

Memorandum

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RE • Charter School Funding Challenge

A. OVERVIEW AND EXECUTIVE SUMMARY.

1. Statement of the Issue: Does the Funding Gap Between Charter Schools and Conventional Public Schools Violate any State Constitution?

Forty states and the District of Columbia have passed laws establishing charter schools and providing a framework for funding them. Charter schools are publicly funded, do not charge a tuition fee to the students, and thus are "public schools." Charter schools differ from their "conventional" public school counterparts in many ways, however, including that they enjoy more freedom to apply innovative curriculum that are designed to help certain children get more from school. These charter schools have enjoyed considerable success in recent years, and in many states these schools have become critical alternatives in the effort to provide children -- particularly disadvantaged children -- better, more effective education.

We have been advised by the Center for Education Reform ("CER"), and have accepted as true for the purposes of this memorandum, that in many states the charter schools receive less public funding on a per pupil basis than their conventional public school counterparts. Thus, for example, the CER has advised us that in Missouri the average funding for conventional public schools is \$6,600 per pupil while funding for the charter schools is \$5,500 per pupil, a 16.7% difference. We have also assumed for the purposes of this memorandum that this funding gap is permitted by statute. That is, the funding gap is not due to an administrative failure to provide the funding to which the charter schools are entitled, but is instead the product of a mechanical application of the law as enacted. This memorandum explores potential challenges to this

funding disparity as unconstitutional under state law. The critical question is whether the funding disparity violates any state constitution.¹

As is explained in greater detail below, all states have constitutional requirements governing the provision of education. Many states hold that the right to receive a public education is a "fundamental right," which means that any legislative action that interferes with or infringes upon this right is subject to "strict scrutiny." When this test is applied, there must be a strong reason supporting the legislative action. Other states do not consider education to be a "fundamental right" and require only a rational basis to justify laws interfering with it. In reviewing the authorities in greater depth, however, it becomes clear that whether the state characterizes education as a fundamental right is not the critical question. Rather, the key is the nature of the right. That is, what obligation does the state have where education is concerned? The overwhelming majority of state constitutions have been interpreted to require only that the state provide an "adequate" education, or something akin to it. Six states require a substantially "equal" education. In eleven states, the nature of the right remains unclear.

2. The Requirement That the State Provide an "Adequate" Education.

Twenty-three state constitutions require an "adequate" education for all public school students. This includes states that specifically use the term "adequate" as well as those where the courts describe the right in terms of getting a "uniform," "thorough" or "efficient" education (or some combination thereof). These terms generally mean that the state is required only to provide each student with an education that meets some minimum standard, usually determined by the legislature. As such, to bring a constitutional challenge to legislative action in these states, a plaintiff would need to allege and prove that the challenged legislative action infringes upon or interferes with a student's ability to receive this "adequate" education. A funding gap alone would not present any constitutional problems. In the specific context of a challenge to the disparate funding between charter schools and conventional schools, the plaintiff would have to allege and prove that the state's disparate funding system interferes with the charter schools' ability to provide an adequate education. This would involve alleging and proving the following types of facts:

- **Class size:** The funding gap precludes the charter schools from hiring enough teachers to keep class sizes low, and the higher ratio of students to teachers interferes with the school's ability to provide the children with the required minimum education.
- **Training, experience and background of teaching staff:** The funding gap requires that the charter school hire teachers with less experience because teachers with greater experience are too expensive to hire.

¹ If there is evidence showing that the funding gaps are actually the product of some failure to comply with the funding statutes -- i.e., the state agency distributes \$6,000 per pupil when it should distribute \$7,000 per pupil -- that would be an entirely different issue. There would be no constitutional issue, there would instead be a straight forward claim alleging a violation of the funding statute.

- **Materials, books and supplies:** The books and other supplies the school provides to the children are inadequate, whether because they are out-of-date, second-hand, have missing pages, or suffer from a similar problem.
- **Test scores as measured against ability:** Charter school students' test scores suffer when compared to their similarly situated conventional public school counterparts.
- **Course offerings and extracurricular activities:** Due to funding problems, children cannot take certain core courses (e.g., geography) or do not have access to sports, art, music or a similar type of extracurricular activities.

