

No. 60A20

SUPREME COURT OF NORTH CAROLINA

ASHLEY DEMINSKI, as guardian)
ad litem on behalf of C.E.D, E.M.D.,)
and K.A.D.,)

Plaintiff-Appellants,)

v.)

PITT COUNTY BOARD)
OF EDUCATION,)

Defendant-Appellee,)

and)

THE STATE BOARD OF)
EDUCATION,)

Defendant.)

From Wake County

No. 17-CV-15159
COA18-998

**BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF
NORTH CAROLINA LEGAL FOUNDATION IN SUPPORT OF
PLAINTIFF-APPELLANTS**

INDEX

Table Of Cases And Authorities.....	ii
Introduction.....	1
Statement of Facts.....	4
Argument.....	4
I. Applying long-standing principles of constitutional interpretation, the right to a sound basic education necessarily includes the right to access that education in a safe and supportive learning environment.....	4
A. Recognition of implicit constitutional rights is critical to preserving expressly enumerated ones.....	4
B. The guarantee of a sound basic education necessarily includes an educational environment that is safe, supportive, and conducive to learning.....	9
II. To preserve the right to a sound basic education, individuals must be able to enforce the right in court.....	11
A. This Court’s precedent emphasizes the need to allow individuals to enforce the personal guarantees found in the Declaration of Rights.....	12
B. Without a constitutional remedy for children like the minor Plaintiffs, educational inequity will only become worse.....	14
Conclusion.....	17
Certificate Of Service.....	19

TABLE OF CASES AND AUTHORITIES

Cases:

Abbeville Cty. Sch. Dist. v. State, 335 S.C. 58, 515 S.E.2d 535 (1999).....10

Bd. of Educ. v. Bd. of Comm’rs of Granville Cty., 174 N.C. 469,
93 S.E. 1001(1917).....7

Brown v. Bd. Of Educ., 347 U.S. 483 (1954).....14

Campaign for Fiscal Equity, Inc. v. State, 86 N.Y.2d 307,
655 N.E.2d 661 (1995).....10

Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, 295 Conn. 240,
990 A.2d 206 (2010).....10

Corum v. Univ. of N. C., 330 N.C. 761, 413 S.E.2d 276 (1992).....9, 11, 12

Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ., 363 N.C. 334,
678 S.E.2d 351 (2009).....13

Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629 (1999).....10-11

Deminski v. State Bd. Of Educ., 837 S.E.2d 611 (N.C. Ct. App. 2020).....2, 9

Estelle v. Gamble, 429 U.S. 97 (1976).....5

Griswold v. Conn., 381 U.S. 479 (1965).....4

Hoke Cty. Bd. Of Educ. v. State, 358 N.C. 605, 599 S.E.2d 365 (2004).....7, 8, 13

Hudson v. McMillian, 503 U.S. 1 (1992).....5

Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982).....5

Lawrence v. Tex., 539 U.S. 558 (2003).....6

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

<i>Leandro v. State</i> , 122 N.C. App. 1, 468 S.E.2d 543 (1996).....	7
<i>Mapp v. Ohio</i> , 367 U.S. 643 (1961).....	6
<i>Midgett v. N. C. State Highway Comm’n</i> , 260 N.C. 241, 132 S.E.2d 599 (1963).....	13
<i>Obergefell v. Hodges</i> , 135 S. Ct. 2584 (2015).....	6
<i>Rhodes v. Chapman</i> , 452 U.S. 337 (1981).....	5
<i>Sale v. State Highway & Public Works Comm’n</i> , 242 N.C. 612, 89 S.E.2d 290 (1955).....	13
<i>Schad v. Borough of Mount Ephraim</i> , 452 U.S. 61 (1981).....	4
<i>State v. Ballance</i> , 229 N.C. 764, 51 S.E.2d 731 (1949).....	6
<i>State v. Carter</i> , 322 N.C. 709, 370 S.E.2d 553 (1988).....	6
<i>State v. Jackson</i> , 348 N.C. 644, 503 S.E.2d 101 (1998).....	5
<i>Tex. v. Johnson</i> , 491 U.S. 397 (1989).....	4
<i>T.K. v. New York City Dep’t Of Educ.</i> , 779 F. Supp. 2d 289 (E.D.N.Y. 2011).....	10
<i>Trop v. Dulles</i> , 356 U.S. 86 (1958).....	5
<i>Tully v. City Of Wilmington</i> , 370 N.C. 527, 810 S.E.2d 208 (2018).....	13
Constitutional Provisions:	
N.C. Const. Art. I, § 1.....	13
N.C. Const. Art. I, § 14.....	12
N.C. Const. Art. I, § 15.....	7
N.C. Const. Art. IX, § 2.....	7
U.S. Const. amend. I.....	4

