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New York Public School Financing Litigation (Symposium: New York State Constitutional Law: Trends and Developments)

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New York Public School Financing Litigation

Honorable Leon D. Lazer*

Professor Barry Latzer:

We resume with a very controversial issue that is actually sweeping the country in the state constitutional law field, and that is the role of the state constitution in questions of school financing. We certainly have an expert with us here today. Judge Leon D. Lazer wrote the majority opinion in the *Levittown*¹ case, in the Appellate Division, which he will be discussing in part in his talk; and this, of course, is one of the crucial decisions on this issue in New York. We are delighted then to greet and hear from the Honorable Leon D. Lazer.

Hon. Leon D. Lazer:

I think I would be remiss if I did not remark upon my own pleasure at having with us two judges of the Court of Appeals. Whenever there might be any discussion of the excellence in the Court of Appeals, their names would be among the first

* The Honorable Justice Leon D. Lazer is a graduate of the City College of New York, received an LL.B from New York University Law School. Justice Lazer served as an Associate Justice of the Appellate Division in the Second Department from 1979 to 1986 and was a Justice of the Supreme Court from 1973 to 1986. He was a partner in the New York law firm of Shea & Gould; Town Attorney for the Town of Huntington, New York; member of the Temporary State Commission to Study Governmental Costs in Nassau and Suffolk Counties, Chair of Pattern Jury Instructions Committee of the New York State Association of Supreme Court Justices; author of many published judicial opinions; member of the American Law Institute; member of the American and New York State Bar Associations; and the Association of Supreme Court Justices of New York State. Justice Lazer retired from the bench in 1986.

¹ Board of Education, Levittown Union Free School District v. Nyquist, 83 A.D.2d 217, 443 N.Y.S.2d 843 (2d Dep't 1981).

mentioned. Touro has a rare privilege to have both of them here today. Now, the title of my address has already been given to you, but I think that it more appropriately ought to be called *Levittown redux*.

The Education Clause of the New York Constitution is short and direct.² This product of the 1894 Constitutional Convention and its predecessor in 1864 has remained unchanged for over a hundred years.³ But in the last twenty years, rather fierce battles have been fought over its meaning.⁴ Before we get to those battles, I will pause for a few moments to discuss what school finance means and what the issue generally is; the method of financing this system of "free common schools."⁵

² N.Y. CONST. art. XI, § 1. The Educational Clause of the New York State Constitution states in pertinent part: "The legislature shall provide for the maintenance and support of a system of free common schools, where-in all the children of this state may be educated." *Id.* There is no United States Constitutional provision similar to the Education Article of the New York State Constitution. See *New York State Constitutional Decisions: 1995 Compilation*, 12 TOURO L. REV. 835 (1996).

³ The text has not changed since 1894, however, N.Y. CONST. art. XI, § 1 was formerly art. IX, § 1 and was subsequently renumbered art. XI, § 1 on Nov. 8, 1938. *Id.*

⁴ See *Campaign For Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 655 N.E.2d 661, 631 N.Y.S.2d 565 (1995); *Board of Education, Levittown Union Free School District v. Nyquist*, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982); *Reform Educational Financing Inequities Today [hereinafter R.E.F.I.T.] v. Cuomo*, 86 N.Y.2d 279, 655 N.E.2d 647, 631 N.Y.S.2d 551 (1995). Other jurisdictions have had battles regarding their education clauses. See *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973); *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990), in which the New Jersey Supreme Court has consistently struck down its school finance system because of a failure to provide thorough and efficient education. *Id.* See also *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1025 (Colo. 1982) where the Colorado Supreme Court upheld its school finance system because it was providing "thorough and uniform educational opportunities." *Id.* The majority of states constitutions include an Educational Clause that requires free public education. Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 VAL. U. L. REV. 459, 466 (1996).

⁵ *Levittown*, 57 N.Y.2d at 48 n.7, 439 N.E.2d at 369 n.7, 453 N.Y.S.2d at 653 n.7. See also N.Y. CONST. art. XI, § 1.

