Vermont Supreme Court
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IN THE SUPREME COURT OF
THE STATE OF VERMONT

SUPREME COURT DOCKET NO.: 2021-177

Sadie Boyd, Madeline Klein, and Town of Whitingham,
Plaintiffs/Appellants,

v.

State of Vermont,
Defendant/Appellee

ON APPEAL FROM THE VERMONT SUPERIOR COURT
CIVIL DIVISION, WINDHAM UNIT
DOCKET NO. 389-10-17 Wmcv

APPELLANTS' BRIEF

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STATEMENT OF ISSUES

1. Whether Vermont's education property taxation and education funding system, 16 V.S.A. §§ 4000-4031; 32 V.S.A. §§ 5400-5412, deprives Plaintiff-Appellant Sadie Boyd of a substantially equal educational opportunity by funding education on a per-pupil basis without regard to the actual cost of providing a substantially equal educational opportunity. *See* Argument Section I.
2. Whether Vermont's education property taxation and education funding system, 16 V.S.A. §§ 4000-4031; 32 V.S.A. §§ 5400-5412, requires Plaintiff-Appellant Madeline Klein to contribute disproportionately to Defendant-Appellee's education fund, including by penalizing her and other Whitingham taxpayers for attempting to adequately fund education. *See* Argument Section II.
3. Whether the court below erred by holding that Defendant-Appellee State of Vermont was entitled to judgment as a matter of law on Plaintiffs-Appellants' claim that Vermont's education property taxation and education funding system, 16 V.S.A. §§ 4000-4031; 32 V.S.A. §§ 5400-5412, compels Plaintiff-Appellant Town of Whitingham to violate the Vermont Constitution by requiring it to collect an unconstitutional tax. *See* Argument Section III.

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STATEMENT OF THE CASE

I. Introduction

Vermont's education property taxation and education funding system, 16 V.S.A. §§ 4000-4031; 32 V.S.A. §§ 5400-5412, is unconstitutional on its face and as applied to Appellants, as it deprives Appellant Sadie Boyd ("Boyd") of a substantially equal educational opportunity, requires Appellant Madeline Klein ("Klein") to contribute disproportionately to the funding of the system, and compels Appellant Town of Whitingham (the "Town") to violate the Vermont Constitution in order to comply with the system.

The court below granted summary judgment to Appellee State of Vermont, holding that (1) Appellants failed to prove that the system caused Boyd to be deprived of a substantially equal educational opportunity; (2) the system as applied to Klein has a rational basis; and (3) because the Appellants failed to prove a constitutional violation with respect to Boyd or Klein, the Town's claim that it was being compelled to collect an unconstitutional tax was without merit. PC-6-9.

As shown below, the lower court's decision should be reversed and the case remanded for trial. The evidence shows that Appellee's system funds education on a per-pupil basis without regard to the actual cost of providing a substantially equal educational opportunity. It further shows that the system penalizes Whitingham taxpayers for attempting to adequately fund education, requiring them to contribute disproportionately to Appellee's education fund. The constitutional infirmities inherent in the current system therefore violate the requirement set forth in *Brigham v. State ("Brigham I")*, 166 Vt. 246 (1997) that Defendant must ensure substantial equality of educational opportunity for all Vermont students.

II. Facts and Procedural History

A. Boyd's Educational Opportunities at Twin Valley

In the 2017-18 school year, prior to the commencement of this case, only 69 courses were taught at Twin Valley Middle High School ("TVMHS"). AV-439-47.

Boyd testified about the details of the TVMHS offerings. These include only one foreign language class, Spanish. AV-396:19-23. Students at TVMHS can take French, but only online. AV-396:25-397:1.

Students at larger Vermont schools "have more career opportunity classes." AV-399:15-400:2. When asked whether there were classes that she would like to take that TVMHS does not offer, Boyd responded, "Business classes . . . . [C]hild development classes, more career classes . . . . [M]ore science or biology classes." AV-403:8-17.

Boyd testified that students at TVMHS are offered "only a few" Advanced Placement ("AP") classes. AV-401:19-402:2. Boyd knew multiple students who had "run out" of classes before graduating from TVMHS. AV-404:13-15.

Boyd testified that part of the problem at TVMHS was that other students were not attending classes there: "[O]nce you hit a certain age, kids in your class start leaving to [go to] other schools." AV-398:2-3. She observed, "if Twin Valley has more money and offers more classes, more students will consider going to Twin Valley, and that will fill the classrooms." AV-405:17-20.

Boyd testified that options for alternative access to classes were problematic. For example, the Windham Regional Career Center, located at Brattleboro Union High School, is "[a]bout a half an hour" away from her location in Whitingham.[1] AV-406:9-12. And when asked about taking a class online, Boyd testified, "I would much rather take it in person." AV-407:5-8.

As for athletics at other high schools, Boyd testified with regard to the high schools closest to TVMHS, "Leland & Gray and Brattleboro are about a half an hour, 40 minutes. Mt. Anthony is about 40 minutes, and [Burr and Burton Academy in Manchester] is almost an hour." AV-407:9-19.

Seth Boyd, a Rule 30(b)(6) witness for the Town of Whitingham (the "Town"), testified that the distance to the nearest high schools would be a logistical challenge making it difficult to share teachers with other districts. AV-374:23-375:12.

Mr. Boyd also testified that smaller schools cannot benefit from the economies of scale that benefit larger schools. AV-360:4-10. Twin Valley Unified Union School District's ("TVSD") relatively high per-pupil spending was attributable to several factors, including "student needs, demographics, special education costs, the facility bond payments . . . over $500,000 a year," as well as "[t]ransportation costs" attributable to, among other things, geographic isolation. AV-370:14-23. As a result, larger districts "have more money to spend on increased opportunities compared to Twin Valley who is spending a higher amount per pupil . . . ." AV-373:4-6. Mr. Boyd thought "there is

[1] This is likely an underestimate, as the distance between Boyd's home at 249 Sadawga Lake Road in Whitingham and Brattleboro Union High School is 26.5 miles, according to Google Maps.

certainly a need for additional opportunities for the students of Twin Valley." AV-361:2-3.

