligation to public elementary and secondary schoolchildren. Judicial authority to render these decisions was expressly reaffirmed in *Nielsen v. State*, and in *Pellegrino v. O'Neill*." *Id.* at 14 (internal citations omitted).

C. THE TRIAL COURT'S CONCERNS WITH COMPLEXITY AND JUDICIAL EXPERTISE ARE MISPLACED IN LIGHT OF *HORTON I* AND *SHEFF*

This Court has repeatedly reviewed challenges to the state's public education system, even where such challenges required the trial court to make complicated factual determinations regarding the quality of education and the state financing system supporting

it. In *Horton I*, for instance, this Court faced a question of "considerable complexity," 172 Conn. 615, 618 (1977), involving whether the state's educational system was providing educational programs of sufficiently equal "breadth and quality." *Id*. at 635. After reviewing an "exhaustive finding of facts," *id.* at 649, involving eight distinct factors of educational quality, *id.* at 634, this Court found the state's educational system constitutionally deficient. The Court in *Horton I* only stayed its hand with respect to where "the ultimate solutions must come from," *i.e.* remedy. *Id.* at 644 (quoting *San Antonio in Dep. Sch. Dist. V. Rodriguez*, 411 U.S. 1, 59 (1973)). Although plaintiffs in this case presented the trial court with a constitutional claim that requires the court to examine various elements of an educational system, plaintiffs are not seeking a judicial determination different in kind from the determination in *Horton I*.

In *Sheff*, the Court reaffirmed that constitutional claims implicating the fundamental right to education, regardless of their complexity, deserve a full determination on the merits. The Court in *Sheff* recognized that "[t]his issue raises questions that are difficult [and that] the answers [the Court] give[s] are controversial," 238 Conn. 1, 24. Nevertheless, the Court reviewed an extensive and complex factual record, finding that "[despite the] initiatives undertaken by the defendants . . . disparities . . . continue[d] to burden the education of the plaintiffs" to a constitutionally impermissible degree. *Id*. at 42. As in *Horton I*, the Court determined the legal question with which it was presented, but afforded the Legislature an opportunity, in the first instance, to fashion a legislative remedy. *See id*. at 46 ("[P]rudence and sensitivity to the constitutional authority of coordinate branches of government counsel the same caution in this case.").

In light of this precedent, the trial court's concerns were misplaced. As *Horton I* and

Sheff make clear, this Court has already considered the relevance of "prudential cautions" such as complexity and judicial expertise in the determination of rights under article eighth, § 1. These decisions establish that (1) such "prudential cautions" should not prevent a court from adjudicating claims under article eighth, § 1, and (2) if such "prudential cautions" are to play a role, they are only relevant at the remedial stage.

D. THE TRIAL COURT'S CONCERN WITH JUDICIAL MANAGEABILITY IS MISPLACED IN LIGHT OF PRIOR DECISIONS OF CONNECTICUT, SISTER STATE, AND FEDERAL COURTS

Courts in Connecticut and elsewhere have successfully made qualitative standards determinations, the types of determinations the trial court characterizes as "far afield from the courts' constitutional function." (Mem. Decision Mot. Strike p.37.) The trial court in *Sheff*, for instance, did not hesitate to consider difficult standards in deciding whether the State provided a "minimally adequate education." *See Sheff v. O'Neill,* 1995 Conn. LEXIS 249, at *30-41 (findings of fact) (copy attached hereto as Exhibit E). The court was able, after viewing the evidence at trial, to make determinations on teacher quality, *id.* at *40*,* the quality of special education, *id.,* and the overall quality of education in Hartford. *Id.* at *41.