U.S. Const. amend. VIII.....5

Statutes:

Individuals with Disabilities Education Act, 20 U.S.C. § 1414.....10

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681.....10

Other Authorities:

2018-19 School Performance Grades and School Accountability Growth by Percentage of Students Identified as Economically Disadvantaged (N. C. Dep’t. of Pub. Instruction, Accountability Serv’s. Div./Analysis & Reporting, 2019).....16

Bruce Baker, *Revisiting That Age-Old Question: Does Money Matter in Education?* (The Albert Shanker Inst., 2012).....16

Catherine Hill & Holly Kearl, *Crossing The Line: Sexual Harassment At School*, Am. Ass’n. of Univ. Women (2011).....17-18

Joint Report to The Court on Sound Basic Education for All: Fiscal Year 2021 Action Plan For North Carolina, *Hoke County Bd. Of Ed. v. State Bd. Of Educ.*, 95-CVS-1158 (Wake Cnty. Sup. Ct. June 15, 2020).....10

Kraft, M., Marinell A.,W.H. & Yee. D., *School Organizational Contexts, Teacher Turnover, And Student Achievement: Evidence From Panel Data*, 53 American Educ. Res. J.5, 1411 (2016).....17

Penn State Center For Evaluation & Education Policy Analysis, *The Importance Of School Facilities In Improving Student Outcomes* (2015).....17

Public School Forum Of N.C., *2020 Local School Finance Study*.....16

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INTRODUCTION

The North Carolina Constitution promises every child access to education. This Court has interpreted the right broadly, as “the intent of the framers was that every child have a fundamental right to a sound basic education which would

¹ No person or entity other than amicus curiae, its members, or counsel wrote this brief or contributed money for its preparation.

prepare the child to participate fully in society as it existed in his or her lifetime.” *Leandro v. State*, 346 N.C. 336, 348, 488 S.E.2d 249, 255 (1997). This Court has also held that to protect other personal guarantees in the Declaration of Rights against government abuse, individuals must have a way to enforce them. So it follows naturally that when public school officials maintain or ignore an educational environment that interferes with a student’s ability to learn, a constitutional injury has occurred, and the student may seek relief in court.

In the decision below, the Court of Appeals took a different view: the right to a sound basic education only concerns the “intellectual function of academics[.]” *Deminski v. State Bd. of Educ.*, 837 S.E.2d 611, 616 (N.C. Ct. App. 2020). Under this analysis, whether the school environment is so dangerous, dysfunctional, or frightening that a child cannot actually learn is irrelevant. For the minor Plaintiffs—children who suffered routine sexual harassment and physical abuse on school grounds that school officials knew about and ignored—the right to education has become an abstraction, unenforceable in the courts and sealed off from real-world considerations that determine whether a student will flourish or fall behind.

This brief argues that long-standing principles of constitutional interpretation require a different outcome. For broad guarantees of individual rights to have real meaning, courts must recognize the implicit, more specific rights contained within. The right to free speech, for example, necessarily protects more than speaking—it also protects the right to thought, inquiry, and

artistic expression. The due process liberty interest encompasses more than freedom from physical restraint—it protects all manner of rights, from pursuing a vocation to decisions about marriage and procreation. If courts didn't recognize these specific rights, the broader, expressly enumerated ones would be rendered hollow and lifeless.