Student outcomes among Twin Valley students reflect unequal educational opportunity. David Adler, Appellants' expert, opined that "Twin Valley's students take the PSAT, SAT and AP tests at rates that are below average for the State. Similarly, those that take these exams score below state averages." AV-353. Participation and scores are, in fact, substantially below average.

Participation rates ranged from the 14th percentile for 10th graders taking the PSAT to the 42nd percentile for 11th graders taking the PSAT. On the SAT, students participate in the 20th percentile. Students participate in the 19th percentile for AP examinations. AV-353.

Student scores are similarly low. Scores on the PSAT were at the 15th percentile and scores on the SAT were at the 20th percentile. AV-353.

In 2016, only 17.14% of Twin Valley students who took the 11th grade New England Common Assessment Program ("NECAP") Science test were deemed proficient, and 40% were substantially below proficient. AV-377. Similarly, only 26.32% of Twin Valley students who took the 8th grade NECAP Science test were deemed proficient, the same percentage as were substantially below proficient. AV-378.

Twin Valley's dropout rates have also been consistently above the state average. In 2009-10, Twin Valley's high school dropout rate was 13% greater than the state average; in 2010-11, it was 114% greater; in 2012-13, it was 118% greater; and in 2013-14, it was 82% greater. TVMHS's dropout rate in 2011-12, when no statewide average was published, was 171% worse than the prior year's average, and 161% worse than the subsequent year. Even in TVMHS's best years (2009-10 and 2014-15), its dropout rate was at least 10% worse than the state average. AV-379-88.

B. Appellee's Education Property Taxation and Education Funding System

1. Education Spending

Vermont's education funding system should "make educational opportunity available to each student in each town on substantially equal terms, in accordance with the Vermont Constitution and the Vermont Supreme Court decision of February 5, 1997, *Brigham v. State of Vermont*." 16 V.S.A. § 4000(a).

Appellee funds education through the Education Fund. 16 V.S.A. § 4025(b)(1). One source of funding for the Education Fund is "all revenue paid to the State from the statewide education tax on nonhomestead and homestead property under 32 V.S.A. chapter 135 . . . ." 16 V.S.A. § 4025(a)(1). Appellee funds education by disbursing from the Education Fund to school districts "the adjusted education payment" under 16 V.S.A. § 4011. 16 V.S.A. § 4028(a). The "adjusted education payment" is "the district's education spending per equalized pupil." 16 V.S.A. § 4001(14).

"Education spending" consists of "the amount of the school district budget" and other sums, which are "paid for by the school district, but excluding any portion of the school budget paid for from any other sources . . . ." 16 V.S.A. § 4001(6). The number of equalized pupils is calculated by making various adjustments to a district's average daily membership of students. 16 V.S.A. § 4001(3).

2. The Homestead Property Tax

Vermont's education property tax is a statewide tax "imposed on all nonresidential and homestead property . . . ." 32 V.S.A. § 5402(a). Although the education property tax is a statewide tax, the homestead rate differs from municipality to municipality based on certain variables including education spending, the number of "equalized pupils," and the "common level of appraisal."

Because TVSD is a unified union school district, the homestead rate for Whitingham is calculated in accordance with 32 V.S.A. § 5402(e)(1), which uses "the base rate determined under subdivision (a)(2) of [§ 5402] and a spending adjustment under subdivision 5401(13) of [Title 32] based upon the education spending per equalized pupil of the unified union." 32 V.S.A. § 5402(e)(1).

The base rate under § 5402(a)(2) is "$[]1.00 multiplied by the education property tax spending adjustment for the municipality per $[]100.00 of equalized education property value as most recently determined under section 5405 of" Title 32. The equalized education property value is based on the "equalized education property tax grand list," which is one percent of various categories of property. 32 V.S.A. §§ 5401(6), 5405(a).

The education property tax spending adjustment is "the greater of: one or a fraction in which the numerator is the district's education spending plus excess spending, per equalized pupil, for the school year; and the denominator is the property dollar

equivalent yield for the school year . . . .” 32 V.S.A. § 5401(13)(A).[2] The property dollar equivalent yield is “the amount of spending per equalized pupil that would result if the homestead tax rate were $ 1.00 per $ 100.00 of equalized education property value, and the statutory reserves under 16 V.S.A. § 4026 and section 5402b of this title were maintained.” 32 V.S.A. § 5401(15).

Excess spending is calculated as follows:

> (A) The per-equalized-pupil amount of the district's education spending, as defined in 16 V.S.A. § 4001(6), plus any amount required to be added from a capital construction reserve fund under 24 V.S.A. § 2804(b).
>
> (B) In excess of 121 percent of the statewide average district education spending per equalized pupil increased by inflation, as determined by the Secretary of Education on or before November 15 of each year based on the passed budgets to date. As used in this subdivision, “increased by inflation” means increasing the statewide average district education spending per equalized pupil for fiscal year 2015 by the most recent New England Economic Project cumulative price index, as of November 15, for state and local government purchases of goods and services, from fiscal year 2015 through the fiscal year for which the amount is being determined.

32 V.S.A. § 5401(12).

For purposes of the excess spending calculation, education spending is defined to exclude certain spending, including for school capital construction, merger planning, and some special education costs. 16 V.S.A. § 4001(6)(B).

The equalized homestead tax rate resulting from the foregoing calculations is divided by the municipality's common level of appraisal to determine the actual homestead tax rate. 32 V.S.A. § 5402(b)(1). Accordingly, all other things being equal, a municipality's homestead rate increases if its education spending increases or its number of equalized pupils decreases, and its homestead rate will increase dramatically if the excess spending penalty is triggered.

Certain taxpayers are entitled to a reduction in their property tax bill based on provisions in Vermont's income tax law that provide for a “homestead property tax income sensitivity adjustment.” 32 V.S.A. §§ 6061-6074. The adjustment, if any, applies

[2] For fiscal years 2022 and 2023, there is a moratorium on the excess spending penalty. 2021 Bill Text VT S.B. 13, § 5 (June 7, 2021).

only to a property owner's "housesite," which includes no more than two acres surrounding the property owner's dwelling. 32 V.S.A. §§ 6061(11), 6066.

