



CAMPAIGN FOR FISCAL EQUITY, INC.

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**BUILDING PLANS FOR REFORM:  
ALABAMA'S SCHOOL FINANCE LITIGATION**

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## BUILDING PLANS FOR REFORM: ALABAMA'S SCHOOL FINANCE LITIGATION

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### INTRODUCTION

In 1993, the Alabama Supreme Court issued a strong and sweeping indictment of the state's public school system. The Court's Liability Order held the state accountable for the inadequate condition of Alabama's schools and outlined the basic elements of the equitable and adequate educational opportunities that the schools must provide under the state constitution. The Remedy Order, issued six months later, prescribed a comprehensive overhaul of Alabama's education and school finance systems. This remedial plan had been designed through negotiations among parties to the lawsuit and the state's major educational decision makers. Moreover, it had received substantial public support in a series of well-attended town meetings and other public engagement activities across the state. Dramatic change appeared to be on the horizon.

Over the last five years, however, it has become clear that victory in the courts was not the last step on Alabama's road to reform — it was among the first. Attempts to implement the Remedy Order have been derailed by delays, interventions, legislative inaction and organized opposition. While the Liability Order has withstood numerous challenges, the state Supreme

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that was not adjusted for the next 50 years.<sup>4</sup> As a result, the millage each district was required to assess could not buy an adequate education in any of the state's school districts. The amount of money the state had to allocate to equalize all districts at the foundation's floor was virtually meaningless, since the floor had been set at a level so far below minimum adequacy.<sup>5</sup>

Thus, by the time plaintiffs filed suit, the Minimum Program Fund was proving wholly unable to provide for the basic needs of many Alabama students. In addition, even though the state provided nearly 70% of school funding, the school finance system was failing to address inequities among the state's school districts. Disparities in property wealth led to huge disparities in resources: the wealthiest district in the state could raise \$2,200 per student from local sources, while the poorest could raise only \$150.<sup>6</sup> To compound the problem, as of 1991, approximately 60 percent of state education funds were allocated through means outside of the Minimum Program Fund, regardless of district needs. As a result, the state was actually allocating more dollars to wealthy systems than to poor systems. Hoover, one of the wealthiest systems in the state, received \$2,532 per student, while Roanoke, one of the poorest, received only \$1,985.<sup>7</sup>

### *Educational and Funding Reform*

In 1989, then State Superintendent of Education Wayne Teague issued

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<sup>4</sup> Trial testimony indicated that the 1991 value of that same Alabama property had increased to approximately \$20 billion. *Alabama Coalition for Equity, Inc. v. Hunt*, 1993 WL 204083 (Ala. Cir. Ct. Montgomery County April 1, 1993) at 10 [hereinafter *Liability Order*].

<sup>5</sup> WAYNE TEAGUE, *AN ANALYSIS OF ADEQUACY AND EQUITY OF ALABAMA'S STATE SCHOOL SYSTEM*, Bulletin 1989 - Number 83 (July 1989) [hereinafter *ANALYSIS OF ADEQUACY*].

<sup>6</sup> Helen Hershkoff, *School Finance Reform and the Alabama Experience* 3 (July 24, 1995) (unpublished manuscript on file with the authors).

<sup>7</sup> *Liability Order*, *supra* note 4, at 11.

transportation. These reforms became meaningless, however, when the legislature refused to appropriate a single dollar to fund the reforms.<sup>14</sup> This decision would have major ramifications, as the trial court in *ACE v. Hunt* would use the state's failure to meet the requirements of the AEIA as one measure of the legal inadequacy of the Alabama public schools.

