IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPELLATE DOCKET NO. 99-1576

BRIAN B., by and through his Mother, Lois B.; ABDUL R., by and through his mother, Dena R.; ANTHONY T., by and through his mother, Christine H.; CURTIS L., by and through his mother, Mattie L.; KENNETH R., by and through his mother, Nancy R.; BYRON A., by and through his mother, Carrie W.; RONELLE W., by and through his mother, Pamela J.; STEVEN S., by and through his guardian, Nancy F.; and JEREMIAH M., by and through his mother, Susan M.; on behalf of themselves and all others similarly situated,

APPELLANTS,

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF EDUCATION; EUGENE HICKOK, in his official capacity as Secretary of the Department of Education; GARNET VALLEY SCHOOL DISTRICT; PHILADELPHIA SCHOOL DISTRICT; and CENTRAL YORK SCHOOL DISTRICT,

APPELLEES.

Appeal From The Order of The United States District Court
For The Eastern District of Pennsylvania
Entered June 17, 1999 in Civil Action No. 96-7991

BRIEF FOR THE APPELLANT

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This Court has appellate jurisdiction to review a district court's interlocutory order denying a preliminary injunction under 28 U.S.C. § 1292(a)(1) providing for appeals from "[i]nterlocutory orders of district courts ... granting, continuing, modifying, refusing or dissolving injunctions..." Id.; see Acierno v. New Castle County, 40 F.3d 645, 652 (3rd Cir. 1994). The United States District Court for the Eastern District of Pennsylvania has jurisdiction under 28 U.S.C. § 1331 and § 1343 to hear this matter in that claims are asserted under the Constitution and laws of the United States, including federal law providing for the protection of civil rights. Appellants' claims for injunctive relief are authorized by 28 U.S.C. § 2202 and 42 U.S.C. § 1983. Appellants timely filed a Notice of Appeal on July 15, 1999.

STATEMENT OF ISSUES

On appeal to this Court appellants seek to reverse the decision of the district court denying their motion for a preliminary injunction. The district court's conclusion that rational-basis review is all that is required by the Constitution's equal protection requirement is incorrect. In light of uncontroverted evidence at the preliminary injunction hearing that 24 Pa. Cons. Stat. § 13-1306.2(a) amounts to a near total deprivation of education to the appellant class, the equal

protection clause demands the application of a heightened level of scrutiny.

Assuming, *arguendo*, that the rational-basis of review is the appropriate level of equal protection scrutiny, Section 1306.2(a) must fail because the classification's relationship to the Commonwealth defendants' asserted goal is so attenuated that the distinction is arbitrary and irrational.

STATEMENT OF THE CASE

Nature of Action & Course of Proceedings

This civil rights class action challenges the constitutionality of 24 Pa. Cons. Stat. 13-1306.2(a)[1], a provision of the Pennsylvania School Code, that allows convicted school-aged youth confined as adults in county correctional institutions, and who are "otherwise entitled to education under the School Code, to be treated as youth who have been expelled from school.

Prior to the passage of § 1306.2(a) in June of 1997, plaintiffs ("appellants"), on behalf of all current and future pre-trial and convicted school-aged youth held in Pennsylvania's county prisons and jails, filed this action challenging the denial of their right to basic and special education under federal and state law. The original plaintiffs were six school-

[1] Act 30 of June 25, 1997, No. 30, § 5, 1997 Pa. Laws 297 (amending the Pennsylvania School code, 24 Pa. Cons. Stat. § 13-1306) (full text attached to the brief of Appellants).

aged youths housed in one of three county jails: Delaware County Prison, Philadelphia House of Correction and York County Prison. None of the named plaintiffs had completed a secondary education. Additionally, four of the named plaintiffs had been identified as eligible for special education and related services under the Individuals with Disabilities Education Act, ("IDEA") 20 U.S.C. §§1400, et seq., and Section 504 of the Rehabilitation Act of 1973, ("Section 504") 29 U.S.C. § 794.[2]

The defendants ("appellees") were the Pennsylvania Department of Education ("PDE"); Eugene Hickok, Secretary for PDE; and three school districts in which the county jails holding the named plaintiffs were located: Garnet Valley School District, Philadelphia School District, and Central York School District.

Six months after the filing of the original complaint, the Pennsylvania General Assembly passed Section 5 of Act 30 of 1997, 24 Pa. Cons. Stat. § 13-1306.2, which drastically limited the education rights of convicted school-aged offenders incarcerated in county adult correctional facilities -- the precise plaintiffs in this lawsuit. The statute states that "[a] person under twenty-one (21) years of age who is confined to an adult local correctional institution following conviction for a criminal

[2] In the original complaint, appellants alleged violations of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq.; IDEA implementing regulations; due process and equal protection guaranteed by the Fourteenth Amendment of the United States Constitution; and supplemental state claims sounding in the Pennsylvania Public School Code, 24 Pa. Cons. Stat. §§ 1-101 et seq..

offense who is otherwise eligible for educational services as provided under this act shall be eligible to receive educational services from the board of school directors in the same manner and to the same extent as a student who has been expelled....” (emphasis added)

Under Pennsylvania law, students seventeen and older who have been expelled are entitled to no education; expelled students under seventeen are to be provided “some educational services” which, pursuant to PDE policy, typically consists of 5 hours of homebound instruction per week. Since students who have been “expelled” are only entitled to very meager “education services,” if any, this statute effectively authorizes the withholding of all or virtually all education from persons of school age who are incarcerated, pursuant to conviction, in county correctional institutions -- as distinct from persons of school age who are incarcerated, pursuant to conviction, in state correctional institutions or who are confined, pursuant to adjudication of delinquency, in juvenile correctional facilities; state correctional institution inmates of school age and juvenile correctional facility inmates of school age must be provided the same education guaranteed to all other Pennsylvania residents of school age.

Two months after § 1306.2(a)’s passage, plaintiffs filed an amended complaint, challenging this amendment to the School Code

and moved for a preliminary injunction. In addition to joining three additional named plaintiffs, plaintiffs challenged the constitutionality of Section 1306.2(a) as violative of the Equal Protection Clause of the Fourteenth Amendment by treating similarly situated groups of inmates unequally.

A hearing on plaintiffs' motion for a preliminary injunction was held November 24-26, 1997. Prior to the hearing, plaintiffs and the Commonwealth defendants entered into a settlement agreement which settled all of plaintiffs' claims against the Commonwealth under federal and state special education laws, and which further settled plaintiffs' claims under 24 Pa. Cons. Stat. § 13-1306.2(b). Specifically, the Commonwealth defendants agreed to ensure the enforcement of the IDEA for eligible inmates (including eligible pre-trial and convicted youth) in the county prisons, to advise school districts of their obligation to provide basic education services to pre-trial school-aged youth in the county prisons (as well as special education for all eligible inmates), and to establish minimum requirements for alternative education programs.[3]

At the hearing on plaintiffs motion for a preliminary injunction, the parties presented testimony and evidence relating

[3] Pursuant to the agreement between the Commonwealth defendants and plaintiffs, the Pennsylvania Department of Education issued a policy bulletin, known as a Basic Education Circular, which outlines school district obligations to pre-trial youth and youth eligible for special education. Appendix II at 416a.

to the constitutionality of Section 1306.2(a). At the conclusion of the hearing, the Court certified the plaintiff class. On June 17, 1999 the district court denied plaintiffs' motion for a preliminary injunction upon finding that plaintiffs were unlikely to succeed on the merits. Plaintiffs timely filed a Notice of Appeal.

Statement of Facts

Pennsylvania law confers on children between the ages of 6 and 21 the right to a public education.[4] This entitlement extends not only to children living at home, but also to those residing in institutions, including almost all school-aged youth housed in adult correctional institutions. Thus, the state provides a full educational program[5] to all young people who are convicted as adults and confined in state prisons or juvenile correctional facilities. In addition, as a result of agreements prompted by the present litigation, youth confined in county jails as pre-trial detainees receive a full program of educational services, as do all individuals, wherever housed, pre-trial or convicted, who because of a disability require

[4] See 22 Pa. Code § 12.1.