The State supplements education funding to certain districts with a "small schools support grant." The grant is available only to districts with at least one school with an average grade size of 20 or fewer students. 16 V.S.A. § 4015(a)(1). TVMHS does not receive a small schools support grant because its average grade size is more than 20.

It is the duty of a municipality to assess and collect the statewide education tax. 32 V.S.A. § 5402(b)(2) ("Taxes assessed under this section shall be assessed and collected in the same manner as taxes assessed under chapter 133 of this title . . . ."). The selectboard is required to draw an order on the town treasurer for the amount of the tax. 32 V.S.A. § 4731. The town treasurer is then required to make the payment to the state. 32 V.S.A. § 5402(c). "The municipality may retain 0.225 of one percent of the total education tax collected . . . ." 32 V.S.A. § 5402(c).

Phil Edelstein, a Rule 30(b)(6) witness for the Town and a member of its Selectboard, confirmed how the process works in Whitingham, testifying, "The [T]own of Whitingham, the select board, the town treasurer, and other people involved in working for the town prepare those tax bills and mail them out to every taxpayer . . . ." AV-343:4-7. When the tax payments come in from taxpayers, "the treasurer . . . sends the money under the statute to the state minus a small amount that is permitted by statute to retain . . . ." AV-348:23-25.

3. By Basing the Homestead Tax Rate on Per-Pupil Spending and Imposing an Excess Spending Penalty, Appellee Reduces Available Funding at TVSD, Imposes an Additional Burden on Whitingham Taxpayers, and Adversely Affects the Town's Finances

Mr. Boyd is a former chair of the Whitingham and Twin Valley School Boards, as well as the Windham Southwest Supervisory Union District Board. AV-365:10-13. He testified that by relying on per-pupil measures, Appellee's education property taxation and education funding system allows larger districts to spread costs over larger numbers of pupils. AV-359:22-25. In other words, "the funding formula that is hinged on per pupil spending doesn't allow the mid size or smaller schools to take advantage of the economies of scale." AV-360:8-10. Mr. Boyd testified that this has resulted in a situation in which larger schools "have more money to spend on increased opportunities compared to Twin Valley who is spending a higher amount per pupil, because of their size . . . ."

That means "taxpayers are paying more taxes, and our students have less opportunities." AV-373:4-8.

William Talbott, an expert witness for Appellee, could not identify an empirical basis for the excess spending threshold. AV-338:7-16. He also did not know whether it forced districts of a certain size to spend above the threshold to provide substantial equality of educational opportunity to its students. AV-338:18-25. He conceded as a result that one could conclude that districts sometimes approve budgets that are at levels below what they deem appropriate. AV-339:17-23.

Mr. Edelstein noted that "Whitingham is in the so-called penalty box. So we are collecting from our residents more in education taxes than we receive in benefit." AV-347:3-5. He agreed with Seth Boyd that with respect to TVSD, "There [are] no economies of scale." AV-347:13.

Klein's property tax bills from the Town for tax years 2007 through 2017 show that although Klein received an income-sensitivity adjustment from Appellee each of those years, the adjustment did not affect her tax liability based on homestead property outside her housesite. AV-448-58. Klein testified, "I struggle each year to pay my taxes." AV-437:17.

Mr. Edelstein testified that Appellee's education property taxation and education funding system harms the Town:

> [W]hat our select boards have done for a number of years, because of the high education tax rate, we have—are not able to spend money on a variety of important town functions. For example, both of our village sewer plants are well beyond their useful life and need to be replaced and rebuilt at tremendous expense. We have not been able to build reserve funds for that.
>
> Our town garage is falling down. Needs to be rebuilt. We would be doing considerably more road maintenance and repair if we were not—weren't trying to continually keep the total tax rate lower. We would be improving our park systems. We would be creating opportunities for sports and child activities, increasing our playground equipment.
>
> We would be building trails; improving our use of our natural resources. We would have more money to spend on community events like Old Home Week. . . . [T]he [T]own of Whitingham has cut back its spending dramatically in order to keep the total tax bill from overwhelming its citizens.

AV-344:12-345:9.

Mr. Edelstein noted that Whitingham and Wilmington "proactively merged their school districts long before the state decided to request that small districts merge." AV-346:3-5. However, "the size of the current school district is too big to benefit from the small school appropriations and not large enough to be able to provide a quality education." AV-346:7-10.

C. Education Spending in Whitingham

Dr. Michael Deweese is an expert witness for Appellee who gave testimony about the educational resources available at Twin Valley. Dr. Deweese testified that the number of library media specialists employed at Twin Valley "exceeds the State's education quality standards . . . ." AV-409:12-13. He admitted that he was not aware of any library media specialists who would have been able to work at Twin Valley on a part-time basis. AV-411:10-17. He agreed that the standards upon which he relied imposed a *cap* on the number of library media specialists at schools with fewer than 300 students, while imposing a *floor* on the number of library media specialists at larger schools. AV-412:5-22. He provided similar testimony with respect to school counselors and school nurse personnel. AV-409:12-427:14.

Dr. Deweese suggested that Twin Valley's staffing could be more efficient if the district were to adopt multigrade classrooms. AV-427:15-432:10. He did not know whether any large schools in Vermont have multigrade classrooms. AV-428:7-10. He admitted that he had "seen more teachers teach straight grade classrooms than multigrade classrooms." AV-430:22-24.

When Dr. Deweese was asked whether Twin Valley was more inefficient than the average Vermont school with respect to the staffing issues he raised, he admitted, "At a school-by-school level, that is not something that I considered." AV-432:14-19. Instead, he testified that Twin Valley's overall education spending "suggests that Twin Valley's staffing . . . has been managed differently" than staffing at other schools. AV-432:19-433:7.

Dr. Deweese further conceded that his opinion that the workmanship for TVMHS's renovations was "shoddy" was based on the opinion of a school counselor with no particular knowledge or expertise with regard to school facility workmanship. AV-433:18-434:5.