A good example of the types of allegations that are required to state a claim for failure to provide an "adequate" education is the complaint that was recently filed in New Jersey challenging that state's educational system. *See Crawford v. Davy*, No. C-230-06 (N.J. Super. Ct. Ch. Div. filed July 13, 2006). That complaint contains extremely detailed allegations of failures in the system including lagging test scores, inadequate transportation, and substandard facilities.

3. The Requirement That the State Provide a Substantially "Equal" Education.

There are three states that do not interpret the constitution as requiring an "adequate" education, but instead require that the state provide all students with an "equal" education.² Even in these states though, the courts have been careful to explain that absolute equality in funding the education is NOT required. Rather, evaluating the equality of the education provided requires an analysis of the quality of the education provided in order to determine whether, for example, a funding gap truly leads to an inferior education in those schools that receive less funding. Thus, in order to challenge the constitutionality of a statutorily-created funding gap between charter schools and conventional public schools the plaintiff would have to plead and prove that the funding gap has created an inequality between the education provided to the charter school and conventional public school students respectively. This would be evaluated based on the same sets of factors that are critical to the "adequacy" analysis outlined above. The difference is that in the "equality" states there is a qualitative comparison of charter schools to conventional public schools, while in "adequacy" states the comparison is of the charter school to some minimum standard. Thus, the plaintiff challenging the funding disparity in "equality" states would need to allege and prove the following kinds of facts:

- **Class size:** Classes are larger in charter schools than in the conventional public schools.
- **Training, experience and background of teaching staff:** Teachers at the charter schools have less experience and training than the teachers in the conventional public schools.

² Although an equal education is required, equal funding is not necessarily required. *See generally Horton v. Meskill*, 172 Conn. 615, 652, 376 A.2d 359 (1977)

- **Materials, books and supplies:** The books and other supplies the schools provide are of inferior quality in the charter schools when compared to the conventional public schools.
- **Test scores as measured against ability:** Charter school students' test scores suffer when compared to their similarly situated conventional public school counterparts.
- **Course offerings and extracurricular activities:** Charter school students have fewer course offerings and more limited access to extracurricular activities.

4. Tension Between Required Allegations and Goals of the CER.

Based on our discussions with the CER throughout this project, it is our understanding that making the kinds of allegations outlined above for asserting these constitutional challenges is at odds with the CER's mission of promoting the successes of the charter schools. If that is still the case, pursuing this litigation alternative may not make sense. If, however, there are plaintiffs willing to make the necessary allegations, and these allegations can be supported by evidence, we have outlined below some of the next steps that should be taken to specifically identify plaintiffs and schools in specific states in order to assert these challenges.

B. LEGAL ANALYSIS.

1. States Where the Constitution Guarantees a Fundamental Right to an "Adequate" Education.

Arizona

Education is deemed a fundamental right in Arizona.³ The court requires strict scrutiny be applied when analyzing legislation.⁴ However, the Supreme Court has determined that in order to provide a uniform education, the state need only fund school systems that are adequate.⁵ The Court ruled that the state must create a financing system that adequately funds all districts so that they can provide sufficient facilities and equipment necessary for students to master the educational goals set by the legislature.⁶ As long as the state is providing an adequate amount of funds to meet the "state education goals" set by the legislature, it is not required to provide equal funding.⁷

Additionally, Arizona has specifically recognized that the different local governments can choose to fund schools above and beyond the state requirements.⁸ Therefore, local communities can raise additional funds through local taxes that go beyond the state required

³ Shofstall v. Hollins, 515 P.2d 590 (Ariz. 1973).

⁴ Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 179 Ariz. 233, 245, 877 P.2d 806 (1994).

⁵ Hull v. Albrecht, 190 Ariz. 520, 524, 950 P.2d 1141 (1998).

⁶ Id.

⁷ Id.

⁸ Id., see also Shofstall, 110 Ariz at 91.

minimum standards. As long as this funding scheme does not cause disparities in the quality of education, gaps caused by local funding are constitutional.⁹

Minnesota

The Supreme Court of Minnesota has declared education a fundamental right.¹⁰ However, this does not entitle students to an identical education, but to one that meets all state standards.¹¹ Additionally, the Court specifically stated that this right does not include a right to equal financing because it is not required by the Constitution.¹² Since there is no fundamental right to equal financing, the Minnesota court will review any funding challenges under rational basis review.¹³ However, it is important to note that the right to education is still analyzed under strict scrutiny, so if a plaintiff is able to show that a financing scheme prevents the state from meeting its baseline obligation of providing an adequate education, it will likely not pass Constitutional muster.¹⁴