## LIABILITY

In 1989, a group of school superintendents led by DeWayne Key of the Lawrence County schools began exploring various ways to remedy the dramatic inequities in Alabama's public education system. This group, which grew to include 34 school districts, as well as individual parents and students, eventually became known as the Alabama Coalition for Equity ("ACE"). At the same time, Helen Hershkoff of the American Civil Liberties Union was conducting a survey of education conditions in all fifty states. Alabama fell near or at the bottom in almost every category, including ranking 49th in the nation in per capita expenditures.<sup>15</sup> The American Civil Liberties Union of Alabama was also eager to address the condition of the state's schools, so Hershkoff forged a connection with C. C. "Bo" Torbert, who DeWayne Key had asked to spearhead the ACE lawsuit.<sup>16</sup> Torbert brought a varied background and wide range of influence to bear on the suit.<sup>17</sup> A former Chief Justice of the Alabama Supreme Court, he had served in the state legislature and ran for Governor in 1990.<sup>18</sup> In addition, Torbert had strong ties to the Alabama business community and

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<sup>14</sup> See Jay Reeves, *Alabama Fights to Rescue Public Schools Mired in Mediocrity*, L.A. TIMES, March 27, 1994, at A2.

<sup>15</sup> Hershkoff, *supra* note 6.

<sup>16</sup> Interview with Helen Hershkoff, American Civil Liberties Union, April 8, 1996.

<sup>17</sup> *Id.*

<sup>18</sup> D. Frank Vinik, *The Contrasting Politics of Remedy: The Alabama and Kentucky School Equity Funding Suits*, 22 J. EDUC. FIN. 60, 66 (Summer 1996).

Plaintiffs in both cases named as defendants the Governor of Alabama, the State Director of Finance, the Lieutenant Governor, the Speaker of the House of Representatives, the members of the State Board of Education and the State Superintendent of Education. Soon, however, most of these parties sought to be realigned as plaintiffs. State Superintendent Wayne Teague led this charge, declaring the suit "indefensible" and suggesting that the State Education Department should not fight the suit.<sup>23</sup> Bo Torbert had laid the groundwork for this realignment through informal discussions with defendants in the hopes of fostering agreement in the remedy stage of the litigation.<sup>24</sup> Many of the defendants, he learned, were already dissatisfied with Alabama's education finance system. In the end, only Governor Hunt and the State Director of Finance were left as defendants for the liability phase of the trial. While the court initially rejected realignment, Circuit Judge Gene Reese took over the case in the fall of 1990 and allowed all parties to realign.<sup>25</sup>

### *Inequity and Inadequacy*

The first hurdle for plaintiffs to clear was Amendment 111 to the Alabama Constitution, which provided that "nothing in this Constitution shall be construed as recognizing any right to education or training at public expense . . . ."<sup>26</sup> Amendment 111 was first proposed in 1953, shortly before the United States Supreme Court's ruling in *Brown v. Board of Education*. Plaintiffs argued that the amendment was proposed in an attempt to avoid mandatory racial integration, and they requested a declaratory judgment

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<sup>23</sup> Vinik at 69.

<sup>24</sup> Torbert Interview.

<sup>25</sup> In November, Reese, a Democrat, had defeated Republican Judge Mark Monteil, who had been appointed by Governor Hunt and opposed realignment. Vinik at 69.

<sup>26</sup> ALA. CONST. amend. 111, art. XIV, § 256.

curriculum and supplies. Plaintiffs also presented evidence that not a single school system in the state had met the new accreditation requirements established by the AELA of 1991.<sup>32</sup> Plaintiffs went to great lengths to demonstrate the deplorable conditions in Alabama's impoverished schools through affidavits, testimony and photographs. One science teacher recounted having to show her students a picture of a microscope because the school did not have one available.<sup>33</sup> At another school, the main playing field had been contaminated by raw sewage from the school's broken septic tank.<sup>34</sup> This empirical evidence seemed to have a great impact on Judge Reese, who focused on these inadequate conditions in his Liability Order.

Plaintiffs also provided testimony and evidence regarding the effect of Alabama's inadequate schools on the state's business climate. Leaders from many of Alabama's largest and most influential businesses testified that the public school system was not providing them with skilled, qualified employees. They also argued that the reputation of Alabama's schools made it difficult to attract new businesses to Alabama and had played a major role in the state's failure to attract a new Saturn automobile plant in 1992.<sup>35</sup>

Plaintiffs then demonstrated huge inequities between Alabama school districts. In addition to disparities in revenues available per pupil, plaintiffs cited inequities in districts' ability to meet state standards, such as performance on the Alabama Basic Competency (ABC) test. One expert found a statistically significant correlation between school affluence and high scores on the ABC test.<sup>36</sup> Plaintiffs also presented evidence of substantial inequities in school facilities, staffing, curricular offerings, supplies and services.