Mr. Boyd testified that Twin Valley was efficient with respect to its spending and did not spend more than it needed. AV-362:19-23. He opined that "Twin Valley would spend a lot more if they could provide some of the opportunities that are available at

larger schools." AV-363:2-4. He also testified that Twin Valley "could still spend more money and be efficient depending on what you were doing with that money and what offerings were available because of it." AV-364:7-10. Specifically, he testified that Twin Valley was efficiently staffed, stating, "[I]n my experience, Twin Valley has always kept an eye towards having the minimum staff required to meet the needs of the students." AV-367:11-19.

As for the number of paraprofessionals employed by Twin Valley, Mr. Boyd testified that individualized education programs required them. AV-368:5-15. When asked about transportation costs for the small student population spread over a large town, he testified that Twin Valley determined "that it was much more efficient, much less cost, to purchase the buses and operate them ourselves rather than contracting with an . . . outside company." AV-371:23-372:2.

D. Procedural History

Appellants commenced this action against Appellee by Verified Complaint with Application for Preliminary Injunction filed October 27, 2017. AV-5. The court below denied Appellee's motion for judgment on the pleadings in its Decision and Order Denying Motion for Judgment on Pleadings dated November 8, 2018. AV-50-54. It subsequently granted Appellee's motion for summary judgment in its Decision on Motion for Summary Judgment filed July 13, 2021. PC-10. Appellants timely filed a notice of appeal dated August 10, 2021. AV-566.

III. Summary of Argument

Summary judgment should not have been granted.

Whether the State's education funding system deprived Boyd of a substantially equal educational opportunity was a disputed issue of fact, and Appellee failed to meet its "heavy burden of justification" for that violation. Appellants showed that Appellee's education taxation system requires Klein to make a disproportionate contribution to the funding of education in Vermont, as she pays significantly more in education property taxes than similarly situated taxpayers in other municipalities, based only on the happenstance of her residence.

Finally, Appellants showed that the Town is a proper plaintiff in this case. Appellee's unconstitutional tax harms the Town by depriving it of revenue, and compels it to collect that unconstitutional tax from its resident property owners, which, in turn,

results in substantially unequal educational opportunities being provided to Whitingham students.

IV. Standard of Review

> When reviewing a grant of summary judgment, this Court applies the same standard of review as the trial court: summary judgment is appropriate when the record before the court clearly shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

Gilman v. Me. Mut. Fire Ins. Co., 175 Vt. 554, 555 (2003).

"In determining whether there is a genuine issue as to any material fact, [the court] will accept as true the allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material," and [will] give the nonmoving party "the benefit of all reasonable doubts and inferences." *In re Diverging Diamond Interchange SW Permit*, 2019 VT 57, ¶ 19 (quoting *Robertson v. Mylan Labs., Inc.*, 2004 VT 15, ¶ 15).

ARGUMENT

I. Appellee's Education Property Taxation and Education Funding System Deprives Boyd of a Substantially Equal Educational Opportunity

A. Appellee Bears a "Heavy Burden of Justification" for Infringing upon Boyd's Right to a Substantially Equal Educational Opportunity

Under the Education and Common Benefits Clauses of the Vermont Constitution,[3] "the state must ensure *substantial* equality of educational opportunity throughout

[3] The Education Clause provides, "Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force, and duly executed; and a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth." Vt. Const. ch. II, § 68. The Common Benefits Clause provides "[t]hat government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community . . . ." Vt. Const. ch. I, art. 7.

Vermont." *Brigham I*, 166 Vt. at 268 (emphasis in original). In *Brigham I*, the Court wrote, "[I]n Vermont the right to education is so integral to our constitutional form of government, and its guarantees of political and civil rights, that any statutory framework that infringes upon the equal enjoyment of that right bears a commensurate *heavy burden of justification*." *Id.* at 256 (emphasis added).

Although the Court left open the question of exactly what standard of review applies to challenges to the State's education funding system, *id.*, *Brigham I* and cases from other states strongly suggest that education is a fundamental right under the Vermont Constitution and that strict scrutiny or something close to it is required when analyzing the State's education funding system.

1. ***Brigham I* Suggests That Education Is a Fundamental Right**

The "heavy burden of justification" recognized in *Brigham I* is one of many statements in that case suggesting that education is a fundamental right. The others are as follows.

First, the Court wrote that "[t]he State has not provided a persuasive rationale for the undisputed inequities in the current educational funding system." *Id.* In seeking a "persuasive rationale" from Appellee, the Court was requiring something more than a mere rational basis for the inequities in the system.

Second, the Court noted that cases from other states "are of limited precedential value to this Court because each state's constitutional evolution is unique and therefore incapable of providing a stock answer to the specific issue before us." *Id.* at 257. However, the Court's ultimate decision aligned it with courts that "have declared property-tax-based systems similar to Vermont's to be unconstitutional." *Id.* at 256. The Court noted, "Almost without exception, these cases have held that education is an important or fundamental right under the applicable state constitution . . . ." *Id.* The Court further observed, "It is, of course, appropriate to consider sister-state interpretations of constitutional provisions similar to Vermont's." *Id.* at 257 n.6. The Court noted that "[p]erhaps the closest education clause textually to Vermont's is Connecticut's," and "[i]n *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (Conn. 1977) the Connecticut Supreme Court held that this provision created a fundamental right to education . . . ." *Id.*

Third, the Court noted that "[o]nly one governmental service—public education—has ever been accorded constitutional status in Vermont." *Id.* at 259. It also wrote that "[p]ublic education is a constitutional obligation of the state . . . ." *Id.*

Fourth, in discussing the history of the Education Clause, the Court wrote that "the Education Clause assumes paramount significance in the constitutional frame of government established by the framers: it expressed and incorporated 'that part of republican theory which holds education essential to self-government and which recognizes government as the source of the perpetuation of the attributes of citizenship.' " *Id.* at 261 (quoting A. Hubsch, Education and Self-Government: The Right to Education Under State Constitutional Law, 18 J.L. & Educ. 93, 97-98 (1989)).