New Hampshire

The New Hampshire's Supreme Court has declared that under the state constitution an adequate public education is a fundamental right.¹⁵ The Court states that this requires the State fund a "constitutionally adequate education."¹⁶ The Court struck down a financing scheme based on property taxes that placed "unreasonable and inequitable tax burdens" on poorer districts. It mandated that the state develop a system that will provide "adequate funding" to every school. However, the Court specifically stated that the requirement to provide an adequate education does not translate into the right to "horizontal resources replication from school to school and district to district."¹⁷

North Carolina

The right to a sound basic education is a fundamental right in North Carolina.¹⁸ The court and the legislature have recognized a qualitative element in this right.¹⁹ However, the Court specifically states that substantial equality in educational opportunities in all of the districts is not required because at some point in time, there will always be a district not in compliance.²⁰ Thus, a sound basic education is deemed to be that which is minimally

⁹ Roosevelt, 179 Ariz. at 242-42.

¹⁰ Skeen v. State, 505 N.W.2d 299, 313 (Minn. 1993).

¹¹ Id. at 311, 316, 318.

¹² Id. at 315.

¹³ Id. at 316.

¹⁴ Id. at 315-16.

¹⁵ Claremont Sch. Dist. v. Governor, 703 A.2d 1353 (N.H. 1997)

¹⁶ Id. at 1359.

¹⁷ Id.

¹⁸ Leandro v. State, 346 N.C. 336, 345, 488 S.E.2d 249 (1997).

¹⁹ Id. at 346; see also N.C.G.S. § 115C-408.

²⁰ Id. at 351.

constitutionally permissible as determined by the legislature.²¹ In order to determine if the education is constitutionally sufficient, the court may look at the legislature's educational goals; the level of performance of the students on achievement tests; and the state's general education and per-pupil expenditures.²²

Despite the declaration that education is a fundamental right, the court expressly declines to extend this right to funding.²³ There is no requirement of substantially equal funding, or even the educational advantages of every district. Therefore, a funding scheme that allows localities to assist in financing their school systems does not amount to a constitutional violation - it is expressly provided for in the North Carolina constitution.²⁴ However, if a plaintiff can show that there is a substantial difference between the quality of education received based on the students' performance, and there is a correlation to the amount of funding - it is likely the funding scheme will be invalidated.²⁵

Virginia

The Supreme Court of Virginia has determined that education is a fundamental right under its constitution.²⁶ However, it has also specifically stated that there is no mandatory requirement for "substantial equality" in spending or programs among or within the school divisions of the Commonwealth.²⁷ The individual state subdivisions are only required to provide educational programs that meet the state's standards of quality.²⁸ However, the court determined that even when applying strict scrutiny, there is no requirement under its constitution that funding or programs be substantially equal.²⁹ The Court has made this determination even in the instance where there was clearly a disparity in the amount of funding and the quality of the schools.³⁰ Therefore, as long as any educational offerings meet the state's minimum requirements, there is no constitutional violation.

²¹ *Id.* at 354-55. The court has defined a "sound basic education as one that provides students with at least: (1) sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocation training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in formal education or gainful employment in contemporary society. Hoke County Bd. of Educ. v. State, 358 N.C. 605, 622, 599 S.E.2d 365 (2004).

²² Leandro, 346 N.C. at 355-56.

²³ *Id.* at 349.

²⁴ *Id.*

²⁵ In Hoke County, evidence was presented that graduates did not have competent reading and math skills and they did not have the skills to perform entry level positions. Hoke County, 358 N.C. at 624-630, 634.

²⁶ Scott v. Commonwealth, 247 Va. 379, 386, 443 S.E.2d 138 (1994).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

2. States Requiring an Adequate Education in the Absence of a Fundamental Right.

A substantial number of state courts have explicitly declared that education is not a fundamental right under their state constitution, or have either decided not to address the matter, or simply have not had the question presented before them. Therefore, these states analyze constitutional challenges to their system of educational funding under a rational basis review, giving high deference to legislative determinations. While there has been some success with these constitutional challenges, no state has required complete equality in educational funding. States generally require that school districts receive an adequate level of education under their constitution and will only find violations of the state constitution when there are inadequacies in the basic level of funding, or if there is a gross disparity of funding that leads to a deficient quality of education.³¹

The states that have faced lawsuits challenging their system of school funding generally follow other states with similar constitutional provisions or educational conditions in answering these lawsuits. Some states require their school systems to provide an "adequate education" for their students, while other states require a similar level of education but employ different terminology in explicating these standards. State courts have required their school systems to provide: (A) a basic adequate education for all schoolchildren; (B) a uniform, thorough, or efficient level of education; (C) legislative or state agency standards for a minimum level of education; or (D) a substantially equal educational opportunity for all schoolchildren within the state. Several states either have no judicial decisions defining an adequate education, or have no case law challenging their system of school funding.