Moreover, in a variety of legal contexts outside of education, this Court has expressed a clear confidence in the ability of Connecticut trial courts to handle exercises in line-drawing. In *Krafick v. Krafick*, 234 Conn. 783 (1995), for instance, the Court noted that "[t]he task of properly valuing pension benefits is complex because such benefits may be defeasible by the death of the employee spouse before retirement and the amount of benefits ultimately received depends upon a number of factors that remain uncertain until actual retirement." *Id.* at 799. Nevertheless, the Court did not hesitate in finding trial courts capable of choosing the most appropriate valuation method in each particular case. *See id.*

This Court has also directed trial courts to evaluate the reliability of scientific evidence "under a threshold admissibility standard assessing the reliability of the methodology underlying the evidence and whether the evidence at issue is, in fact, derived from and based upon that methodology." *Prentice v. Dalco Elec., Inc.*, 280 Conn. 336, 343 (2006) (quoting *Maher v. Quest Diagnostics Inc.*, 269 Conn. 154, 168 (2004)). As these cases demonstrate, this Court has consistently found Connecticut judges competent to set standards and draw lines in cases requiring the interpretation of complex factual information.

Further, many of our sister courts have proven capable of adjudicating a minimum qualitative standard of educational opportunity. More than eighteen states have determined that constitutional challenges to the adequacy of public school financing systems are justiciable,[15] while only seven states have reached the opposite conclusion.[16] The

[15] *See Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark. 31, 54 (2002) ("This court's refusal to review school funding under our state constitution would be a complete abrogation of our judicial responsibility and would work a severe disservice to the people of this state. We refuse to close our eyes or turn a deaf ear to claims of a dereliction of duty in the field of education."); *Idaho Schs. for Equal Educ. Opportunity v. Evans,* 123 Idaho 573, 583 (1993) ("[W]e decline to accept the respondents' argument that the other branches of government be allowed to interpret the constitution for us. That would be an abject abdication of our role in the American system of government."); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 209 (Ky. 1989) ("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 . . . to decide whether its actions are constitutional is literally unthinkable."); *McDuffy v. Sec'y of the Executive Office of Educ.,* 415 Mass. 545, 611 (1993) ("[W]e have the duty . . . to adjudicate a claim that a law and the actions undertaken pursuant to that law conflict with [or fall short of] the requirements of the Constitution. 'This,' in the words of Mr. Chief Justice Marshall, 'is of the very essence of judicial duty.'") (quoting *Colo. v. Treasurer & Receiver Gen.*, 378 Mass. 550, 553 (1979)); *Columbia Falls Elem. Sch. Dist. No. 6 v. State,* 326 Mont. 304, 310 (2005) (rejecting *Baker v. Carr*-based political question argument and concluding that, "[a]s 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 [to education]."); *Claremont Sch. Dist. v. Governor*, 138 N.H. 183, 192 (1993) (concluding that the

difficulties in adjudicating such disputes need not be exaggerated. As stated by the Georgia Supreme Court in *McDaniel v. Thomas*, "[a] substantial number of courts have been called upon to decide issues similar to those presented in this [adequacy] case and have not found the difficulties associated therewith to be insurmountable. 248 Ga. 632, 633 (1981)