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<sup>32</sup> Martha Morgan et al., *Establishing Education Program Inadequacy: The Alabama Example* 28 U. MICH. J. L. REF. 559, 582-83.

<sup>33</sup> *Id.* at 593.

<sup>34</sup> Plaintiffs' Pre-Trial Brief, *supra* note 29, at 11.

<sup>35</sup> Vinik, *supra* note 18, at 72; Morgan et al., *supra* note 32, at 585.

<sup>36</sup> Liability Order, *supra* note 4, at 14.

students with an opportunity to obtain the following:

1. Sufficient skills to function "in Alabama, and at the national and international levels," in oral and written communications, mathematics and science;
2. Sufficient understanding of economic, social, and political systems, of basic civic institutions, and of the history, politics and social structure both of Alabama and the United States, to enable the student to make informed choices and understand and contribute to the issues that affect his or her community, state and nation;
3. Sufficient understanding of the arts "to enable each student to appreciate his or her cultural heritage and the cultural heritages of others;"
4. Sufficient training, or preparation for advanced training, in academic or vocational skills "to enable each child to choose and pursue life work intelligently" and to compete favorably with their counterparts in Alabama, the United States and throughout the world; and
5. Sufficient support and guidance "so that every students feels a sense of self-worth and ability to achieve, and so that every student is encouraged to live up to his or her full human potential."<sup>43</sup>

Despite contesting the lawsuit, Governor Hunt announced that he would not appeal the liability ruling. Instead, he declared the decision an "opportunity to fundamentally change Alabama's public school system for the better," and pledged to appoint a task force to recommend ways to

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<sup>43</sup> The order further enjoined the state officials charged with responsibility for Alabama's public school system to "establish, organize and maintain a system of public schools" that obeys the order's mandates. Liability Order at 62. The language of the order in large part paralleled the goals for an efficient educational system articulated by the Kentucky Supreme Court in *Rose*, *supra* note 20.

At the time, Flynt served on the Board of the A+ Coalition for Better Education. Founded in 1991, A+ comprises both a research foundation and a grassroots citizens advocacy organization. Its diverse membership includes representatives of some of Alabama's largest corporations who believe that education reform makes good business sense, as well as parents, civic leaders, students and other concerned Alabamians. A+ played a role in the liability phase of *ACE v. Hunt*: the organization filed an amicus brief, and a number of A+'s benefactors filed affidavits arguing that education reform would improve the state's business climate. Early on, however, these business leaders realized that their work alone would not bring about statewide change. Members of A+ "knew [they] were not going to see education reform until the people demanded it." Their plan, therefore, was to "form an organization, recruit 25,000 Alabamians who would pay \$10 in dues each, and build an army" for education reform.<sup>47</sup>

A+ decided to study reform efforts in nearby Kentucky and South Carolina, both of which had been successful in their education funding reform efforts. In both states, A+ staff met with governors, legislators, educators and businessmen to discuss the path they had taken toward reform. They learned that advocates in both states had developed a clear vision of public school reform and presented it to the public-at-large.<sup>48</sup> With the help of David Hornbeck, who had greatly influenced Kentucky's legislative reforms after the *Rose* decision, A+ set out to develop such a vision for Alabama.<sup>49</sup> A+ also saw the pending school funding suits as an opportunity

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<sup>47</sup> Interview with Cathy Gassenheimer, Managing Director, A+ Research Foundation, April 17, 1996.

<sup>48</sup> A+, DRAFTING A-BLUEPRINT FOR SUCCESSFUL ALABAMA SCHOOLS 2 (n.d. [Spring 1993]) [hereinafter BLUEPRINT].