Iowa, Georgia, Kansas, Louisiana, Massachusetts, New York, Oregon, South Carolina, and Washington all require some form or variation of an adequate education as the baseline determination for whether a school funding system is meeting its' constitutional requirement. In Iowa, the state supreme court turned down a due process and equal protection challenge to the state open enrollment financing legislation, holding in dictum, that students have a right to an adequate education.³² The Kansas Supreme Court expounded on its requirement for "suitable" finances for a constitutionally adequate education as providing for, "intellectual, educational, vocational and scientific improvement."³³ The highest courts in Georgia, Louisiana, New York, Oregon, South Carolina and Washington all require their states to provide some form of a "minimal" adequate education, finances, and educational facilities, but assert their state constitutions do not mandate equality and uniformity of those resources among school districts.³⁴

³¹ See *Skeen v. State*, 505 N.W. 299, 311 (Minn. 1993).

³² *Exira Comty. Sch. Dist. v. State*, 512 N.W.2d 787, 796 (Iowa 1994) (upholding the open enrollment legislation as assuring every student roughly the same amount of funds wherever they are educated within the state).

³³ *Montoy v. State*, 112 P.3d 923 939 (Kan 2005) (Montoy III) (finding state failed to comply with its constitutional duty to provide a suitably financed system of education); *Montoy v. State*, 102 P.3d 1160, 1163-64 (Kan. 2005) (Montoy II) (finding the state failed to provide suitable finances for middle-sized and large school districts with a high proportion of minority, special education, and at-risk students).

³⁴ *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981) (upholding financing scheme even in the face of disparities because it is subject to rational basis review and there is no constitutional obligation for "equal" education and

Although not adopting a definitive standard for an adequate education, the Supreme Court of Massachusetts found that an adequately educated child was one with sufficient oral and written communication skills, sufficient training in the arts, sufficient academic or vocational skills, and several other detailed criteria.³⁵

3. States Requiring a "Uniform," "Thorough," or "Efficient" Education.

Several state constitutions contain educational provisions that require the legislatures to provide for a "uniform" or "thorough" or "efficient" school system, or some combination thereof.³⁶ Court decisions further defining these constitutional terms often parallel the standards of those states requiring an "adequate education." State constitutions with "uniform", "thorough", and "efficient" provisions include Colorado, Florida, Idaho, Illinois, Maryland, New Jersey, Ohio, and Oklahoma. Rhode Island's constitution includes provisions that require the legislature to "promote public education" and provide for its funding.³⁷

In Colorado, the constitutional provision for a "thorough and uniform" system of public schools is a mandate to the General Assembly to provide each child an opportunity to receive an education, but it does not require absolute equality in educational services or expenditures.³⁸ The court in Idaho found the State's system of school funding unconstitutional because of the State's approach to repairing and replacing unsafe school buildings in poorer districts was inconsistent with the court's view of thoroughness in providing school facilities, instructional programs and textbooks, and transportation.³⁹ The Maryland Court of Appeals also expounded on its constitution's educational provision, finding that "thorough and efficient" required a full,

funding); Charlett v. State, 703 So.2d 1199, 1206-07 (La. Ct. App. 1998) (upholding school finance system because as long some funding was being provided by the State to every school district, the State was meeting its constitutional provision of "minimum"); Campaign for Fiscal Equity v. State, 801 N.E.2d 326, 331-32, (N.Y. 2003) (stating students are entitled to minimally adequate physical facilities and instrumentalities of learning); Abbeville Cty. Sch. Dist. v. State, 515 S.E.2d 535, 540 (S.C. 1999) (in suit where appellants did not seek "equal" funding, but alleged funding resulted in inadequate education, court found a "minimally adequate education required by [the] constitution... include[s] providing students adequate and safe facilities in which they," can learn to read, write, speak English, learn math, economic, social and political systems, and acquire academic and vocational skills); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 94 (Wash. 1978) (Seattle I) (holding that the minimum education constitutionally required consists of equipping students with skills to become citizens and compete in the marketplace of ideas); Coalition for Equitable Sch. Funding, Inc. v. State, 811 P.2d 116 (Ore 1991) (declaring that the method of funding public schools that requires reliance on local property taxes and permits differences district to district does not violate the Oregon constitution as long as funding meets state standards).