New York's educational system is essentially very similar to that of the other states.⁶ That is, the state itself has the obligation to educate its children, but, while retaining some overall supervisory power and providing financial assistance, it delegates the actual educational function to local school districts which number seven hundred in New York.⁷ Outside the City of New York, the school districts have the power to impose taxes, such as real estate taxes, to finance their operations.⁸ Taxpayers outside the cities are generally well aware that the school tax item is the largest one in their real estate tax bills.⁹ In the cities, the schools are financed through the municipal budgets.¹⁰ There is no individual taxing power by a city board of education, and without that taxing power, the city boards of education compete with police, fire, transportation, garbage collection, and maintenance of the various other functions of the government.¹¹ The city boards of education also have to share with those other agencies the financing they need.¹² This, in the jargon of school finance litigation, is called municipal overburden.¹³ In addition to these real estate revenues raised by the local school districts, and the cities through their general tax-raising power, which can, of course, include income taxes, sales taxes and the like, the state, through its general revenues and through, as of a year or two

⁶ See generally Tricia E. Bevelock, *Public School Financing Reform: Renewed Interest in the Courthouse, But Will the Statehouse Follow Suit?*, 8 ST. JOHN'S L. REV. 467 (1991).

⁷ *Levittown*, 57 N.Y.2d at 44, 439 N.E.2d at 366, 453 N.Y.S.2d at 651.

⁸ *Id.* at 44-45, 439 N.E.2d at 367, 453 N.Y.S.2d at 651.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Board of Education, *Levittown Union Free School Dist. v. Nyquist*, 83 A.D.2d 217, 261, 443 N.Y.S.2d 843, 871 (2d Dep't 1981). See also *Levittown*, 57 N.Y.2d at 42, 439 N.E.2d at 364, 453 N.Y.S.2d at 649.

¹² *Id.*

¹³ *Levittown*, 57 N.Y.2d at 53 n.4, 439 N.E.2d at 372 n.4, N.Y.S.2d at 656 n.4. Municipal overburden is a condition "in which some areas, particularly urban areas, have exceptionally high non-educational expenses . . . [so that] revenues raised by property taxes which might otherwise be used for education, must be diverted to non-educational purposes." (citing *Robinson v. Cahill*, 355 A.2d 12 (N.J. 1973)).

ago, fifty-one different formulas, provides financial aid to the districts and to the cities.¹⁴ Aid to education is the largest single item of the state budget.¹⁵ In some districts, in some cases, state aid provides half or more than half of the revenue available to the school district.¹⁶ In the complaints in the cases I am going to be discussing, the amount of eight billion dollars is mentioned as the amount of the state aid to education.¹⁷

While state aid to education comes from general state revenues, the locally raised financing in non-city school districts comes from *ad valorem* real estate taxes.¹⁸ That means taxes based on the value of real estate, and that means that school districts with high real estate values have many times more resources available for the education of their children than poorer districts.¹⁹ Thinking locally, all of those office buildings and factories down in the south end of the Town of Huntington are in the Half Hollow Hills School District. Those buildings and factories do not send children to school. Yet those buildings produce huge tax revenues for the school district, as would, for instance, in Nassau County, the Roosevelt Field shopping areas for the local school district, as would other commercial and industrial areas. In addition, in high value or high-priced residential districts, such as Manhasset or Great Neck, or Lloyd Harbor the values of real estate is high, and there are high revenues for those school districts.

In such districts, the school boards are able to spend approximately, as pleaded in the recent cases, six times as much per pupil as poorer districts with low real estate values.²⁰ Some of those poorer districts have been named in the recent litigation.

¹⁴ *R.E.F.I.T. v. Cuomo*, 152 Misc. 2d 714, 578 N.Y.S.2d 969, 970 (Sup. Ct. Nassau County 1991).

¹⁵ *Levittown*, 57 N.Y.2d at 38 n.2, 439 N.E.2d at 363 n.2, 453 N.Y.S.2d 648 n.2.

¹⁶ See *New York State Constitutional Decisions: 1995 Compilation: Education*, 12 TOURO L. REV. 835, 845 (1995).

¹⁷ *R.E.F.I.T.*, 152 Misc. 2d at 715, 578 N.Y.S.2d at 970.

¹⁸ *Levittown*, 83 A.D.2d at 221, 443 N.Y.S.2d at 846.

¹⁹ *Id.*

²⁰ *R.E.F.I.T.*, 152 Misc. 2d at 719, 578 N.Y.S.2d at 972.