<sup>49</sup> At the time, Hornbeck also served as a senior education consultant to the Business Roundtable, an organization of executive officers who develop public policy positions on national issues. A former state superintendent in Maryland, he is currently the Superintendent of Schools in Philadelphia, where he is attempting to implement a thorough-going agenda to dramatically reform urban education. For a comprehensive overview of Kentucky's legislative reforms, see MOLLY A. HUNTER, ALL EYES FORWARD: PUBLIC ENGAGEMENT AND FISCAL EQUITY IN KENTUCKY 20-44 (Campaign for Fiscal Equity, Inc., Apr. 1998).

document.<sup>54</sup> After two days of discussion and input, all 25 participants agreed on a final version of the Blueprint.<sup>55</sup>

With the Blueprint in hand, A+ began to conduct public forums on education reform. In January 1993, the organization co-sponsored regional meetings in Alabama's four largest cities for representatives from business, education and political groups.<sup>56</sup> Following these regional events, A+ held a series of town meetings across the state. The purpose of the meetings was two-fold: to encourage input on priorities for education reform, and to encourage citizen involvement in the reform process.<sup>57</sup> Each meeting included a keynote address by Wayne Flynt, small group discussions of the Blueprint and a video that explained the Blueprint in simple language. The video was written and produced by WVTM, a Birmingham NBC affiliate, and narrated by one of the station's news anchors. Over 2,000 people attended the first town meeting in Tuscaloosa, and excitement about the process grew quickly. "We talked about holding ten town meetings," said Cathy Gassenheimer, managing director of A+'s Research Foundation. "But people would come and say, 'You have to come to my city.'"<sup>58</sup> In all, over 23,000 Alabamians turned out for meetings in nearly two dozen cities, an interest noted with enthusiasm by the statewide press.

Of course, not all of the reaction to A+'s positions was positive. The meetings also stimulated interest among those opposed to widespread

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<sup>54</sup> Specifically, the November 1992 meeting included Bo Torbert, Lieutenant Governor Folsom, Speaker of the House Jimmy Clark, Sandra de Graffenreid from the Alabama Association of School Boards, Paul Hubbert from the Alabama Education Association, seven of the state's top CEOs, the State Superintendent of Education and two members of the State Board of Education.

<sup>55</sup> A+, *FOR THE SAKE OF OUR CHILDREN: THE FUTURE OF ALABAMA'S PUBLIC SCHOOLS, A FIVE YEAR REPORT* (November 1996) [hereinafter *SAKE OF OUR CHILDREN*].

<sup>56</sup> Other sponsors included the Alabama Education Association, the Alabama PTA, the Alabama Association of School Boards, and local chambers of commerce. *Id.* at 3.

<sup>57</sup> *Id.* at 1.

<sup>58</sup> Gassenheimer Interview.

of revisions and clarifications.<sup>63</sup> The number of town meetings continued to grow through the spring and fall of 1993, and A+ planned a two-year process to hone its reform positions. At the same time, however, Governor Folsom and his Task Force on Education Reform were working to quickly draft reform legislation, a fact that led some participants in the town meetings to be skeptical about the impact their input would have on the process.<sup>64</sup> When legislation was introduced in the fall, A+ discontinued its town meetings.

In addition to providing favorable coverage of A+'s meetings, the Alabama media played a significant role in building support for the lawsuit and education reform. When *ACE v. Hunt* was filed, many of the state's major newspapers ran editorials supporting the suit. Some urged the state not to fight the suit, while others urged legislators to reform the school finance system before the courts did.<sup>65</sup> Some followed A+'s lead and pointed to Kentucky as a model for change. A+ was not shy about courting the media. The group employed pollsters and campaign managers, and its leadership met with the editors and news directors of almost every major media outlet in the state. As Cathy Gassenheimer explained, "We treated this as a political campaign."<sup>66</sup> These efforts proved fruitful when Birmingham TV station WVTM broadcast a yearlong series on education entitled "Great Expectations." Shortly before the trial, WVTM also ran an extensive series of reports on fiscal equity, the successful school funding suit in Kentucky, and the widespread education reform engendered by that

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<sup>63</sup> BLUEPRINT, *supra* note 48, Second Draft (July 1993). Most important among these was the provision of health care and social services in schools, an issue that aroused strong opposition from some groups. A+ revised the Blueprint to say that elementary schools would offer voluntary programs to address basic health and social service needs, "utilizing to the fullest existing public and private agencies." *Id.* at 3.