³⁵ Hancock v. Commissioner of Education, 822 N.E.2d 1134, (Mass. 2005) (citing seven criteria to determine an educated child, while upholding the state's revised educational funding scheme to comply with McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993) (where the court had invalidated the state scheme because of a disproportionate allocation of state funds resulting in a lower quality of education in poorer districts).

³⁶ See Colo. CONST. art. IX § 2 ("thorough and uniform"); Md. CONST. art. VIII § 1 ("thorough and efficient").

³⁷ See R.I. CONST. art. XII §§1, 2.

³⁸ Lujan v. Colorado State Board of Ed., 649 P.2d 1005, 1018-19 (Colo. 1982) (holding the state system of funding education, by relying on local property taxes, was rationally related to a legitimate state purpose).

³⁹ Idaho Schools for Equal Educational Opportunity v. Evans, 850 P.2d 724, 734-35 (Idaho, 1993).

complete, and effective educational system, but not one with an equal allocation of expenditures per pupil.⁴⁰

Like the Maryland court, Florida, Illinois, Ohio and Oklahoma courts have also found that a thorough and efficient education does not require equality among all school systems, but the state should provide adequate facilities and uniformity of opportunity to receive an adequate education.⁴¹ The New Jersey constitution also includes a provision for "thorough and efficient" schools, which New Jersey courts, in the course of handling funding litigation and finding that multiple special needs districts were not receiving this constitutional minimum, have interpreted as requiring that each student receive a minimally adequate education.⁴²

Rhode Island is unique in that the constitution requires the legislature to promote public schools and provide funding for them. The Supreme Court recognizes that there is a right to education under the constitution.⁴³ However, it draws strict lines of separation of powers and holds that regulation and funding of education is within the province legislature.⁴⁴ In a case challenging the school finance system, the Court suggested that "[b]ecause the Legislature is endowed with virtually unreviewable discretion in this area, plaintiffs should seek their remedy in that forum rather than in the courts."⁴⁵

4. States Where the Constitution Guarantees a Right to an "Equal" Education.

Connecticut, Wisconsin and Wyoming have determined that students are entitled to a near equal education under their respective constitutions. However, in Connecticut and Wisconsin, it has been specifically stated by their Supreme Courts, that there is no requirement of equal funding encompassed in the fundamental right to education. Wyoming requires the state to provide equal financing that may be augmented by the various localities.

⁴⁰ Hornbeck v. Somerset County Board of Ed., 458 A.2d 758, 776 (Md. 1983).

⁴¹ See DeRolph v. State, 0677 N.E.2d 733, 780 (Ohio 1997) (mandating thorough and efficient school systems are ones with facilities in good repair and the supplies, materials, and funds necessary to maintain such facilities in a safe manner); Fair Sch. Fin. Council of Oklahoma v. State, 746 P.2d 1135, 1149-50 (Okla. 1987) (holding the state guarantees the opportunity to receive a minimum basic education). Coalition for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles, 680 So.2d 400 (Fla. 1996) (Supreme Court declined to declare education a fundamental right and stated that declaring a standard of adequacy would present a substantial risk of judicial intrusion into the powers and responsibilities assigned to the legislature, both in determining appropriations, and in providing by law for an adequate and uniform system of education; Jenkins v. Leininger, 659 N.E.2d 1366 (Ill. 1995) (Supreme Court declared that there is no fundamental right to education. High quality education is a goal of the legislature and it is within its purview to ensure that it adequately finances schools to ensure it meets this goal.)

⁴² See Abbott v. Burke, 495 A.2d 376 (N.J. 1985).

⁴³ City of Pawtucket v. Sundlum, 662 A.2d 40, 57 (R.I. 1995).

⁴⁴ *Id.* at 59. It is also important to note that the Court will review any funding challenges under a rational basis review.

⁴⁵ *Id.* at 57.