The William Floyd School District, Roosevelt School District, Brentwood, and even middle class districts like Levittown, have very little commercial real estate.²¹ Those who attack the educational finance system argue, and are able to prove, that affluent districts have better facilities, better equipment, better teachers, lower pupil teacher ratios, smaller classes, new schoolbooks, enriched curriculum, more extracurricular activities, while the poorer districts have large classes, less equipment, portable classrooms, run-down facilities, higher pupil/teacher ratios and minimum curriculum, etc.²² The bottom line of the argument made against the current school finance system is that there is a huge disparity in education between that received by pupils in the rich as opposed to the poorer districts.²³ There is an inequality so gross that it allegedly violates the Equal Protection Clauses of the Federal²⁴ and State Constitutions²⁵ and results in violations of the state constitutional mandates for providing a free education.²⁶

Legal assault on these systems started almost three decades ago, and the first major victory for those came in *Serrano v. Priest*²⁷ in 1971 when the California Supreme Court found that the California school finance system was unconstitutional on two grounds.²⁸ The court held that wealth was a suspect classification and that the local property tax discriminated in favor of richer districts because the available resources were a function of the

²¹ *Id.* See also *Levittown*, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982).

²² *R.E.F.I.T.*, 152 Misc. 2d at 720, 578 N.Y.S.2d at 973.

²³ *R.E.F.I.T.*, 152 Misc. 2d at 719, 578 N.Y.S.2d at 972.

²⁴ U.S. CONST. amend. XIV, § 1. The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution states in pertinent part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

²⁵ N.Y. CONST. art. I, § 11. Article I, § 11 provides in pertinent part: "No person shall be denied the equal protection of the law of this state or any subdivision thereof." *Id.*

²⁶ See N.Y. CONST. XI, § 1.

²⁷ 487 P.2d 1241 (Cal. 1971).

²⁸ *Id.* at 1244 (stating that "such a system cannot withstand constitutional challenge and must fall before the equal protection clause.").

child's parents' wealth or that of his or her school district.²⁹ The court also held that education was a fundamental right for equal protection purposes, and that mandated strict scrutiny review.³⁰ The California Supreme Court concluded that there was no compelling state interest to justify the inequality,³¹ scoffing at the contention that there existed any, meaningful local control in the poor school districts.³²

Well, the United States Supreme Court quickly quenched the reformist fire, and in *San Antonio School District v. Rodriguez*³³ found that wealth was not a suspect classification and under the federal constitution, at least, education was not a fundamental interest.³⁴ It was not guaranteed by the Federal Constitution, and therefore rational basis review was appropriate. By a five to four decision, that attack on the Texas school finance system was rejected.³⁵

As a result of *San Antonio School District v. Rodriguez*, the state assaults or the first wave of assaults on state finance systems came to an end, and a second wave commenced after that, or shortly after that, in which the thrust was that the Equal Protection Clauses of the state constitutions were violated by these kinds of disparities; that education was, indeed, a fundamental interest under the state constitutions; and therefore, either strict scrutiny review or intermediate scrutiny was required. That second wave succeeded, to some degree, and a number of the school finance systems were held unconstitutional. As a matter of fact, Arkansas, California, Connecticut, New Jersey, West Virginia and Wyoming found their systems unconstitutional. In those states, or some of them, the language

²⁹ *Id.* at 1252-53.

³⁰ *Id.* at 1249 (stating that "[u]nder the strict standard applied in such cases, the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose.").

³¹ *Id.* at 1264.

³² *Id.* at 1260.

³³ 411 U.S. 1 (1973).

³⁴ *Id.* at 35.

³⁵ *Id.*

used in the state constitution required the state to provide a “general and uniform system of schools,” or a “thorough and efficient system of schools.”³⁶ Those words don’t exist in the New York Education Article, which simply says: provide a system of free common schools.³⁷

Modern commentators, argue that a third wave of assaults now exists and that wave bases the attack on the finance systems on the theory that the systems do not provide an “adequate education.” A number of state systems have been overthrown on the basis of that contention, most prominently Kentucky where the Kentucky Supreme Court has set out the standards for an adequate educational program.³⁸

³⁶ *Id.* at 44. See, e.g., ARK. CODE ANN. § 6-20-302. Section 302 states: “[I]t is the intent of this subchapter to maintain and foster such local control consistent with the state’s constitutional mandate to assure suitability and efficiency in the public school system.” *Id.*

³⁷ *Rodriguez*, 411 U.S. at 44. See N. Y. CONST. art. II, § 1. Article II, § 1 states: “The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.” *Id.*

³⁸ *Rose v. Council for Better Education*, 790 S.W.2d 186, 212 (Ky. 1989).