[5] A full educational program, as defined by state law, consists of 5 ½ hours of instruction per week for 180 days per year. Op. at 4; 24 P.S. § 15-1504.

special educational services.[6]

Had the state not chosen, shortly after this litigation was filed, to enact 24 P.S. §13-1306.2(a), the case would have been resolved and the entitlement to attend school would extend, without exception, to all persons of school age in adult facilities. By enacting §13-1306.2(a), however, the state singled out one discrete subgroup of incarcerated youth – appellants here[7] – for radically different treatment. The statute provides that *convicted* youth confined as adults in county correctional institutions are "eligible to receive educational services ... to the same extent as a student who has been expelled [from school] ...." Because an expelled student under age 17 has a right to only minimal services,[8] and because an expelled student 17 or older gets no education at all,[9] "the effect of 24 P.S. §13-1306.2(a) is to substantially curtail, or wholly eliminate, the educational entitlement of convicted county

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[6] See generally Op. at 3-5; [Appendix II at 416a, Interim Agreement].

[7] The plaintiff class below included pre-trial and convicted youth, with and without disabilities. Because agreements have been reached with respect to the education of all members of the class except those convicted youth, without disabilities, who are housed in county jails, we refer to them as "appellants" here.

[8] Op. at 4, 25 (finding that the "accepted instructional ration" for expelled students under age 17 is five hours per week, as contrasted to 27.5 hours per week for others).

[9] Op. at 4, 25.

correctional institution inmates under the age of twenty-one."[10]

Although they are *treated* as expelled students, these young people have not, in fact, been expelled from school. Nor, as a general rule, could they be, since they have not committed in-school offenses, much less been afforded any due process procedures concerning their in-school behavior.[11] The basis for depriving these young people of an education has nothing to do with their behavior at school, or for that matter with any aspect of their educational history. Rather, the variable that determines whether a school-aged person who is convicted as an adult will be educated is the location of his confinement. If he is sent to a state adult facility, he can go to school; if he is sent to a state juvenile facility, he can go to school; if he is sent to a county juvenile detention facility, he can go to school; *if he is sent to a county adult facility, he cannot*.

The decision as to where an individual will be confined depends, in turn, on the length of the individual's sentence and, in certain instances, the discretion of the sentencing judge.[12] There is no suggestion on this record that educational factors

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[10] Op. at 4.

[11] See 24 P.S. §§ 13-1317, 13-1318; Goss v. Lopez, 419 U.S. 565 (1975).

[12] Op. at 29-31. In particular, persons whose sentence is two years are less are housed in county facilities; those whose sentence is five years are more are housed in state facilities; and those with sentences of between two and five years can be housed in either type of facility, at the discretion of the sentencing judge.

play a significant role in these decisions. There is also no suggestion, much less any evidence, that the characteristics of individuals sent to state prison differ in any relevant respect from those of appellants, except that, as among the two groups, it is appellants who have committed less serious crimes and received lesser sentences.[13]

The "radical abridgement of classroom hours"[14] effected by §13-1306.2(a) has a drastic effect on appellants. For these individuals, the majority of whom "have a history of poor educational achievement, school failure, and low skill proficiency...," the deprivation of education has a "severely detrimental impact."[15] For those under 17, the minimal instruction offered "provides little benefit," and "is not sufficient to learn basic skills, let alone to pass a GED examination"; many of these individuals will, upon release, "find

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[13] The state did argue, in response to appellants' challenge to the statute, that school-age youth in state prisons have a greater need for education than those confined in county jails, because they (state prison inmates) serve longer sentences and are less likely to be able to return to school upon their release. Op. at 42. Obviously, however, this supposed greater need results simply from the individual's place of confinement, rather than from any characteristics of the individual himself. In any event, moreover, the district court found the state's argument to be unsupported by the record, though it also held that the argument might pass the rational basis test. Op. at 43.

[14] Op. at 27.

[15] Op. at 26, 33.

themselves illiterate and unemployable."[16] For those over 17, who are provided with no education at all, the effect is even harsher. The bottom line is that:

> [P]ersons who enter county correctional institutions deficient in basic skills and are then deprived of education while incarcerated are unlikely to become literate upon release. And those who do not gain a high school diploma are anywhere from three to five times as likely to suffer poverty as their graduating peers. Moreover, they are more than five times as likely to be forced to rely on public assistance, and more than three times as likely to be unemployed.[17]

Finally, the record shows that the burdens, on county jails, of educating appellants are *de minimis.* The educational services themselves, *i.e.*, teachers, materials, and so forth, are provided by the local school district.[18] With regard to the provision of space for educational programs, only three county correctional institutions currently have no program space; some others have "very limited facilities for all programs." The total number of institutions in which, at present, space "would be a problem" is 13; these are among the smallest of the 73 county facilities. Even in those institutions, defendants have made available, or will shortly make available pursuant to agreements in this case, space in which to provide basic educational services to pre-trial detainees and special

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[16] Op. at 27.

[17] Op. at 32-33.

[18] Op. at 3; 24 P.S. § 13-1306.

educational services to *all* eligible inmates.[19] It is also undisputed, of course, that in all other situations in the Commonwealth, space problems are addressed rather than allowed to trump the duty to provide educational services; thus, if state prisons, or for that matter local schools, need additional space, the space is found or built. Finally, apart from minimal space issues, the record reveals no burdens, in terms of security or otherwise, that might result from the provision of appellants.

STATEMENT OF RELATED CASES & PROCEEDINGS

This case has not been presented to this Court previously. To appellants' counsel's knowledge, there are no other related cases, either pending or completed, in this Court or any other court or agency.

STATEMENT OF SCOPE OF REVIEW

This Court's scope of review of the district court's decision denying appellants' motion for a preliminary injunction is abuse of discretion. Duraco Products v. Joy Plastic Enterprises, Ltd., 40 F.3d 1431, 1438 (3rd. Cir. 1994). However, "any determination that is a prerequisite to the issuance of an injunction is reviewed according to the standard applicable to that particular determination." Id. (quoting John F. Harkins Co. v. Waldinger Corp., 796 F.2d 657, 658 (3rd Cir. 1986). Thus, in addition to exercising an abuse of discretion standard for a

[19] Op. at 35-37.

denial of preliminary injunction, this Court exercises plenary review over the district court's conclusions of law and its application of the law to the facts, Duraco Products, 40 F.3d at 1438, but reviews the district court's findings of fact for clear error. Id.; see Nutrasweet Co. v. Vit-Mar Enterprises, 176 F.3d 151, 153 (3rd Cir. 1999). Where, as here, the essential findings of fact are conceded or are undisputed and the district court's decision rests on an interpretation and application of the law rather than on facts, this Court's review is broad. Philadelphia Marine Trade Ass'n v. Local 1291, 909 F.2d 754, 757 (3rd Cir. 1990); See Loretangeli v. Critelli, 853 F.2d 186, 193-196 (3rd Cir. 1988) (concluding the district court erred in assessing the likelihood of plaintiff's success on the merits).

SUMMARY OF ARGUMENT

Appellants seek reversal of the lower court's denial of its motion for a preliminary injunction, in which appellants sought to enjoin the enforcement of 24 Pa. Cons. Stat. § 13-1306.2(a), an amendment to the Pennsylvania School Code which provides that convicted school-aged youth in county correctional facilities may be treated as expelled students for the purposes of their educational entitlement. The provision declares that appellants alone, as compared to all other school-aged youth in the criminal and juvenile justice systems, shall be deemed ineligible for basis education services.

Appellants challenged § 1306.2(a) as violative of their rights under the Equal Protection Clause of the Fourteenth Amendment, and argued that, under Plyler v. Doe, 457 U.S. 202 (1982), heightened scrutiny must be applied in evaluating the constitutionality of the statutory provision. The lower court disagreed, applied rational basis review, and denied appellants' motion.

Appellants submit that the lower court erred in two key respects. First, the lower court erred in failing to follow established Supreme Court precedent in Plyler, providing that where a total denial of education to a discrete subgroup has resulted in devastating consequences for their educational and employment future, heightened scrutiny must be applied to the challenged classification. The lower court erroneously read an exception into Plyler that heightened scrutiny is applicable only where the denial of education occurs below a certain age. No such exception was recognized by the Court, nor has any other court read such an exception into Plyler.