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constitutional right to adequate education is justiciable and that "any citizen" has standing to "enforce the State's duty" to fulfill this right); *Abbott v. Burke,* 149 N.J. 145, 168 (1997) (holding that, while deference should be given to legislative content and performance standards, it is still the court's duty to ensure that these standards, "together with funding measures, comport[ ] with the constitutional guarantee of a thorough and efficient education for all New Jersey school children."); *Campaign for Fiscal Equity, Inc. v. State (CFE I),* 86 N.Y.2d 307, 315 (1995) ("We conclude that a duty [to provide a sound, basic education] exists and that we are responsible for adjudicating the nature of that duty.") *Leandro v. State,* 346 N.C. 336, 345 (1997) (rejecting the "political question" argument and stating that "[w]hen a government action is challenged as unconstitutional, the courts have a duty to determine whether that action exceeds constitutional limits. . . . Therefore, it is the duty of this Court to address plaintiff-parties' constitutional challenge to the state's public education system."); *DeRolph v. State,* 78 Ohio St.3d 193, 198 (1997) (holding school finance unconstitutional and stating, "[w]e will not dodge our responsibility by asserting that this case involves a nonjusticiable political question. . . and [ ] pass our responsibilities onto the lap of the General Assembly."); *Abbeville County Sch. Dist. v. State,* 335 S.C. 58, 67 (1999) (holding that because "[i]t is the duty of this Court to interpret and declare the meaning of the Constitution," the trial court should not have "us[ed] judicial restraint, separation of powers, and the political question doctrine as the bases for declining to decide the meaning of the education clause"); *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 780-81 (finding that the judiciary was not precluded "from determining whether the Legislature has met its constitutional obligation to the people to provide for public education"); *Seattle Sch. Dist. No. 1 v. State,* 90 Wash. 2d 476, 502 (1978) (stating that a finding of nonjusticiability would be "illogical"); *Pauley v. Kelly,* 162 W.Va. 672, 690-91 (1979) (after reviewing decisions from other jurisdictions, noting the deference courts give to legislatively promulgated education policies but stating that "these jurisdictions have not hesitated to examine legislative performance of the [constitutional] mandate, and we think properly so, even as they recite that courts are not concerned with the wisdom or policy of the legislation"); *Vincent v. Voight*, 236 Wis. 2d 588, 599 (2000) (after noting that *Baker v. Carr* holds that "a court must decide on a case-by-case inquiry whether a so-called political issue is justiciable," concluding that "the [school finance] issues presented to us in this case are appropriate for decision by this court in the exercise of our constitutional role"); *Campbell County Sch. Dist. v. State,* 907 P.2d 1238, 1264 (Wyo. 1995) (rejecting the separation of powers argument and stating that "[a]lthough this Court has said the judiciary will not encroach into the legislative field of policy making, as the final authority on constitutional questions the judiciary has the constitutional duty to declare unconstitutional that which transgresses the state constitution.").

[16] *See supra* note 8.

(citations and internal quotations marks omitted). That decades-old sentiment was recently echoed by the Texas Supreme Court, which rejected the plaintiffs' arguments that education disputes should be deemed nonjusticiable due to unmanageability:

> Nor do we agree with the State defendants that the constitutional standards of adequacy, efficiency, and suitability are judicially unmanageable. These standards import a wide spectrum of considerations and are admittedly imprecise, but they are not without content. At one extreme, no one would dispute that a public education system limited to teaching first-grade reading would be inadequate, or that a system without resources to accomplish its purposes would be inefficient and unsuitable. At the other, few would insist that merely to be adequate, public education must teach all students multiple languages or nuclear biophysics, or that to be efficient, available resources must be unlimited. In between, there is much else on which reasonable minds should come together, and much over which they may differ. The judiciary is well-accustomed to applying substantive standards the crux of which is reasonableness.
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> . . . .
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> The State defendants argue that if the standards of article VII, section 1 had judicially manageable content, litigation over the constitutionality of the public education system would not have lasted as long as it has. It is true, of course, as this case illustrates, that disagreements over the construction and application of article VII, section 1 persist. But such disagreements are not unique to article VII, section 1; they persist as to the meanings and applications of due course of law, equal protection, and many other constitutional provisions. Indeed, those provisions have inspired far more litigation than article VII, section 1, which has been at the heart of only a few lawsuits in two decades.

Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 778-779 (Tex. 2005).

Finally, the experience of the federal courts provides myriad examples of how courts are able to manage qualitative standards. In *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), the federal court evaluated maintenance services and patient programs in a federal prison hospital to determine whether substandard hospital conditions violate the Eighth Amendment of the U.S. Constitution. In *Pugh v. Locke*, the federal court evaluated conditions of overcrowding and access to medical facilities and staff within a federal prison.

406 F. Supp. 318, 329 (M.D. Ala. 1976) (finding that the government had failed to provide "basic elements of adequate medical care" in violation of the federal Constitution). In *Nelson v. Heyne*, the federal court determined the "minimal medical standards" applicable to the execution of federal prisoners. 491 F.2d 352, 357 (7th Cir. 1974). In none of these contexts did the federal court have specialized expertise in the areas governed by the remedial order. However, plaintiffs in such suits were afforded the opportunity to present experts who could provide intelligible standards that did not co-opt the policymaking authority of the state legislatures, yet also protected the rights of the plaintiff parties. There is no obstacle that prevents a trial court in the instant case from doing the same.

CONCLUSION

For the foregoing reasons the trial court's September 17, 2007 decision should be reversed and remanded with appropriate instructions.

Respectfully Submitted,

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