A child’s right to an adequate education is a fundamental one under our Constitution. An efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their

New York's venture in school finance litigation started in the seventies with a lengthy trial in a case entitled *Board of Education, Levittown School District v. Nyquist*.³⁹ Twenty-seven school districts, five major cities, and various parents' groups joined in the attack. The trial took place before Justice Kingsley Smith in Nassau County. It took two hundred and seventy seven days of trial, twenty three thousand pages of testimony, four hundred exhibits, one hundred and eighty witnesses, to try the case. Justice Smith declared the system unconstitutional under the Federal and State Equal Protection Clauses and the Education Article.⁴⁰ After Justice Smith's decision, *San Antonio School District v. Rodriguez* came down from the Supreme Court. The New York Appellate Division, Second Department, held the system unconstitutional under the State Equal Protection Clause and the Education Article.⁴¹

The Appellate Division found education was a highly important interest in New York and that as far as the state's Equal Protection Clause was concerned, heightened or intermediate scrutiny was appropriate. A rational basis approach would not sustain an attack on the system.⁴² The Court also found that the Education Article was violated by a method of finance which fails to provide a school system capable of providing an education for many educable children. There is key language in the old Appellate Division decision which is now in dispute in the current litigation. The Appellate Division found that such an education should equip children to be "functioning and productive citizens in our democracy and competitors in the market and the marketplace of ideas."⁴³ As noted, the Court declared the system unconstitutional.

counterparts in surrounding states, in academics or in the job market.

Id. at 212.

³⁹ 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. Nassau County 1978).

⁴⁰ *Id.* at 531-32, 408 N.Y.S.2d at 642.

⁴¹ *Id.* at 251, 443 N.Y.S.2d at 864.

⁴² *Id.* at 257, 443 N.Y.S.2d at 868.

⁴³ *Id.* at 249, 443 N.Y.S.2d at 863.

I am going to skip some of the other language of the Second Department in the interest of moving our program ahead. In 1982, the Court of Appeals, by a vote of six to one, Judge Fuchsberg dissenting,⁴⁴ modified the Appellate Division determination, (it was, of course, really a reversal) and declared the state educational system constitutional.⁴⁵ That decision, written by Judge Jones is the basis for much of the discussion of what has happened since, in the more recent attempts to overthrow the state finance system.⁴⁶ While in *Levittown*, the Court of the Appeals accepted the detailed factual findings of the lower courts and the Appellate Division's affirmance and additional findings of facts, it quickly rejected the Appellate Division's holding of unconstitutionality; held that the *San Antonio School District v. Rodriguez* analysis was appropriate; that intermediate level scrutiny did not apply with reference to the assaults on the state educational finance system, and accepted the *San Antonio School District v. Rodriguez* theory that the rational basis for the current system was local control of education.⁴⁷

Therefore, the Appellate Division determination was overturned; the system was declared constitutional.⁴⁸ In dealing with the Education Article, Judge Jones' opinion declared that the legislature had made prescriptions with reference to minimum number of days of attendance, required courses, text books, qualification of teachers, pupil transportation and the like.⁴⁹ These prescriptions provided an education; indeed it connoted a "sound basic education."⁵⁰ Judge Jones wrote that New York's educational expenditures exceeded every other state and it was for the legislature to make determinations as to how much more ought to be offered.⁵¹ The issue was not, in essence, a judicial

⁴⁴ 57 N.Y.2d 27, 50, 439 N.E.2d 359, 370, 453 N.Y.S.2d 643, 654 (1982) (Fuchsberg, J., dissenting).

⁴⁵ *Id.* at 50, 439 N.E.2d at 370, 453 N.Y.S.2d at 654.

⁴⁶ 57 N.Y.2d at 27, 439 N.E.2d at 359, 453 N.Y.S.2d at 643.

⁴⁷ *Id.* at 42, 439 N.E.2d at 365, 453 N.Y.S.2d at 650.

⁴⁸ *Id.* at 41, 439 N.E.2d at 365, 453 N.Y.S.2d at 649.

⁴⁹ *Id.* at 47-48, 439 N.E.2d at 368-69, 453 N.Y.S.2d at 652-53.

⁵⁰ *Id.* at 48, 439 N.E.2d at 369, 453 N.Y.S.2d at 653.

⁵¹ *Id.* at 38, 439 N.E.2d at 363, 453 N.Y.S.2d at 647.

matter. However, he did say for the court majority that if gross and glaring inadequacy could be shown, it might be that the system could be found unconstitutional.⁵² In any event, the *Levittown* decision ended the first wave of the legal attacks on New York's educational finance system.