Second, the lower court erred in its definition and application of rational basis review under the Equal Protection Clause. Relying almost exclusively on Supreme Court cases involving commercial and economic classifications, the lower court improperly narrowed the Supreme Court's jurisprudence to a highly deferential standard allowing for effectively no scrutiny

at all. In fact, the Court has consistently required, in cases involving more sensitive issues or controversial social policies, a more searching inquiry requiring that the classification "find some footing in the realities of the subject addressed by the legislation," Heller v. Doe, 509 U.S. 312, 321 (1993), and that the relationship to the classification's asserted goal not be so attenuated "as to render the distinction arbitrary or irrational." Cleburne v. Cleburne Living Center, 473 U.S. 432, 446 (1985). By failing to evaluate the challenged classification in accordance with Supreme Court precedent, the lower court ignored and overlooked its own findings of fact which demonstrated the absence of any facts to support the classification, the tenuous link between the classification and the Secretary's purported rationales, and that appellants had indeed negatived each of the Secretary's purported rationales.

ARGUMENT

II. Preliminary Statement

The Equal Protection Clause of the Fourteenth Amendment "commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike."[20] City of Cleburne v. Cleburne Living

[20] It is undisputed that plaintiffs, convicted school-aged youth in county prisons, and other convicted school-aged youth held in state correctional facilities and county juvenile detention centers are

Ctr., Inc., 473 U.S. 432, 439 (1985)(citing Plyler v. Doe, 457 U.S. 202, 216 (1982)).

While this commitment to treating alike similarly situated persons is not absolute -- the Fourteenth Amendment's "promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons," Romer v. Evans, 517 U.S. 620, 631 (1996) -- it is the bedrock principle against which Section 1306.2(a) must be measured.

Generally, a governmental policy "is presumed to be valid and will be sustained if the classification drawn by the statute [or policy] is rationally related to a legitimate state interest." Cleburne, 473 U.S. at 440. Where suspect or quasi-

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similarly situated for the purposes of equal protection analysis. Although the lower court implied that juveniles incarcerated in the juvenile justice system might have a greater claim to education because of the juvenile justice system's greater emphasis on rehabilitation, its factual findings support a conclusion that plaintiffs are similarly situated to other incarcerated youth in Pennsylvania. As the lower court found, plaintiffs and other school aged youth in the juvenile and criminal justice systems are generally students at risk, with a disproportionate number having a history of learning disabilities, school failure, and illiteracy. [Op. at 32-33; Appendix I at 48a]. According to unrebutted testimony from plaintiffs' expert, Dr. Leone, in terms of learning characteristics, youth in the juvenile and criminal justice systems are the same in that they are naive learners and need systemic instruction in order to benefit from an education program. [Appendix II at 200a]. In addition to their shared educational deficits and learning characteristics, school-age youth, regardless of whether they are held in juvenile or adult facilities, are generally charged with and convicted of the same criminal offenses. [See Appendix II at 412a, Plaintiffs' Hearing Exhibit #1].

suspect classifications, or fundamental rights are at issue, the court will apply "strict" scrutiny to the classification, requiring that it be more narrowly tailored to meet a substantial or compelling governmental interest. Id.; see Plyler v. Doe, 457 U.S. 202, 216-17 & n.14 (1982).

While the United States Supreme Court has not generally characterized education as a fundamental right, it has held that an intermediate level of scrutiny, "heightened" scrutiny, may be appropriate in cases involving educational interests where the classification causes a complete denial of education to a particular class of students. See Plyler, 457 U.S. at 221 (applying heightened level of scrutiny to overturn statute which withheld funds from school districts that provided education to undocumented alien children). According to Plyler, a Court's obligation in these cases is to assure "that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the state." Id. at 218.[21]

In analyzing appellants' challenge to 24 Pa. Stat. Ann. § 13-1306.2(a), the lower court ruled that appellants failed to

[21] Heightened scrutiny has also been defined as requiring that the classification be substantially related a legitimate governmental interest. Cleburne v. Cleburne Living Center, 473 U.S. 432, 441 (1985). See also, Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) (under heightened scrutiny, a classification fails unless it serves "important governmental objectives and ... the discriminatory means employed are substantially related to the achievement of those objectives.")

demonstrate that heightened scrutiny should apply. Applying the rational relationship test to the classification, the court found the statute constitutional – albeit a "barely-arguably-penny-wise but almost-indisputably-pound-foolish statute." Op. at 2. Finding that appellants had failed to demonstrate a likelihood of success on the merits on their challenge, the lower denied plaintiffs' motion for preliminary injunctive relief. For the reasons set forth below, the decision of the lower court must be reversed.

III. The Standard for Obtaining Preliminary Injunctive Relief

To obtain a preliminary injunction, plaintiffs must establish that they are likely to prevail on the merits of their claims and that they will suffer irreparable harm if the relief is not granted. The court must also consider whether the potential harm to the defendant from issuance of a preliminary injunction outweighs possible harm to the plaintiffs if such relief is denied, and whether the granting of the preliminary injunction is in the public interest. S & R Corp. v. Jiffy Lube International, Inc., 968 F.2d 371, 374 (3d Cir. 1992). As set forth below, plaintiffs meet all of these requirements.

IV. Appellants Have Established a Likelihood of Success on the Merits

A. The Lower Court Erred in Failing to Apply Heightened Scrutiny to 24 Pa. Stat. § 13-1306.2(a)

In declining to apply heightened scrutiny to § 1306.2(a),

the lower court erred because it failed to follow the rule of law established by the Supreme Court in Plyler. The lower court has erroneously read Plyler to preclude the application of heightened scrutiny to classifications effecting a denial of education unless the deprivation begins below a certain age. The court has created an exception to Plyler that is contrary to the holding of the Court itself. Because the lower court has failed to follow established Supreme Court precedent, its holding that heightened scrutiy is inapplicable must be reversed.

In determining whether to apply heightened scrutiny to the challenged classification, the lower court compared the nature and effect of § 1306.2(a) to the classifications at issue in Plyler and three other Supreme Court cases in which plaintiffs had challenged, under the Equal Protection clause, either a *denial of access* to educational services, or the *quality* of educational services, pursuant to state legislative enactments. In addition to Plyler, the court examined the Supreme Court's holdings in San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973), Papasan v. Allain, 478 U.S. 265 (1986), and Kadrmas v. Dickinson Public Schools, 487 U.S. 450 (1988). Together, these four cases provide the constitutional framework for analyzing challenges to state legislative classifications abridging children's educational entitlement or experience.

In three of these four cases, Rodriguez, Papasan, and

Kadrmas, the Court applied the lowest level of scrutiny – rational relationship – to the challenged classification. Significantly, in none of these three cases did the challenged classification completely bar the schoolhouse door to plaintiffs. In both Rodriguez and Papasan, plaintiffs alleged discrimination in the allocation of state funds to public education which raised the issue of the *adequacy of the quality* of plaintiffs' education rather than the actual *availability* of education. In Kadrmas, plaintiff challenged the lack of free busing in her particular school district, a claim which, while it affected her ability to *get to school*, in no way denied her *the right to go to school*.