Fifth, after quoting the remarks of past governors concerning "the importance of education to self-government and the state's duty to ensure its proper dissemination," the Court observed that "[t]he courts of this state have been no less forthright in declaring education to be a fundamental obligation of the state," then referred to education's "long and settled history as a fundamental obligation of state government . . . ." *Id.* at 262-64.

Appellants' education claims are consistent with one made by the student plaintiffs and accepted by the Court in an earlier case involving Whitingham students. In *Brigham v. State ("Brigham II")*, 179 Vt. 525 (2005), the Court wrote, "Because of nondiscretionary expenditures on special education, transportation, and the school facilities themselves, plaintiffs allege that the school districts have less money available to fund instruction and curriculum." *Brigham II*, 179 Vt. at 525. Among other things, the student plaintiffs "compared the number of course offerings at Whitingham with that of Essex High School to show that students in Essex have substantially greater curriculum choices." *Id.* at 529. The Court noted, "The students argue that these deficiencies demonstrate the State's failure to provide them with a substantially equal educational opportunity compared to the educational opportunities of students in other public school districts, which offer more curriculum choices . . . ." *Id.* at 525.

Vermont jurisprudence therefore suggests that education is a fundamental right, the infringement of which is subject to strict scrutiny.

2. Many State Courts Have Held Education Is a Fundamental Right

As the *Brigham I* Court noted, the high courts of a number of states have "held that education is an important or fundamental right under the applicable state constitution . . . ." *Brigham I*, 166 Vt. at 256 (citing *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 397 (Tex. 1989); *Washakie County Sch. Dist. v. Herschler*, 606 P.2d 310, 336 (Wyo. 1980); *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 93 (Ark. 1983)); *see also Brigham I*, 166 Vt. at 257 n.6 (citing *Horton*, 376 A.2d 359).

Other states' high courts have reached similar conclusions. *See, e.g.*, *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997) ("We hold that in this State a constitutionally adequate public education is a fundamental right."); *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997) (holding that intent behind state constitution's education clause "was that every child have a fundamental right to a sound basic education which would prepare the child to participate fully in society as it existed in his or her lifetime"); *Scott v. Commonwealth*, 443 S.E.2d 138, 142 (Va. 1994) (holding "education is a fundamental right under the Constitution"); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 206 (Ky. 1989) ("[W]e recognize that education is a fundamental right in Kentucky."); *Clinton Mun. Separate Sch. Dist. v. Byrd*, 477 So. 2d 237, 240 (Miss. 1985) (holding "the right to a minimally adequate public education created and entailed by the laws of this state is one we can only label fundamental"); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979) ("Because education is a fundamental constitutional right in this State, then, under our equal protection guarantees any discriminatory classification found in the educational financing system cannot stand unless the State can demonstrate some compelling State interest to justify the unequal classification."); *Robinson v. Cahill*, 351 A.2d 713, 720 (N.J. 1975) (holding "the right of children to a thorough and efficient system of education is a fundamental right guaranteed by the Constitution"); *Serrano v. Priest*, 487 P.2d 1241, 1258 (Cal. 1971) ("We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest.' "); *cf. State v. Angilau*, 245 P.3d 745, 753 (Utah 2011) (noting in dicta, "As for a minor's right to education, this is a fundamental right . . . ."); *Walker v. Ark. State Bd. of Educ.*, 365 S.W.3d 899, 908 (Ark. 2010) ("Notwithstanding the fact that we have not previously recognized a fundamental right to an adequate education, the State has an absolute constitutional duty to provide [students] with one . . . .").

In *Claremont*, the New Hampshire Supreme Court based its holding on two grounds. "First and foremost is the fact that our State Constitution specifically charges the legislature with the duty to provide public education. This fact alone is sufficient in our view to accord fundamental right status to the beneficiaries of the duty." *Id.* at 1358 (internal citation omitted). The court then added:

> Second, and of persuasive force, is the simple fact that even a minimalist view of educational adequacy recognizes the role of education in preparing citizens to participate in the exercise of voting and first amendment rights. The latter being recognized as fundamental, it is illogical to place the means

> to exercise those rights on less substantial constitutional footing than the rights themselves.

Id. at 1358-59; *see also Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993) (holding "education *is* a fundamental right under" state constitution's education clause providing "The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools") (emphasis in original). This reasoning applies equally to Vermont's Education Clause.

The foregoing strongly suggests that education is a fundamental right under the Vermont Constitution, and that legislative enactments that infringe upon that right are subject to strict scrutiny.

B. Under Any Standard, Boyd Was Deprived of a Substantially Equal Educational Opportunity

Whether the Court applies strict scrutiny, rational basis analysis, or some level of intermediate scrutiny, the result is the same—Appellee deprived Boyd of a substantially equal educational opportunity.

1. Boyd Did Not Receive a Substantially Equal Educational Opportunity

Boyd was deprived of an educational opportunity substantially equal to that afforded to students at larger schools. Each dollar of per-pupil education funding goes further at larger schools than it does at TVMHS. Accordingly, unlike students at larger schools, Boyd did not benefit from economies of scale. The excess spending penalty exacerbated the inequity Boyd suffered by reducing the funding available to provide her with educational opportunities.

Under the Education and Common Benefits Clauses, "the state must ensure *substantial* equality of educational opportunity throughout Vermont." *Brigham I*, 166 Vt. at 268 (emphasis in original). In *Brigham II*, the Court reinstated student plaintiffs' claims based on alleged violations of the students' right to a substantially equal educational opportunity. *Brigham II*, 179 Vt. at 529.

The student plaintiffs' allegations that provided the basis for reversal in *Brigham II* were similar to the evidence Appellants have presented here. In *Brigham II*, the Court wrote as follows: "The students argued that because of Act 60's inadequate funding, their

schools do not have enough money to spend on curriculum. . . . They compared the number of course offerings at Whitingham with that of Essex High School to show that students in Essex have substantially greater curriculum choices." *Brigham II* at 528-29.