The next wave started in the 1990's with two actions: one brought for the suburbs in a case called *Reform Educational Financing Inequities Today v. Cuomo* [hereinafter "*R.E.F.I.T.*"]⁵³ and the other brought on behalf of the school districts in the City of New York, entitled *Campaign for Fiscal Equality v. State* [hereinafter "*C.F.E.*"].⁵⁴ The *R.E.F.I.T.* action was met by a motion to dismiss, and that motion was granted by Justice Roberto sitting in Nassau County.⁵⁵ Justice Roberto made some interesting findings: the wealth disparities between districts statewide at the time *Levittown* was decided was forty-six to one, and seventeen to one in Suffolk.⁵⁶ By the 1990's the disparity in Suffolk alone was three hundred thirty to one;⁵⁷ disparities of one hundred to one were not uncommon; and nineteen Suffolk districts were sixteen times richer than the William Floyd School District.⁵⁸ William Floyd's per pupil expenditure was \$7,107.⁵⁹ More affluent neighboring school districts spent as much as \$43,000 per pupil.⁶⁰ After finding all of this, Justice Roberto declared that he was bound by the *Levittown* holding, and dismissed the case.⁶¹ The ruling was affirmed by the Second

⁵² *Id.* at 48-49, 439 N.E.2d at 369, 453 N.Y.S.2d at 653.

⁵³ 86 N.Y.2d 279, 655 N.E.2d 647, 631 N.Y.S.2d 551 (1995); 199 A.D.2d 488, 606 N.Y.S.2d 44 (2d Dep't 1993); 152 Misc. 2d 714, 578 N.Y.S.2d 969 (Sup. Ct. Nassau County 1991).

⁵⁴ 205 A.D.2d 272, 619 N.Y.S.2d 699 (1st Dep't 1994), *modified*, 86 N.Y.2d 307, 655 N.E.2d 661, 631 N.Y.S.2d 565 (1995).

⁵⁵ *R.E.F.I.T.*, 152 Misc. 2d 714, 578 N.Y.S.2d 969 (Sup. Ct. Nassau County 1991).

⁵⁶ *Id.* at 718, 578 N.Y.S.2d at 971-72.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 726, 578 N.Y.S.2d at 976 ("Notwithstanding the merits discussed in this decision, any deviation from the *Levittown* holding must come from either

Department.⁶² The case ultimately came before the Court of Appeals, and in a three page decision by Judge Levine, the court declared the school finance system constitutional, and noted that there was not much difference between the old *Levittown* case and the current *R.E.F.I.T.* case.⁶³

However, there is a different result in the *C.F.E.* case.⁶⁴ The New York City school districts argued in this separate case that the education provided by the statewide system, at least in the City, fell below minimum standards.⁶⁵ It was an inadequate education. The City also claimed a violation of Title VII of the 1964 Civil Rights Act⁶⁶ and discrimination under the Equal Protection Clause⁶⁷ as well. Justice DeGrasse permitted the Title VII and discrimination causes of action to remain.⁶⁸ The

the Court of Appeals itself or by legislative action.”). See *Mountain View Coach Lines v. Storms*, 102 A.D.2d 663, 476 N.Y.S.2d 918 (2d Dep’t 1984).

⁶² *R.E.F.I.T.*, 199 A.D.2d 488, 606 N.Y.S.2d 44 (2d Dep’t 1993).

⁶³ *R.E.F.I.T.*, 86 N.Y.2d 279, 285, 655 N.E.2d 647, 649, 631 N.Y.S.2d 551, 553 (1995).

⁶⁴ *Campaign for Fiscal Equality v. State of New York*, 205 N.Y.2d 307, 655 N.E.2d 661, 631 N.Y.S.2d 565 (1995).

⁶⁵ *C.F.E.*, 162 Misc. 2d 493, 498, 616 N.Y.S.2d 851, 855 (Sup. Ct. New York County 1994).

⁶⁶ *Id.* at 321-22, 655 N.E.2d at 669, 631 N.Y.S.2d at 573; 42 U.S.C. § 2000d (1997). This section of Title VII of the Civil Rights Act of 1964 provides in pertinent part: “No person in the United States shall on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” *Id.*

⁶⁷ U.S. CONST. amend XIV, § 1. Section 1 of the Fourteenth Amendment of the Constitution provides: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” *Id.* N.Y. CONST. art. I, § 11. Section 11 of the New York State Constitution provides: “No person shall be denied the equal protection of the laws of this state or any subdivision thereof.” *Id.*

⁶⁸ *C.F.E.*, 162 Misc. 2d at 500, 616 N.Y.S.2d at 856. Judge DeGrasse held that a system which is discriminatory in effect, yet without discriminatory intent, may violate civil rights. *Id.* He relied on Executive Law § 291(2) which provides that “[t]he opportunity to obtain an education . . . without discrimination because of age, race, creed, color, national origin, sex or marital status . . . is hereby recognized as and declared to be a civil right.” *Id.* See N.Y. EXEC. LAW § 291(2) (McKinney 1998).