Only in Plyler did the Court apply the more rigorous "heightened" scrutiny test.[22] Plyler involved a challenge to provisions of the Texas Education Code which withheld from local school districts any state funds for the education of children who were not legally admitted to the United States, and also

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[22] The Supreme Court's failure to apply heightened scrutiny to the classifications at issue in Rodriguez, Papasan and Kadrmas does not rebut the application of heightened scrutiny here. In none of these other cases did the legislation completely or effectively foreclose the affected children's access to education. See Rodriguez, 411 U.S. 1 (1973) (challenged school-financing scheme resulted in disparities in per pupil spending in some districts, but not in availability of basic education to all children); Papasan, 478 U.S. 265 (1986) (plaintiffs challenged a specific component of state school financing scheme, but no evidence that funding disparities resulted in any children receiving no instruction); Kadrmas, 487 U.S. 450 (1988) (challenged school busing fee imposed financial hardship on plaintiff, but plaintiff had other transportation means available to her such that classification did not lead to complete denial of access to education).

authorized local school districts to deny enrollment in their public schools to such children. 457 U.S. at 205. The provisions thus effectively barred the children of undocumented aliens from enrolling in Texas' public schools, thereby denying these children a basic education. The provisions applied to all Texas public schools, from elementary through secondary schools, and had an impact on all school-aged children in this group, from kindergarten through high school.[23]

According to the court below, four elements present in Plyler dictated application of heightened scrutiny to the Texas legislative classification: "a denial of education; plaintiffs' lack of power over their disabling status; the importance of the right in maintaining basic institutions; and the consequences to individuals flowing from the deprivation of [education]." Op. at 25.

The lower court analyzed § 1306.2(a) in light of these elements. While finding that two of the elements in Plyler were met – namely the plaintiffs' lack of control over the disabling status of assignment to a county jail and the severely

[23] The children in Plyler could enroll in school if they paid a "tuition fee". 457 U.S. at 206 n.2. Under Section 1306.2, convicted youth do not have that option, they cannot "buy" a seat in the classroom; rather, this statute provides for the total, or effectively total, exclusion from educational services of school-aged youth while incarcerated in county facilities . Upon release from prison, some plaintiff members will no longer be eligible for public education due to their age; moreover, as the lower court found, "a significant break in education during confinement makes it unlikely that a convicted offender will resume his education when released." Op. at 43.

detrimental impact of the deprivation of education caused by the statute – the court also distinguished this case from Plyler in two respects: it held that § 1306.2(a) does not constitute a "denial of education" within the meaning of Plyler -- because the statute denies education only to students above a certain age -- and that the deprivation worked by the statute is not as significant as the deprivation in Plyler or in its effect on "maintaining our basic institutions" – again because the statute denies education only to students above a certain age. Op. at 31 (quoting Plyler, 457 U.S. at 221). As stated above, Appellants submit that the lower court erred by creating exceptions to Plyler not required by Plyler itself. Heightened scrutiny is the appropriate standard by which to assess the constitutionality of this statute.

1. 24 Pa. Stat. Ann. § 13-1306.2(a) Constitutes a Denial of Education Within the Meaning of Plyler

The lower court's conclusion that § 1306.2(a) does not impose a "denial" of education within the meaning of Plyler is unsupported by the record below. It is also contrary to the Supreme Court's analysis in Plyler.

While the Supreme Court declined to apply strict scrutiny to the Plyler classification – undocumented aliens are not a suspect class and education has never been deemed a "fundamental right" under the Constitution – the Court's application of heightened scrutiny was driven by its declaration that education is not

"merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." Id. at 221. The Court stressed "the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child." Id. The Court concluded:

> [M]ore is involved in these cases than the abstract question whether [the Texas statute] discriminates against a suspect class, or whether education is a fundamental right. [The statute] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of [the statute], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in [the statute] can hardly be considered rational unless it furthers some substantial goal of the State.

Id. at 223-224 (emphasis added). The Court could find no such substantial state interest, and declared the Texas provisions unconstitutional:

> It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare and crime. It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.

Id. at 230 (emphasis added).

As amended by § 1306.2(a), the Pennsylvania School Code, by equating the educational entitlement of convicted school-aged youth in the county prisons to that of expelled students under the Code, imposes a similarly sweeping foreclosure of appellants' rights to obtain basic educational services. The statute now limits appellants' entitlement to education to as little as one and one-half hours and no more than five[24] hours of instruction per week until their seventeenth birthday, and no educational services at all after age seventeen. As found by the lower court, this means that persons incarcerated in county prisons receive as little as 18% of the public school instruction provided to their counterparts in other state and county correctional facilities up to age seventeen, while convicted inmates seventeen or older receive no instruction at all. Op. at 25-26.

As further found by the lower court, however, the availability of even up to five hours per week of instruction is of no educational consequence: As the lower court noted, "[u]ncontested evidence indicates that five hours of education per week is not sufficient to learn basic skills, let alone pass

[24] Compulsory school-aged youth – those under the age of seventeen -- are entitled to "some" education under the challenged classification as all expelled children are. While school districts generally will provide up to five hours a week of education to such children, fn. 4, supra, under state law, "some" education may be as little as 1.5 hours per week. Abremski v. Southeastern School District Board of Directors, 54 Pa. Commw. 229, 297-98, 421 A.2d 485, 488-89 (1980).

a GED examination....Indeed, expert testimony suggests – without contradiction – that an educational program offering only five hours of instruction per week provides little benefit." Op. at 27 (emphasis added). See also Appendix I at 207a-208a; Appendix II at 440a. Thus, whatever the scope of the denial of education wrought by 1306.2(a), it is effectively the same whether plaintiffs are under or over the age of seventeen.

Additionally, the lower court found that "a deprivation of this magnitude – an 82% diminution in hours of education for a person who could be as young as fourteen – is likely to have serious effects on education and literacy."[25] Op. at 26. Finding that a majority of plaintiff class members have a history of poor educational achievement, school failure, and low proficiency, reflected in the disproportionate number of persons with poor literacy skills found in the criminal justice system, the lower court also concluded that, "upon their release from custody, many individuals limited to five hours of instruction per week during their stay in a county correctional institution will find themselves illiterate and unemployable." Op. at 27.[26]

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[25] Under the Pennsylvania Juvenile Act, youth of any age may be charged as an adult if they are charged with murder, since murder is excluded from the jurisdiction of the juvenile court. 42 Pa. Con. Stat. § 6302. Thus, while the majority of school-aged youth held in the county prison system will be 14 or older, it is possible that some offenders could be younger.

[26] The lower court's findings in this regard are virtually identical to the trial court's findings in Plyler regarding the plight of undocumented aliens – findings adopted by the Supreme Court – which

Despite finding appellants as a class to be severely educationally disadvantaged, and doomed to illiteracy and unemployment as a consequence of the deprivation wrought by § 1306.2(a), the court nevertheless declined to apply heightened scrutiny to the statute. Noting that Pennsylvania has a compulsory education law making education compulsory for children until their seventeenth birthday, the court declared that appellants were "likely to have had the opportunity to acquire many of the skills that the plaintiff children in Texas had not had an opportunity to acquire." Op. at 27. The lower court concluded: "Considered over the course of the fifteen years during which a Pennsylvania resident is entitled to public education, the potential for a substantial curtailment of education near the end of that entitlement period does not seem to me to come close enough to Plyler to warrant the application of heightened scrutiny." Id. at 28. These conclusions are supported neither by the record nor by the lower court's own findings of fact.

To the contrary, the lower court expressly found, based on the uncontroverted testimony and report of appellants' expert,

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led to its holding the Texas statute unconstitutional: "Finally, the court noted that under current laws and practices ...without an education, these undocumented children, '[a]lready disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices,... will become permanently locked into the lowest socio-economic class.'" 457 U.S. at 207-208 (quoting from the district court decision, 458 F.Supp. 569, 577).

that appellants have *not* acquired the skills the general public school student might acquire from several years of compulsory public education. It is therefore untenable for the court to use a contrary assumption, which has no support in the record, as a basis for declining to apply heightened scrutiny. Appellants are not a class of "Pennsylvania resident[s]." Op. at 28. Rather, appellants are a discrete class of school-aged convicted offenders whose "history of poor educational achievement, school failure, and low skill proficiency," id. at 26, is both well-documented and undisputed. Based on the record below, appellants are indeed akin to the class of school-aged children in Plyler, for whom the same stigma of illiteracy and likely permanent membership in our society's lowest socio-economic class, inter alia, plainly pushed the Court to apply heightened scrutiny.