<sup>64</sup> Gassenheimer Interview.

<sup>65</sup> See, e.g., *Lawsuit is Right: State Should Not Fight Funding Suit*, MONTGOMERY ADVERTISER, May 6, 1990, and *Mule and Mortarboard*, BIRMINGHAM NEWS, May 6, 1990 (cited in Vinik, *supra* note 18, at 80).

<sup>66</sup> Gassenheimer Interview.

about improving their schools and to advocate for reform. They also saw these meetings as complementary to the school funding suits, an aid to achieving the kinds of reforms being advocated by plaintiffs.<sup>70</sup>

Meanwhile, remedy negotiations went on behind closed doors. At the outset, the parties agreed that no third party interests (such as A+ or other advocacy groups) would be at the table for remedy negotiations. Many of these influential groups, however, were able to exert some influence on new educational policy through Governor Folsom's Task Force on Education Reform. The task force was composed of legislators, education advocates and representatives from the State Department of Education; it was chaired by Charlie Waldrep, who was also slated to be the governor's representative in the remedy negotiations. Through Waldrep, therefore, the task force meetings served a dual purpose: they gave non-parties to the suit a way to participate in the remedial process, and they allowed the governor's office to gauge reactions to various proposals being considered in the negotiations.

Early negotiations went smoothly, aided by the plaintiffs' belief that Folsom genuinely supported education reform. Not only did plaintiffs think he believed it was the right thing for the people of Alabama, they also thought Folsom believed that he would improve his chances for reelection by adequately resolving the issue. Soon, however, ACE plaintiffs voiced concerns about how the equity issue would be handled in the remedial proposal.<sup>71</sup> While they realized early on that a "Robin Hood" approach, which would directly take money from rich districts in order to fund the poor, would not be politically feasible, ACE argued that equity belonged at the front of the document as a primary goal of remedy implementation. ACE wanted to put pressure on the legislature to commit to fully funding equity, even if this might jeopardize the support of wealthy districts.<sup>72</sup> Eventually, however, ACE compromised. Adequacy and equity would be paired near the end of the order. The proposal would require the legislature

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<sup>70</sup> *Id.*

<sup>71</sup> Hershkoff Interview; Torbert Interview.

<sup>72</sup> Flynt Interview.

- VII. The system's infrastructure must be sound.
- VIII. Technology shall be used to raise student and teacher productivity and expand access to learning.
- IX. Special education shall be part of an inclusive system of education.
- X. Public school funding must be equitable and adequate.<sup>75</sup>

Each of these headings is accompanied by specific requirements, some of them extensive. The order provides guidelines for student and educator performance standards, and also includes a set of general provisions concerning monitoring, implementation, and the Court's commitment to retain jurisdiction to ensure implementation of the order. On October 22, 1993, the Court approved the Remedy Order subject to notice and a class-action fairness hearing. A few small changes were made in response to a number of relatively minor comments,<sup>76</sup> and the Remedy Order was adopted on December 3, 1993.

## IMPLEMENTATION

### *Legislative Proposals*

As the final touches were being put on the Remedy Order, legislation was already being developed. Governor Folsom's Task Force on Education

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<sup>75</sup> *Id.* at 2, 7-9, 11-14, 17. To ensure an equitable and adequate funding system, the Remedy Order called on the state to establish a foundation program that would "minimize educational disadvantages due to social or economic deprivation" and distribute funds in a manner that reflects student need. It also required a minimum local tax effort, equalized by the state, to ensure adequately funded educational opportunities. *Id.* at 17.

<sup>76</sup> The Alabama Association of School Boards took issue with provisions for school-based decision making; the Homewood and Mountain Brook school boards objected to the requirement of racial, sexual and geographic representation on all boards and entities established under the proposed remedial order; and CARE filed a brief contending that African-Americans constitute a special sub-class deserving formal recognition in the remedial phase of the litigation.