Appellate Division, First Department, dismissed the entire action.⁶⁹ It then came before the Court of Appeals.⁷⁰ The result was four opinions.

Let me briefly tell you about these four opinions. We are talking about a motion to dismiss. Judge DeGrasse dismissed part of the case,⁷¹ the First Department dismissed the rest of it,⁷² and four opinions resulted in the Court of Appeals.⁷³ The majority opinion, sustaining two causes of action, was written by Judge Ciparick,⁷⁴ a critical concurring opinion was written by Judge Levine,⁷⁵ and two partial dissents were written by Judge Simons⁷⁶ and Judge George Bundy Smith.⁷⁷ Interestingly enough, Judge Ciparick, who wrote the majority opinion, in a footnote, dissented from the portion of her own opinion that dismissed one of plaintiffs' causes of action.⁷⁸ In any event, what is important and what the current debate is about is that minimally educational services are not being provided.⁷⁹ She wrote in her majority

⁶⁹ *C.F.E.*, 205 A.D.2d at 278, 619 N.Y.S.2d at 702.

⁷⁰ *C.F.E.*, 86 N.Y.2d 307, 655 N.E.2d 661, 631 N.Y.S.2d 565 (1995).

⁷¹ *C.F.E.*, 162 Misc. 2d at 500, 616 N.Y.S.2d at 856.

⁷² *C.F.E.*, 205 A.D.2d 272, 619 N.Y.S.2d 699.

⁷³ *C.F.E.*, 86 N.Y.2d 307, 655 N.E.2d 661, 631 N.Y.S.2d 565 (1995).

⁷⁴ *Id.* at 312-24, 655 N.E.2d at 661-71, 631 N.Y.S.2d at 565-75.

⁷⁵ *Id.* at 324-32, 655 N.E.2d at 671-75, 631 N.Y.S.2d at 575-79 (Levine, J., concurring).

⁷⁶ *Id.* at 332-44, 655 N.E.2d at 675-82, 631 N.Y.S.2d at 579-86 (Simons, J., dissenting in part).

⁷⁷ *Id.* at 344-59, 655 N.E.2d at 682-91, 631 N.Y.S.2d at 586-95 (Smith, J., dissenting in part).

⁷⁸ *Id.* at 312, 655 N.E.2d at 663, 631 N.Y.S.2d at 567. Judge Ciparick dissents in part from the majority opinion, for reasons stated Judge Smith's dissent, voting to "reinstate the causes of action on behalf of the municipal plaintiffs as well as the non-municipal Plaintiffs and to reinstate the second cause of action insofar as it asserts a violation of the Equal Protection Clause of the State Constitution." *Id.* Nevertheless, since Judges Simons, Titone, Bellacosa and Levine concluded that the community school board lacked capacity to bring the suit, and the majority opinion applied only to the remaining non-municipal plaintiffs. *Id.* The municipal plaintiff's equal protection claim will no doubt reoccur when this case comes back to the Court of Appeals.

⁷⁹ *Id.* at 313, 655 N.E.2d at 664, 631 N.Y.S.2d at 568.

opinion, which is joined by three other judges: "A sound, basic education . . . would consist of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury."⁸⁰ Judge Levine and Judge Simons, as you will hear in a moment or two, regard that definition, particularly the portion of it dealing with the language that says, "eventually productively function as civic participants capable of voting and serving on a jury," as the definition in the Appellate Division, Second Department holding in *Levittown*, which the Court of Appeals had overturned.⁸¹

So, that is why I say it is *Levittown redux* in this situation. Judge Ciparick wrote, of course, that major portions of the complaint should be sustained because, viewing the complaint liberally, students are not receiving the opportunity to obtain an education that permits them to speak, and I quote: "effectively in English, perform basic mathematical calculations . . . and . . . to acquire the skills, knowledge, and understanding and attitudes

⁸⁰ *Id.* at 315-16, 655 N.E.2d at 665-66, 631 N.Y.S.2d at 569-70. N.Y. CONST. art. XI, § 21 (McKinney 1998). The Education Article provides: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all of the children of this state may be educated." *Id.* See Board of Education, Levittown Union Free School District v. Nyquist, 57 N.Y.2d 27, 48, 439 N.E.2d 359, 369, 453 N.Y.S.2d 643, 653 (1982) (interpreting the term education as provided in article eleven, section 1 of the New York State Constitution as imposing a duty on the legislature to ensure the availability of a "sound basic education.").