Moreover, the lower court's interpretation of Plyler is unprecedented. While Plyler has generally not been extended to cases challenging the adequacy of education offered as compared to the availability or access to education, no lower court to date has read Plyler's application of heightened scrutiny to turn on either the age, past educational experience or current academic proficiency of the class affected. In Horton v. Marshall Public Schools, 769 F. 2d 1323 (8th Cir. 1985), for example, the court followed Plyler and applied heightened scrutiny to an Arkansas residency requirement providing that only

children domiciled or residing with a parent or guardian in the local school district could attend the local public schools. The court held the requirement unconstitutional in light of Plyler:

> Here, a group of children has been singled out ... to be totally deprived of an education. It is inescapable, in light of Plyler and in light of the interests at stake, that the denial of an education to the class of children involved in this case 'can hardly be considered rational unless it furthers some substantial goal of the State.'

769 F. 2d at 1330 (quoting Plyler, at 224.)

Significantly, the two school-aged plaintiffs in Horton were fifteen and seventeen, 769 F. 2d at 1324, and at no point did the Eighth Circuit consider either the previous educational experience of the plaintiffs, or their current skill levels. Rather, the court construed Plyler as requiring the application of heightened scrutiny where a group of children was *singled out* for discriminatory treatment, and where the discriminatory treatment involved a *total deprivation* of educational services. Id. at 1330 (reviewing the concurring and dissenting opinions in Plyler.)

Likewise, in Nancy M. v. Scanlon, 666 F. Supp.723 (E.D. Pa. 1987), the court applied heightened scrutiny to a residency requirement of the Pennsylvania School Code which excluded non-resident foster children from attending their local public schools, since these children did not reside with a parent or

guardian as required by the Code.[27] Named plaintiffs Nancy M. and Bruce A. were both teenagers at the time they challenged their exclusion. Id. at 725. The court applied heightened scrutiny because the class of foster children "comprise[d] a discrete group of persons who, in the vast majority of cases, lack responsibility for and control over their status, and the power to change it, but who may, nevertheless, because of their status, be precluded from attending school in a non-resident district." Id. at 727. In striking the provision, the court again made no reference to the deprivation being somehow less "total" simply because it came late in the plaintiffs' educational development.[28]

2. The "Structural Significance of the Right" is The Same as that in Plyler

While acknowledging that "[w]rit large, the right at issue here – access to education – is the same as that in Plyler," Op. at 31, the lower court *mis*reads Plyler to hold that "the

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[27] The denial of education in Nancy M. was not as "total" as the deprivation here. As the court recognized, "theoretically, these children maintain the right to attend school in their resident district, [although] distance often makes this a practical impossibility." 666 F.Supp. at 727.

[28] See also, Major v. Nederland Indep. School District, 772 F. Supp. 944, 948 (E.D. Tex. 1991)(school district policy denying admission to student not residing with parent or guardian in district violated the Equal Protection clause; court followed Plyler because plaintiffs were a "discrete class of children not accountable for their disabling status" and court found it "doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." (quoting Brown v. Board of Education, 347 U.S. 483, 493 (1954)).

structural significance of access to education may differ depending on the age group of the class denied the access." Op. at 31-32. Comparing the applicability of the Texas provisions to children of all school ages to the more limited reach of § 1306.2(a), the court distinguishes the "importance of education" to appellants: "Where Justice Brennan wrote persuasively in Plyler of the 'importance of education' ... to the prudent exercise of fundamental rights such as voting and speech, the argument has somewhat less force when applied to persons between fourteen and twenty,[29] who have already had many years of school." Id. at 32.

The lower court's analysis is simply wrong. Nowhere in Plyler does the Court suggest that its opinion on the constitutionality of the Texas provisions turns on "the age group of the class denied the access." Indeed, the fact that the Texas statute affected students of all ages rebuts, rather than proves, the lower court's view. In Plyler, a seventeen-year-old child of an illegal immigrant clearly would have had the same constitutional right to attend the Texas public schools as a six-year-old child -- without regard to the child's educational background or access prior to age seventeen, and without regard

[29] Under Pennsylvania law, children actually have the right to an education until age 21: "all persons residing in [the] Commonwealth between the ages of 6 and 21 are entitled to a free and full education...." 22 Pa. Code § 12.1.

to the skill level of the child. In both cases, the "lifetime hardship" of the "stigma of illiteracy" was the same, and it was this consequence of the denial of basic education that drove the Court to strike down the statute -- not how many years of education the plaintiffs in Plyler actually missed, or experienced.

Moreover, the lower court's view of the lack of harm to plaintiffs where there is merely a "belated" denial of educational services is completely at odds with its finding, *only a few sentences later*, that, "on the record before me I cannot say that the cost of deprivation of education is different in kind from the cost of the deprivation of education on the plaintiff class in Plyler – namely, that such deprivation forecloses 'the means by which [the plaintiff class] might raise the level of esteem in which it is held by the majority.' (citation omitted). The Plyler Court noted that an individual deprived of basic education would be handicapped 'each and every day of his life,' and enumerated the costs of that handicap in the stark terms of an 'inestimable toll ... on the social, economic, intellectual, and psychological well-being of the individual." Op. at 32 (quoting Plyler, 457 U.S. at 222). This bleak rendering of the costs to appellants because of the denial of education imposed by § 1306.2(a) cannot be squared with the notion that arguments about "the importance of education"

have "somewhat less force" when applied to appellants.

More importantly, there is a complete absence of support in the record for the lower court's ruling that education between the ages of fourteen and twenty-one is not as important as education prior to age fourteen. Whereas the lower court's finding that the serious consequences flowing from the denial of basic education to appellants were the same as the consequences found in Plyler is firmly rooted in the record,[30] there is absolutely nothing in the record to support the claimed differential in the value of education according to when it is offered. Significantly, the court makes no reference to the record in positing this "rule."

Finally, and most fatally, the lower court misapprehends the essential teaching of Plyler: Where the "countervailing costs" of the challenged classification are so severe as to impose a "lifetime hardship" that will "deny [these children] the ability to live within the structure of our civic institutions and

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[30] The lower court wrote:

> The record in this case illustrates, unhappily, the continuing vitality of the findings which underlay the Court's decision in Plyler a dozen years ago. As testimony at the preliminary injunction hearing revealed, persons who enter county correctional institutions deficient in basic skills and are then deprived of education while incarcerated are unlikely to become literate upon release. (citation omitted). And those who do not gain a high school diploma are anywhere from three to five times as likely to suffer poverty as their graduating peers. (citation omitted). Moreover, they are more than five times as likely to be forced to rely on public assistance, and more than three times as likely to be unemployed." Op. at 32-33 (emphasis added).

foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation ... the discrimination contained in the [statute] can hardly be considered rational unless it furthers some substantial goal of the State." 457 U.S. at 223-224 (emphasis added). Accordingly, once the court concludes, as it has here, that, as a consequence of the deprivation imposed by 1306. 2(a), plaintiffs "will find themselves illiterate and unemployable," Op. at 27, it has already met the criteria established by Plyler for the application of heightened scrutiny, and heightened scrutiny *must* be applied. The actual circumstances of the deprivation (plaintiffs' age, education, length of time of deprivation) are relevant not to *whether* heightened scrutiny applies, but at the next stage, as part of the heightened scrutiny analysis itself.

In this regard, as recognized by the lower court, applying heightened scrutiny to § 1306.2(a) would surely doom the classification. The court expressly noted that the space and cost rationales put forward by the Secretary would have difficulty surviving the more rigorous Plyler test. Op. at 37, n.29; 40, n.32.

B. The Lower Court Erred in Holding That Section 1306.2(a) Is Constitutional under the Rational Basis Test

The lower court held that § 1306.2 (a) passes constitutional muster under rational basis review. The court's holding is in error and must be reversed. The court reached this result

despite rejecting almost all of the Secretary's post-hoc rationales for the legislation, and concluding that the remaining rationales, though unpersuasive and unsupported by the record, must be upheld under the "undemanding analytical framework to which [FCC v.] Beach Communications, [508 U.S. 307, 315][30] directs us." Op. at 43. The court's error lies in its giving undue weight to the Supreme Court's equal protection jurisprudence in cases involving purely economic or commercial regulations,[31] and ignoring the Court's broader mandate where more compelling societal interests are at stake.