In that spirit, this Court held in *Leandro* that the state Constitution guarantees not just *some* education, but a substantively adequate one. To ensure that *Leandro* continues to have real meaning in the lives of real people, this Court should make clear that a sound basic education does not merely require that the curriculum be adequate and the teachers qualified. Rather, it must also include access to an educational environment that is safe, supportive, and conducive to learning. If school officials ignore or maintain an educational environment replete with hazards that interfere with a child's ability to learn, access to a sound basic education has effectively been denied.

This brief further argues that, as with other rights in the Declaration of Rights, the right to a sound basic education is meaningless if individual students cannot enforce it in the courts. Holding otherwise will only perpetuate and deepen severe inequities in educational opportunity.

For these reasons, the Court should reverse the Court of Appeals and allow Plaintiffs to pursue their claim.

STATEMENT OF FACTS

Amicus adopts the facts set out by the Court of Appeals.

ARGUMENT

I. Applying long-standing principles of constitutional interpretation, the right to a sound basic education necessarily includes the right to access that education in a safe and supportive learning environment.

To give practical effect to broad constitutional guarantees of individual rights, courts must recognize the more specific, unenumerated rights that are implicit in the broader ones. Applying that principle here, the right to a sound basic education must include the right to access that education in a safe and supportive learning environment.

A. Recognition of implicit constitutional rights is critical to preserving expressly enumerated ones.

This Court and the U.S. Supreme Court have often recognized that broad constitutional guarantees necessarily include more specific rights. Starting with the First Amendment, the express guarantees of freedom of speech and press protect “not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach.” *Griswold v. Conn.*, 381 U.S. 479, 482 (1965) (citations omitted). The Amendment also protects a wide range of expressive *conduct*, whether political or artistic in nature. *See Tex. v. Johnson*, 491 U.S. 397, 403 (1989); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981). These

rights don't appear in the constitutional text, but they are "necessary in making the express guarantees fully meaningful." *Griswold*, 381 U.S. at 483; *see also Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (explaining that the right to send and receive information is "an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution").²

So too with constitutional prohibitions on cruel and unusual punishments. The U.S. Supreme Court has taken an expansive view of the Eighth Amendment, rejecting the idea that it only applies to penalties "meted out by statutes or sentencing judges." *Hudson v. McMillian*, 503 U.S. 1, 18 (1992) (Thomas, J., dissenting). Instead, the Court has decided cases with an eye towards "[t]he basic concept underlying the Eighth Amendment," which is "nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). Thus, cruel and unusual punishments include exposure to dangerous prison conditions, *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981), use of excessive force by guards, *Hudson*, 503 U.S. at 7, and inadequate medical care, *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). Had the narrower view prevailed, the Constitution would do little to protect our most vulnerable from horrific government abuse.

² The state Constitution provides at least these same protections, as the federal Constitution establishes the minimum protections for parallel state provisions. *See State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998).

Similarly, the state and federal Constitutions say nothing about a right to exclude improperly gathered evidence. But this Court and the U.S. Supreme Court have long recognized that without an implicit exclusionary rule, broader constitutional protections against unreasonable search and seizure “might as well be stricken from the Constitution.” *State v. Carter*, 322 N.C. 709, 718, 370 S.E.2d 553, 558 (1988) (quoting Sam Ervin, *The Exclusionary Rule: An Essential Ingredient of The Fourth Amendment*, 5 *The True Bill* 1, 3 (N.C. Bar Ass’n 1985)). These provisions would be reduced to “‘a form of words’, valueless and undeserving of mention in a perpetual charter of inestimable human liberties[.]” *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

Case law has also identified more specific rights protected by the due process liberty interest. “The term ‘liberty,’ as used in these constitutional provisions, does not consist simply of the right to be free from arbitrary physical restraint or servitude[.]” *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949). Instead, it protects all manner of unenumerated rights, from pursuing a vocation to marrying and having children. *See id*; *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015). This construction is necessary so that “persons in every generation can invoke [the Constitution’s] principles in their own search for greater freedom.” *Lawrence v. Texas*, 539 U.S. 558, 579 (2003).