Connecticut

The Connecticut Supreme Court has declared education to be a fundamental right which requires the state to offer an equal education to all of its citizens.⁴⁶ The state has an affirmative constitutional obligation to provide "a substantially equal educational opportunity to all of the state's schoolchildren."⁴⁷ This concept has been codified in legislation which states that "each child shall have ... equal opportunity to receive a suitable program of educational experiences."⁴⁸ Quality is determined by assessing "(a) class sizes; (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."⁴⁹ The Court will employ strict scrutiny to determine if the state is meeting its obligations to provide an education of equal quality.⁵⁰

It is important to note that although the state requires equality in the substance of the education students received,⁵¹ the Connecticut Supreme Court has recognized that there is no constitutional requirement that funding be equal.⁵² The Court has stated that there may be differences in the amount of funding based on the economic and educational factors of each locality.⁵³ Therefore, there may be differences in funding across the state's subdivisions based on the cost to educate students, as long as the quality of education is substantively equal.

Wisconsin

The Supreme Court of Wisconsin had declared that education is a fundamental right.⁵⁴ The Court explains that this translates to mean that each student has a right to an equal opportunity to a sound basic education.⁵⁵ There is no requirement for complete uniformity, but rather an effort to ensure that resources are allocated in a manner to assure that the "character of instruction" is as uniform as possible.⁵⁶ The legislature has outlined the general requirements for educational uniformity, which generally encompasses minimum standards for teacher certification, a minimal number of school days, and standard school curricula.⁵⁷

⁴⁶ Horton v. Meskill, 172 Conn. 615, 645, 376 A.2d 359 (1977); see also State v. Stecher, 35 Conn. Supp. 501, 503, 390 A.2d 408 (1977).

⁴⁷ Sheff v. O'Neill, 238 Conn. 1, 17, 678 A.2d 1267 (1996).

⁴⁸ C.G.S.A. 10-4a(1). The legislature has charged the local boards of education with "giv[ing] all of the children of the school district as nearly equal advantages as may be practicable... which includes [providing] (1) adequate instruction books, supplies, materials, equipment, staffing, facilities and technology, (2) equitable allocation of resources among its schools, (3) proper maintenance of facilities, and (4) safe school settings." C.G.S.A. 10-220(a).

⁴⁹ Horton, 172 Conn. at 634.

⁵⁰ Sheff, 238 Conn. at 25; Horton, 172 Conn. at 646.

⁵¹ The court recognized that "absolute equality or precise equal advantages cannot be attained except in the most relative sense." Horton, 172 Conn. 652.

⁵² Id.

⁵³ Id.

⁵⁴ Kukor v. Grover, 148 Wis.2d 469, 496, 436 N.W.2d 568 (1989).

⁵⁵ Vincent v. Voight, 236 Wis.2d 588, 640, 614 N.W.2d 388 (2000).

⁵⁶ Kukor, 148 Wis.2d at 492.

⁵⁷ Id. at 492-93. See also Wis. Stat. § 121.02

The Wisconsin Court has specifically declared that the fundamental right to education does not mandate equality in per-pupil expenditures in districts.⁵⁸ The Court notes that the objective should be to “equaliz[e] outcomes, not merely inputs.”⁵⁹ Additionally, Wisconsin does not apply strict scrutiny in cases that involve funding disparities. In finance challenges, the court will undertake a rational basis review because the rights at issue are not premised on a total denial of education opportunity.⁶⁰ Therefore, any challenge of charter schools funding will be analyzed under rational basis and the state is likely to prevail.⁶¹

Wyoming

In Wyoming, education is a fundamental right.⁶² The court essentially determined that this meant that the legislature must provide a system of education that is generally uniform and will equip students for their “future roles as citizens, participants in the political system, and competitors both economically and intellectually.”⁶³ Like most states, the legislature is charged with propagating specific standards of what will constitute a “uniform” education.⁶⁴

Wyoming is different than most states in that it applies strict scrutiny to the right to education, as well as to the right to educational financing.⁶⁵ The Wyoming Court determined that the state is constitutionally required to provide districts with equal funding per student in order to ensure that students receive an equal education.⁶⁶ However, this does not bar localities from raising additional funds to supplement their state apportionment and enhance the education offered to their respective students.⁶⁷

5. States Requiring Substantially Equal Funding for Education.

In addressing constitutional challenges to school funding systems, the states of Arkansas, Texas and Tennessee have all required that their school children be provided a “substantially equal” educational opportunity. In a recurring litigation challenging the State’s system of allocating funds among school districts, the Arkansas Supreme Court found that the State’s responsibility to provide an equal educational opportunity consisted of providing substantially equal curriculum, facilities, and equipment for obtaining an adequate education.⁶⁸ Texas courts

⁵⁸ *Kukor*, 148 Wis.2d at 496. See also *Vincent*, 236 Wis.2d at 638.