As the Supreme Court has stated, under rational basis

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[30] The outcome in Beach Communications Inc. is not surprising. It has been more than forty years since the Court invalidated on equal protection grounds a purely business regulation. Even the Lochner Court rarely invoked equal protection principles to invalidate economic legislation. Almost every law declared unconstitutional under rational basis review involved a class of people who, for one reason or another, faced obstacles to their participation in the political process that produced the challenged law - newcomers, see Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336 (1989); out-of staters, see Williams v. Vermont, 472 U.S. 14 (1985); hippies, see United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973); the mentally retarded, see City of Cleburne v. Cleburne Living Center, Inc. 473 U.S. 432 (1985); non-freeholders, see Quinn v. Millsap, 491 U.S. 95 (1989); and gays, see Romer v. Evans, 517 U.S. 620 (1996); see also **Laurence H. Tribe, American Constitutional Law** § 16-3 p.1445 (2d ed. 1988) ("Th[e] sporadic move away from near-absolute deference to legislative judgments seems to be a judicial response to statutes creating distinctions among classes of residents based on factors the Court evidently regards as in some sense 'suspect' but appears unwilling to label as such.")

[31] In its discussion of the constitutionality of § 1306.2(a) under the rational basis test, the lower court relies almost exclusively on Beach, a case involving the regulation of cable television operators; Nordlinger v. Hahn, 505 U.S. 1(1992), a case involving property taxes; and Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955), a case involving a law favoring optometrists over opticians.

review, the Equal Protection Clause is generally satisfied "so long as there is a plausible policy reason for the classification." Nordlinger v. Hahn, 505 U.S. 1,11 (1992). In Nordlinger, the Court expressly recognized that "[t]his standard is especially deferential in the context of classifications made by complex tax laws." Id.(emphasis added) In cases involving classifications which affect more sensitive individual rights and interests, the Court has demanded more of the legislature, even under rational basis review.

Thus, in Romer v. Evans, a case involving a challenge to a Colorado constitutional amendment barring the adoption -- and mandating the repeal -- of any state or local law or ordinance protecting gay men and women from discrimination, the Court made clear that even under rational basis review, it "insist[s] on knowing the relation between the classification adopted and the object to be attained." 517 U.S. at 632. As the Court explained,

> [t]he search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority ... By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.

Id.

Romer echoed the Court's views from earlier Equal Protection cases involving more sensitive interests. In Cleburne v.

Cleburne Living Center, 473 U.S. 432 (1985), where the Court struck down a local zoning ordinance requiring a special use permit for group homes for the mentally retarded but not other group home residents, the Court cautioned that a "State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. Furthermore, some objectives – such as 'a bare ... desire to harm a politically unpopular group' (citation omitted) – are not legitimate state interests." 473 U.S. at 446-447 (emphasis added).[32] In Shapiro v. Thompson, 394 U.S. 618 (1968)

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[32] The lower court's failure to even mention Cleburne in its discussion concerning the constitutionality of § 1306.2(a) is error in and of itself. In the instant case, the classification drawn by the Legislature is even more arbitrary and irrational than Cleburne's zoning ordinance. In Cleburne, the Court acknowledged "that the mentally retarded as a group are indeed different ... from those who would occupy other facilities that would be permitted in [the same] zone without a special permit." 473 U.S. at 448. No such argument premised on even minor distinctions between appellants and all other incarcerated school aged youth can be made in favor of Section 1306.2(a). As the record reflects, the statute expressly exempts similarly situated school-aged youth housed in state-operated correctional facilities. Only the location and type of facility where they happen to be housed distinguish appellants from all other convicted school-aged inmates. If the zoning ordinance in Cleburne had required a special use permit based upon which sub-group of the mentally retarded the applicant belonged to, its arbitrariness would be even more manifest; yet the Court did not require such "heightened" irrationality as a prerequisite to striking down the statute.

Moreover, Cleburne is particularly instructive in assessing the legitimacy of a classification when the record does not support the government's objectives. The Court in Cleburne independently examined the evidence in the record which supported the city's assertions of purpose, and rejected them because they were unsupported by the evidence. Id. at 449-50. The Court declared the classification in Cleburne invalid because:

[the] record does not clarify how, in this connection, the

overruled, on other grounds by Edelman v. Jordan, 415 U.S. 651 (1974), where the Court struck durational residency requirements for the receipt of welfare benefits, the Court added a further caveat to rational basis review: While recognizing that a State has a valid interest in protecting the fiscal integrity of its programs, the Court also held that a

> State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools.... Appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification.

394 U.S. at 633. (emphasis added).[33] See also, Rinaldi v. Yeager,

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> characteristics of the intended occupants of the [group] home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes.... The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded....

Id. at 450.

[33] For other "rational relationship" cases in which the Court required a more extensive examination of the actual rationality of the link between the classification and purported state interest, see, e.g, United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (claim to a minimum level of food stamps); Zobel v. Williams, 457 U.S. 55 (1982) (monetary benefits from the government). See also Maldonado v. Houstoun, 177 F.R.D. 311 (1997)(In striking down Pennsylvania residency requirement that affected level of TANF benefits, court reiterated that a state's desire to save money cannot be accomplished "by invidious distinctions between classes of its citizens.")

Even in Nordlinger, the Court described rational basis review in more searching terms than the lower court here. Despite noting the special deference to tax regulations, the Court also noted that rational basis review is satisfied so long as "the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker." 505 U.S. at 11. (emphasis added.) The Court then reiterated its

384 U.S. 305, 308-309 (1966)("The Equal Protection Clause requires more of a state law than non-discriminatory application within the class it establishes. (citation omitted) It also imposes a requirement of some rationality in the nature of the class singled out." (emphasis added)).

Moreover, the lower court's holding is unwarranted not only because the court unnecessarily narrowed even this most deferential standard of review; it also abdicated its responsibility to ascertain either the actual *rationality* of the purported bases for the classification or the *sufficiency of the link* between the rationales and the classification. As demonstrated below, the record reflects that appellants proved facts that brought into question the legitimacy and impartiality of the classification, and met their burden "to negative every conceivable basis which might support it." Heller v. Doe, 509 U.S. 312, 320 (1993) (quoting Lehnhausen v. Lakeshore Auto Parts Co., 410 U.S. 356, 364 (1973)).

1. Appellants' Evidence Successfully Rebutted the Secretary's Assertion That § 1306.2(a) Is Justified By Alleged Space Limitations In a Fraction of County Correctional Facilities

Secretary Hickok suggested that space limitations in county

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requirement in Cleburne that the classification may not be so attenuated as to render the distinction "arbitrary or irrational." Id. Likewise, in Heller, another case relied on by the lower court, the Court recognized that "even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation." 509 U.S. at 321 (emphasis added).

correctional institutions[34] justified the classification, not because there is no space in which educational services may be provided, but because some county correctional institutions might either have to pre-empt other programs or make costly renovations to the facility. Op. at 35. The Secretary's argument is thus not a claim that there is no space for basic education programs, but that there may be insufficient space for other programs the county facilities might choose to provide. Acknowledging this to be a "thin reed" to support a statute which "entails so substantial a deprivation," the court, citing Beach, nevertheless accepted the Secretary's rationale.[35]

The Secretary's argument is not even a "thin reed." In fact, there is no space shortage in the county prisons for education programs; the Secretary has merely speculated that there might be a space shortage for other programs to which

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[34] The Secretary has asserted purported rationales for the legislation aimed at conditions or features of either the county correctional facilities themselves or the county prison population. In so doing, the State has not only drawn distinctions between convicted school-aged county prison inmates and convicted school-aged state prison inmates or juvenile facility inmates, the State has also drawn distinctions between convicted school-aged county prison inmates and all other school-aged inmates held, and receiving educational services, in the county prisons. Appellants will address the rationality of these internal county prison distinctions as well.