These cases demonstrate how broad constitutional guarantees must be construed in a way that gives them practical effect and fulfills their underlying purpose. In North Carolina, perhaps no case better exemplifies the spirit of this

principle than *Leandro* itself. That case asked whether Article I, Section 15 and Article IX, Section 2 of the state Constitution require a substantively adequate education. These provisions promise an education to all North Carolinians, but say nothing about its quality. Given the textual silence, the Court of Appeals held that the Constitution required access to *some* education, but not necessarily a good one. *See Leandro v. State*, 122 N.C. App. 1, 11, 468 S.E.2d 543, 550 (1996).

This Court disagreed. It considered the words of Justice William Hoke, written over a century ago, explaining that the state Constitution’s education provisions “were intended to establish a system of public education *adequate to the needs of a great and progressive people*, affording school facilities of recognized and ever-increasing merit to all the children of the state and to the full extent that our means could afford and intelligent direction accomplish.” 346 N.C. at 346, 488 S.E.2d at 254 (emphasis original) (quoting *Bd. of Educ. v. Bd. of Comm’rs of Granville Cty.*, 174 N.C. 469, 93 S.E. 1001, 1002 (1917)). *Leandro* recognized this underlying purpose, concluding, “An education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate.” 346 N.C. at 345, 488 S.E.2d at 254. In other words, the right to an education had to be practically meaningful for children in public schools, to each of whom our state had made a solemn promise.

Several years later, this Court made clear “that the children of the state enjoy the right to *avail* themselves of the opportunity for a sound basic

education.” *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 621, 599 S.E.2d 365, 380 (2004) (emphasis added). That case acknowledged that the right to education does not exist in a vacuum. Rather, school officials must identify “at-risk” students and take the affirmative steps necessary to allow those students to compete with peers who were not “at-risk,” such as tutoring, extra class sessions, and counseling. *Id.* at 636-37, 599 S.E.2d at 389-390.

B. The guarantee of a sound basic education necessarily includes an educational environment that is safe, supportive, and conducive to learning.

Here, the Court of Appeals characterized the right to a sound basic education as “strictly confined to the intellectual function of academics”—the right does “not encompass claims arising from abuse of a student, even on school premises.” *Deminski*, 837 S.E.2d at 616. Under this view, it would also seemingly not matter if a classroom consistently devolved into violent chaos that prevented students from hearing or seeing the lesson. *See id.* at 619 (Zachary, J., dissenting) (“[I]t would be credulous to differentiate, for constitutional purposes, between a student whose teacher refuses to teach math and a student whose teacher fails to intervene when other students’ harassing and disruptive behavior prevents her from learning it.”). As long as the curriculum is sound, the Constitution is satisfied, even if conditions maintained or ignored by school officials make it impossible to learn.

This Court’s decisions, read together with the principles discussed above, do not support this conclusion. A child cannot reasonably be expected to learn if

they are consistently subjected to sexual harassment, extreme bullying, or some other clear hazard. The right to a sound basic education must therefore require a safe and supportive learning environment. Otherwise, *Leandro* offers little more than a “fanciful gesture” to students like the minor Plaintiffs—children who face environments so dangerous or dysfunctional that the opportunity to attain a sound basic education is effectively denied. *See Corum v. Univ. of N. C.*, 330 N.C. 761, 786, 413 S.E.2d 276, 291 (1992).