⁵⁹ *Vincent*, 236 Wis.2d at 626.

⁶⁰ *Kukor*, 148 Wis.2d at 498.

⁶¹ In *Vincent*, the court determined that a funding system where a disparity in funding exists based on the local districts’ revenue-raising capacity is not unconstitutional because the “state adequately funds each school district to provide for a basic education.” *Vincent*, 236 Wis.2d at 626.

⁶² *Campbell County Sch. Dist. v. State*, 907 P.2d 1238, 1257 (Wyo. 1995).

⁶³ *Id.* at 1259.

⁶⁴ *Id.* at 1261.

⁶⁵ *Id.* at 1266. In *Campbell*, the districts received 93% of their funding from the state. However, the complicated funding formula ultimately left schools with different per-pupil funding amounts. There was also a wide divergence in the additional 7% because of the property tax differential.

⁶⁶ *Id.* at 1279-80.

⁶⁷ *Id.*

⁶⁸ *Lakeview v. Huckabee*, 91 S.W.3d 472, 500 (Ark. 2002) (*Lakeview III*) (the litigation resulted in a finding that the state system of funding violated the state constitution because there was no legitimate governmental purpose for

addressing litigation on the issue of school funding have held that the State constitution requires substantially equal access to similar revenues per pupil.⁶⁹ Recent Texas litigation found that the State educational funding system was constitutional despite having school districts that lacked additional funding to address growing populations, wide gaps in performances among student groups of race, and high drop-out rates.⁷⁰

In contrast to the recent Texas case, the Tennessee Supreme Court found the state educational funding system violated the equal protection clause of the state constitution since local control of the public school systems did not provide a rational basis for substantial disparities in funding levels and educational opportunities.⁷¹ In a later decision addressing teacher compensation about the same litigation, the court found that while Tennessee requires that all children receive a substantially equal educational opportunity, such does not include uniformity in teacher salaries.⁷²

6. States Where the Constitutional Guarantee is Unclear.

In the following states, the Courts have not decisively determined whether a student is entitled to an equal or adequate education.

Pennsylvania

In Pennsylvania, education is a fundamental right.⁷³ However, since declaring education a fundamental right in 1995, the Pennsylvania Supreme Court has not given any indication of the level of scrutiny the court will apply to a constitutional challenge. Older cases review any challenges under a test similar to rational basis. Legislation was generally upheld if it had a "reasonable relation to the purposed expressed in Article X [the education clause]."⁷⁴ However, the court has not readdressed this issue since declaring education a fundamental right.

Additionally, it is not clear what is encompassed in this fundamental right to education. Like most states, the legislature has the responsibility to establish standards governing the educational programs.⁷⁵ However, since the 1995 Wilkinsburg decision, the Pennsylvania courts have not taken any affirmative steps to define the fundamental right of education. It is not clear how they will analyze a funding challenge based on this fundamental right. It is clear that the Commonwealth is required to ensure that each of its subdivisions has sufficient funds to ensure that it can meet its legal obligations.⁷⁶ Therefore, based on previous case law, it is reasonable to

discrepancies in curriculum, facilities, equipment and teacher pay); see also Lakeview v. Huckabee, 189 S.W.3d 1 (Ark. 2004) (finding the criteria for an adequate education was a determination for the legislature).

⁶⁹ Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 397 (Tex. 1989) (finding state system of education violated constitutional requirement for efficiency).

⁷⁰ Nceley v. West Orange-Cove Consol. Ind. Sch. Dist., 176 S.W.3d 746 (Texas 2005) (holding an adequate education program is one that is reasonably able to provide access to a quality education).

⁷¹ Tennessee Small Sch. Systems v. McWhorter, 851 S.W.2d 139 (Tenn. 1993) (Small Schools I).

⁷² Tennessee Small Sch. Systems v. McWhorter, 91 S.W.3d 232, 243 (Tenn. 2002) (Small Schools III).