[35] If lack of space is accepted as the Secretary's rationale for excluding a distinct group of school-age youth from participating in educational programs to which they are plainly "otherwise entitled" under Pennsylvania law, then virtually any denial of service based on space or other analogous physical limitations could be upheld. This is surely a slippery slope.

convicted inmates may or may not have a comparable right under state law. Thus, as a threshold matter, the so-called space limitations in the "fraction of county correctional institutions identified as presenting possible space problems," Op. at 37, don't exist; there can be no "reasonably conceivable state of facts," Beach Communications, 508 U.S. at 313, that could provide a rational basis for the classification. Additionally, in the absence of any conceivable state of facts, the relationship of the classification to this goal is indeed so "attenuated as to render [this] distinction arbitrary or irrational." Nordlinger, 505 U.S. at 11.

Moreover, as the record shows, this argument is patently absurd. First, witnesses for the Secretary himself recognized the absurdity of this argument: When asked whether the lack of an infirmary or kitchen in the prisons would permit them to deny essential food or medical supplies (to which convicted inmates may clearly claim an entitlement), one Commonwealth witness readily conceded that other arrangements would be made to ensure the provision of such services. [Appendix II at 291a-292a, Palkovich]. Testimony from another defense witness established that county prisons readily adapted when they became legally required to establish law libraries for use by the prison

population. [Appendix II at 320a-321a, Strock].[36] A third defense witness testified that at least three of the older state correctional facilities were not originally designed to have schools in them, causing the state to co-opt space in order to conduct classes. [Appendix II at 265a, Keeley]. The same witnesses further testified that special education programming had been added to the school programs in the state youth development centers and state correctional facilities over time to comply with new state and federal law requirements, and that this has also caused the expansion and modification of existing educational facilities. [Appendix II at 266a-267a, Keeley]. From defense testimony alone, there is no *legitimate* or *plausible* reason why county prisons should not likewise be required to adapt where state law provides that convicted school-aged youth are "otherwise entitled" to basic education services.

Secretary Hickok's rationale for Section 1306.2(a) is proven all the more irrational in light of additional testimony and evidence by appellants at the preliminary injunction hearing. Appellants' expert testified to his experience of working in systems where education programs were not in existence or

[36] The same witness further undermined the asserted space rationale when he stated that although thirteen county prisons do not have space to house a classroom, he anticipated a continued trend of county prison construction for the future. [Appendix at 320a, Strock]. Presumably, new construction could take into account the need for additional space for education programs.

minimally so, and how the systems adapted to develop educational programs consistent with state and federal law mandates. [Appendix I at 211a-213a, Leone; Appendix II at 433a, fn 7 and accompanying text]. From a practical perspective, appellants' expert testified that other correctional institutions around the county have dealt with space problems by using portable classrooms, such as trailer classrooms. [Appendix I at 211a-213a]. This is not the only solution available, but it highlights the fact that the arrangements can be made to deal with space or facilities issues rather than use them as an excuse to simply deny the right to education altogether.[37]

2. Appellants Successfully Rebutted the Secretary's Claim of Higher Costs in County Correctional Facilities

Secretary Hickok also speculated that the Legislature might have adopted Section 1306.2(a) because education can be achieved at a greater cost effectiveness in state correctional institutions than in county jails. The Secretary produced no proof of cost comparisons between educating persons in state and

[37] Both the Secretary and the lower court fail to acknowledge the malleableness of correctional education. Beyond their entitlement to 27.5 hours of basic education per week, appellants have never demanded a full complement of education programs (e.g., science and computer laboratories, music labs, etc.). Philadelphia's House of Correction and Delaware County Prison are at least two examples of facilities where room for educational programs was arranged in spite of limited available space. [Appendix II at 435a-440a, Plaintiffs' Expert Report].

county corrections facilities.[38] The Secretary simply asserts that the Legislature was concerned with the limited financial resources of local school districts. Given the actual funding scheme for public education under State law, however, the Secretary's fiscal rationale is not plausible, and certainly has no "footing in the realities of the subject addressed by the legislation." Heller, 509 U.S at 321.

In accordance with State law, the Legislature currently allocates the costs of educating youthful offenders to local school districts if they are housed in county-operated juvenile detention facilities. 24 Pa. Stat. §§ 13-1306, 13-1308. Likewise, the Legislature currently allocates the cost of educating school-aged offenders housed in a county prison to the school district, if they are either pre-trial or eligible for special education. 24 Pa. Stat. § 13-1306.2(a). It defies logic to suggest that it is reasonable, from a cost perspective, to require school districts to pay for basic and special education of all pre-trial and otherwise eligible inmates in juvenile detention centers and county prisons, but not convicted offenders

[38] In fact, as the lower court noted, several county correctional institutions house more school-aged convicted offenders than do a number of state correctional institutions -- suggesting that in the several instances in which § 13-1306.2(a) channels educational programs to smaller school-aged populations in state correctional institutions rather than to larger school-aged populations in county correctional institutions, the statute may be seen, perversely, as tending to raise per-pupil costs. Op. at 38-39 & n.30.

housed in the county prisons, simply defies logic.

The lower court's reliance on Heller to accept the Secretary's cost-saving rationale is misplaced.[39] The lower court misstates Heller for the proposition that "preservation of resources generally suffices to justify a classification." Op. at 39. The Court made no such assertion. Even under Heller, there must be a "reasonably conceivable state of facts that could provide a rational basis for the classification." 509 U.S. at 320 (citing Beach Communications Inc., 508 U.S. at 313).[40]

More importantly, the lower court ignored the fact that, under State law, the home school district retains the financial obligation to provide for the education of all school-aged youth officially resident in this district, even if they are temporarily attending school in another district in the state. Hence, there is no added cost to the school district in paying for the education of convicted school-aged persons in county jails. Regardless of where members of the class reside, so long

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[39] However, the lower court was correctly skeptical of the Legislature's intent: "On the facts before me, I think it likely that plaintiffs would be able to prove that 24 P.S.A. § 13-1306.2(a) is not substantially related to the governmental interest in saving money." Op. at 40, n.32.

[40] Compare the record before the Court in Heller v. Doe, which contained extensive evidence and documentation of the differences in treatment and diagnosis of the mentally ill and mentally retarded such that Kentucky's more lenient commitment procedures for the mentally retarded were upheld, with the wholly speculative and empty record in this case regarding the alleged burdens on school districts to extend educational services to plaintiffs.

as they are under the age of twenty-one they may elect to continue their education, and the school district must "pay" for it. If members of the class were not incarcerated in county facilities, but were living at home or in other residential settings, the school district would be responsible for their education. Continuing to provide for the education in the county prison is not a new cost to the school district; it is the same cost it would have incurred if the school-aged offender were not incarcerated. On this point, Nancy M. is dispositive:

> Neither have defendants shown that the section 1305 classification substantially furthers the state's asserted interests in either administrative or economic efficiency ... Under the Public School Code, a child's resident school district is responsible for educational costs, remains responsible even if the child attends school in a non-resident district, and must reimburse the non-resident district for these costs. ... (citations omitted) ... Thus, no matter which school district accommodates the foster child, the economic effect on the state, the resident [district], and the non-resident district remains constant.

666 F.Supp. at 729. Nancy M. is indistinguishable from this case. Imposing the obligation to pay for the education of incarcerated convicted offenders on the school districts creates no new financial obligations for those districts. As with the Secretary's claims of limited space, his arguments about cost prove illusory.

3. Appellants' Evidence Successfully Rebutted the Asserted Rationale That Persons Housed in State Correctional Institutions Have A Greater Need For Educational Services Than Persons In County Jails

Despite declaring "that most informed observers would not find Secretary Hickok's link between the educational disparity and the interest in educational efficiency to be persuasive," Op. at 43, the lower court accepted the Secretary's third speculative rationale that the longer term and more stable youth population found in the state correctional system would benefit more from educational services than a more transient population found in county jails, primarily because they are less likely to be able to return to their local school district following incarceration. Appellants rebutted these claims.

First, as held by the lower court, appellants showed "that the disparity of treatment fostered by § 13-1306.2(a) may be only remotely connected" to the asserted interest in educational efficiency. Op. at 42. (emphasis added). In unrebutted testimony from the Secretary's own witness, James Keeley, the acting Chief of the Bureau of Correction Education of Pennsylvania Department of Education, the Commonwealth stated that there appears to be "no reason why the school-aged population in the county prison should be treated differently than school-aged youth in the [juvenile] system and adult state correctional system." Op. at 42. When the Secretary's own witness concedes the lack of any basis for the classification, it is untenable for the court to presume or supply one.