⁸¹ *C.F.E.*, 86 N.Y.2d 307, 330, 665 N.E.2d 661, 674, 631 N.Y.S.2d 565, 578 (1995) (Levine, J., dissenting). Judge Levine argued that the majority unwisely departed from *Levittown* by holding that the State's constitutional educational funding responsibility must extend to guaranteeing students the opportunity to acquire those skills to "function productively as civic participants." *Id.* Instead, *Levittown* set forth a narrower state role, flowing from New York's historic tradition of dividing responsibility over public education between state and local school governments, under which the quality of education necessary to enable students to function in society is largely a matter of local decision subject to standards and assistance from appropriate State executive, legislative and administrative bodies. *Id.* See *Levittown*, 57 N.Y.2d at 45-46, 439 N.E.2d at 367-68, 53 N.Y.S.2d at 651-52.

necessary to participate in a democratic self-government.”⁸² And she gives the details, which I now can’t give you due to time, as to the unavailability of the necessary elements to produce such students as far as physical facilities, curricular, any qualified teachers and the like.⁸³

The Title VII regulations attack was sustained because the complaint alleged that as far as the distribution of federal aid, which is what Title VII deals with, the effect of the state’s educational scheme was to discriminate against students and the minorities in the City.⁸⁴ The state allocates thirty-four percent of its aid to New York City, which has thirty-seven percent of the state’s students, eighty-one percent of whom are minorities, constituting seventy-four percent of all minority students in the state. The state had not advanced any justification for the disparity in aid.⁸⁵ So the result, is that the two causes of actions survived the state’s dismissal motion and the matter was remanded back to the trial courts.⁸⁶

A word about Judge Levine’s concurring opinion⁸⁷ and Judge Simon’s partial dissent.⁸⁸ They are important because this case is coming back. Judge Levine will likely still be there, as probably will at least two likely appointees of Governor Pataki. Judge Levine was highly critical of the majority opinion.⁸⁹ He believed it adopted the *Levittown* Appellate Division’s view of basic

⁸² *C.F.E.*, 86 N.Y.2d 307, 318-19, 655 N.E.2d 661, 667, 631 N.Y.S.2d 565, 571 (1995).

⁸³ *Id.* Judge Ciparick found that plaintiffs properly stated a cause of action based upon factual allegations of “inadequacies in physical facilities, curricula, numbers of qualified teachers, availability of text books, etc.” *Id.*

⁸⁴ *Id.* at 324, 655 N.E.2d at 670-71, 631 N.Y.S.2d at 574-75.

⁸⁵ *Id.* See *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985). See also *Groves v. Alabama State Bd. of Educ.*, 776 F. Supp. 1518, 1523 (M.D. Ala. 1991).

⁸⁶ *Id.*

⁸⁷ *Id.* at 324-32, 655 N.E.2d at 671-75, 631 N.Y.S.2d at 575-79 (Levine, J., concurring).

⁸⁸ *Id.* at 332-44, 655 N.E.2d at 675-82, 631 N.Y.S.2d at 579-86 (Simons, J., dissenting in part).

⁸⁹ *Id.* at 324-32, 655 N.E.2d at 671-75, 631 N.Y.S.2d at 575-79 (Levine, J., concurring).

education guaranteed by Article XI. He quotes from that decision which had cited to a Washington case, *Seattle School District No. 1 v. Washington*,⁹⁰ that the educational opportunities which are constitutionally required are those “‘in the contemporary setting to equip our children for their role as citizens and as potential competitors in today’s market as well as in the marketplace of ideas.’”⁹¹ The Appellate Division majority opinion went on to say that “we believe that section 1 of Article XI of the New York Constitution requires no less.”⁹² The Court of Appeals in *Levittown*, as a matter of law, held to the contrary.⁹³ Thus, Judge Levine was of the view that the majority opinion in *C.F.E.* flies in the face of the Court of Appeals in *Levittown*.⁹⁴

Judge Simons was also critical, contending that how we distribute the state’s revenues and the local revenues is a matter for the legislature.⁹⁵ The best way for me to handle what he did is to quote him:

I believe that the constitutional duty is satisfied if the state creates the structure for a State-wide system of schools in which children are given the opportunities to acquire an education and supports it. It is for other branches of government, not the courts, to define what constitutes a sound, basic education and, assuming the state has not defaulted on its duty to establish a State-wide system and provide financial support to insure that the opportunity to be educated is available to all. In my view,

⁹⁰ 585 P.2d 71 (Wash. 1978).