⁷³ Sch. Dist. of Wilkinsburg v. Wilkinsburg Educ. Assoc., 452 Pa. 335, 343, 667 A.2d 5 (1995).

⁷⁴ Reichley v. North Penn Sch. Dist., 533 Pa. 519, 527, 626 A.2d 123 (1993).

⁷⁵ Commonwealth v. Hall, 309 Pa. Super. 407, 411, 455 A.2d 674 (1983).

⁷⁶ Penn. Human Relations Comm'n v. Sch. Dist. of Philadelphia, 681 A.2d 1366, 1383 (Pa. Cmwlth 1996).

conclude that as long as the state is providing sufficient funding to the school district to meet the legislative requirements, there is no violation.⁷⁷

Mississippi

Mississippi recognizes education as a fundamental right.⁷⁸ However, like Pennsylvania, the state has not further defined exactly what is encompassed in this right. In general, the right is limited to an "adequate public education." This is similar to the language found in states in the previous category. At this point we cannot determine exactly how the state will analyze a funding challenge based on any fundamental right. However, the plain language of the decision declaring this right, supports the conclusion that students have the right to an "adequate" education.⁷⁹

7. States without Judicial Decisions or Case Law on Funding Education.

There is no case law in Alaska, Missouri, Michigan and New Mexico addressing the quality required from state schools.⁸⁰ Additionally, Delaware, Hawaii, Indiana, Nevada, and Utah have not had challenges to their systems of educational funding to offer guidance to a possible challenge in those states. There is no case law within those states addressing whether education is a fundamental right, the standard of review for a constitutional challenge to a educational funding scheme, or to the minimum level of adequate education required within those states.

C. Next Steps if the Litigation Will go Forward.

It is our collective view that litigation may still be a viable alternative. In particular, a challenge may be possible in one of the "equality" states (CT, WI, PA), but as stated, the plaintiffs will have to allege and prove that the education provided by the charter schools is not equal to the education provided by the conventional public schools because of the funding disparity. If the CER is interested in exploring this litigation, we recommend the following next steps:

⁷⁷ See generally *Id.* at 1383 (court states that if the political subdivision charged with a legislative duty proves that it has inadequate resources to comply, the Commonwealth is obligated to adequately fund it so that it may satisfy its duties).

⁷⁸ *Clinton Mun. Separate Sch. Dist. v. Byrd*, 477 So.2d 237, 240 (Miss. 1985).

⁷⁹ "Thus while there may be no federally created fundamental right to education, as the school board argues ... the right to a minimally adequate public education created and entailed by the laws of this state is one we can only label fundamental." *Id.*

⁸⁰ See generally *Comm. for Educational Equal. v. State*, 878 S.W.2d 446 (Mo. 1994) (holding education is not a fundamental right, but not addressing adequacy of education); *E. Jackson Pub Schools v. State*, 348 N.W.2d 303, 305 (Mich. Ct. App. 1984) (stating that while the state has an obligation to provide a basic education, the plaintiffs made no claim that pupils would be denied an adequate education); 1999 *Zuni Sch. Dist. V. State of New Mexico*, litigation claiming the system of school finance was unconstitutional was obviated when state adopted a court-ordered uniform funding system for school facilities.

- Identify particular schools within one of the states listed above where the charter school is having difficulty providing a proper education as compared to conventional public schools;
- Interview the principals, teachers and parents of those schools;
- Evaluate the willingness to assert the required allegations concerning the education being provided and the challenges that are attributable to the funding gap;
- Collect and evaluate the evidence that would be required to establish the truth of the allegations (e.g., comparative information on class size, teach experience, course offerings, extra-curricular activities, transportation, physical facilities, test scores).

If plaintiffs are willing to make the required allegations, then we suggest that these steps be followed, in which case litigation may still be a viable option to challenge the constitutionality of a funding scheme that does not ensure that charter schools receive enough money to provide an equal or adequate education for its students.

Alternatively, the CER should dedicate its efforts to see if there are states where state or local officials are not complying with the funding statutes. That is, even where it may be constitutional for the state to enact a funding scheme whereby charter schools receive less than their conventional school counterparts, if the states simply are not providing the funding that the legislation directs then the schools may be able to sue for the additional funds to which they are entitled. This type of suit was beyond the scope of the work we have completed thus far.