Here, limited curriculum choices are one of many factors contributing to Whitingham students' deprivation of a substantially equal educational opportunity. As the court below noted, "It is undisputed that Twin Valley offers fewer in-person courses, and fewer sports programs than larger schools in Vermont." PC-6. As Boyd testified, students who might otherwise attend TVMHS go elsewhere. AV-398:2-3. Alternative course options, such as the Windham Regional Career Center and online learning, do not provide an adequate substitute for in-person courses at TVMHS. Appellee's suggested alternative of participating in athletics with other schools is not a practical option for students in a district as isolated as Twin Valley. Twin Valley students' participation in and performance on standardized tests, as well as their elevated dropout rates, provide further proof of their lack of educational opportunities.

2. Appellee's Education Funding System Deprived Boyd of a Substantially Equal Educational Opportunity

The trial court held that Appellants failed to present evidence that Appellee's education funding system caused Boyd's lack of educational opportunities. PC-6-7. The court stated, "the undisputed facts suggest that the lack of programs and resources are directly related to the kinds of issues identified in *Brigham* as inevitably resulting in some inequality, i.e. to the school's size, location, transportation costs, and the like." PC-7.

But what the Court stated in *Brigham I* was that "[t]he Constitution does not, to be sure, require exact equality of funding among school districts or prohibit *minor* disparities attributable to unavoidable local differences." *Brigham I*, 166 Vt. at 267 (emphasis added). The Court did not state that the disparities attributable to local differences were invariably minor; it simply stated that minor disparities attributable to local differences were not unconstitutional.

Appellants have presented evidence that the disparities in Whitingham students' educational opportunities as compared to students in larger districts, even if attributable to local differences, are *not* minor. Accordingly, whether or not those substantial disparities are attributable to school size, location, transportation costs, and the like, Appellee has a duty to ensure that its education funding system addresses them. Because it has failed to do so, it has failed to provide Boyd with a substantially equal educational opportunity.

This was reflected in evidence Appellants offered of per-pupil funding disparities between districts in 2018, which were as great as those between the "poor" districts and the "rich" ones discussed in *Brigham I*. *See* chart *infra* at 27.

3. ***Brigham I* Supports Appellants**

Brigham I sought to remedy "inequities in educational opportunities." *Brigham I*, 166 Vt. at 265. Although the inequities that the Court faced in *Brigham I* arose from differences in property value, *Brigham I* should not be read to permit the right to a substantially equal educational opportunity to be defeated by other means, including a funding formula that fails to account for the actual cost of providing such an opportunity.

The disparities in test results, course offerings, dropout rates, and athletic offerings between Whitingham students and other students in Vermont speak to inequality of educational opportunity.

With regard to the relative merits of in-person versus online learning, as Boyd testified concerning an online class, "I would much rather take it in person." AV-407:5-8. While online and other alternative programs undoubtedly offer an educational opportunity, it is entirely different to claim that they offer an educational opportunity that is substantially equal to the one provided by in-person classes at Twin Valley. If that were so, larger schools would surely offer fewer in-person classes than they do.

4. Appellee's Deprivation of Boyd's Right to a Substantially Equal Educational Opportunity Is Unconstitutional

The inequities of educational opportunity caused by Appellee's education funding formula do not meet strict scrutiny.

In *Brigham I*, the Court described the standard for strict scrutiny analysis:

> Where a statutory scheme affects fundamental constitutional rights . . ., both federal and state decisions have recognized that proper equal protection analysis necessitates a more searching scrutiny; the State must demonstrate that any discrimination occasioned by the law serves a compelling governmental interest, and is narrowly tailored to serve that objective.

Brigham I, 166 Vt. at 265. Only "when no fundamental right or suspect class is involved, [does] state law need only reasonably relate to a legitimate public purpose[.]" *Brigham I*, 166 Vt. at 251 (quoting *Choquette v. Perrault*, 153 Vt. 45, 52 (1989)).

However, " 'labels aside,' Vermont case law has consistently demanded in practice that statutory exclusions from publicly-conferred benefits and protections must be 'premised on an appropriate and overriding public interest.' " *Baker v. State*, 170 Vt. 194, 206 (1999). Thus, Vermont's Common Benefits Clause "require[s] a 'more stringent' reasonableness inquiry than was generally associated with rational basis review under the federal constitution." *Id.* at 203. In *Baker*, the Court noted that "[t]his approach may . . . be discerned in the Court's recent opinion in *Brigham*" *I*. *Id.* Thus, at a minimum, Appellee must meet the "heavy burden" of justifying that the harm suffered by Boyd is "premised on an appropriate and overriding public interest." *Brigham I*, 166 Vt. at 256; *Baker*, 170 Vt. at 206.

As discussed above, Appellants have shown that Whitingham students are deprived of a substantially equal educational opportunity because Appellee funds education on a per-pupil basis, rather than on the basis of the actual cost of educating Whitingham's students, and because Appellee imposes a penalty on so-called "excess" spending.

Appellee might argue that the interests underlying its funding system include funding education, equalizing districts' access to funds, encouraging wise spending, preserving local control, and ensuring fair treatment of low-income taxpayers. None of these interests meets Appellee's "heavy burden of justification." *Brigham I*, 166 Vt. at 256.

With regard to local control, the *Brigham I* Court noted that it is a "laudable goal," but the words that followed apply here:

> Individual school districts may well be in the best position to decide whom to hire, how to structure their educational offerings, and how to resolve other issues of a local nature. The State has not explained, however, why the current funding system is necessary to foster local control. Regardless of how the state finances public education, it may still leave the basic decision-making power with the local districts.

Brigham I, 166 Vt. at 265-66. As the Court later wrote, "there is no necessary or logical connection between local control over the raising of educational funds, and local decisionmaking with respect to educational policy." *Id.* at 267.

The Court's reasoning concerning local control applies equally to the remaining interests. The current funding system, which does not account for the actual cost of educating Whitingham students and penalizes Whitingham taxpayers for attempting to provide an adequate education for their students, is not necessary in order to fund education, equalize districts' access to funds, encourage wise spending, or ensure fair treatment of low-income taxpayers.