The State Board of Education and multiple county boards appear to agree. In separate ongoing litigation, those parties, along with minor plaintiffs, recently submitted a joint report detailing “the actions and investments necessary to ensure a sound basic education for all children, including specific goals to be achieved by 2030.”³ Among those goals is increased funding for school counselors, nurses, social workers, and psychologists to “ensure that schools are safe and supportive learning environments.”⁴

This Court would not be the first to hold that a minimally adequate education involves a safe and functional learning environment—other states’ high courts interpreting similar constitutional guarantees have reached that

³ Joint Report to the Court on Sound Basic Education for All: Fiscal Year 2021 Action Plan for North Carolina at 3, *Hoke County Bd. Of Ed. v. State Bd. Of Educ.*, 95-CVS-1158 (Wake Cnty. Sup. Ct. June 15, 2020), https://files.nc.gov/governor/documents/files/Leandro_FY2021_plan_rev0615_2020-FINAL.pdf.

⁴ *Id.* at 9. Notably, this report did *not* call for harsher disciplinary practices or an increased law enforcement presence in schools.

conclusion as well. *See, e.g., Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 317, 655 N.E.2d 661, 666 (1995) (“The State must assure that some essentials are provided. Children are entitled to minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn.”); *Abbeville Cty. Sch. Dist. v. State*, 335 S.C. 58, 68, 515 S.E.2d 535, 540 (1999) (“We define this minimally adequate education required by our Constitution to include providing students adequate and safe facilities in which they have the opportunity to [learn.]”); *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 295 Conn. 240, 342 n.15, 990 A.2d 206, 268 n.15 (2010) (Palmer, J., concurring) (“It goes without saying that a safe and secure environment also is an essential element of a constitutionally adequate education.”).

Federal courts interpreting education statutes have also acknowledged that bullying and sexual harassment may interfere with a minimally adequate education, and that schools have an affirmative duty to intervene. Under the Individuals with Disabilities Education Act (IDEA), a school’s failure to prevent bullying may deprive a child of a “free appropriate education.” *See T.K. v. New York City Dep’t of Educ.*, 779 F. Supp. 2d 289, 317 (E.D.N.Y. 2011) (“When responding to bullying incidents, which may affect the opportunities of a special education student to obtain an appropriate education, a school must take prompt and appropriate action.”). Under Title IX, school districts may be liable if they permit student-on-student sexual harassment. *Davis v. Monroe Cty. Bd. of*

Educ., 526 U.S. 629, 654 (1999) (holding that a student who alleged school officials “made no effort whatsoever either to investigate or to put an end to the harassment” stated a claim under the act).⁵

This Court should therefore hold that a dangerous or dysfunctional educational environment—including one that subjects students to pervasive abuse and harassment—may violate the state constitutional right to a sound basic education.

II. To preserve the right to a sound basic education, individuals must be able to enforce the right in court.

At the Court of Appeals, amicus for Pitt County Board of Education argued that students should not be permitted to sue local school boards for individual *Leandro* violations. Br. of Amicus Curiae N. Carolina Sch. Bd. Ass’n., at 5-7. This argument should be rejected for two reasons.

First, this Court has repeatedly recognized the importance of allowing individuals to sue state and local governments for the violation of personal rights grounded in the Declaration of Rights. The right to education—also personal to every student—is critically important and should therefore receive the same protection.

Second, closing the door on claims such as Plaintiffs’ may gut any means under state law for holding school officials accountable for abusive school

⁵ Because these remedies come from federal law, they do not limit plaintiffs’ right to sue under the state Constitution “in the absence of an adequate *state* remedy[.]” *Corum*, 330 N.C. at 782, 413 S.E.2d at 289 (emphasis added).

environments, and would exacerbate the already gross inequity in public education that persists in North Carolina.

A. This Court’s precedent emphasizes the need to allow individuals to enforce the personal guarantees found in the Declaration of Rights.

“The civil rights guaranteed by the Declaration of Rights in Article I of our Constitution are individual and personal rights entitled to protection against state action” *Corum*, 330 N.C. at 782, 413 S.E.2d at 289. This Court has repeatedly held that to preserve these rights in the face of government abuse, an individual enforcement mechanism is necessary.