Likewise, with respect to the Secretary's further

speculation that state inmates are less likely to return to school upon release, the lower court acknowledged that appellants presented "credible – and unrebutted – expert testimony that a significant break in education during confinement makes it unlikely that a convicted offender will resume his education when released." Op. at 43, Appendix I at 204a.

The court accepted the Secretary's claims by asserting that the rational basis inquiry neither delves into the actual rationality of the link between disparity and interest, Op. at 43 (citing Beach Communications, 508 U.S. at 315)(emphasis added), nor into the legislature's actual belief in the rationality of the link between disparity and interest. Op. at 43 (citing Nordlinger, 505 U.S. at 15.) Both assertions fail. Nowhere in Beach does the Court preclude an inquiry into the actual rationality of the justification, nor could it. No matter how deferential the Court has characterized this inquiry, it has never deleted the word "rational" from the test. The link must be "plausible," it must be rooted in a "conceivable state of facts," it must have "some footing in the realities of the subject addressed." Where the only evidence presented belies the existence of any facts or reality to support the classification, imagined or otherwise, even rational basis review cannot save the classification. Similarly, where the testimony shows the Secretary, through his witnesses, did not himself believe in the

"rationality of the link," the classification must be struck.

In sum, the lower court erred in its application of the rational relationship test, both in selectively reading Supreme Court cases to reduce rational basis scrutiny to virtually no scrutiny at all, and in failing to credit appellants' "credible" and "unrebutted" evidence (and the court's own findings) as "negativing" every purported rationale put forward by the Secretary.[41]

IV. Appellants Have Established Irreparable Harm

It cannot be seriously disputed that this denial of education constitutes irreparable harm to appellants, which no legal remedy could adequately redress.[42] Citing Plyler, the district court concluded "[t]he record contains considerable evidence delineating the 'inestimable toll ... on the social, economic and intellectual, and psychological well-being" of individuals caused by the deprivation of education." Op. at 45, (citing Plyler, 457 U.S. at 222.). The lower court agreed with the testimony and report of appellants' expert witness that the impact of inadequate educational services or educational services

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[41] A fourth rationale suggested by the Secretary, that providing education to appellants might create security problems in state facilities, was rejected outright by the lower court.

[42] Counsel for Secretary Hickok clarified that the Commonwealth is not disputing the "question of whether or not the denial of education unlawfully constitutes irreparable harm." [Appendix I at 178a-179a].

is enormous. Id. at 45-46. Those inmates who are deficient academically will remain illiterate and will be unable to obtain competitive employment without structured, systemic educational services. [Appendix I at 202a; Appendix II at 441a, Plaintiffs' Expert Report]. For many, this may be their last opportunity to receive educational services since, by the time they are released from a county prison, they may be no longer eligible for public education services from a school district due to their age. [Appendix I at 202a]. For those inmates who are released prior to turning twenty-one, due to the gap in education services where they have not been achieving competencies or credits toward graduation, they will have little incentive to finish school and will have a difficult time "catching up" in order to achieve a high school diploma. [Appendix I at 204a]. Appellants have met their burden of showing that members of appellants' class will be irreparably harmed if injunctive relief is not granted.

V. Appellees Will Not Be Harmed If The Preliminary Injunction Is Issued, And Its Issuance Is In the Public Interest

While appellants will suffer irreparable harm if their educational needs go unmet, Secretary Hickok will suffer no such harm if injunctive relief is issued. Rather Secretary Hickok would be required to administer and enforce the law as to appellant class just as he is required to do so throughout the Commonwealth as it relates to the maintenance and conduct of the public school. See 71 Pa. Stat. §§ 66, 71. As an initial matter, Secretary Hickok would be required to advise local school district of their obligation to provide full basic education to school-aged convicted youth in the county prisons. There is simply no financial risk to the Department of Education as a result of invalidating this legislation and requiring the extension of full basic education to appellants. Because the harm to Secretary Hickok is insignificant, injunctive relief should be granted to appellants, who, in contrast, will suffer immeasurably from being excluded from any public services.[43]

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[43] Although plaintiffs have settled their claims with the defendant school districts, there is similarly insignificant harm if the Court grants injunctive relief. A reimbursement scheme has been established by the Legislature which permits the school districts to obtain reimbursement for the cost of educating these students from the students' home districts of residence. 24 Pa. Stat. §§ 1308, 1309. Under Section 1306.2(c), the State has even made it easier for local school districts to be reimbursed – PDE may deduct the funds from the resident school district itself and pay them directly to the host school district from its costs in providing education to appellants.

Issuance of the requested relief is also in the public interest.[44] First, the public interest is served by promoting compliance with the requirements of federal law. The public interest is further served by providing education to a class of youth, serving a sentence of two years or less, who will likely return to their communities and even to local schools. As testimony from the hearing confirms, education is a highly cost-effective form of crime prevention, in that is has been shown to reduce recidivism rates, limit rates of re-incarceration, and facilitate the successful and productive reintegration of returning inmates back into their communities. Appendix at 205a; see Op. at 46. Testifying as to the state correctional facilities, Mr. Keeley from the Pennsylvania Department of Education likewise acknowledged the benefits of a good school program, stating: "it gives students a lot of concrete, positive activities that they're able to not only benefit from while they're in school, but it also carries back into life and the rest of their institution." Appendix II at 259a; see Op. at 46.

Because appellants are all serving short sentences and will soon return to their communities, the state and counties have a similar interest in facilitating this populations' successful

[44] Counsel for Secretary Hickok does not dispute the connection between education and the public interest, conceding that there "would be benefits if we could educate this class ... of plaintiffs." [Appendix I at 179a].

return and transition back into their communities - an interest that is served by encouraging, not discouraging, educational opportunity and achievement. The public interest is plainly served by providing education to this population.

VI. Conclusion

For the reasons set forth above, appellants respectfully request that the district court's denial of appellants' motion for a preliminary injunction be reversed.

Respectfully submitted,

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CERTIFICATION OF BAR MEMBERSHIP

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CERTIFICATE OF COMPLIANCE

I, Marsha L. Levick, certify that the foregoing Brief for the Appellant meets the type-volume limitations of Rule 32(a)(7)(B). The number of words in the brief is 12,826, including text and footnotes.

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ORDER & OPINION OF THE LOWER COURT

RELEVANT STATUTORY PROVISIONS

Act 30 of June 25, 1997, No. 30, § 5, 1997 Pa. Laws 297 (amending the Pennsylvania School code, 24 Pa. Cons. Stat. § 13-1306)

§ 13-1306.2. Juveniles incarcerated in adult facilities

(a) A person under twenty-one (21) years of age who is confined to an adult local correctional institution following conviction for a criminal offense who is otherwise eligible for educational services as provided under this act shall be eligible to receive educational services from the board of school directors in the same manner and to the same extent as a student who has been expelled pursuant to section 1318.

(b) A person under twenty-one (21) years of age who is confined to an adult local correctional institution following a charge for a criminal offense who is otherwise eligible for educational services as provided under this act shall be eligible to receive services from the board of school directors in the same manner and to the same extent as a student who has been placed in an alternative education program for disruptive students.

(c) The department shall effectuate necessary procedures for the transfer of funds from the school district of residence to the school district in which the local correctional institution is located. In effectuating the transfer of funds, the department may deduct the appropriate amount from the Basic Education Funding allocation of any school district which had resident students who were provided educational services in the local correctional facility.

(d) For purposes of this section, the term "convicted" means a finding of guilty by a judge or a jury or the entry of a plea of guilty or nolo contendere for an offense under 18 Pa.C.S. (relating to crimes and offenses) whether or not judgment of sentence has been imposed.

(e) For purposes of this section, a "local correctional [FN2] institution" shall include any jail, prison or detention facility operated by a county or jointly by more than one county or by a municipality. The term does not include any facility used for the detention or confinement of juveniles.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on October 14, 1999, he personally caused to be served two copies of the foregoing Brief of Appellant, by first class mail, postage pre-paid, upon:

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