One problem with the system is that by equalizing *districts'* access to funds, the system deprives *students* of substantially equal educational opportunities. This is because the expenses inherent to educating Whitingham students mean that equal funding does not equate to equal opportunity. If it did, how could one explain the extreme divergence in per-pupil spending that currently exists?

The disparity between districts is notable when comparing spending in fiscal year 2018 to spending in fiscal year 1995. After reviewing education spending in fiscal year 1995, the *Brigham I* Court noted that "some school districts in Vermont commonly spend twice as much or more per student as other districts." *Brigham I*, 166 Vt. at 254. Here are the extremes in fiscal year 1995 compared to the extremes in fiscal year 2018:

Fiscal Year	**Highest Per-pupil Spending**	**Lowest Per-pupil Spending**	**Highest Per-pupil Spending as Percentage of Lowest Per-pupil Spending**
1995[4]	$7,726 (Winhall)	$2,979 (Eden)	259%
1995 *adjusted to 2018 dollars*[5]	$12,723.08 (Winhall)	$4,905.78 (Eden)	259%
2018[6]	$22,225.92 (Victory)	$6,463.78 (Ferdinand)	344%

[4] *See Brigham I*, 166 Vt. at 254.

[5] Calculated using Saving.org, "Inflation Calculator," *available at* https://www.saving.org/inflation/inflation.php?amount=100&year=1995. This calculator uses the Consumer Price Index (CPI) data provided by the U.S. Bureau of Labor Statistics. *Id.*

[6] *See* School District Spending Per Pupil, available at https://education.vermont.gov/documents/data-per-pupil-spending-fy2018 (last visited Nov. 16, 2020).

The trial court noted that "[t]he goal of the educational tax system of which the plaintiffs complain is to encourage all Vermont schools to limit per pupil funding to about the same level . . . ." PC-6. If per-pupil spending is equated with educational opportunity, the massive disparities in the current system show that it is not providing substantial equality of educational opportunity. And that is clearly not a problem that is limited to Whitingham.

The evidence shows that Whitingham has spent wisely but has still been subject to the excess spending penalty.

Dr. Deweese's testimony shows that the standards upon which Appellee relies to claim that Twin Valley's staffing levels for library media specialists, school counselors, and school nurse personnel are inefficient are in fact double standards which impose caps on staffing levels for small schools, like the Twin Valley schools, and floors on staffing levels for larger schools. AV-409:12-427:14. Dr. Deweese admitted that he did not consider whether Twin Valley was more inefficient than the average Vermont school with regard to the staffing issues to which he testified. AV-432:14-19. He also admitted that his belief that Twin Valley's lack of a capital plan caused unnecessary spending was merely an assumption, and that his opinions regarding shoddy workmanship and concomitant premature maintenance at TVMHS were also based on assumptions. AV-433:2-6, 433:18-435:10.

As for low-income taxpayers like Klein, they must pay the homestead rate on non-housesite property, distinguishing them only by a matter of degree from taxpayers who pay the homestead rate on their entire homesteads.

Accordingly, Appellee has failed to meet its "heavy burden." *See Brigham I*, 166 Vt. at 256.

II. Appellee's Education Property Taxation System Requires Klein to Contribute Disproportionately to Appellee's Education Fund

Appellee's education property taxation system requires Klein to make a disproportionate contribution to the funding of education in Vermont. Klein pays significantly more in education property taxes than similarly situated taxpayers in other municipalities, based only on the happenstance of her residence. This is so even though the education property tax is a *statewide* tax, and even though Twin Valley students are not receiving a substantially equal educational opportunity.

The Proportional Contribution Clause provides in relevant part "[t]hat every member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to contribute the member's proportion towards the expence of that protection . . . ." Vt. Const. ch. I, art. 9. The Proportional Contribution Clause "requir[es] legislative classifications of taxpayers to be reasonably related to the purpose for which the classification was established, and fairly and equitably applied among like classes of taxpayers[.]" *Brigham II* at 529 (citing *In re Property of One Church St. City of Burlington*, 152 Vt. 260, 266 (1989)).

In *Brigham II*, the Court reversed the lower court's dismissal of the plaintiff taxpayers' claim "that Act 60's method of taxation to fund education violates their rights under the Vermont Constitution because it imposes a disproportionate burden upon the taxpayers in their towns compared to similarly situated taxpayers in other towns." *Brigham II*, 179 Vt. at 525. The plaintiff taxpayers had alleged the following:

> [T]hey pay disproportionately high state and local education taxes compared to similarly situated taxpayers of other Vermont towns. They also allege[d] that because the State is inadequately funding education under Act 60, they are forced to pay higher education taxes than other taxpayers who own property of the same value and have identical adjusted gross incomes.

Id. at 526.

In *Brigham II*, Appellee "argue[d] that the taxpayers will not be able [to] show that Act 60's taxation system lacks a rational basis, and then conclude[d] on the merits of plaintiffs' case that this tax scheme is rationally related to the objective of providing substantially equal access to education revenues." *Brigham II*, 179 Vt. at 529 (internal quotation marks omitted). But the Court allowed the case to proceed based on the plaintiff taxpayers' allegation "that a statistical analysis will reveal the combined local and state education-related property taxes in their towns to be among the highest in the state." *Id.* at 529.

It is undisputed that Whitingham's state education property taxes are among the highest in the state. However, the court below held that *Brigham II* "is not relevant here" because it "was decided at an earlier phase in the case and did not even consider whether the State's educational taxation system could satisfy the rational basis test . . . ." PC-8. The court below concluded as follows:

> [I]n light of the goals of this system to which these plaintiffs object, to ensure "reasonable educational equality of opportunity" to students throughout the state, by imposing penalties on school systems that spend excessive sums on students, the State's system as applied to Plaintiff Klein does have a rational basis.

PC-8.

While it is true that *Brigham II* involved a motion to dismiss, and the Court did not consider whether there was a rational basis for the State's education property taxation system, the Court concluded that the plaintiff taxpayers' allegations concerning their relative tax burden were sufficient to allow their claims to proceed. *Brigham II*, 2005 VT 105, ¶ 15. This suggests that if those allegations had been proven, the plaintiff taxpayers would have prevailed.