If the Constitution and state law don’t expressly provide a remedy for a particular injury, “the common law will furnish the appropriate action for adequate redress of such grievance.” *Midgett v. N. C. State Highway Comm’n*, 260 N.C. 241, 250, 132 S.E.2d 599, 608 (1963), *overruled on other grounds by Lea Co. v. N. C. Bd. of Transp.*, 308 N.C. 603, 304 S.E.2d 164 (1983). Therefore, this Court has held that individuals may seek compensation under the state Constitution’s Takings Clause even without an expressly enumerated remedy. *Id.*; *Sale v. State Highway and Pub. Works Comm’n*, 242 N.C. 612, 617, 89 S.E.2d 290, 295 (1955).

Relying on those cases, *Corum* recognized a constitutional cause of action for free speech violations. Article I, Section 14 provides “a direct personal guarantee of each citizen’s right of freedom of speech.” *Id.* at 781, 289. This Court reasoned that free speech “should be protected at least to the extent that

individual rights to possession and use of property are protected,” and concluded that “[a] direct action against the State for its violations of free speech is essential to the preservation of free speech.” *Id.* at 782, 413 S.E.2d at 289.

More recently, this Court held that a local government employee could sue his employer for violating Article I, Section 1’s promise that all persons may enjoy “the fruits of their own labor.” *Tully v. City of Wilmington*, 370 N.C. 527, 534, 810 S.E.2d 208, 214 (2018). That decision relied in part on this Court’s “long-standing emphasis on ensuring redress for every constitutional injury[.]” *Id.* (quoting *Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 342, 678 S.E.2d 351, 357 (2009)).

Here, the Constitution’s promise of a sound basic education—like the rights discussed above—is a direct personal guarantee to every public-school student in North Carolina. *See Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 617, 599 S.E.2d 365, 378 (2004) (describing the right established in *Leandro* as “a child’s individual right of an opportunity to a sound basic education”); *Leandro*, 346 N.C. at 348, 488 S.E.2d at 255 (“[T]he intent of the framers was that every child have a fundamental right to a sound basic education which would prepare the child to participate fully in society as it existed in his or her lifetime.”). This right is no less important than the right to free speech, just compensation for taken property, or enjoying the fruits of one’s labors. Indeed, the need for enforcement is perhaps even greater here—as Chief Justice Earl Warren observed, a child’s education is critically important for shaping their life and the life of our Nation:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Brown v. Board of Education, 347 U.S. 483, 493 (1954).

This Court should therefore allow Plaintiffs to seek redress for the violation of a fundamental individual right.

B. Without a constitutional remedy for children like the minor Plaintiffs, educational inequity will only become worse.

Leandro held that the state Constitution guarantees a sound basic education, but not substantially equal funding among public schools. 346 N.C. at 349, 488 S.E.2d at 256. From district to district, students often face extraordinary disparities in funding and instructional quality. According to a study by the Public School Forum of North Carolina, Pitt County spent \$1,596 per student for the 2017-18 school year, while other counties spent as much as \$5,256 and as little as \$434.⁶ The study observed that “[t]hese funding disparities have

⁶ Public School Forum of North Carolina, *2020 Local School Finance Study*, 3 (2020), <https://www.ncforum.org/2020-local-school-finance-study>.

tangible impacts in North Carolina classrooms. For instance, local salary supplements for educators are generally substantially larger in high-wealth and larger districts, which better positions them to attract and retain top talent.”⁷

Unsurprisingly, research has found a clear correlation between per-pupil spending and educational outcomes.⁸

These inequities will only deepen for children in poorer districts who are also subjected to unsafe environments. Research shows that the educational environment can affect student achievement. This includes not just factors such as temperature, lighting, and noise,⁹ but exposure to bullying and other environmental dysfunction.¹⁰

⁷ *Id.* at 1.