⁹¹ *C.F.E.*, 86 N.Y.2d 307, 328-29, 655 N.E.2d 661, 673, 631 N.Y.S.2d 565, 577 (citing *Levittown*, 83 A.D.2d 217, 249, 443 N.Y.S.2d 843, 863 (quoting *Seattle School Dist. No. 1 v. Washington*, 90 Wash.2d 476, 517, 585 P.2d 71, 94) (Wash. 1978)).

⁹² *C.F.E.*, 86 N.Y.2d at 329, 655 N.E.2d at 673, 631 N.Y.S.2d at 577 (quoting *Levittown*, 83 A.D.2d at 249, 443 N.Y.S.2d at 843).

⁹³ *Id.* at 329, 655 N.E.2d at 674, 631 N.Y.S.2d at 578. (citing to *Levittown*, 83 A.D.2d at 248-49, 443 N.Y.S.2d at 863 (holding that plaintiffs and intervenors in *Levittown* had not established or even claimed that the State’s public education funding scheme failed to provide the educational opportunity required by Article XI, § 1 of the New York State Constitution)).

⁹⁴ *Id.* at 330, 655 N.E.2d at 674, 631 N.Y.S.2d at 578.

⁹⁵ *Id.* at 333, 655 N.E.2d at 676, 631 N.Y.S.2d at 580.

plaintiffs have not successfully pleaded that the State has violated that duty.⁹⁶

Both Judge Levine and Judge Simons concurred, Judge Simons partially, in the majority opinion,⁹⁷ but only because the complaint itself, which had to be viewed liberally, had declared that children were simply not receiving any education that would even fit the definition in *Levittown*.⁹⁸ So, the concurrence by Judge Levine and Judge Simons certainly does not indicate that when the case comes back up that there will be a similar result.

Judge George Bundy Smith felt that the majority opinion did not go far enough, and in almost an emotional opinion, asserted that the Federal and State Equal Protection Clauses were violated.⁹⁹

So, what we have is a complaint sustained with reference to the education article of the State Constitution and the Title VII implementing regulations, which has been remanded back to the trial courts.¹⁰⁰ I spoke to Justice DeGrasse yesterday and he told me that the discovery was ongoing. So the current attack is part of the national third wave attack that I mentioned to you earlier.¹⁰¹ It's an attack on adequacy. After the case comes back to the Court of Appeals, we may learn whether New York will join Washington, Kentucky, Connecticut, Tennessee, Massachusetts, Arizona, Texas, New Hampshire, Wyoming, New Jersey, West Virginia, Montana, Arkansas and Vermont in declaring their systems unconstitutional, or whether it will remain with the other states that either have not faced the challenge or have found their

⁹⁶*Id.*

⁹⁷ *Id.* at 324-32, 655 N.E.2d at 671-75, 631 N.Y.S.2d at 575-79 (Levine, J., concurring); 86 N.Y.2d at 312-24, 655 N.E.2d at 661-71, 631 N.Y.S.2d at 565-75 (majority, joined in part by Simons, J.).

⁹⁸ *Id.* at 325, 655 N.E.2d at 671, 631 N.E.2d at 575. Judge Levine agreed with the majority, holding that since the "complaint also refers to specific educational deficiencies and alleges that the State's funding scheme denies New York City public school students the opportunity to achieve even basic literacy . . . [the allegations] are sufficient to withstand the motion to dismiss" *Id.*

⁹⁹ *Id.* at 344-58, 655 N.E.2d at 682-91, 631 N.Y.S.2d at 586-95.

¹⁰⁰ *Id.* at 314-24, 655 N.E.2d at 664-71, 631 N.Y.S.2d at 568-75.

¹⁰¹ *Id.* at 312, 655 N.E.2d at 663, 631 N.Y.S.2d at 567.

systems constitutional. So the saga continues, and I suspect some day Touro will hold a similar conference to review the ultimate judgement. Thank you.