The only case cited by the court below that involved a disproportionate contribution claim directed at Appellee's education property taxation system is *Schievella v. Vermont Department of Taxes*, 171 Vt. 591 (2000). PC-7-8. But in *Schievella*, the taxpayer classification at issue was based on income, satisfying the reasonableness requirement of the Proportional Contribution Clause. *See Schievella*, 171 Vt. at 593.

Here, Appellee is treating similarly situated taxpayers differently based not on their income but on their town of residence. Such treatment is not reasonably related to the goal of ensuring substantial equality of educational opportunity to students throughout the state.

Appellants' Proportional Contribution Clause claim should be reinstated.

III. Appellee's Education Property Taxation and Education Funding System Harms the Town

The Town is a proper plaintiff in this case. Appellee's unconstitutional tax harms the Town by depriving it of revenue. Moreover, Appellee compels the Town to collect that unconstitutional tax from its resident property owners, which, in turn, results in substantially unequal educational opportunities being provided to Whitingham students.

A. The Town Has Capacity to Sue Appellee

The court below implied that the Town did not have capacity to sue Appellee, holding, "The fact that the Town can receive . . . income incidental to the collection of

state taxes from its residents does not . . . mean that the Town exercises any control over the State's educational tax system." PC-9.

Town of Andover v. State, 170 Vt. 552 (1999) controls with respect to a municipality's capacity to sue the State. The Court described the *Andover* lawsuit in relevant part as follows:

> Plaintiff municipalities sued the State of Vermont seeking a declaration that the Equal Educational Opportunity Act of 1997 (Act 60), 16 V.S.A. §§ 4001-4029, is unconstitutional because it requires municipalities to (a) set tax rates for other municipalities; (b) initiate revenue bills to fulfill the general obligations of the state; and (c) undertake the state's constitutional responsibility for providing equal educational opportunities. The State moved to dismiss on the ground that plaintiffs lacked capacity to challenge the validity of a legislative enactment.

Andover, 170 Vt. at 552-53.

In reversing the trial court's dismissal of the municipal plaintiffs from the case, the Court noted that "[i]t is not true that municipalities always lack capacity to sue the state." *Id.* The Court then remanded the case for "consideration of whether compliance with the statute at issue would in fact require the municipalities to violate constitutional provisions." *Id.*

The Court's recognition of the possibility of a municipality suing the state is consistent with decisions rendered by many courts in other states, which have implicitly or explicitly recognized municipalities' capacity and/or standing to sue the state in education finance litigation. *See, e.g.*, *Londonderry Sch. Dist. SAU # 12 v. State*, 907 A.2d 988 (N.H. 2006); *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472 (Ark. 2002); *Edgewood*; *Rose*, 790 S.W.2d at 201; *Washakie*, 606 P.2d at 317.

Appellants have shown that the statutes at issue require the Town to violate constitutional provisions by compelling it to collect an unconstitutional tax from its resident property owners, which, in turn, results in substantially unequal educational opportunities being provided to Whitingham students. Nevertheless, the court below suggested that the Town would be insulated from liability to a taxpayer for collecting an unconstitutional tax because the Town did not "control" the tax system. PC-9.

This "control" requirement seems to have been borrowed from *City of New York v. State*, 655 N.E.2d 649 (N.Y. 1995). *City of New York* involved three causes of action, all of which concerned the education being provided to students in New York City. *City of N.Y.*, 655 N.E.2d at 650-51. None of the causes of action concerned the constitutionality

of a tax. More importantly, as the four-to-two majority noted, the plaintiffs did not argue for application of the exception that applies here, "where the municipal challengers assert that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription." *Id.* at 652. The court addressed that exception anyway, concluding that "it cannot be persuasively argued that the City officials in question should be held accountable either under the Equal Protection Clause or the State Constitution's public Education Article by reason of the alleged State underfunding of the New York City school system over which they have absolutely no control." *Id.* at 654.

City of New York is distinguishable, as this Court has not adopted the "control" requirement in the context of deciding a municipality's capacity to sue. And, even if it had, Vermont law provides municipalities with some control over the collection of Appellee's education tax that a taxpayer could use as a basis to sue the Town: "The municipality may retain 0.225 of one percent of the total education tax collected . . . ." 32 V.S.A. § 5402(c).

Accordingly, the Town has capacity to sue Appellee for the harm the Town has suffered as a result of Appellee's education property taxation and education funding system.

B. Appellee's Education Property Taxation and Education Funding System Harms the Town

Appellee's education property taxation and education funding system harms the Town in two ways.

First, as shown above, it compels the Town to violate the Vermont Constitution by collecting an unconstitutional tax from resident taxpayers, which, in turn, results in substantially unequal educational opportunities being provided to Whitingham students.

Second, it deprives the Town of revenue. Mr. Edelstein testified that "the [T]own of Whitingham has cut back its spending dramatically in order to keep the total tax bill from overwhelming its citizens." AV-345:6-9. Those cutbacks have kept the Town from replacing its sewer plants, rebuilding its garage, maintaining and repairing its roads, and improving its parks.[7] AV-344:12-25.

[7] The court below correctly noted that "[a] municipality may establish constitutional standing to challenge a state law when its operations are affected . . . ." PC-9.

Because the Town has capacity to sue Appellee, and it has presented evidence of the harm it has suffered as a result of Appellee's education property taxation and education funding system, its claims should be reinstated.

CONCLUSION

Based on the foregoing, Appellants respectfully submit that the lower court's decision should be reversed and the case remanded for trial.

V.R.A.P. 32(a)(7)(D) CERTIFICATE OF COMPLIANCE

May this certify that this brief complies with the word-count limit of V.R.A.P. 32(a)(4)(A)(i). This brief contains 8,652 words, as measured by Microsoft Word, the word-processing system used to prepare the brief.

DATED at Brattleboro, County of Windham and State of Vermont, this 22nd day of September, 2021.

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