⁸ See Bruce Baker, *Revisiting That Age-Old Question: Does Money Matter in Education?*, at iv (The Albert Shanker Inst., 2012), <https://files.eric.ed.gov/fulltext/ED528632.pdf>; 2018-19 School Performance Grades and School Accountability Growth by Percentage of Students Identified as Economically Disadvantaged (N. C. Dep’t. of Pub. Instruction, Accountability Serv’s. Div./Analysis and Reporting, 2019), https://files.nc.gov/dpi/documents/accountability/reporting/spg_growth_by_e ds_10022019.pdf.

⁹ See Penn State Center for Evaluation and Education Policy Analysis, *The Importance of School Facilities in Improving Student Outcomes* (2015), <https://sites.psu.edu/ceepa/2015/06/07/the-importance-of-school-facilities-in-improving-student-outcomes/>.

¹⁰ See Kraft, M.A., Marinell, W.H. & Yee. D., *School organizational contexts, teacher turnover, and student achievement: Evidence from panel data*, 53 *American Educ. Res. J.*, 5, 18-19 (2016), https://scholar.harvard.edu/files/mkraft/files/kraft_marinell_yee_2016_school_contexts_teacher_turnover_and_student_achievement_aerj.pdf. The full set of measurements contributing to the “safety” factor in this study include “whether

Student-on-student sexual harassment in particular can prevent children from realizing the benefits of schooling. A national survey of middle and high school students found that around one third of students who experienced sexual harassment reported not wanting to go to school as a result, and one third felt sick.¹¹ An additional thirty percent said sexual harassment caused them difficulties studying and nearly twenty percent reported trouble sleeping.¹² Smaller but still meaningful percentages of harassed students got in trouble in school because of harassment, stayed home from school, changed their route to or from school, quit an activity or sport, or even switched schools.¹³

Research also shows that the harm of unsafe school environments falls disproportionately on students of color, students from low-income homes, and girls. According to a recent study, students from lower-income homes who were

the school is characterized by crime and violence or students being threatened or bullied, whether order and discipline are maintained, whether adults within the school are disrespectful to students, and whether teachers feel safe at their school and can get the help they need to address student misbehavior.” *Id.* at 15-16.

¹¹ Catherine Hill & Holly Kearl, *Crossing the Line: Sexual Harassment at School*, Am. Ass’n. of Univ. Women, at 022 (2011), <https://www.aauw.org/app/uploads/2020/03/Crossing-the-Line-Sexual-Harassment-at-School.pdf>. This study’s definition of sexual harassment included behavior ranging from physical assault and unwanted touching to unwelcome sexual jokes, slurs, and rumors circulated in-person and online. *Id.* at 10. By this definition, 48 percent of surveyed students experienced sexual harassment at school over the course of one school year. *Id.* at 11.

¹² *Id.* at 23.

¹³ *Id.*

harassed at school were more likely than higher-income students who were harassed to experience negative effects on their wellbeing and education.¹⁴ The data also suggested that Black and Latinx students were more likely to suffer ill effects from sexual harassment than were their white peers.¹⁵ And girls were not only more likely to be harmed by experiences of sexual harassment than boys, but were also more likely to be targets of sexual harassment in the first place.¹⁶

Amicus does not suggest that allowing individual students to sue for *Leandro* violations will cure the systemic inequities that have plagued North Carolina's public schools for so long. But for children like the minor Plaintiffs who allege an inability to access educational opportunity because of school officials' indifference, this cause of action may provide the only meaningful opportunity to be made whole.

CONCLUSION

The Court of Appeals' decision should be reversed. This Court should hold that the constitutional promise of a sound basic education—made to *every* child—includes a safe and supportive educational environment that is conducive to

¹⁴ *Id.*

¹⁵ *See id.* at 23, 25.

¹⁶ *See id.* at 22.

learning. This Court should further hold that individual students may sue local school boards for violations of that right.

Respectfully submitted, this the 5th day of August, 2020.

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I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

I certify that on 5 August 2020, I served the foregoing document on counsel for the parties via electronic mail addressed to:

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